HONG KONG BAR ASSOCIATION

Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
DX-180053 Queensway 1 E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

9 November 2018

Mr. Lemuel Woo
Clerk to Panel
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong.

Dear Lemuel

Re: Ex Gratia Compensation for Defendants in aborted Criminal Trials

Please find herewith a copy of the Note from the Hong Kong Bar Association in relation to Ex Gratia Compensation for Defendants in aborted Criminal Trials dated 9 November 2018, which has been endorsed at the Bar Council Meeting held on 8 November 2018.

Yours sincerely,

Philip Dykes SC
Chairman

Hong Kong Bar Association's

Note to the Panel on Administration of Justice and Legal Service

in relation to

Ex Gratia Compensation for Defendants in aborted Criminal Trials

1. A member of the Bar expressed concern about a gap in the law concerning costs in criminal cases. The gap in the law was identified in a CFI trial which was aborted after 37 days due to the illness of the trial judge. A fresh trial has been listed. There are no legislative provisions that would enable the defendant to recover wasted costs in this situation. The existing costs provisions require either a conviction or acquittal before jurisdiction is founded for making a costs order.

Hong Kong Compensation Schemes

2. Article 11(5) of the Hong Kong Bill of Rights Ordinance (Cap. 383) provides that if a conviction has been reversed or if the defendant had 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 the defendant.

3. Article 11(5) clearly applies in only limited circumstances and to cases where the defendant has been convicted.

4. In Hong Kong, there is no statutory regime to compensate defendant who has been a victim of miscarriage of justice.

5. There is only an administrative scheme run by the Government,[1] available for three kinds of applicants:

   (1) a person who was sentenced to custodial imprisonment received a free pardon because his innocence has been established or his conviction has been quashed following a reference to the Court of Appeal by the Hong Kong Chief Executive or an appeal out of time.

   (2) In exceptional cases, where a person has spent time in custody, following a wrongful conviction or charge resulting by a serious default by the police or other public authority, or resulting from a wrongful act of a judge or a magistrate. In cases involving the judiciary compensation would only be made on recommendation of the judiciary.

   (3) Residual category where an "outstandingly deserving" person suffered loss not caused by a wrongful act or omission by a public authority.

6. Claims have to be made to the DOJ and it would approve payment in appropriate circumstances. There is no prescribed form or procedure. The assessment for compensation can be made internally by the DOJ or with the assistance of independent advice outside the DOJ. The decision of the DOJ is final, and it is not the Government's normal practice to publish details of individual awards.

7. The scheme is not applicable in the circumstances described above because there is no "wrongful" conduct of a judge.

---

[1] "Compensation for Persons Wrongfully Imprisoned, Information for Claimants" https://www.doj.gov.hk/eng/archive/pdf/ann20040624e.pdf **[Attachment 1];** "Compensation for Miscarriage of Justice", Johannes Chan SC, HK Lawyer 2013 **[Attachment 1A]**

Other Jurisdictions

8. In other jurisdictions, legislative compensation schemes generally are available for wrongfully convicted defendants. Such schemes require the applicant to prove his or her innocence as a condition of eligibility for such compensation.

9. In Australia, there is a scheme available for the defendants in criminal proceedings, which are aborted by the death or protracted illness of a judge.

Australia

10. In Australia, section 6A of the Suitors' Fund Act 1951 covers cases when criminal and civil proceedings are halted as a result of the death or prolonged illness that stop the proceedings. The parties can make an application to the Director General of the Attorney General's Department. The amount payable under the section to any one person shall, in respect of that application, not exceed: (a) $10,000; or (b) such other amount as many be prescribed (at the time when the proceedings were rendered abortive or the new trial was ordered). A copy of section 6A Suitors' Fund Act 1951 is enclosed herewith as **Attachment 2**.

11. Other schemes are available in Australia, while there are no other statutory or common law scheme to compensate individuals who have been wrongfully convicted and imprisoned (except Australian Capital Territory), state governments, however, can pay compensation on an ex gratia basis to those who have been wrongfully prosecuted, imprisoned or convicted.

12. In the Australian Capital Territory, under section 23 of the Human Rights Act 2004[2], an individual who is wrongfully convicted of a criminal offence may seek compensation. The individual must have: -

(1) Been convicted of a criminal offence by a final decision of a court;

(2) Suffered punishment as a result;

(3) Had conviction reversed (or pardoned) on the ground that new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

13. The convicted person does not need to have been imprisoned. A lesser sanction, such as a fine or a recording of a conviction alone, may amount to punishment under the section.

England & Wales

14. In the UK, under section 133(1) of the Criminal Justice Act 1988, compensation is available for persons who have been convicted of a criminal offence and when subsequently a conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

15. There would only be a miscarriage of justice "*if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence...*". See: Section 133(1ZA)

[2] See: https://aic.gov.au/publications/tandi/tandi356

16. Section 133(5) limits the circumstances in which a conviction can be said to have been reversed. Cases where defendants appealed in time are not included.

17. In the past, for cases outside section 133, the Home Secretary operated an ex gratia payment for applicants who have spent time in custody, for example where there is serious default by a public authority, usually the police, or if an accused person is completely exonerated (whether at trial or on appeal). This scheme has since been abolished in 2006, as the scheme was seen as unnecessary.[3]

18. In May 2018, the Supreme Court heard as to whether the current statutory scheme is compatible with the presumption of innocence under the Human Rights Act. Judgment is yet to be handed down[4].

New Zealand

19. There is a scheme for ex gratia compensation for wrongful conviction and imprisonment.

20. Eligible applicants must have served all or part of a sentence of imprisonment or have received a free pardon or had their convictions quashed without an order for retrial.

21. The Ministry of Justice assesses each claim and further advice will be obtained from a Queen's Counsel for cases meriting further assessment. If

[3] Putting the Wheels Back On: a better approach to compensation for miscarriages of justice, Samuel Linehan, 2016 **[Attachment 3]**

[4] See: https://www.theguardian.com/commentisfree/2018/may/09/miscarriage-of-justice-victims-uk-supreme-court

the QC is satisfied that the applicant is innocent on the balance of probabilities, the QC will recommend an appropriate amount of compensation in accordance with the guidelines. The Cabinet will make the final decision on the recommendation of the Minister.

22. The types of compensation include payments for non-pecuniary losses following a conviction, such as emotional harm and loss of liberty, payment for pecuniary losses following a conviction, such as loss of future earnings and loss of livelihood or a public apology or statement of innocence.[5]

23. For cases falling outside the abovementioned guidelines, the Cabinet has discretion to pay compensation to applicants in extraordinary circumstances, in the interests of justice. But such persons require to have their convictions quashed or set aside under the following circumstances: -

(1) if a retrial is ordered by an appeal court but trial does not proceed;

(2) if a retrial is ordered by an appeal court and the person is acquitted after retrial; or

(3) where the conviction is quashed on a rehearing in the District Court.

24. Applicants for claims outside the guidelines must also show that they are innocent on the balance of probabilities and in addition, they must show that there are extraordinary circumstances justifying compensation.

25. Section 5 of the Criminal Cases Act 1967 provides for costs for successful defendants. However, this section does not cover other losses a defendant may have suffered as a result of being prosecuted, detained or imprisoned

[5] https://www.justice.govt.nz/assets/Documents/Publications/miscarriage-of-justice-compensation-for-wrongful-conviction-and-imprisonment-backgrounder.pdf **[Attachment 4]**

or convicted. See: §§40 and 44 of Compensation for Wrongful Conviction or Prosecution, Preliminary Paper 31, April 1998.

26. The Hong Kong Bar Association (the "**HKBA**") considers that there is a case for providing compensation in cases like the one described in (1) and that consideration should be given to putting compensation in other cases on a statutory footing.

Dated the 9th of November 2018.

HONG KONG BAR ASSOCIATION

Compensation for persons wrongfully imprisoned

Information for claimants

The Government is prepared under certain circumstances to pay compensation to those who have spent time in custody following a wrongful conviction or charge. There are two compensation schemes, one under statutory provisions and the other under administrative arrangements.

No general entitlement

2. There is no general entitlement to recompense for wrongful conviction or charge. For example, compensation will not be awarded in cases where at the trial or on appeal the prosecution was unable to prove its case beyond reasonable doubt against the accused person, or where the conviction was quashed on a technicality. Where circumstances are such that compensation could be awarded, it may be refused or reduced if the claimant was wholly or partly to blame for his misfortune: for example, where he deliberately withheld evidence which would have demonstrated his innocence.

Statutory provisions

3. Compensation is payable under Article 11(5) of the Hong Kong Bill of Rights, as provided for in the Hong Kong Bill of Rights Ordinance (Cap. 383). The Article provides that:

> "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."

4. If a claim under Article 11(5) cannot be resolved with the Government amicably, it will have to be adjudicated by the court like any other civil claim.

Ex gratia arrangements

5. Alternatively, the Government may make an *ex gratia* payment, in certain exceptional cases, where the claimant has spent time in custody following a wrongful conviction or charge resulting from serious default by the police or other public authority. This might be the case, for example, when bail was refused because of incorrect information given to the court by the prosecutor or the police, or where police suppressed material evidence which would have helped to exonerate a convicted person. Compensation may also be payable on this basis where the wrongful act was that of a judge or magistrate, but payment in such cases should only be made on the recommendation of the judiciary.

How to apply for compensation

6. Applications should be made in writing to the Department of Justice, 23rd Floor, High Block, Queensway Government Offices, 66 Queensway, Hong Kong. Alternatively, you may apply by fax at (852) 2877 2353 or by e-mail to dojinfo@doj.gov.hk.

7. There is no standard application form. Applications should include the applicant's full name, date of birth, place and date of conviction and details of charge, the circumstances in which the conviction was reversed or the charge dropped, and the reasons why the applicant considers that compensation is due to him or her. Where charges were dropped it would be helpful to know which police, ICAC or correctional services unit was involved.

8. The Department of Justice will consider any application which is made, examining it as appropriate under the statutory provisions and the *ex gratia* arrangements. The Department of Justice will make the final decision as to whether an application qualifies for payment, and if so, the amount of payment after considering the circumstances of the individual case. It is not the Government's normal practice to publish details of individual awards.

Department of Justice
September 2009

Features Administrative Law Dispute Resolution Criminal | **August 2013**

Compensation for Miscarriage of Justice

The author argues for a replacement of the existing administrative scheme for compensation for miscarriage of justice by a legislative scheme which is transparent and fair, as an aggrieved person who has lost his liberty as a result of a wrongful conviction would unlikely have confidence on the fairness of the existing administrative scheme that is run internally by the Government. He further argues that the appellate court should be given an express power to make recommendation for compensation for miscarriage of justice or to refer an application for compensation to an independent body in appropriate cases.

No matter how best one tries, miscarriage of justice happens in every legal system. Sometimes it is a result of human inadequacies; sometimes it is a result of systemic failures. It could result from serious default by the law enforcement agencies or other public authorities, or from an over-zealous attitude of the members of the judiciary to do justice.

It may also be brought about by the conduct of the defendant himself. It must be equally obvious that not every case where the prosecution fails to prove its case will result in a miscarriage of justice. There is strong societal interest to ensure that decisions to prosecute should be made independently on the merits and in accordance with established policies without fear of any consequence of unsuccessful prosecution. On the other hand, when serious miscarriage of justice occurs, mere vindication of the conviction may not be sufficient, and there should be a proper mechanism for the victim to claim compensation.

No statutory regime

Article 11(5) of the Bill of Rights provides that if a conviction has been reversed or if the defendant had 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 the defendant.

This article has a narrow scope of application as it applies only to miscarriage of justice arising from non-disclosure of fact or discovery of new fact, which is but one of the circumstances where miscarriage of justice may occur. On the other hand, it provides that compensation is to be made available whenever a defendant suffers punishment as a result of wrongful conviction. It is not confined to situations where the defendant has spent time in custody.

Unfortunately, apart from this general provision, there is no statutory scheme for claiming compensation for miscarriage of justice. There is an administrative scheme run by the Government, and the details are set out in the document *Compensation for Persons Wrongfully Imprisoned, Information for Claimants* (http://www.doj.gov.hk/eng/archive/pdf/ann20040624e.pdf).

The administrative guidelines set out three main situations under which compensation is payable for miscarriage of justice. The first is when a person who was sentenced to custodial imprisonment received a free pardon because his innocence has been established or his conviction has been quashed following a reference to the Court of Appeal by the Hong Kong Chief Executive or an appeal out of time. This would apply to a very narrow range of cases (for example, where key witnesses were found to have committed perjury long after the conviction, and where newly found evidence has conclusively established the innocence of the convicted person).

The second situation is that the Government would be prepared to make *ex gratia* payment, in certain exceptional cases, where the claimant has spent time in custody following a wrongful conviction or charge resulting from serious default by the police or other public authority, or resulting from a wrongful act of a judge or a magistrate, but in the latter case involving the judiciary, compensation would only be made on the recommendation of the judiciary.

Thirdly, there is a residual category of cases that are "outstandingly deserving", even where the loss was not caused by a wrongful act or omission by a public authority.

Despite its nature as an administrative scheme, the English court has held, in relation to a similar scheme in the UK, that it was for the court, and not the Minister, to decide what the *ex gratia* scheme meant on the basis of what a reasonable and literate person would understand the circumstances to be in which he could be paid compensation under it.

It was held that no reasonable person would draw a distinction between a person who faces a charge in domestic criminal court or one who faces a charge in extradition proceedings. Nor would any reasonable distinction be made between detention resulting from wrongful allegations and detention resulting from formally laid charges.

Accordingly, *ex gratia* compensation was payable in the case of wrongful detention arising from an allegation of terrorism that led to the loss of liberty even when that allegation was not the subject of the formal charge, which was a relatively minor holding charge, as set out in R (on the application of Raissi) v Secretary of State for the Home Department [2008] QB 836.

In R (Mullen) v Secretary of State for the Home Department [2003] 2 WLR 835, the English Court of Appeal held that "miscarriage of justice" was wide enough to cover the situation where a conviction was quashed as an abuse of process notwithstanding that the defendant had not been proved to be innocent.

The claim has to be made to the Department of Justice (the "DOJ"), which has delegated authority to approve payment in appropriate circumstances. There is no prescribed form or procedure. The assessment for compensation could be made internally by the DOJ or with the assistance of independent assessment outside the DOJ. The decision of the DOJ is final, and it is not the Government's normal practice to publish details of individual awards.

It is unfortunate that this compensation scheme is not widely publicised, and there is a singularly lack of transparency of the process. For example, there is no reason not to publish details of the awards, given the public interest involved whenever there is a miscarriage of justice that warrants compensation. Nor is there any information about the number of claims each year, the nature of claims, the length of time to process these claims and their outcome. There is no time limit to process the claim, and the claimant is normally not kept informed of the progress.

According to an information paper before the Legislative Council Panel of Administration of Justice and Legal Services in 2003 (*Payment of compensation to persons wrongfully imprisoned*, June 2003), between 1987 and 2003, there were only five cases, two of which were settled out of court and three of which involved ex gratia compensation.

The total amount involved was about HK$10 million, of which HK$9 million was paid out in an out-of-court settlement in or about 1992 to 110 claimants who were refugee claimants wrongfully detained in Hong Kong when they had no intention to stay here (Pham Van Ngo and 110 others v Attorney General [1993] HKLY 468).

It is reassuring to know that there are only five alleged cases of miscarriage of justice that warrants compensation in a period of 16 years, though one cannot help being sceptical if this is anywhere near the real picture.

No clear procedure

When the miscarriage of justice involves wrongful conduct of the judiciary, it is necessary to have a recommendation from the judiciary before any compensation could be awarded. This is no doubt for good reason to avoid interference with the independence of the judiciary. In other cases where recommendation of the judiciary is not mandatory, such recommendation will no doubt strengthen the hands of the claimant in claiming compensation.

Unfortunately, there is no clear procedure for the judge to make recommendation for compensation. In HKSAR v Chan Shu-hung [2012] 2 HKLRD 437, the defendant was charged with a minor offence of criminal damage. He was alleged to have criminally damaged the barbed wire belonging to the incorporated owners of the building that he lived, the barbed wire being put up in order to prevent him from climbing up the water tank to fly kites.

He appeared in person and insisted on defending the charge. The magistrate was apparently furious that the defendant did not see sense to agree to be bound over, and was no doubt considering that the defendant was wasting everyone's time in defending such a minor matter.

There was extensive intervention in his cross-examination from the bench. Not being the most eloquent of persons, the defendant had prepared a document setting out his defence. Despite his repeated requests, the magistrate refused to look at the document. After the prosecution closed their case, the magistrate adjourned the hearing and, without any warning or affording him any reasonable opportunity of making representation, revoked his bail and remanded him in custody at the Siu Lam Psychiatric Centre for 14 days for the purpose of calling for psychiatric reports. The defendant was found to be mentally normal. He was subsequently convicted and fined HK$1,500 and was ordered to pay compensation in the sum of HK$450.

On appeal, the learned judge was shocked at how the defendant was being treated. Having listened to the audio recording of the hearing and read the transcript, she could not find any reasonable basis for the magistrate to come to the view that the defendant "spoke in an incoherent and confused manner", save that he insisted on defending the charge, which is his constitutional right.

Nor was there any information to suggest that the defendant would pose any threat of any danger to himself or any other person. There was no realistic prospect that the defendant would be given a custodial sentence if he were to be convicted, and yet he was remanded in custody without considering if custody was necessary, without considering any less drastic alternative, and without affording him any realistic opportunity to resist the custody.

The conviction was set aside. However, when the defendant claimed for compensation for wrongful conviction, the learned judge held that whether the Government would grant *ex gratia* compensation to the defendant was entirely within the scope of the Government's administrative arrangement, and whether the judiciary would make a recommendation in his favour to the Government about *ex gratia* payment had nothing to do with the appeal.

Hence, it was held that an appeal hearing was not the appropriate occasion or channel for an appellant to make an application for such compensation. Ironically there was no other procedure for him to request a recommendation from the judiciary. The defendant then made a claim with the DOJ, and nine months after the judgment, his claim for compensation is still being considered.

Matter for the judiciary

With great respect, it is unfortunate that the learned judge found that the appeal was not the appropriate venue to deal with an application for compensation for miscarriage of justice.

Administration of justice is a matter for the judiciary and compensation for miscarriage of justice must be very much part of that administration of justice. The appellate judge was apprised of the relevant facts and the reasons for setting aside the conviction. Who else would be in a better position than the appellate judge to recommend compensation for miscarriage of justice in these circumstances, at least when the wrongful act is attributed to the judiciary?

If the miscarriage of justice is a result of default on the part of the law enforcement agencies or other public authorities, the appellate judge, if not to deal with the matter himself because some material evidence is not before the court, should be in a good position to refer to another body to carry out an independent inquiry with a view to determining whether compensation should be paid.

Indeed, dealing with an application for a recommendation for compensation in open court, as opposed to having a claim to be determined behind closed doors of the government bureaucracy, will give the process a better sense of transparency and fairness, and will reinforce public confidence in the process of administration of justice. The hesitation of the learned judge is understood as there is no clear procedure to allow her to deal with the issue of compensation.

Arguably there is an inherent power to make recommendation of this kind. To put the matter beyond doubt, it is suggested that there should be express statutory power in the rules of the court to ensure that such recommendation will form part of the appeal process and lies within the discretion of the judiciary (at least when the wrongful act is attributable to the judiciary). There should also be an express power for a judge to refer an application for compensation for miscarriage of justice to an independent body for consideration and determination.

Conclusion

At present, the *ex gratia* compensation scheme is administrative in nature. The criteria for compensation and the level of compensation are left entirely in the discretion of the Government. In other jurisdictions a similar scheme has received legislative backing - for example, the Irish Criminal Procedure Act 1993, Section 9; and the UK Criminal Justice Act 1988, Section 133.

Those who have suffered and lost their liberty arising from a wrongful conviction are unlikely to have strong confidence in the Government or the administration of justice system. It would not give him any confidence if his claim for compensation for miscarriage of justice is to be determined in an obscure process that is controlled entirely by the Government. The public would also be entitled to know how miscarriage of justice is vindicated.

To provide better protection to the claimant and to foster public confidence in the administration of justice system, it is desirable to introduce a legislative scheme to ensure that such claims are, and are seen to be, handled in a fair, impartial and transparent manner.

By Johannes MM Chan SC, *Dean Faculty of Law, The University of Hong Kong*

Suitors' Fund Act 1951 No 3

Status information

Currency of version

Current version for 15 August 2005 to date (generated 19 October 2016 at 11:32).
Legislation on the NSW legislation website is usually updated within 3 working days.

Provisions in force

All the provisions displayed in this version of the legislation have commenced. For commencement and other details see the Historical notes.

See also:

Suitors' Fund Amendment (Costs of NCAT Appeals) Bill 2016 [Non-government Bill: the Hon P G Lynch, MP]

New South Wales

Suitors' Fund Act 1951 No 3

Contents

Historical notes

New South Wales

Suitors' Fund Act 1951 No 3

An Act to make further and better provision in respect of the liability for costs of certain litigation; to establish a Suitors' Fund to meet such liability; and for purposes connected therewith.

1 Name of Act and commencement

(1) This Act may be cited as the *Suitors' Fund Act 1951*.

(2) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.

2 Definitions

(1) In this Act, unless the context or subject matter otherwise indicates or requires:

Appeal includes any motion for a new trial and any proceeding in the nature of an appeal.

Corporation has the same meaning as it has in the *Corporations Act 2001* of the Commonwealth.

Costs, when used in relation to an appeal in respect of which an indemnity certificate is granted, includes:

(a) the costs of the application for the indemnity certificate but, except as provided by paragraph (b) of this definition, does not include costs incurred in a court of first instance,

(b) where a new trial is ordered upon the appeal, the costs of the first trial.

Court includes such tribunals or other bodies as are prescribed.

Director-General means:

(a) the Director-General of the Attorney General's Department, or

(b) any person employed within that Department who is authorised in writing by the Director-General to exercise the powers and perform the functions of the Director-General under this Act.

Fund means the Suitors' Fund established under this Act.

Indemnity certificate means an indemnity certificate granted under section 6 (1), (1A) or (1AA) or 6B.

Land and Environment Court means the Land and Environment Court constituted under the *Land and Environment Court Act 1979*.

Legally assisted person has the meaning ascribed thereto in section 4 (1) of the *Legal Services Commission Act 1979*.

Sequence of appeals means a sequence of appeals in which each appeal that follows next after another appeal in the sequence is an appeal against the decision in that other appeal.

Supreme Court means the Supreme Court of New South Wales or a judge thereof.

(2) This Act applies to and in respect of:

(a) a court,

(b) an appeal to or from a court,

(c) proceedings or actions before a court, and

(d) a decision of a court,

exercising State or federal jurisdiction.

3 Suitors' Fund

(1) There is to be established in the Attorney General's Department Account a "Suitors' Fund" into which shall be paid the moneys referred to in section 5 and from which shall be paid the amounts referred to in sections 6 (2), 6A, 6B and 6C.

(2) In addition to the money payable out of the Fund under this Act the following amounts shall be a charge against and shall be paid out of the Fund:

(a) all costs of management of the Fund as certified by the Auditor-General,

(b) any amount considered by the Director-General to be surplus to the Fund's requirements,

(c) fees payable to consultants retained by the Director-General to advise on the proper investment of the Fund.

(2A) An amount referred to in subsection (2) (b) shall not be paid out of the Fund without the concurrence of the Attorney General.

(2B) An amount paid out of the Fund under subsection (2) (b) shall be used for expenditure:

(a) on improving (or on projects designed to lead to improving) court facilities and services, and

(b) towards the administrative costs incurred in relation to the operation of Part 5 of the *Civil Procedure Act 2005*.

(3) The Fund shall, subject to this Act and the regulations, be under the direction, control and management of the Director-General.

(4) All moneys payable to the Fund under this Act and interest allowed thereon shall be made available to the Director-General for investment or for the purpose of paying the amounts referred to in subsection (2) of section 6 or any other amount properly payable out of the Fund.

(5) Interest at a rate to be determined by the Treasurer shall be allowed on the amount at the credit of the account first referred to in subsection (4).

(6) The Fund shall as far as practicable be invested in securities in which trustees are by law authorised to invest.

(7) Interest derived from the investment of the Fund shall form part thereof.

(8) The income of the Fund shall not be subject to taxation under any Act of this State.

(9) The Director-General may retain consultants to advise on the proper investment of the Fund.

4 Director-General to be corporation sole

(1) For the purposes of the exercise and discharge of the powers, authorities, duties, functions and obligations conferred and imposed upon the Director-General by this Act, the Director-General is hereby declared to be a corporation sole under the name of "The Director-General of the Attorney General's Department".

The said corporation sole shall have perpetual succession and an official seal and may in the corporate name sue and be sued and shall be capable of purchasing, holding, granting, demising, disposing of and alienating real and personal property and of doing and suffering all such other acts and things as a body corporate may by law do and suffer.

(2) The assets of the Fund shall be vested in the said corporation sole.

(3) Where any property real or personal or the interest therein or charge thereon is vested in or is acquired by the said corporation sole, the same shall unless otherwise disposed of by the said corporation sole pass to and devolve on and vest in its successors.

(4) The seal of the said corporation sole shall not be affixed to any instrument or writing except in the presence, or by the direction, of the Director-General who shall attest by the Director-General's signature the fact and date of the seal being so affixed.

(5) The appointment of the Director-General and the Director-General's official seal shall be judicially noticed.

(6) (Repealed)

5 Contributions to the Fund

(1) As soon as practicable after the last day of each month, there shall be paid to the Fund such percentage, not exceeding in any case ten parts per centum, of the fees of court collected in any court or in any jurisdiction of any court which are paid into the Consolidated Revenue Fund during the month ending on that day, as may be fixed by the Governor, upon the recommendation of the Colonial Treasurer, by proclamation published in the Gazette with respect thereto.

The Governor may from time to time in like manner vary or revoke any such proclamation.

(2) Any proclamation under subsection (1) may fix different percentages in respect of:

(a) different courts,

(b) different jurisdictions of the same court,

(c) courts held at different places.

(3) Any amounts payable to the Fund under subsection (1) shall be paid out of the Consolidated Revenue Fund, and are hereby specially appropriated.

6 Costs of certain appeals

(1) If an appeal against the decision of a court:

(a) to the Supreme Court on a question of law or fact, or

(b) to the High Court from a decision of the Supreme Court on a question of law,

succeeds, the Supreme Court may, on application, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(1A) Where an appeal against the decision of a court to the Industrial Relations Commission of New South Wales or to the District Court of New South Wales on a question of law succeeds, that Commission or Court, as the case may be, may, upon application made in that behalf, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(1AA) Where an appeal under section 56A of the *Land and Environment Court Act 1979* to the Land and Environment Court on a question of law succeeds, that Court may, upon application made in that behalf, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(1B) For the purposes of this section, a taxing officer of a court shall, when acting as such a taxing officer, be deemed to be exercising the jurisdiction of a court of first instance.

(2) Where a respondent to an appeal has been granted an indemnity certificate, the certificate shall entitle the respondent to be paid from the Fund:

(a) an amount equal to the appellant's costs of:

(i) the appeal in respect of which the certificate was granted, and also

(ii) where that appeal is an appeal in a sequence of appeals, any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted,

ordered to be paid and actually paid by the respondent: Provided that where the Director-General is satisfied that the respondent is unable through lack of means to pay the whole of those costs or part thereof or that payment of those costs or part thereof would cause the respondent undue hardship, or where those costs or part thereof have not been paid by the respondent and the Director-General is satisfied that the respondent cannot be found after such strict inquiry and search as the Director-General may require or that the respondent unreasonably refuses or neglects to pay them, the Director-General may, if so requested by the appellant or the respondent, direct in writing that an amount equal to those costs or to the part of those costs not already paid by the respondent be paid from the Fund for and on behalf of the respondent to the appellant and thereupon the appellant shall be entitled to payment from the Fund in accordance with the direction and the Fund shall be discharged from liability to the respondent in respect of those costs to the extent of the amount paid in accordance with the direction,

(b) fifty per centum or such other percentage as may be prescribed (at the time when the indemnity certificate is granted) in lieu thereof by the Governor by proclamation published in the Gazette of the amount payable from the Fund pursuant to paragraph (a) or, where no amount is so payable, an amount equal to the costs of:

(i) the appeal in respect of which the certificate was granted, and also

(ii) where that appeal is an appeal in a sequence of appeals, any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted,

as taxed, incurred by the respondent and not ordered to be paid by any other party: Provided that where an amount is payable from the Fund pursuant to paragraph (a), but the Director-General directs that the costs of the appeal or appeals referred to in subparagraph (i) or in subparagraphs (i) and (ii) incurred by the respondent and not ordered to be paid by any other party be taxed at the instance of the respondent or those costs are, without such a direction, taxed at the instance of the respondent, the amount payable from the Fund under this paragraph shall be the amount equal to those costs as so taxed, and

(c) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, an amount equal to the costs incurred by the respondent in having those costs taxed.

Notwithstanding the foregoing provisions of this subsection:

(i) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, the aggregate of the amounts payable from the Fund pursuant to that paragraph and paragraph (c) shall not exceed the amount payable from the Fund pursuant to paragraph (a).

(ii) (Repealed)

(2A) The maximum amount payable from the Fund for any one appeal is:

(a) $20,000 in the case of an appeal to the High Court, or

(b) $10,000 in the case of any other appeal.

(2B) If more than one indemnity certificate has been issued in connection with the same appeal, the maximum amount payable from the Fund with respect to any one indemnity certificate is:

(a) an amount equal to the maximum amount payable from the Fund for that appeal divided by the number of indemnity certificates issued in connection with that appeal, or

(b) subject to subsection (2A), such other amount as may be determined by the court by which the indemnity certificate is issued.

(2C) Subsections (2A) and (2B) do not apply to appeals lodged before the commencement of those subsections.

(3) An indemnity certificate granted in respect of an appeal to the respondent to the appeal, being an appeal in a sequence of appeals, shall be vacated if:

(a) in a later appeal in the sequence the successful party is the one to whom the indemnity certificate was granted, or

(b) an indemnity certificate is granted in respect of a later appeal in the sequence and the respondent to the earlier appeal is a party to the later appeal.

(4) (a) An indemnity certificate granted in respect of an appeal to the respondent to the appeal shall have no force or effect:

(i) where a time is limited for appealing against the decision in the appeal—during the time limited for appealing against the decision in the appeal,

(ii) where an appeal lies against the decision in the appeal but no time is so limited—until an application for leave to appeal against the decision in the appeal has been determined and, where leave is granted, the appeal is instituted, or until the respondent lodges with the Director-General an undertaking in writing by the respondent that the respondent will not seek leave to appeal, or appeal pursuant to the leave granted, against the decision in the appeal, whichever first happens,

(iii) notwithstanding anything contained in subparagraph (ii) where the respondent gives the undertaking referred to in that subparagraph and thereafter seeks leave to appeal, or appeals, against the decision in the appeal—until the application for leave has been determined and, where leave is granted, the appeal is instituted,

(iv) notwithstanding anything contained in the foregoing provisions of this paragraph where the decision in the appeal is the subject of an appeal—during the pendency of the appeal.

Where the appeal and a later appeal or later appeals form a sequence of appeals and the indemnity certificate has not been vacated under subsection (3):

(v) the reference to the decision in the appeal in the foregoing provisions of this paragraph shall be construed as including a reference to the decision in the later appeal or in each such later appeal, as the case may be, and

(vi) the reference to the pendency of the appeal in those provisions shall be construed as including a reference to the pendency of the later appeal or of each such later appeal, as the case may be.

(b) Where an undertaking has been given by a respondent under the foregoing provisions of this subsection and thereafter the respondent seeks leave to appeal or appeals, as the case may be, against the decision to which the undertaking relates, the respondent shall, upon demand made by the Director-General, pay to the Director-General any amount paid to the respondent, or for and on behalf of the respondent, under the indemnity certificate or, if the respondent notifies the Director-General in writing of the respondent's seeking leave to appeal or of the respondent's appeal, as the case may be, any amount paid to the respondent, or for and on behalf of the respondent, under the indemnity certificate before the respondent gave the notification, and the amount concerned may be recovered by the Director-General from the respondent as a debt in any court of competent jurisdiction.

Any amount paid to, or recovered by, the Director-General under this subsection shall be paid by the Director-General into the Fund.

(c) Nothing in this subsection affects the operation of subsection (3).

(5) The grant or refusal of an indemnity certificate shall, except as provided by subsections (5A), (6) and (7), be in the discretion of the Supreme Court, Land and Environment Court, Industrial Relations Commission of New South Wales or District Court of New South Wales, as the case may be, and no appeal shall lie against any such grant or refusal.

(5A) Where a respondent to an appeal referred to in subsection (1), (1A) or (1AA) is a legally assisted person, the respondent shall, for the purpose of exercising the discretion referred to in subsection (5) and for the purpose of determining the amount which the respondent is entitled to be paid from the Fund:

(a) be deemed not to be a legally assisted person, and

(b) be deemed to have incurred such costs as have been incurred by any other person in the course of acting for the respondent as a legally assisted person.

(6) An indemnity certificate shall not be granted in respect of any appeal from proceedings begun in a court of first instance before the commencement of this Act.

(7) An indemnity certificate shall not be granted in favour of:

(a) the Crown,

(b) a corporation that has a paid-up share capital of two hundred thousand dollars or more, or

(c) a corporation that does not have such a paid-up share capital but that, within the meaning of section 50 of the *Corporations Act 2001* of the Commonwealth, is related to a body corporate that has such a paid-up share capital, unless the appeal to which the certificate relates was instituted before the commencement of the *Legal Assistance and Suitors' Fund (Amendment) Act 1970*.

6A Costs of proceedings not completed by reason of death of judge etc

(1) Where on or after the day on which Her Majesty's assent to the *Suitors' Fund (Amendment) Act 1959* is signified:

(a) any civil or criminal proceedings are rendered abortive by the death or protracted illness of the judge or magistrate before whom the proceedings were had,

(a1) any civil or criminal proceedings are rendered abortive for the purposes of this paragraph by section 46A (Appeal against damages may be heard by 2 Judges) of the *Supreme Court Act 1970* or section 6AA (Appeal against sentence may be heard by 2 judges) of the *Criminal Appeal Act 1912*, because the judges who heard the proceedings were divided in opinion as to the decision determining the proceedings,

(b) an appeal on a question of law against the conviction of a person (in this section referred to as the appellant) convicted on indictment is upheld and a new trial is ordered, or

(c) the hearing of any civil or criminal proceedings is discontinued and a new trial ordered by the presiding judge or magistrate for a reason not attributable in any way to disagreement on the part of the jury, where the proceedings were with a jury, or to the act, neglect or default, in the case of civil proceedings, of all or of any one or more of the parties thereto or their counsel or attorneys, or, in the case of criminal proceedings, of the accused or the accused's counsel or

attorney, and the presiding judge or magistrate grants a certificate (which certificate the presiding judge or magistrate is hereby authorised to grant):

(i) in the case of civil proceedings—to any party thereto stating the reason why the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to disagreement on the part of the jury, where the proceedings were with a jury, or to the act, neglect or default of all or of any one or more of the parties to the proceedings or their counsel or attorneys, or

(ii) in the case of criminal proceedings—to the accused stating the reason why the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to disagreement on the part of the jury or to the act, neglect or default of the accused or the accused's counsel or attorney,

and any party to the civil proceedings or the accused in the criminal proceedings or the appellant, as the case may be, incurs additional costs (in this section referred to as ***additional costs***) by reason of the new trial that is had as a consequence of the proceedings being so rendered abortive or as a consequence of the order for a new trial, as the case may be, then the Director-General may, upon application made in that behalf, authorise the payment from the Fund to the party or the accused or the appellant, as the case may be, of the costs (in this section referred to as ***original costs***), or such part thereof as the Director-General may determine, incurred by the party or the accused or the appellant, as the case may be, in the proceedings before they were so rendered abortive or the conviction was quashed or the hearing of the proceedings was so discontinued, as the case may be.

(1A) Where, in the opinion of the Director-General:

(a) the Director-General would, but for this subsection, not be entitled to authorise payment of an amount to a person under subsection (1) because that person incurred neither original costs nor additional costs by reason only of the fact that that person was a legally assisted person, and

(b) that person would have incurred original costs and additional costs had that person not been a legally assisted person,

subsection (1) shall apply to and in respect of that person as if that person had not been a legally assisted person and as if that person had incurred such original costs and additional costs as the Director-General determines:

Provided that the Director-General may, in lieu of authorising payment under that subsection of an amount to that person, authorise payment of that amount to such person or persons as in the Director-General's opinion is or are entitled to receive payment thereof.

(1B) If an application has been made under subsection (1) in respect of proceedings rendered abortive, or a new trial ordered, after the commencement of the *Suitors' Fund (Amendment) Act 1987*, the amount payable under that subsection to any one person shall, in respect of that application, not exceed:

(a) $10,000, or

(b) such other amount as may be prescribed (at the time when the proceedings were rendered abortive or the new trial was ordered).

(2) No amount shall be paid from the Fund under this section to:

(a) the Crown,

(b) a corporation that has a paid-up share capital of two hundred thousand dollars or more, or

(c) a corporation that does not have such a paid-up share capital but that, within the meaning of section 50 of the *Corporations Act 2001* of the Commonwealth, is related to a body corporate that has such a paid-up share capital, unless the proceedings were rendered abortive or the new trial was ordered (as referred to in subsection (1)) before the commencement of the *Legal Assistance and Suitors' Fund (Amendment) Act 1970.*

6B Costs of certain appeals on ground that damages were excessive or inadequate

(1) Where an appeal to the Court of Appeal on the ground that the damages awarded in the action in respect of which the appeal is made were excessive or inadequate succeeds, the respondent to the appeal or any one or more of several respondents to the appeal, shall (if granted an indemnity certificate under subsection (2)) be entitled to be paid from the Fund:

(a) an amount equal to the costs of the appellant in the appeal ordered to be paid and actually paid by the respondent: Provided that where the Director-General is satisfied that the respondent is unable through lack of means to pay the whole of those costs or part thereof or that payment of those costs or part thereof would cause the respondent undue hardship, or where those costs or part thereof have not been paid by the respondent and the Director-General is satisfied that the respondent cannot be found after such strict inquiry and search as the Director-General may require or that the respondent unreasonably refuses or neglects to pay them, the Director-General may, if so requested by the appellant or the respondent, direct in writing that an amount equal to those costs or to the part of those costs not already paid by the respondent be paid from the Fund for and on behalf of the respondent to the appellant and thereupon the appellant shall be entitled to payment from the Fund in accordance with the direction and the Fund shall be discharged from liability to the respondent in respect of those costs to the extent of the amount paid in accordance with the direction,

(b) fifty per centum or such other percentage as may be prescribed (at the time when the indemnity certificate is granted) in lieu thereof by the Governor by proclamation published in the Gazette of the amount payable from the Fund pursuant to paragraph (a) or, where no amount is so payable, an amount equal to the costs of the appeal, as taxed, incurred by the respondent and not ordered to be paid by any other party: Provided that where an amount is payable from the Fund pursuant to paragraph (a), but the Director-General directs that the costs of the appeal incurred by the respondent and not ordered to be paid by any other party be taxed at the instance of the respondent or those costs are, without such a direction, taxed at the instance of the respondent, the amount payable from the Fund under this paragraph shall be the amount equal to those costs as so taxed, and

(c) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, an amount equal to the costs incurred by the respondent in having those costs taxed.

Notwithstanding the foregoing provisions of this subsection:

(i) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, the aggregate of the amounts payable from the Fund pursuant to that paragraph and paragraph (c) shall not exceed the amount payable from the Fund pursuant to paragraph (a),

(ii) the amount payable from the Fund in respect of the appeal shall not in any case exceed the sum of $10,000 or such other amount as may be fixed (at the time when the indemnity certificate is granted) in lieu thereof by the regulations under this Act.

(2) If an appeal to the Court of Appeal on the ground that the damages awarded in the action in respect of which the appeal is made were excessive or inadequate succeeds, the Court of Appeal may, on application, grant:

(a) to the respondent to the appeal, or

(b) to any one or more of several respondents to the appeal,

an indemnity certificate in respect of the appeal.

(3) The grant or refusal of an indemnity certificate shall, except as provided by this section, be in the discretion of the Court of Appeal and no appeal shall lie against any such grant or refusal.

(4) The provisions of section 6 (4) (a) (i)–(iv) and (b) apply to and in respect of an indemnity certificate granted under this section in the same way as they apply to and in respect of an indemnity certificate granted under section 6.

(5) If a respondent to an appeal is a legally assisted person, the person shall, for the purpose of exercising the discretion referred to in subsection (3) and for the purpose of determining the amount which the respondent is entitled to be paid from the Fund:

(a) be deemed not to be a legally assisted person, and

(b) be deemed to have incurred such costs as have been incurred by any other person in the course of acting for the respondent as a legally assisted person.

(6) An indemnity certificate shall not be granted in favour of:

(a) the Crown,

(b) a corporation that has a paid-up share capital of two hundred thousand dollars or more, or

(c) a corporation that does not have such a paid-up share capital but that, within the meaning of section 50 of the *Corporations Act 2001* of the Commonwealth, is related to a body corporate that has such a paid-up share capital, unless the appeal was instituted before the commencement of the *Legal Assistance and Suitors' Fund (Amendment) Act 1970.*

6C Payments not otherwise authorised by this Act

(1) If:

(a) a party to an appeal or other proceedings incurs or is liable to pay costs in the appeal or proceedings,

(b) the party is not otherwise entitled to a payment from the Fund in respect of the costs, and

(c) the Director-General is of the opinion that a payment from the Fund in respect of the costs, although not authorised by section 6, 6A or 6B, would be within the spirit and intent of those sections,

the Director-General may, with the concurrence of the Attorney General, pay from the Fund to the party such amount towards the costs as is assessed by the Director-General having regard to the circumstances of the case.

(2) A payment under this section shall not exceed $10,000.

6D Reduction of payment if taxation of costs not contested

The Director-General may, if:

(a) an amount is payable from the Fund under this Act in relation to costs incurred in an appeal, and

(b) taxation of the costs was not contested by the other party to the appeal,

reduce the amount payable to an amount that would, in the Director-General's opinion, have been payable had the taxation been contested.

7 Regulations

(1) The Governor may make regulations not inconsistent with this Act prescribing all matters which, by this Act, are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without prejudice to the generality of subsection (1) the regulations may make provision with respect to the manner of operating on the Fund and the custody of documents evidencing investment of the Fund and with respect to the taxation, for the purposes of this Act, of the costs of an appeal incurred by a respondent and with respect to all matters relating thereto, including but without limiting the generality of the foregoing provisions of this subsection:

(a) the specification of the principles to be followed in the preparation of a bill of those costs and in the taxation of such a bill,

(b) the specification of who shall be the taxing officer of such a bill and in relation thereto that different persons or officers shall be the taxing officers in respect of bills that relate to different courts or different jurisdictions of a court,

(c) the persons to be served with a copy of such a bill.

(3) (Repealed)

8 Savings and transitional provisions

Schedule 1 has effect.

Schedule 1 Savings and transitional provisions

(Section 8)

1 Determination of entitlement to payment before the commencement of the Suitors' Fund (Amendment) Act 1987

The entitlement of the following persons to a payment from the Fund shall be determined having regard to the provisions specified in respect of those persons:

(a) a person who was granted an indemnity certificate under section 6 before the commencement of the *Suitors' Fund (Amendment) Act 1987*—the provisions of this Act as in force at the date of granting of the certificate,

(b) a person to whom a payment was or is authorised under section 6A in respect of proceedings rendered abortive, or a new trial ordered, before the commencement of the *Suitors' Fund (Amendment) Act 1987*—the provisions of this Act as in force at the date the proceedings were rendered abortive or the new trial was ordered,

(c) a person who was entitled to a payment from the Fund under section 6B in respect of a decision on an appeal on the ground that damages awarded were excessive or inadequate—the provisions of this Act as in force at the date of the decision.

2 Continuation of Act in relation to Privy Council appeals

(1) This Act applies to and in respect of an appeal from a decision of the Supreme Court made to the Queen in Council before the commencement of the *Suitors' Fund (Amendment) Act 1987.*

(2) For the purpose of subclause (1), this Act shall be deemed to have been amended:

(a) by the insertion of the following matter at the end of section 6 (1) (b):

, or

(c) to the Queen in Council from a decision of the Supreme Court on a question of law,

(b) by the insertion of the following paragraph after section 6 (2A) (b):

(b1) if it was granted in respect of an appeal to the Queen in Council from a decision of the Supreme Court—not exceed $20,000, or

(3) An application under section 6 shall not be granted in respect of an appeal to the Queen in Council unless it is made within 2 years after:

(a) the date of commencement of the *Suitors' Fund (Amendment) Act 1987*, or

(b) the date of the written decision on the appeal,

whichever is the later.

3 Transfer of money consequent on enactment of Courts Legislation Further Amendment Act 1998

(1) As soon as practicable after the commencement of Schedule 9 [1] to the amending Act, the balance standing to the credit of the account which, immediately before that commencement, was required by section 3 to be established in the Special Deposits Account in the Treasury, is to be transferred to the Attorney General's Department Account and the account from which the balance is transferred is to be closed.

(2) The account established under subclause (1) is a continuation of, and is taken to be the same fund as, the Suitors' Fund established and operating under section 3 of this Act immediately before the commencement of Schedule 9 [1] to the amending Act.

(3) In this clause, ***amending Act*** means the *Courts Legislation Further Amendment Act 1998*.

Historical notes

The following abbreviations are used in the Historical notes:

Am	amended	LW	legislation website	Sch	Schedule
Cl	clause	No	number	Schs	Schedules
Cll	clauses	p	page	Sec	section
Div	Division	pp	pages	Secs	sections
Divs	Divisions	Reg	Regulation	Subdiv	Subdivision
GG	Government Gazette	Regs	Regulations	Subdivs	Subdivisions
Ins	inserted	Rep	repealed	Subst	substituted

Table of amending instruments

Suitors' Fund Act 1951 No 3. Assented to 31.5.1951. Date of commencement, 1.11.1951, sec 1 (2) and GG No 182 of 26.10.1951, p 3080. This Act has been amended as follows:

1959 No 20 Suitors' Fund (Amendment) Act 1959. Assented to 19.10.1959.
Date of commencement of sec 2, 1.11.1951, sec 1 (4).

1960 No 8 Suitors' Fund (Amendment) Act 1960. Assented to 24.3.1960.
Date of commencement, 1.11.1951, sec 1 (3).

1965 No 33 Decimal Currency Act 1965. Assented to 20.12.1965.
Date of commencement of sec 4, 14.2.1966, secs 1 (3), 2 (1), and the Currency Act 1965 (Commonwealth), sec 2 (2).

1970 No 10 Legal Assistance and Suitors' Fund (Amendment) Act 1970. Assented to 23.3.1970.
Date of commencement of sec 3 (1) (c) (ii) (iii), 1.11.1951, sec 3 (2); date of commencement of sec 3 (1) (e) (i) (ii) (v) (vi) (vii) (ix), 1.1.1966, sec 3 (4) and GG No 164 of 24.12.1965, p 4295; date of commencement of sec 3 (1) (e) (iii) (iv), 19.10.1959, sec 3 (6).

No 37 Legal Practitioners (Legal Aid) Act 1970. Assented to 18.8.1970.
Date of commencement, 25.1.1971, sec 1 (2) and GG No 161 of 18.12.1970, p 5036.

1979 No 84 Suitors' Fund (Legal Services Commission) Amendment Act 1979. Assented to 16.5.1979.
Date of commencement of Sch 1, 21.12.1979, sec 2 (2) and GG No 171 of 7.12.1979, p 6129.

1983 No 153 Miscellaneous Acts (Public Finance and Audit) Repeal and Amendment Act 1983. Assented to 29.12.1983.
Date of commencement of Sch 1, 6.1.1984, sec 2 (2) and GG No 4 of 6.1.1984, p 19.

1985 No 64 Suitors' Fund (Land and Environment Court) Amendment Act 1985. Assented to 15.5.1985.
Date of commencement of Sch 1, 11.6.1985, sec 2 (2) and GG No 91 of 7.6.1985, p 2511.

No 158 Miscellaneous Acts (Special Deposits Account) Amendment Act 1985. Assented to 28.11.1985.
Date of commencement of Sch 1, 20.6.1986, sec 2 (2) and GG No 97 of 20.6.1986, p 2796.

1986 No 16 Statute Law (Miscellaneous Provisions) Act 1986. Assented to 1.5.1986.

1987 No 48 Statute Law (Miscellaneous Provisions) Act (No 1) 1987. Assented to 28.5.1987.

Date of commencement of Sch 32, 1.9.1987, sec 2 (12) and GG No 136 of 28.8.1987, p 4809.

No 249 Suitors' Fund (Amendment) Act 1987. Assented to 16.12.1987.

Date of commencement, 28 days after assent. Amended by Statute Law (Miscellaneous Provisions) Act (No 2) 1988 No 92. Assented to 19.12.1988. Date of commencement of the provision of Sch 26 relating to the Suitors' Fund (Amendment) Act 1987, assent, sec 2 (1).

1990 No 46 Statute Law (Miscellaneous Provisions) Act 1990. Assented to 22.6.1990.

Date of commencement of the provisions of Sch 1 relating to the Suitors' Fund Act 1951, 1.8.1990, Sch 1 and GG No 90 of 20.7.1990, p 6684.

1994 No 14 Supreme Court (Amendment) Act 1994. Assented to 10.5.1994.

Date of commencement, 1.7.1994, sec 2 and GG No 80 of 17.6.1994, p 2917.

1996 No 30 Statute Law (Miscellaneous Provisions) Act 1996. Assented to 21.6.1996.

Date of commencement of Sch 3, 3 months after assent, sec 2 (3). Amended by Statute Law (Miscellaneous Provisions) Act (No 2) 1996 No 121. Assented to 3.12.1996. Date of commencement of Sch 2, assent, sec 2 (1).

No 121 Statute Law (Miscellaneous Provisions) Act (No 2) 1996. Assented to 3.12.1996.

Date of commencement of Sch 4.52, 4 months after assent, sec 2 (4).

1997 No 141 Courts Legislation Further Amendment Act 1997. Assented to 17.12.1997.

Date of commencement of Sch 1.10, 2.2.1998, sec 2 and GG No 16 of 30.1.1998, p 432.

1998 No 172 Courts Legislation Further Amendment Act 1998. Assented to 14.12.1998.

Date of commencement of Sch 9, 1.2.1999, sec 2 and GG No 178 of 24.12.1998, p 9951.

2001 No 34 Corporations (Consequential Amendments) Act 2001. Assented to 28.6.2001.

Date of commencement of Schs 1.8 and 2.49, 15.7.2001, sec 2 (1) and Commonwealth Gazette No S 285 of 13.7.2001.

No 121 Justices Legislation Repeal and Amendment Act 2001. Assented to 19.12.2001.

Date of commencement of Sch 2, 7.7.2003, sec 2 and GG No 104 of 27.6.2003, p 5978.

2005 No 28 Civil Procedure Act 2005. Assented to 1.6.2005.

Date of commencement of Sch 5.46, 15.8.2005, sec 2 (1) and GG No 100 of 10.8.2005, p 4205.

This Act has also been amended pursuant to an order under secs 8 (2) and 9 (3) of the *Reprints Act 1972* No 48 (formerly *Acts Reprinting Act 1972*). Order dated 22.11.1978, and published in GG No 166 of 24.11.1978, p 4857, declaring that:

(a) the *Suitors' Fund Act 1951* is an enactment to which sec 8 (2) of the *Acts Reprinting Act 1972* applies, and

(b) the *Suitors' Fund Act 1951*, the words "of this Act" where secondly occurring in sec 3 (1) excepted, is an enactment to which sec 9 (3) of the *Acts Reprinting Act 1972* applies.

Table of amendments

No reference is made to certain amendments made by the *Decimal Currency Act 1965*, the *Reprints Act 1972*, and Schedule 3 (amendments replacing gender-specific language) to the *Statute Law (Miscellaneous Provisions) Act 1996*.

Sec 2	Am 1959 No 20, sec 2 (a); 1960 No 8, sec 2 (a); 1970 No 10, sec 3 (1) (a); 1979 No 84, Sch 1 (1); 1985 No 64, Sch 1 (1); 1987 No 249, Sch 1 (1); 1997 No 141, Sch 1.10 [1]; 2001 No 34, Sch 1.8.
Sec 3	Am 1959 No 20, sec 3 (a); 1970 No 10, sec 3 (1) (b); 1979 No 84, Sch 1 (2); 1983 No 153, Sch 1; 1985 No 158, Sch 1; 1987 No 249, Sch 1 (2); 1990 No 46, Sch 1; 1998 No 172, Sch 9 [1] [2]; 2005 No 28, Sch 5.46.
Sec 4	Am 1959 No 20, sec 2 (b); 1987 No 249, Sch 1 (3).
Sec 6	Subst 1959 No 20, sec 2 (c). Am 1960 No 8, sec 2 (b); 1970 No 10, sec 3 (1) (c); 1979 No 84, Sch 1 (3); 1985 No 64, Sch 1 (2); 1986 No 16, Sch 23; 1987 No 249, Sch 1 (4); 1996 No 121, Sch 4.52; 1997 No 141, Sch 1.10 [2]; 2001 No 34, Sch 2.49 [1].
Sec 6A	Ins 1959 No 20, sec 3 (b). Am 1970 No 10, sec 3 (1) (d); 1970 No 37, sec 20; 1979 No 84, Sch 1 (4); 1986 No 16, Sch 23; 1987 No 249, Sch 1 (5); 1994 No 14, sec 4; 2001 No 34, Sch 2.49 [2]; 2001 No 121, Sch 2.190.
Sec 6B	Ins 1959 No 20, sec 3 (b). Am 1970 No 10, sec 3 (1) (e); 1979 No 84, Sch 1 (5); 1986 No 16, Sch 23; 1987 No 249, Sch 1 (6) (am 1988 No 92, Sch 26); 2001 No 34, Sch 2.49 [3].
Secs 6C, 6D	Ins 1987 No 249, Sch 1 (7).
Sec 7	Am 1960 No 8, sec 2 (c); 1987 No 48, Sch 32.
Sec 8	Ins 1987 No 249, Sch 1 (8).
Sch 1	Ins 1987 No 249, Sch 1 (8). Am 1998 No 172, Sch 9 [3].
The whole Act	Am 1997 No 141, Sch 1.10 [3] ("Secretary" and "Secretary's" omitted wherever occurring, "Director-General" and "Director-General's" inserted instead respectively).

Putting the wheels back on: a better approach to compensation for miscarriages of justice

Introduction

In December 2014, Victor Nealon was released from prison after 17 years, when his conviction for rape was overturned on the strength of a DNA test which pointed to another man being the attacker.[1] He appeared via videolink from HMP Wakefield. After the hearing he was released and taken to Leeds Railway Station. He was given £46 to buy a train ticket to Shrewsbury, where he was supposed to meet a friend. His friend, however, had gone to meet him at the Royal Courts of Justice in London. Nobody had told him about the videolink. Before his imprisonment Mr Nealon had been employed as a postman. 17 years later, as a result of an unsafe conviction, he was left on the street.[2]

His application for compensation for a miscarriage of justice was refused by the Secretary of State for Justice on the basis that he had not established beyond reasonable doubt that there had been a 'miscarriage of justice' as defined by s.133(1ZA) Criminal Justice Act 1988, as amended:

> For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales [...] if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly).

This was upheld by both the High Court and the Court of Appeal.[3] Mr Nealon's fundamental difficulty was that the Court of Appeal had found that his conviction was unsafe, as the new evidence might reasonably have led the jury to reach a different verdict.[4] The Court did not consider whether or not he committed the offence, nor should it have under s.2 Criminal Appeal Act 1968 and in view of

[1] *R v Nealon* [2014] EWCA Crim 574. The opinions here expressed are personal.
[2] Jon Robins, 'Washing Hands of Justice?'180 JPN 282 (2016); Mark Newby, 'Our lack of care for the victims of miscarriages of justice is a national scandal,' *Justice Gap*, http://thejusticegap.com/2016/06/lack-compensation-victims-miscarriages-justice-nothing-short-scandal/ [5 September 2016] (2016).
[3] *R(Hallam and Nealon) v Secretary of State for Justice* [2016] 3 WLR 329.
[4] *R v Nealon* at [35].

the presumption of innocence. Sir Thomas Bingham MR (as he then was) highlighted the distinction and its effect in another case:[5]

> Nor do I wish to suggest that Mr. Bateman is not the victim of what the man in the street would regard as a miscarriage of justice. [...] But that is not in my judgment the question. The question is whether the miscarriage of justice from which Mr. Bateman has suffered is one that has the characteristics which the Act lays down as a pre-condition of the statutory right to demand compensation.

The distinction is somewhat legalistic and for many difficult to understand.[6] It nonetheless has significant practical consequences that go beyond a mere entitlement to compensation. Persons who have been released after serving a custodial sentence are provided with support from the Probation Service in settling into life outside prison. Mr Nealon and others like him have no such recourse, other than advice from the Miscarriage of Justice Support Service.[7]

It has been demonstrated that the need for support is significant. The difficulties of adjustment after release on appeal are 'severe, bewildering and unexpected.'[8] A 2013 study of 54 persons in this position found that psychiatric morbidity during imprisonment and after release was common. Conditions include post-traumatic stress disorder; substance abuse; and severe depression. Of the 32 persons who had been employed before imprisonment, only eight were employed when assessed after release. In addition to going some way to acknowledging the wrong suffered by those wrongly imprisoned, compensation can facilitate the specialist services that they require as a result of their period in custody.

---

[5] *R(Bateman) v Secretary of State for the Home Department* [1994] 7 Admin LR 175.
[6] Siôn Jenkins, 'Miscarriages of justice and the discourse of innocence,' 40(3) Journal of Law and Society, 329-55 (2013).
[7] Ruth Runciman, 'Anti-Social Behaviour Bill briefing,' *Justice Gap*, http://thejusticegap.com/2013/11/anti-social-behaviour-bill-briefing/ [5 September 2016] (2013).
[8] *Ibid.*

This paper will summarise the state of the law around compensation for miscarriages of justice. It will be argued that the rationale behind the law is not coherent or satisfactory, and that the law may be contrary to the presumption of innocence in common law and under Article 6(2) European Convention on Human Rights 1950. A reform will then be suggested that is desirable, practical and useful.

The current law

International law

The United Kingdom is obliged under international law to compensate victims of miscarriages of justice. Article 14(6) International Covenant on Civil and Political Rights 1966 provides:

> 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.

The United Kingdom signed the Covenant on 16 September 1968 and ratified it on 20 May 1976.[9]

The ex gratia *scheme*

For some years, the United Kingdom gave effect to this obligation by way of an *ex gratia* scheme; this later operated alongside the statutory scheme established by the 1988 Act. The *ex gratia* scheme

[9] Sally Lipscombe and Jacqueline Beard, 'Miscarriages of justice: compensation schemes,' House of Commons Library, SN/HA/2131 (2015).

operated in accordance with a statement made in 1985 by the then Home Secretary, Douglas Hurd. Compensation would normally be paid on application by anyone who had spent time in custody and:[10]

- had received a free pardon or had his conviction quashed on a reference or appeal out of time;
- his period in custody followed a wrongful conviction or charge resulting from serious default by the police or another public authority; or
- in exceptional circumstances, but not merely on an acquittal, where facts emerged at trial or on appeal within time that exonerated him.

It can be seen that the right to compensation was limited: those who were acquitted after remand in custody, and those who whose convictions were quashed on an appeal in time, were not normally entitled to claim.

This scheme was abolished in 2006. The then Home Secretary Charles Clarke indicated that the existence of an *ex gratia* scheme was unnecessary and confusing, given the statutory scheme. Abolition was in line with a rebalancing of the justice system to take better account of the needs of victims.[11] It has been argued that victims of miscarriages of justice are also (in)direct victims of crime.[12] In any case, an application for judicial review of the decision was not successful.[13]

The statutory scheme

All that remains therefore is the statutory scheme under s.133 of the 1988 Act, which is based largely on the wording of the 1966 Covenant.

[10] HC Deb., 29 November 1985, vol.87, cols 689-690.
[11] HC Deb., 19 April 2006, cols 14-17WS.
[12] e.g. John Spencer, 'Compensation for wrongful imprisonment,' Crim. LR 11, 803-822 (2010).
[13] *R(Niazi) v Secretary of State for the Home Department* (2008) 152(29) SJLB 29.

S.133(5) of the Act limits the circumstances in which a conviction can be said to have been reversed, such that a successful appeal within the usual 28-day time limit is not included. The 'exceptional circumstances' provision for compensation in the *ex gratia* scheme is not preserved in England and Wales. Case law has established that the new or newly discovered fact must be fresh evidence, not a technical or procedural error; it must also be the sole or principal reasons that the conviction was quashed.[14]

Mullen

Until 2014, there was no statutory definition of 'miscarriage of justice' for the purpose of s.133 of the 1988 Act. In *R(Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 there was disagreement over the meaning of the term. Lord Bingham stated that the term was concerned with wrongful convictions, which extended not only to those who were innocent of the offences convicted, but also to those who, because something had gone seriously wrong with the investigation or trial, should not have been convicted, whether or not they were guilty. Lord Steyn held however that the term extended only to those cases where the person concerned was clearly innocent. After *Mullen*, both tests seem to have been followed.[15]

Adams

R(Adams) v Secretary of State for Justice [2012] 1 AC 48 was an attempt to clarify the law.[16] The Justices conducted a lengthy review of the *travaux préparatoires* to Article 14(6) of the 1966 Covenant, but found them of limited assistance, beyond indicating that it was not intended to limit compensation to those who were clearly innocent.

---

[14] *R(Bateman)*; *R(Murphy) v Secretary of State for the Home Department* [2005] 1 WLR 3516; Stephanie Harris, 'Miscarriage of Justice,' Westlaw Insights (2015).
[15] *R(Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin); *R(Harris) v Secretary of State for the Home Department* [2009] 2 All ER 1.
[16] Marny Requa and Hannah Quirk, *The Supreme Court on compensation for miscarriages of justice*, 75(3) MLR, 387-400 (2012).

Lord Phillips PSC found that at [37] that s.133 of the 1988 Act had two purposes. The primary purpose was to provide compensation to those convicted and punished for crimes that they did not commit. The subsidiary purpose was to ensure that compensation would not be paid to those convicted and punished for crimes they did commit. The problem, as adverted to above, is that the criminal appeal process deals with the safety of a conviction, not guilt or innocence. It is therefore [37]:

> [...] not satisfactory to make the mere quashing of a conviction the trigger for the payment of compensation. It was this problem which led to the adoption of the imprecise language of article 14.6, which has been reproduced in section 133. In interpreting section 133 it is right to have in mind the two conflicting objectives. It is necessary to consider whether the wording of the section permits a balance to be struck between these two objectives and, if so, how and where that balance should be struck.

The Court adopted four categories of successful appeal identified by Dyson LJ (as he then was) in Adams' appeal as the framework for their discussion. Category 1, where fresh evidence clearly showed that the defendant was innocent, was agreed to fall within s.133. Category 2, where the fresh evidence was such that had it been available at the time of the trial, no reasonable jury could possibly have convicted, was considered by a majority of 5 to fall within s.133. However, it was considered that more robust wording was required: 'a new fact would show that a miscarriage of justice has occurred when it so undermined the evidence against the defendant that no conviction could possibly be based on it.' As innocence is not a concept known to the criminal justice system, Lady Hale JSC considered at [116] that this approach was consistent with the 'golden thread' that a person is only guilty if the state can prove it beyond reasonable doubt.

Category 4, where the fresh evidence rendered the conviction unsafe because had it been available at the time of the trial, a reasonable jury may or may not have convicted, was agreed to be outside s.133,

as inclusion would give no sensible meaning to the phrase 'beyond reasonable doubt.' Category 4, where something has gone seriously wrong during the investigation or trial, was also agreed to be outside s.133, as it deals with abuse of process rather than guilt or innocence.

It was clearly necessary for the Court to draw the line somewhere in determining who would be entitled to claim compensation. There was no perfect solution. As Lord Phillips PSC observed at [50], limiting the right to Category 1 cases would mean that all those who could claim would be innocent, but some innocent persons would be unable to claim if they could not demonstrate their innocence. On the other hand, at [55], including Category 2 would have the effect that not all those entitled are in fact innocent. It would however ensure those innocent persons who cannot prove their innocence beyond reasonable doubt can claim. This was considered the more satisfactory outcome.

Ali

A number of test cases following *Adams* came before the High Court in *R(Ali and others) v Secretary of State for Justice* [2013] 1 WLR 3536. The Court acknowledged that there was a lack of clarity in relation to the territory between Categories 1 and 3, and proposed a reformulation or Lord Phillips PSC's test which carried the same meaning but greater clarity.

Allen

Article 6(2) of the European Convention on Human Rights 1950 provides that every person is entitled to be presumed innocent until proven guilty. *Adams* found at [58] that the right was not engaged by s.133 of the 1988 Act, as the focus will be on the new or newly discovered fact. However in *Allen v United Kingdom* (2016) 63 EHRR 10, the European Court held at [104] that the right was engaged, as compensation claims would require an assessment of the criminal proceedings and invite comment on

the applicant's possible guilt. It was considered at [126] that in all cases the language used by the decision-maker would be critical to establishing whether the decision is compatible with Article 6(2).

The statutory definition

The Anti-social Behaviour, Crime and Policing Act 2014 introduced a statutory definition of 'miscarriage of justice' under s.133(1ZA) of the 1988 Act. This has the effect of further limiting entitlement to those who can establish that the new or newly discovered fact shows that they did not commit the offence.

The then government justified this on the basis that the law was unclear, resulting in a number of judicial review claims by unsuccessful applications for compensation, resulting in legal costs of £100,000 per year. It was necessary to introduce a statutory definition to clarify the law and stem the 'bulge' of claims following *Adams*.[17]

The Bill in its original form required that the applicant show beyond reasonable doubt that he is innocent of the offence. Following a Lords proposed amendment that aimed to give statutory effect to the test proposed by Lord Phillips PSC in *Adams*, the then government proposed the current form. In the House of Commons, Damian Green for the government struggled to establish that there was a difference between 'did not commit' and 'is innocent of;' in the House of Lords, Lord Faulks frankly admitted that the only difference was semantic.[18]

---

[17] Ministry of Justice, *Anti-Social Behaviour, Policing and Crime Bill: Fact Sheet: Compensation for miscarriages of justice (clause 151)*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251337/18_Factsheet_miscarriages_of_justice_-_updated_for_Lords.pdf [5 September 2016] (2013); *Idem*, *Clarifying the circumstances in which compensation is payable for miscarriages of justice (England and Wales)* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197579/DOC002.PDF [5 September 2016] (2013).

[18] HC Deb., 4 February 2014, vol.575, col 163.; HL Deb., 11 March 2014, vol. 752, col 1710.

Proposal for reform

Redefinition of 'miscarriage of justice'

The example of Mr Nealon should demonstrate that the test, already narrow before 2014, is now almost impossible to satisfy. The reform proposed here is straightforward: to adopt the test suggested by Lord Phillips PSC in *Adams*.[19] Thus S.133(1ZA) of the 1988 Act would read:

> [...] there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales [...] if and only if the new or newly discovered fact shows conclusively that the evidence against the person at trial is so undermined that no conviction could possibly be based on it [...].

This meets the asserted aim of reducing the (relatively modest) legal cost of judicial review, as any statutory definition would. Further and more significantly, it ensures that those who are innocent but who cannot prove that they did not commit the offence are not excluded. Examples include those who are convicted solely on the basis of a discredited witness or improperly obtained confession, or (as in Mr Nealon's case) on the basis of undermined scientific evidence. On the other hand, it is a higher bar than the safety test applied by the Court of Appeal, and accordingly excludes those who may have committed the offence. This test would not be difficult to operate: as noted in *Adams*, the process is similar to that of 'no case to answer.' Finally, there is no risk to the presumption of innocence, as the focus is squarely on the quality of the evidence, rather than responsibility or guilt.

[19] Justice, *Anti-social Behaviour, Crime and Policing Bill: House of Lords Report Stage: Briefing and suggested amendments on compensation for miscarriages of justice*, https://www.liberty-human-rights.org.uk/sites/default/files/JUSTICE%20and%20Liberty%20briefing%20for%20ASBCP%20Bill%20on%20compensation%20%28Jan%202014%29.pdf [5 September 2016] (2014).

Conclusion

After *Mullen*, Professor Spencer considered that the law was as bad as it could possibly be.[20] Notwithstanding that, the 2014 Act made it worse. It has excluded all *Adams* Category 2 claimants in the name of a relatively modest saving in legal costs.[21] The dilemma here is similar to that addressed by Blackstone's formulation, but it has been solved in the contrary manner, by setting a test that is very difficult to satisfy.

The proposed reform is desirable, in that it will reduce the terrible impact of miscarriages and the cost to the public purse of supporting victims by way of the NHS and social benefit payments. It is practical in that it is relatively inexpensive. It is useful, in that it increases the coherency and legitimacy of the criminal justice system.

(2,982 words)

[20] *Supra*, n.12.

[21] It is to be noted that the then government did not premise the amendment on any saving to compensation costs.

Backgrounder

Compensation for wrongful conviction and imprisonment

MINISTRY OF JUSTICE
Tāhū o te Ture

May 2015

Attachment 4

Compensation for wrongful conviction and imprisonment

There is no legal right to compensation for wrongful conviction and imprisonment. However, the Government in its discretion can compensate someone wrongfully convicted and imprisoned by making an ex gratia payment.

Compensation under the following scheme is only payable to persons who:

(a) are imprisoned following a wrongful conviction that is subsequently set aside;

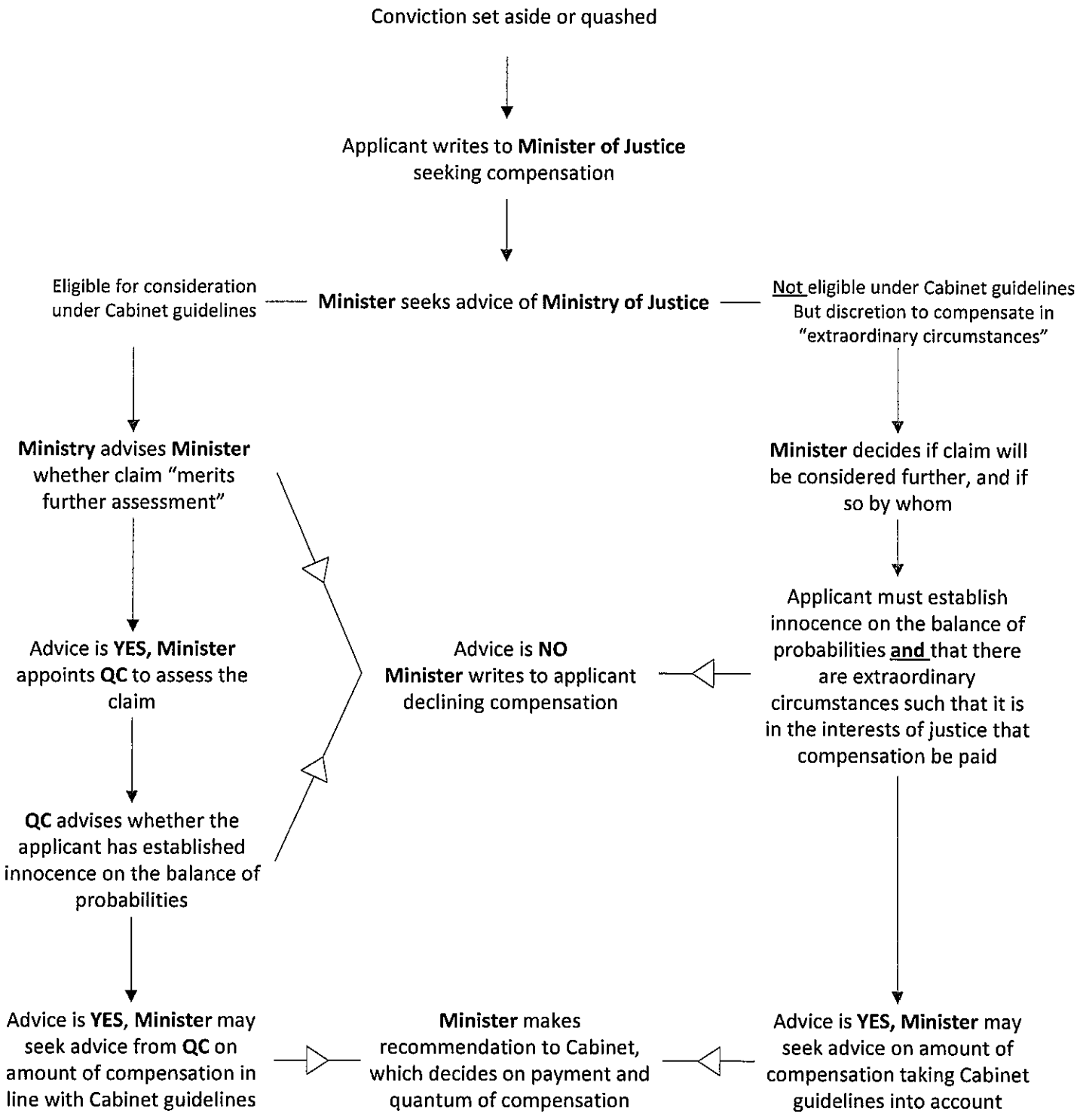
(b) are, at a minimum, innocent on the balance of probabilities.

Cabinet guidelines	Cabinet has established guidelines for deciding whether or not someone receives compensation for wrongful conviction and imprisonment and how much compensation they receive.
Eligible claimants must be imprisoned, and subsequently pardoned or convictions quashed	The Cabinet guidelines require claimants to: • be alive at the time of application • have served all or part of a sentence of imprisonment • have received a free pardon or have had their convictions quashed on appeal without order of retrial.
Investigation and determination of claims	The Ministry of Justice initially assesses each claim. Claims meriting further assessment are referred by the Minister of Justice to a Queen's Counsel for advice. The Queen's Counsel then reports to the Minister on the merits of the claim. If the Queen's Counsel is satisfied that the applicant is innocent on the balance of probabilities, the Queen's Counsel will recommend an appropriate amount of compensation in line with the guidelines. Cabinet makes the final decision on the recommendation of the Minister.
Types of compensation	The Cabinet guidelines contemplate three kinds of compensation for successful claimants: • payments for non-pecuniary losses following conviction (for example, loss of liberty or emotional harm) – based on a starting figure of $100,000 for each year in custody • payments for pecuniary losses following conviction (for example, loss of livelihood and future earnings) • a public apology or statement of innocence.
Process for determining eligibility and quantum of compensation	The process for determining eligibility and quantum of compensation for claims within Cabinet guidelines is set out in the flow chart on page 3.

Claims outside guidelines	In making the guidelines, Cabinet reserved the discretion to pay compensation to an applicant who was *not eligible* in extraordinary circumstances, where it is in the interests of justice. *Non-eligible* claimants include persons who have had their convictions quashed or set aside under the following circumstances: • where a retrial is ordered by an appeal court but the trial does not proceed; • where a retrial is ordered by an appeal court and the person is acquitted at the retrial; or • where the conviction is quashed on a rehearing in the District Court.
Investigation and determination of claims outside guidelines	Cabinet prescribed no additional criteria or process for consideration of claims falling outside the Cabinet guidelines. However, current practice is to ensure that, where relevant, important principles in the Cabinet guidelines are applied in a consistent manner to such claims. Claimants outside guidelines must show, at a minimum, that they are innocent on the balance of probabilities. They must also show that there are extraordinary circumstances that justify compensation. Unlike claims inside the Cabinet guidelines, there is no requirement that the claim be considered by a Queen's Counsel. The Ministry of Justice may, however, seek a Queen's Counsel's assistance in relation to any or all aspects of a claim.
Types of compensation	There is no requirement to apply the Cabinet guidelines relating to calculation of compensation. However, an approach is usually adopted that is generally consistent with the guidelines.
Process for determining eligibility and quantum of compensation	The process for determining eligibility and quantum of compensation for claims outside guidelines is set out in the flow chart on page 3.

Process for determining eligibility and quantum of compensation

Compensation for wrongful conviction and imprisonment



Information for potential applicants

Who can apply for compensation?

If you believe you have been wrongfully convicted and imprisoned you can apply to the Minister of Justice for compensation.

You can make an application yourself or someone, such as a lawyer, can apply on your behalf. A lawyer can advise you on the merits of making an application and, if you go ahead, can also help you collect relevant information and prepare your submissions.

How do I apply?

Applications for compensation should be submitted to the Minister of Justice. You will need to provide information about your convictions and imprisonment, and how your convictions were quashed or set aside.

At a minimum, you will need to explain why you are innocent of the charges and state what evidence you rely on to show your innocence. The onus is on the applicant to establish his or her innocence, at a minimum, to the balance of probabilities.

If your claim is outside the Cabinet guidelines, you will also need to explain why it is you think there are extraordinary circumstances in your case justifying compensation. This is a high standard to meet.

Your application, including any supporting documents and submissions, should be sent to the Office of the Minister of Justice at the following address:

Minister of Justice
Parliament Buildings
WELLINGTON 6160

Appendix: Cabinet guidelines

Cabinet guidelines

Cabinet has approved guidelines for deciding whether someone is eligible for compensation and how much they should receive. The following reproduces the text of:

- Cabinet guidelines on eligibility criteria and factors to be taken into account in determining the size of payments
- Additional guidelines on the quantum of compensation payments.

Compensation and ex gratia payments for persons wrongly convicted and imprisoned in criminal cases

Criteria for eligibility and factors to be taken into account in determining the size of payments

1. The category of claimants who shall be eligible to receive compensation or ex gratia payment in respect of being wrongly convicted of offences (qualifying persons) 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.
2. Any qualifying person may apply to the Minister of Justice for compensation or ex gratia payment and the Minister shall refer those cases meriting further assessment to a Queen's Counsel appointed by the Minister for that purpose.
3. In the case of an application by a qualifying person convicted by way of court martial, application should be made to the Minister of Defence who will consult with the Minister of Justice when referring cases meriting further assessment to a Queen's Counsel.
4. The Queen's Counsel shall report to the referring Minister, certifying whether he or she is satisfied that the claimant is innocent on the balance of probabilities. If concluding this is so, he or she will also recommend an appropriate amount of compensation/ex gratia payment, taking into account the following factors:
   (a) the conduct of the person leading to prosecution and conviction;
   (b) whether the prosecution acted in good faith in bringing and continuing the case;
   (c) whether the investigation was conducted in a reasonable and proper manner;
   (d) the seriousness of the offence alleged;
   (e) the severity of the sentence passed; and
   (f) the nature and extent of the loss resulting from the conviction and sentence.

5. Losses are in respect only of the period following conviction and are defined as follows:

   Non-pecuniary losses

   (a) loss of liberty;

   (b) loss of reputation (taking into account the effect of any apology to the person by the Crown);

   (c) loss or interruption of family or other personal relationships; and

   (d) mental or emotional harm.

   Pecuniary losses

   (a) loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;

   (b) loss of future earning abilities;

   (c) loss of property or other consequential financial losses resulting from detention or imprisonment; and

   (d) costs incurred by or on behalf of the person in obtaining a pardon or acquittal.

6. Compensation may comprise an ex gratia payment by the Crown, a public statement of the person's innocence and in appropriate cases a public apology by the Crown.

7. Claimants shall have no right of appeal against an assessment of compensation/ex gratia payment and in accepting any offer made they must agree to forego and discontinue any other claims against the Crown in respect of matters relating to the convictions that led to the offer of compensation/ex gratia payment.

Additional guidelines on quantum of future compensation

1. The calculation of compensation payments under the Cabinet criteria should be firmly in line with the approach taken by New Zealand courts in false imprisonment cases;

2. The starting figure for calculating non-pecuniary losses should be set at $100,000 and that this base figure is to be multiplied on a pro rata basis by the number of years spent in custody so that awards for non-pecuniary losses are proportional to the period of detention;

3. The figure obtained under the calculations referred to above should be then added to the figure representing the amount assessed for the presence/absence of the factors outlined in the Cabinet guidelines;

4. 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;

5. A claimant's pecuniary losses should be calculated separately, and the resulting figure should then be added to the amount assessed for non-pecuniary loss, the sum of which represents the total compensation payable to a claimant.