

Compensation Guidelines for Wrongful Conviction and Imprisonment

August 2020

Introduction to Compensation Guidelines

On 27 July 2020, Cabinet agreed to adopt new guidelines concerning compensation for persons wrongly convicted and imprisoned in criminal cases.

These guidelines are called the Compensation Guidelines for Wrongful Conviction and Imprisonment. They replace previous guidelines that were agreed by Cabinet in 1998 and amended in 2000 and 2001.

The Compensation Guidelines were issued by the Minister of Justice on 19 August 2020 and came into force on that date.

For the full text of the Guidelines, see from the next page (pages 2 – 7).

For a summary of the step-by-step process for calculation of compensation under the Guidelines, see page 8.

When it adopted the new guidelines, Cabinet agreed to review the monetary amounts in the Guidelines every five years.

Cabinet also agreed that the Minister of Justice may, as the need arises,

- a publish information explaining the application or intended application of the Compensation Guidelines, and
- b amend the Guidelines to clarify their application.

You can find explanatory material about the Guidelines here: <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/miscarriages-of-justice/compensation-for-wrongful-conviction-and-imprisonment/>.

Compensation Guidelines for Wrongful Conviction and Imprisonment

Background and purpose

- 1 There is no legal right to receive compensation from the Government for wrongful conviction and imprisonment. However, the Government in its discretion may decide to compensate a person who has been wrongly convicted and imprisoned by making an ex gratia payment.
 - 2 These Guidelines have been adopted by Cabinet to aid consideration of applications for compensation by such persons.
 - 3 The purposes of the compensation scheme described by these Guidelines are to:
 - a Vindicate innocent defendants;
 - b Provide reasonable compensation for losses arising from wrongful conviction and consequent loss of liberty;
 - c Enhance public confidence in the justice system.
 - 4 However, nothing in the Guidelines requires the Government to agree to compensate a person in any particular case.
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Commencement and transitional arrangements

- 5 The Guidelines come into force on the date they are issued by the Minister of Justice.
 - 6 The Guidelines replace all previous guidelines, criteria, procedures or practices used to aid consideration of applications by persons who have been wrongly convicted and imprisoned.
 - 7 The Guidelines apply to applications that:
 - a Are received by the Ministers of Justice and Defence on or after the commencement date; or
 - b Were submitted before the commencement date, where the relevant Minister had not by that date decided that the application merited further assessment.
 - 8 Any other application submitted before but not determined by the commencement date will continue to be assessed under the former guidelines.
 - 9 A person whose application for compensation for wrongful conviction and imprisonment was considered and determined before these Guidelines came into force is not eligible to make an application under these Guidelines in respect of the same matter.
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Interpretation

- 10 In these Guidelines:

“**Relevant Minister**” means the Minister to whom, in accordance with paragraph 19, an application should be made.

“Further assessment” means:

- a Assessment of whether an application meets or could meet the criteria for compensation specified in paragraph 17(a) to (c); and
- b If so, assessment of appropriate compensation in accordance with paragraphs 29 – 43.

“Imprisonment” includes detention in a hospital or secure facility under a sentence of imprisonment.

“Independent advice” means advice from a retired New Zealand or foreign Judge, a senior New Zealand or foreign lawyer (such as a Queen’s Counsel) and includes advice from more than one such person.

“Loss of livelihood” means loss of earnings, or earnings-related, income for the period from when the applicant is imprisoned until the applicant is treated as wrongly convicted under paragraph 14. It does not include loss of an unemployment benefit or similar government assistance.

“Qualifying bail or parole” means a period of bail or parole where there are significant restrictions on liberty as conditions of that bail or parole, occurring during the time between conviction and when the applicant is treated as wrongly convicted under paragraph 14.

Functions of Ministers of Justice and Defence

- 11 The Minister of Justice is responsible for:
 - a Administration of these Guidelines;
 - b Receiving applications under these Guidelines;
 - c Deciding whether each application merits further assessment and, if so, the procedure for assessment of the application;
 - d Subject to paragraph 17, determining the application.
- 12 In the case of an application by a person convicted of an offence under military law, the Minister of Defence will perform the functions specified in paragraph 11(b) to (d) in consultation with the Minister of Justice, including where the Minister of Defence provides advice to Cabinet.

Eligibility

- 13 An application under the Guidelines may be made only by a person who:
 - a Was wrongly convicted of an offence within the meaning of paragraph 14;
 - b Served all or part of a sentence of imprisonment in relation to that conviction;
 - c Is alive at the time of the application.
- 14 A person is wrongly convicted of an offence if:
 - a The person received a free pardon in respect of the offence;
 - b The person’s conviction was quashed or set aside by an appeal court or the trial court, and no retrial or further hearing was ordered;

- c The person's conviction was otherwise quashed or set aside and no further proceedings can be brought against the person in respect of the offence.
- 15 Paragraph 14(c) includes but is not limited to cases where a court orders a retrial and:
- a Proceedings are permanently stayed before or at trial;
 - b The person is discharged before or at trial;
 - c The person is acquitted at trial.
- 16 These Guidelines extend to persons who are convicted of an offence under military law.
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Criteria for compensation

- 17 A person who is eligible to apply in accordance with paragraphs 13 – 16 may be compensated under these Guidelines only if Cabinet is satisfied on the relevant Minister's advice that:
- a The applicant is innocent on the balance of probabilities of the offence(s) in respect of which the application was made;
 - b Compensation is in the interests of justice, having regard to the purposes of the compensation scheme, and taking into account:
 - i The conduct of the applicant leading to the prosecution and conviction;
 - ii All other relevant circumstances; and
 - c The applicant has suffered losses that are compensable under these Guidelines.
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Applicant's responsibility

- 18 The applicant is responsible for:
- a Establishing that their application meets the criteria for compensation specified in paragraph 17(a) to (c);
 - b Providing any information reasonably required to consider the application, including best available documentary evidence to support any claim for pecuniary losses.
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Procedure

- 19 An application for compensation under these Guidelines should be made to:
- a The Minister of Justice; or
 - b In the case of an application by a person convicted under military law, the Minister of Defence.
- 20 Following receipt of the application, the relevant Minister will decide whether the application merits further assessment.
- 21 The procedure for further assessment of any application is a matter for the relevant Minister.

- 22 If the relevant Minister decides that the application merits further assessment, the Minister may seek independent advice on the question of whether or not the applicant is innocent on the balance of probabilities.
 - 23 If the Minister is otherwise satisfied that the applicant is innocent on the balance of probabilities, it is unnecessary for the Minister to consider seeking independent advice.
 - 24 The Minister may seek independent advice on any other matter relating to the application, including the calculation of appropriate monetary compensation.
 - 25 The relevant Minister may decline an application at any time after it has been received if the Minister considers that the application does not or could not meet the criteria for compensation specified in paragraph 17(a) to (c).
 - 26 A decision to compensate an applicant under these Guidelines must be made by Cabinet in accordance with paragraph 17.
 - 27 An applicant has no right of appeal against any assessment of or decision made in respect of the person's application under these Guidelines.
 - 28 In accepting any offer of compensation, an applicant must agree to forgo and discontinue any other claims against the Crown in respect of matters relating to the conviction or convictions that led to the offer.
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Types of compensation

- 29 Compensation under these Guidelines may comprise:
 - a A monetary amount of up to \$250,000 per year for each year of imprisonment (this is the adjusted annual rate referred to in paragraph 34);
 - b A monetary amount of up to \$75,000 per year for time spent on qualifying bail or parole;
 - c Reasonable costs incurred in obtaining a pardon or having the wrongful conviction set aside;
 - d Reasonable costs incurred in pursuing the application for compensation;
 - e A transition allowance of up to \$50,000 to aid reintegration into society and recognise loss of future earning capacity;
 - f A monetary amount of up to \$250,000 to compensate for any other significant pecuniary losses exceeding \$50,000 in total;
 - g An adjustment, by way of increase or decrease to the total amount of compensation, of up to \$150,000 to reflect aggravating and mitigating features;
 - h A public statement of the applicant's innocence;
 - i Where appropriate, a public apology by the Crown/Government.
- 30 Losses are compensable under these Guidelines:
 - a To the extent that they are attributable to the applicant's wrongful conviction and imprisonment;
 - b To the extent they have been incurred by or on behalf of the applicant;
 - c In respect of the period following conviction only; and
 - d As assessed in accordance with paragraphs 29 and 31 – 43.

Assessment of compensation

Assessment of annual rate

31 The base annual rate is \$150,000.

32 The base rate provides compensation for

a Non-pecuniary losses, being:

i Loss of liberty;

ii Loss of reputation;

iii Loss or interruption of family or other personal relationships;

iv Loss or interruption of school or study opportunities;

v Mental or emotional harm; and

b Pecuniary losses below the \$50,000 threshold specified in paragraph 36.

33 The base rate may then be adjusted to reflect annual loss of livelihood, where applicable, taking into account income tax and any benefits received by the applicant while imprisoned. Loss of livelihood will not be more than \$100,000 per year.

34 The adjusted annual rate (being the sum of the base annual rate and the amount assessed under paragraph 33) is then multiplied by the number of years and part years of imprisonment.

Example: if a person spends 3 years and 9 months in prison, the adjusted annual rate would be multiplied by 3.75 years.

Time spent on bail or parole after conviction

35 Any period of qualifying bail or parole is compensated by multiplying that period, in years and part years, by up to 50% of the base annual rate.

Example: if a person spends 1 year and 3 months on qualifying bail or parole, the above rate would be multiplied by 1.25 years.

Loss of property and financial loss

36 Where the applicant has suffered significant loss of property or significant other consequential financial loss exceeding \$50,000 in total, an amount between \$50,000 and \$250,000 may be awarded to reflect that loss. Examples of losses that may be compensated under this paragraph include:

a Loss of inheritance; or

b Loss of an investment opportunity;

but do not include loss of future earning capacity.

Costs of challenging wrongful conviction and pursuing compensation application

37 Reasonable costs, as specified in paragraph 29(c) and (d), can include:

a Legal costs;

- b Costs of engaging other professionals such as private investigators, medical specialists, accountants, or actuaries.

38 Reasonable legal costs should be assessed with reference to the Crown Solicitor rates set by the Solicitor-General for work on criminal prosecutions on instructions from departments. These rates are to be used as a guide only and higher (or lower) rates may be reasonable in the circumstances of an individual application.

Transitional allowance

39 A transition allowance of up to \$50,000 may be made to cover some of the costs of reintegration into society, such as counselling, vocational counselling or re-training, education costs or health costs for a transitional period. The allowance is also intended to provide a catch-up period to compensate for loss of future earning capacity.

40 Payment of a transitional allowance may be conditional on the production of receipts for any specific anticipated costs for which the allowance is made

Aggravating and mitigating features in respect of conviction

41 The amount of compensation payable to an applicant in accordance with these Guidelines may be adjusted, in applicable cases, to reflect the aggravating and mitigating features specified in paragraphs 42 and 43.

42 An applicant's compensation may be increased by an amount up to \$150,000 to reflect

- a Misconduct or negligence in conducting the investigation that led to the applicant's prosecution and conviction;
- b Bad faith by the prosecution in bringing or continuing the prosecution.

43 An applicant's compensation may be decreased by an amount up to \$150,000 to reflect blameworthy conduct by the applicant contributing wholly or in part to the prosecution or conviction.

Step by step guide: how compensation is calculated under the Compensation Guidelines

Where a person qualifies for compensation under the Compensation Guidelines, their compensation award will represent a mix of annualised compensation and additional payments for specific losses.

1 Annualised compensation would cover:

- Non-pecuniary losses and minor pecuniary losses while imprisoned for a wrongful conviction;
- Non-pecuniary losses while on bail or parole following conviction;
- Loss of livelihood while in prison following conviction.

2 There may be additional payments, where relevant:

- A transition allowance to aid reintegration to society and return to work;
- Recovery of legal and other professional fees incurred in challenging the wrongful conviction and pursuing a compensation application;
- An amount to compensate for significant pecuniary losses.

3 The total of these calculations can then be adjusted – upwards or downwards – to reflect any aggravating or mitigating features relating to the person’s prosecution and conviction

A step-by-step process shows how the compensation award would be calculated.

Step	Calculation element	Amount
A	Annual rate for period of imprisonment following conviction	\$150,000
B	Annual loss of livelihood during time in prison	\$0 - \$100,000
C	Add A and B	\$150,000 - \$250,000
D	C x years and part years of imprisonment	Subtotal D
E	Annual rate for time on bail or parole following conviction	\$0 - \$75,000
F	E x years and part years on bail or parole	Subtotal F
G	Transition allowance, up to \$50,000	Subtotal G
H	Reasonable costs in challenging conviction and seeking compensation	Subtotal H
I	Significant pecuniary losses between \$50,000 and \$250,000	Subtotal I
J	Add D, F, G, H and I	Provisional total J
K	Adjustment for aggravating and mitigating features	Between +\$150,000 and - \$150,000
L	Combine J and K	Final total