

**COMPENSATION FOR A MISCARRIAGE OF JUSTICE:
NOTE FOR SUCCESSFUL APPLICANTS
DECEMBER 2017**

General

1. A decision to pay compensation to an applicant may be made either:
 - a) under the provisions of section 133 of the Criminal Justice Act 1988 (see Appendix A); or
 - b) as an ex gratia payment (see Appendix B).
2. As a successful applicant, you will be told of the reason why your application was successful and the scheme by which a payment will be made. You should note that a decision to pay compensation is not an admission of legal liability on the part of the Scottish Ministers.
3. Such decisions are not based on considerations of liability, for which there are remedies at civil law. The payment is made in recognition of the hardship caused by a wrongful charge or conviction even where there might not otherwise be any grounds for a civil claim for damages.
4. Payment of such sums may affect any legal rights to the recovery of civil damages through the courts that you may have. It is recommended that you consider seeking independent legal advice from a solicitor, a Citizen's Advice Bureau or a Law Centre. Please note that the Scottish Government will not provide legal advice to you or to other members of the public.
5. If, prior to your application, you have received any payment of compensation in respect of your claim, whether in settlement of civil legal proceedings for damages or otherwise, then you must advise us of this without delay. Similarly, if any such separate claim for compensation is outstanding (whether that is by court proceedings or otherwise) when you apply, or are commenced by you after you have been successful in your application, then you must inform us of this without delay. Where payment has been made under your application then we will inform the relevant parties concerned (which may be the court and/or the defender in such a legal action) of the details of the award. This is to prevent double recovery of compensation.

Awards of Compensation

6. Although the Scottish Ministers are responsible for taking the final decision on whether you are eligible for compensation, the assessment of the amount of the award for compensation is undertaken by an independent assessor, appointed by the Scottish Ministers under Schedule 12 to the Criminal Justice Act 1988. The independent assessor is experienced in the assessment of damages.

Procedure for assessing the amount of the payment

7. The independent assessment is made on the basis of written submissions which set out the relevant facts. Now that a decision to pay compensation has been made by the Scottish Ministers, you or your solicitor are invited to submit to the Criminal Law & Practice Unit of the Criminal Justice Division any information, or representations, which you would like the assessor to take into account when considering the amount to be paid. The onus is on you to quantify your losses arising from the miscarriage of justice, and to support with documentary evidence your submissions regarding your losses. Based on this material a draft Memorandum will be prepared by the Criminal Justice & Sentencing Branch for the assessor, to include:

- (a) a full statement of the facts of your case;
- (b) any available information on your circumstances, including all previous convictions (if any);
- (c) your date of birth and those of your children (if any);
- (d) any special features in your case which might be considered relevant to the amount to be paid;
- (e) any comments which the Justice Directorate may wish to make, in its discretion, on any aspect of your claim; and
- (f) the incorporation of comments or representations received from you, or on your behalf.

8. A draft of the completed memorandum will be sent to you, or your solicitor, for any further comments that you may wish to make. Factual amendments to the memorandum can be made where it is reasonable and necessary to do so. Usually, however, a copy of the comments will be sent to the assessor with the submission of the memorandum. The Scottish Ministers reserve the right to comment on any information/report provided by your solicitor to the independent assessor in support of your application. Any comments made by the Scottish Ministers in such circumstances will be copied to your solicitor for information. The assessor may seek further information or clarification from you or your solicitor. Communications are channelled through the Scottish Government Criminal Justice Division, as there is no direct contact between the assessor and you or your solicitor.

Principles Applied

9. In reaching an assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary losses arising from the wrongful charge or conviction and/or loss of liberty. No deduction shall be made from the award for pecuniary loss for “saved living expenses” (that is, living expenses which the applicant did not incur during the relevant period of imprisonment/detention).

10. In assessing pecuniary and non-pecuniary loss, any or all of the following factors may be relevant according to the circumstances:

Personal pecuniary loss

(a) loss of earnings as a result of the charge or conviction (to be supported by best available documentary evidence, together with details of any State benefits received during the same period);

(b) loss of future earning capacity;

(c) additional expenses incurred, e.g. for travelling, in consequence of detention, including such expenses incurred by the applicant's immediate family.

Non-pecuniary loss

(a) Damage to character or reputation; hardship, including mental suffering; injury to feelings, and inconvenience.

Interim Payments

11. Exceptionally an interim payment, or payments, may be made by the Scottish Ministers before the final amount of the award of compensation is determined. This will only be done on the advice of the independent assessor. The amount of any interim payment/s will be paid generally on account and will be deducted from the final award. The assessor’s consideration of whether an interim payment might be made in a particular case, and the amount of any such payment, is based upon the information available to him or her about the miscarriage of justice in respect of which compensation is being paid, the consequences which flowed from it and on your current immediate financial needs.

LEGAL FEES AND OTHER EXPENSES

Overturning the conviction

12. The Scottish Ministers will not consider reimbursing legal fees for overturning your conviction if legal aid was available. This will be the case even if your solicitor has not claimed from the legal aid fund. The Scottish Ministers will only consider paying reasonable legal expenses for overturning your conviction if your solicitor can prove your legal aid application was refused, or that legal aid would not have been available. Without evidence that legal aid was not available, the Scottish Ministers will not consider any claims for legal fees in respect of overturning the conviction. In cases where legal aid was not available for overturning the conviction, only reasonable, necessary and proportionate legal expenses will be met. If we are unable to reach agreement with you on the level of expenses, paragraph 16 below will apply.

Applying for miscarriage of justice compensation

13. The Scottish Ministers will consider the extent to which any expenses, legal or otherwise, incurred by you in pursuing your application for compensation should be reimbursed as part of your claim.

14. Fees payable to your solicitor will only be reimbursed to the extent that they relate to work that has been actually, reasonably and necessarily done. Fees will be reimbursed in accordance with the rates for civil work prescribed from time to time in the Table of Fees in Part II of Schedule 3 to the Advice and Assistance (Scotland) regulations 1996, enhanced by 50%. Outlays incurred by your solicitor will only be reimbursed to the extent that they have been actually, reasonably and necessarily incurred. Fees payable to counsel will only be reimbursed when the Independent Assessor has agreed in advance that the employment of counsel is appropriate, and will only be reimbursed to the extent of any limit from time to time approved by the Independent Assessor.

15. Where reimbursement of legal expenses is sought, your solicitor should provide a detailed account of expenses, drawn up in accordance with the previous paragraph, detailing the fees and disbursements incurred to date and setting out an estimate of any further fees and disbursements likely to be incurred.

16. If we are unable to reach agreement with you on the level of expenses, the Scottish Ministers will refer the matter to the Independent Assessor for determination of the level of expenses. In determining the level of expenses, the Independent Assessor may, at his or her discretion, require the Account of Expenses to be remitted on a joint remit to the Auditor of the Court of Session or to a Law Accountant for the purpose of independent assessment. In the event of an independent assessment, the basis of the assessment will be 'agent and client, third party paying'.

Payment of interest on awards of compensation

17. The Scottish Ministers accept that they are liable to pay interest on some, but not all, of your pecuniary and non-pecuniary losses that make up your award of compensation. They would expect the Independent Assessor to calculate interest in accordance with the following principles:

(a) Where interest is awarded, it will be calculated on the basis of the applicable 'judicial' rate (currently 8%). Any interest awarded will be simple interest rather than compound interest.

(b) Interest will not be awarded on any part of an award that relates to future losses, damages or symptoms. Where any part of an award relates to both past and future losses it will be apportioned for the purpose of calculating interest on the past element.

(c) Where a loss has accrued over a period of time (such as a loss of wages, or a period of illness) interest is calculated by applying half the 'judicial' rate to the total loss during the period in question. Where the loss in question is no longer being incurred (such as when there has been a return to work, or a resolution of symptoms), the full judicial rate is applied for the remainder of the period.

(d) Where interest is awarded, it will be reckoned from the date on which the loss or symptoms in question were first incurred, but no earlier than the date of wrongful conviction. Interest will be awarded only up to the date of the Independent Assessor's determination.

(e) Interest may be awarded on certain awards for non-pecuniary losses, such as awards in respect of personal injury and mental suffering. However, it is anticipated that awards reflecting the loss of liberty and damage to reputation will already reflect the delays involved and that interest will therefore not be payable in addition.

Interim payments

18. Any interim payments you receive will be paid first out of those elements of your award that attract interest, (e.g. past wage loss). Therefore, any interim payments made to you will be taken into account when the final calculation of interest is made.

Further general

19. In considering the circumstances leading to the wrongful charge or, as the case may be, conviction, the assessor will also have regard, where appropriate, to the extent to which your case might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed towards by your own conduct. The assessor will also have regard to any other convictions (if any) and any punishment resulting from them.

20. Under section 133(4) of the 1988 Act the determination of the amount of the award for compensation is entirely for the assessor. The Scottish Ministers have no power to vary that determination. Section 133(4A) of the 1988 Act sets out the criteria which the assessor must have regard to when assessing the amount of compensation payable. Although in *ex gratia* claims the assessor's role is strictly to advise the Scottish Ministers of the amount to be paid, in practice the Scottish Ministers will regard themselves as bound by the assessor's recommendation. All applicants are provided with a written note from the assessor setting out the basis on which the decision is made.

21. The assessor will not enter into correspondence or discussion about the award, nor is this a matter for negotiation. The Scottish Ministers would consider approaching him/her on your behalf only if, in response to written representations, the Scottish Ministers consider that there are good grounds for doing so. Such grounds are likely to be limited to situations where there is evidence that the assessor had failed to take a material point into account, or had taken into account erroneous or irrelevant material.

22. If, having accepted an award, you subsequently receive compensation from any other source, you will not require to repay any of your award to the Scottish Ministers. However, you should be aware that your receipt of an award from the Scottish Ministers may affect your entitlement to pursue other remedies, such as a civil claim for damages. If you are pursuing, or are contemplating pursuing, other remedies, you should take legal advice about this.

Payment of the award

23. The Scottish Ministers will make payment of your compensation award to you or your solicitor in accordance with any agreement made between you and your solicitor. If the award is to be paid into your solicitor's client account, then the Scottish Ministers will require to receive a mandate signed by you authorising this to be done.

Publicity

24. To protect your privacy the Scottish Ministers will not normally make any statement, public or otherwise, about the amount of an award in a particular case. Where they have reason to believe that any separate settlement (whether that be by civil proceedings or otherwise) is being, or may be pursued, by you, the Scottish Ministers will notify the quantum of compensation awarded by the assessor (which will include a breakdown of the total sum awarded), for use strictly in any such proceedings, to the relevant parties involved (which may be the court or the defenders in any civil proceedings). The purpose of this procedure is to prevent a double recovery of compensation.

25. The Scottish Ministers have responsibility for accounting for public expenditure and they must, therefore, be ready to answer any specific queries by Members of the Scottish Parliament in respect of the administration of the miscarriage of justice schemes. However, it is not normal practice to reveal the names of individuals receiving payments of compensation. Where questions are raised about a specific individual, the Scottish Ministers will advise enquirers, for example from the press, to contact you, your solicitors or other agent. You should advise the Scottish Ministers if you do not wish this practice to be followed.