

## Hon Andrew Little

Minister of Justice

### Proactive release – New Compensation Guidelines for Wrongful Conviction and Imprisonment

Date of issue: 20 August 2020

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

No.	Document	Comments
1	<b>New Compensation Guidelines for Wrongful Conviction and Imprisonment</b> <i>Cabinet Paper</i> Office of the Minister of Justice	Released in full.
2	<b>New Compensation Guidelines for Wrongful Conviction and Imprisonment</b> <i>Social Wellbeing Committee Minute</i> Cabinet office Meeting date: 22 July 2020	Released in full.

In confidence

Office of the Minister of Justice

Chair, Cabinet Social Wellbeing Committee

## **New Compensation Guidelines for Wrongful Conviction and Imprisonment**

### **Proposal**

1. This paper seeks Cabinet's approval of new Compensation Guidelines to govern consideration of *ex gratia* compensation payments to persons who are wrongly convicted and imprisoned. They would replace the Guidelines adopted in 1998.

### **Executive Summary**

2. In New Zealand, compensation for wrongful conviction and imprisonment has always been treated as a matter for the exercise of the government's discretion and not a legal right. In 1998, Cabinet agreed to adopt Guidelines to guide the exercise of its discretion to make *ex gratia* payments in deserving cases. Fundamental to the Guidelines is that a successful applicant can show they are innocent on the balance of probabilities.
3. Since 1998, 35 applications for compensation have been considered and determined. Initial experience led to amendments to the Guidelines in 2000 and 2001. However, the Guidelines have not been revised, or considered by Cabinet since 2001. Subsequent experience has demonstrated that, in their current form, the Guidelines are difficult to apply consistently and fairly. Teina Pora's application highlighted the inflationary impact on the rates for non-pecuniary loss, principally loss of liberty, which had not been adjusted since their introduction in 2000.
4. The Guidelines are well overdue for revision. I propose improvements to:
  - 4.1. Simplify the eligibility criteria so the Guidelines apply fairly to all cases where persons are wrongly convicted and imprisoned;
  - 4.2. Recognise that the "interests of justice" should be an express requirement for an award of compensation;
  - 4.3. Clarify and streamline the pecuniary and non-pecuniary losses that are compensable under the Guidelines;
  - 4.4. Update annual rates of compensation to reflect the impact of inflation since 2000 and provide for regular review of those rates by Cabinet;
  - 4.5. Make the assessment procedure, including the use of independent legal advisers, more flexible to fit the needs of different applications.

5. If Cabinet agrees, I would issue new Compensation Guidelines implementing decisions on this paper. The new Compensation Guidelines would apply to applications made after the date of issue and any existing application on which substantive consideration had not yet commenced. There are currently 4 applications in the latter category.
6. To ensure the new Compensation Guidelines are more durable in future, I also recommend that the Minister of Justice be invited, as the need arises, to clarify matters of detail in the new Compensation Guidelines either by amendment or published guidance. Proposed amendments that would vary or depart from Cabinet's decisions would still have to be approved by Cabinet.
7. New Compensation Guidelines will be clearer to understand, fairer in their operation and more straightforward to apply. I do not anticipate they will result in more applications being accepted for consideration than currently.

### **The Current Position**

8. There is no legal right to compensation for wrongful conviction and imprisonment.
9. However, since 1998, Cabinet and the Minister of Justice have overseen a scheme under which a person who is wrongly convicted and imprisoned can apply for and receive compensation, by way of *ex gratia* payment. Such payments are made at Cabinet's discretion and applications are dealt with according to the following guidelines collectively described in this paper as 'the Guidelines' (and attached as **Appendix A**):
  - 9.1. *The Cabinet Criteria for Compensation or Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases* [CAB (98) M 46/6C, STR (98) M 39/6];
  - 9.2. *The Additional Guidelines on Quantum of Future Compensation* [CAB (00) M 24/6, POL (00) M 18/3];
  - 9.3. Amendments to the *Cabinet Criteria* [CAB (01) M 39/5, POL Min (01) 34/5].
10. A brief history of the background to the Guidelines, as well as an overview of applications since 1998 is attached as **Appendix B**.
11. No changes to the Guidelines have been made since 2001.

### *Key features of the compensation scheme*

12. At the time the Guidelines were adopted in 1998, Cabinet agreed that the purposes of the compensation scheme were to:
  - 12.1. Provide adequate compensation for losses, especially loss of liberty, resulting from wrongful conviction;
  - 12.2. Vindicate innocent defendants; and
  - 12.3. Enhance public confidence in the criminal justice system.

13. Key features of the Guidelines as they now stand are:
- Decisions to pay compensation are made by Cabinet on a case by case basis;
  - Applications are made to and considered by the Minister of Justice. In the case of a wrongful conviction in the military justice system, the application should be made to the Minister of Defence, who then acts in consultation with the Minister of Justice;
  - To be eligible under the Guidelines, a person who has been convicted and sentenced to imprisonment must have received a pardon or had their conviction set aside on appeal without order of retrial;
  - The first decision for the relevant Minister is whether the application “merits further assessment”. If so, the application is to be referred to a Queen’s Counsel for assessment;
  - Innocence is a fundamental criterion for the payment of compensation. Accordingly, the QC is to assess and report on whether the person is innocent on the balance of probabilities;
  - If the applicant is found to be innocent on the balance of probabilities, the QC will assess and report on an appropriate amount of compensation;
  - Pecuniary and non-pecuniary losses are compensable if they occur after the wrongful conviction and are attributable to the conviction.
14. When it adopted the *Cabinet Criteria* in 1998, Cabinet also reserved its discretion to consider non-eligible claims where there are “extraordinary circumstances” and it is in the interests of justice to do so.
15. In practice, this residual discretion has been used to enable fair consideration of applications where the non-eligibility relates to the way the conviction was set aside, for example, in cases where a retrial *is* ordered but the person is subsequently acquitted or discharged.
16. This has led, in effect, to a second, parallel stream of applications. There are no guidelines governing the procedure for their assessment or the calculation of compensation. Though they are assessed in a manner that is broadly consistent with the Guidelines, in practice there is more flexibility than under the Guidelines. The applicant does, however, have the extra burden of establishing “extraordinary circumstances” in addition to their innocence on the balance of probabilities.

### **Why do the Guidelines Need Revision?**

17. In advising successive Ministers of Justice, the Ministry’s experience over the last 20 years is that nearly every application has raised distinct issues that have tested the fairness, workability or comprehensiveness of the Guidelines. Many of these issues could not have been anticipated because they arose either from the specific circumstances of an individual’s criminal case or the specific losses that person suffered when wrongly convicted and imprisoned.

18. To some extent, such issues can be addressed by making it easier, as issues arise, to clarify and explain the Guidelines. I comment on this at paragraphs 53 - 56. However, other issues about the terms of the Guidelines are more fundamental and require consideration by Cabinet.
19. The most visible sign that the Guidelines had fallen out of date was the consideration of Teina Pora's application, capped by the High Court decision in *Pora v Attorney-General* [2017] NZHC 2081. The decision pointed to inflation adjustment of Teina Pora's compensation award because the applicable compensation rates in the Guidelines had not been reviewed since they were set in 2000. Cabinet subsequently decided to make inflation adjustments to Mr Pora's award [CAB-17-MIN-0493] and to the compensation offered to Tyson Redman [CAB-18-MIN-0082].
20. Other significant issues requiring attention are:
- 20.1. Eligibility – the exclusion of wrongful convictions where a retrial is ordered means that those applications have to be dealt with under the 'extraordinary circumstances' discretion. This imposes an unfair burden on applicants and complicates assessment of applications;
  - 20.2. Interests of justice – while innocence on the balance of probabilities is a minimum requirement for payment of compensation, the Guidelines do not expressly state that compensation should also be in the *interests of justice*, having regard to all the circumstances of the case, including the applicant's conduct;
  - 20.3. Non-pecuniary losses – the calculation formula in the Guidelines (adopted in 2000 via the *Additional Guidelines*) are ambiguous and awkward to apply. They also tend to result in disproportionately large awards for persons who spend a short time in prison compared to those who serve lengthy terms;
  - 20.4. Pecuniary losses – it is unclear what some categories of pecuniary loss are meant to cover and how such losses should be calculated. There are also gaps in coverage;
  - 20.5. Inflexible procedure – the Guidelines currently require the appointment of Queen's Counsel to assess both innocence and quantum. This is not the best use of public funds as claims vary widely and do not necessarily require independent legal advice on all facets.

21. I address these topics below.

### **Eligibility**

#### *Boundaries of compensation scheme*

22. When it set up the compensation scheme, Cabinet decided to implement the recommendations in the Law Commission's 1998 report, about the scope of the proposed compensation scheme. They were:
- 22.1. The scheme should apply to cases of wrongful *conviction* but not wrongful *prosecution*. The proper functioning of the criminal justice system requires the

Police to be able to bring charges where there is a prima facie case and the courts to be able to detain an accused person in custody pending trial. Acquittal at trial or discharge without conviction did not mean a prosecution was wrongful or that the system had failed.

- 22.2. The scheme should be confined to cases of wrongful conviction where the person had been sentenced to and served a term of imprisonment, in whole or part.
- 22.3. Eligibility should be limited to persons who had been pardoned or had their conviction set aside without order of retrial.

*No change to core aspects of scheme*

23. The requirements of a wrongful conviction and consequent imprisonment are core features of the compensation scheme and I do not propose any change to them. To extend the scheme to wrongful *prosecution* would fundamentally change its character. To include wrongful convictions that do not result in imprisonment would widen the scope of the scheme and bring in a substantial class of eligible claimants whose losses, while not inconsequential, are of a different kind than those deprived of liberty.

*One procedure for all wrongful convictions*

24. I do, however, propose that the eligibility limitation to persons who have had successful appeals that do not result in a retrial be dispensed with. The expectation, underpinning the Law Commission's recommendation - that the requirement would operate as a proxy for merit - has not been borne out in practice. It is common practice for a new trial to be ordered, and for the decision whether to proceed to be left with the prosecutor and, ultimately, the trial court. Equally, appeal courts often enter an acquittal or stay of proceeding for reasons unrelated to the strength of the prosecution case, for example, where the appellant has served their sentence or a trial is no longer viable because of loss of evidence.
25. In practice, wrongful convictions have fallen into two streams, inside and outside Guidelines, based solely on whether or not a retrial was ordered when the applicant's appeal was allowed. Where a retrial was ordered (i.e. the claim falls outside Guidelines), claims are assessed under Cabinet's residual "extraordinary circumstances" discretion. Claimants must show that their case exhibits some "extraordinary circumstance" as well as demonstrating innocence. That is unfair because it is not merit-based and creates an extra hurdle for claimants. It also complicates assessment of these claims.
26. Procedurally, it would be much more straightforward to have one set of Guidelines and procedures for *all* claims based on a wrongful conviction, regardless of how the conviction is set aside. The Guidelines, including the other improvements recommended in this paper could then be applied in a consistent manner to all claims.

### *Treatment of claims outside compensation scheme*

27. I also recommend that Cabinet not reserve an “extraordinary circumstances” discretion to deal with other claims that fall squarely outside the scope of the compensation scheme, for example, pre-conviction losses or cases where there is no sentence of imprisonment (paragraphs 22.1 and 22.2).
28. That is not to rule out there may be an exceptional case that warrants consideration. However, the existing compensation scheme, tailored to deal with wrongful conviction and imprisonment, is not suited to consideration of distinctly different claims of injustice. In a truly exceptional case, it is open to a department to consider using a departmental appropriation it administers to incur expenses, including by way of *ex gratia* payment, in accordance with the requirements of the Cabinet Office Circular *Proposals with Financial Implications and Financial Authorities* – CO (18) 2.

### **Interests of Justice**

#### *General principle*

29. On the face of the current Guidelines, there is a single, essential criterion for the payment of compensation to an eligible applicant – demonstrated innocence on the balance of probabilities. Innocence is fundamental to the integrity of the compensation scheme.
30. In practice, successive Ministers of Justice have also taken into account whether compensation would be in the *interests of justice* or, to put it another way, have decided that a claim should not proceed where it would *not* be in the interests of justice to compensate the applicant, having regard to the purposes of the compensation scheme. These are cases where the payment of compensation would likely undermine, rather than enhance, confidence in the compensation scheme and the criminal justice system.
31. This judgement usually occurs at the point when the Minister decides whether an application merits further assessment by a Queen’s Counsel, though the Minister or Cabinet may decide to decline a claim at any time if compensation is judged not to be in the interests of justice. The judgement is highly contextual and is made by weighing a number of factors that will be specific to each applicant’s individual case.

#### *Applicant’s conduct*

32. Claims have typically been declined on “interests of justice” grounds because, even though the person is or may be technically innocent of the relevant charge, their conduct may otherwise be blameworthy, and sometimes criminal, to such an extent that paying compensation would be contrary to the purposes of the scheme.
33. Past examples have included:
  - 33.1. The person’s conduct constituted an offence of equal seriousness to the offences on which the person was originally convicted, or was at least offending of sufficient seriousness;

- 33.2. The person intended to commit an offence, although their conduct was not actually criminal;
- 33.3. The person substantially contributed to their conviction, for example by pleading guilty;
- 33.4. The person was only sentenced to imprisonment following conviction because they refused to entertain a community-based sentence.
34. While it is possible to identify factors (such as those listed above) that, in the abstract, may be relevant to the interests of justice, it is not possible to identify in advance what will be decisive in any individual case. For example, while whether an applicant has contributed to their own conviction by pleading guilty may be a factor to be weighed, an individual applicant's reasons for pleading guilty will also be taken into account. Accordingly, the fact of the guilty plea may or may not count against the payment of compensation, depending on the individual circumstances involved. Likewise, not all blameworthy conduct would disqualify an applicant from compensation. In cases to date, it is only where the conduct is sufficiently serious that compensation would not be seen as just.

#### *Proposal*

35. I consider the scheme would be more robust and transparent if the "interests of justice" was a formal requirement in the Guidelines. That would also minimise the risk of judicial review, which was demonstrated by the High Court's willingness to review the application of the Guidelines in *Pora v Attorney-General*.

#### **Calculation of losses under the current Guidelines**

36. The current Guidelines reflect a tort-based approach to the calculation of an applicant's losses. The basic premise of the measurement of damages in tort is to put the aggrieved person in the position that he or she would have been in but for the wrongful act. The assessment of loss attempts to take account of the individual circumstances of each applicant.
37. Under the current Guidelines, claimants can be compensated for a range of non-pecuniary and pecuniary losses:
- 37.1. The compensable non-pecuniary losses identified in the Guidelines are loss of liberty, loss of reputation, loss or interruption of family or other personal relationships, and mental or emotional harm.
- 37.2. The categories of pecuniary loss identified are loss of livelihood, loss of future earning abilities, loss of property or other consequential losses, and costs incurred in obtaining a pardon or acquittal.
38. Although the Guidelines as initially adopted appeared straightforward, they proved difficult to apply in practice. The Guidelines identified the categories of compensable loss, but they did not include any guidance about appropriate levels of compensation and the intended calculation method was unclear. Accordingly, in 2000, Cabinet adopted the *Additional Guidelines* with the aim of standardising and clarifying the calculation process and providing some benchmark amounts. The *Additional*

*Guidelines* also included a general statement that compensation under the Guidelines should be “firmly in line with the approach taken by the New Zealand courts in false imprisonment cases”. However, the application of the *Additional Guidelines*, particularly the calculation method, also proved to be difficult, and was further elaborated by the decision of the High Court in *Akatere v Attorney-General* [2006] 3 NZLR 705.

39. The end result, following *Akatere*, is a complex calculation approach that has remained difficult to apply in practice. It requires a separate assessment of pecuniary and non-pecuniary losses, within which a further two-stage assessment of non-pecuniary losses is undertaken. Under the current approach, a claimant receives a fixed rate of \$100,000 per year in respect of loss of liberty. A further, one-off amount is then assessed in respect of all other non-pecuniary losses. This amount can be adjusted, up or down, to reflect a number of factors relating to the circumstances of the individual claimant, but according to the *Additional Guidelines* “should even out around \$100,000”.
40. As noted above, the Guidelines were intended to take account of the circumstances of individual claimants, but the resulting calculation approach is oddly fragmented and has led to disproportionate results in some circumstances. Further, there are many areas where the Guidelines remain unclear (including in the definitions and assessment of pecuniary losses) and where different approaches have been taken in different claims.

#### **Proposed changes to the assessment of compensation**

41. I propose that Cabinet adopt a simpler and more streamlined compensation model. Broadly, the proposed model would combine all non-pecuniary and some pecuniary losses in a single annual rate assessment, would provide for additional payments for specific pecuniary losses, and would allow some adjustment for individual circumstances. I also propose including clearer definitions of the categories of loss, and specifying some maximum amounts. Attached as **Appendix C** is a step-by-step description of the calculation model.
42. Under the proposed model:
  - 42.1. Compensation would be based on an annual rate that includes compensation for all non-pecuniary losses, loss of livelihood while in prison, and minor pecuniary losses. The base annual rate would be \$150,000 per year, with an adjustment of up to \$100,000 per year to reflect loss of earnings, where applicable. The combined annual rate would be multiplied by the length of time spent in prison so that compensation is proportionate to the time spent wrongly imprisoned;
  - 42.2. There would also be compensation (of up to 50% of the base annual rate) for any time spent on restrictive bail or parole conditions while awaiting appeal or retrial;
  - 42.3. All claimants would be eligible for a transition allowance of up to \$50,000, to aid reintegration to society and return to work;

- 42.4. Claimants would be compensated for the costs incurred in challenging the wrongful conviction and in pursuing a compensation claim. This would cover both legal fees and the costs of other professionals;
- 42.5. There would be specific provision for compensation for any significant pecuniary losses between \$50,000 and \$250,000 (smaller pecuniary losses below the \$50,000 threshold are covered in the base annual rate);
- 42.6. The total amount of compensation would then be adjusted (up or down) to a maximum of \$150,000, to reflect any aggravating or mitigating circumstances relating to the conviction. These would be limited to prosecution bad faith in bringing or continuing the prosecution, misconduct or negligence in conducting the investigation on which the prosecution was based, and blameworthy conduct on the part of the claimant contributing (wholly or in part) to the prosecution or conviction. This would be a one-off adjustment to the total amount of compensation and would not affect the amount of the annual rate. This adjustment is not intended to take account of blameworthiness or conduct factors that are so serious that they might lead to the claim being rejected outright in accordance with the "interests of justice" criterion.
43. I also propose that Cabinet direct the Minister to review all monetary rates set out in the Guidelines every five years, and report back to Cabinet with recommendations on whether the rates should be maintained or adjusted.
44. I consider that these proposals strike an appropriate balance between clarity and ease of application on the one hand, and recognition of individual circumstances on the other.
45. More particularly, the proposed model would address the shortcomings in the current Guidelines in the following ways:
- 45.1. The proposed annual rate (combining all non-pecuniary losses with loss of livelihood and minor pecuniary losses) will eliminate the current two-stage assessment of non-pecuniary losses and will be simpler to calculate. It will also address an issue with the Guidelines whereby claimants who have been imprisoned for a relatively short amount of time can receive a disproportionately large amount of compensation. This occurs because one element of the current two-stage assessment is essentially a fixed amount that is not proportional to the time spent in prison;
- 45.2. The inclusion of loss of livelihood as an element of the annual rate will help to streamline the calculation process, and there will be a clearer definition of loss of livelihood and a maximum rate;
- 45.3. Compensation for time spent on restrictive bail or parole conditions will be included in the scheme. These losses are not expressly included in the Guidelines and there have been different approaches taken to whether and how they can be recognised;

- 45.4. Loss of educational opportunities will be expressly included as an element of the new annual rate. Under the current Guidelines it is not clear whether and how these losses are compensable;
- 45.5. The confusing reference to comparisons with the approach taken in false imprisonment cases – which in practice has no role in the calculation – will be omitted;
- 45.6. A new transition allowance, up to a set amount, will replace the need to make a separate assessment for loss of future earnings (which under the current Guidelines tends to be highly speculative). It is intended to provide a catch-up period to compensate for loss of earning capacity and also to cover some of the costs of reintegration into society, such as counselling or retraining, for a transition period;
- 45.7. The proposed discretion to award a discrete amount for a significant loss of property or consequential financial loss (for example, a lost inheritance or loss of a commercial opportunity), within a stated range, is intended to eliminate claims for small losses (which are covered in the base annual rate) in favour of compensation for significant losses only up to a maximum amount;
- 45.8. The new Compensation Guidelines will make it clear that both legal and professional costs incurred in challenging a wrongful conviction and in pursuing a compensation claim are compensable, and that assessment will be guided by reasonable rather than actual costs;
- 45.9. The one-off adjustment for factors relating to an individual's, or the state's, conduct leading to the conviction will provide some discretion to take account of the particular circumstances of a claimant's case. This will be a simpler and more straightforward adjustment than under the current Guidelines, and will not undermine the simplicity of the annual rate.
46. The proposal for regular review (on a five-yearly basis) of the monetary amounts set out in the Guidelines will address the High Court's findings in the *Pora* case about the necessity of ensuring consistency of treatment between applicants over time by allowing future inflationary changes to be accommodated.
47. In my view these proposals will result in a simpler, fairer scheme that will be easier to apply in practice.

#### **Flexible Procedure for Assessment**

48. In 1998, Cabinet decided that in order to maintain the integrity of the assessment process and enhance public confidence, assessments of innocence and quantum of compensation should be undertaken by a Queen's Counsel who will then report to the Minister of Justice.
49. I agree that the independence and expertise of QCs is central to the operation of the Guidelines. That is particularly so in cases where innocence is in dispute or where the assessment of losses is complex and involves debatable questions of judgement.

### *Queens' Counsel not always required*

50. However, experience shows that assessment by a senior, independent lawyer is not necessarily required for all claims or for all facets of an application. Compensation claims vary widely in their demands. One example is the person whose innocence is readily apparent from the facts uncovered at or following a successful appeal. On the calculation side might be the person whose losses do not require complex evaluation (for example where there is no claim for significant consequential financial loss).
51. I consider that the current requirement to require assessment by a QC in all cases is too prescriptive and does not make the best use of public funds.
52. Instead, I propose that the relevant Minister have the flexibility to decide which claims or parts of claims require independent advice and who would be a suitable adviser (e.g. a QC, retired judge, a panel) and to tailor the procedure to the demands of each claim.

### **Clarifying Application of Guidelines**

53. Cabinet's decisions in 1998, 2000 and 2001 were translated into Guidelines that had the advantage of being relatively short and high-level and therefore accessible.
54. The Guidelines have, however, left a lot to be worked out in practice, in particular the generality of the Guidelines relating to the scope and meaning of compensable losses (e.g. the meaning of "loss of livelihood" and "loss of future earning capacity"). While Queen's Counsel and officials have been able to address issues as they arise on a case by case basis, that does not promote common understanding of the Guidelines and ultimately, consistent decision-making.
55. The proposals in this paper will go some way to resolving issues that have arisen to date. However, issues of detail and interpretation will arise in the future. I do not consider it is feasible to bring the text of the Guidelines back to Cabinet on each occasion for amendment or clarification.
56. Instead, I propose that as the need arises and consistent with Cabinet's decisions on this paper, the Minister of Justice could clarify the application of the Guidelines either by amending the detail of the Guidelines or by publishing explanatory information. This would keep the Guidelines up-to-date and be of assistance to all users, whether applicants, Ministers, independent advisers or officials.

### **Commencement and Transitional Arrangements**

57. I propose that the new Compensation Guidelines come into effect on the date that they are issued by me and published on the website of the Ministry of Justice. They would apply to all claims made on or after that date and any claims that had been lodged but were still awaiting the relevant Minister's decision on whether they *merited further assessment*. Applications that had already proceeded to active consideration under the current Guidelines would be completed in accordance with those Guidelines.
58. I also recommend that Cabinet agree that persons whose compensation claims have been considered and determined in accordance with the current Guidelines not be

eligible to make a fresh application under the new Compensation Guidelines in respect of the same matter. This would confirm the finality of previous decisions and ensure the adoption of new Compensation Guidelines is not seen or used as an opportunity to relitigate the outcome.

## **Consultation**

59. The New Zealand Defence Force, Crown Law Office, New Zealand Police, Treasury, Department of Corrections, the State Services Commission, Te Puni Kōkiri, Ministry for Pacific Peoples, and Ministry for Women have been consulted on the paper. The Department of Prime Minister and Cabinet has been informed.

## **Financial implications**

### *Effect of proposal on number of successful applications*

60. The potential pool of applicants will remain the same after merging the two streams (inside and outside Guidelines), as persons outside Guidelines have always been eligible to apply for compensation, albeit with such applications having a more complicated method of assessment.
61. It is also important to note the proposed changes to the Guidelines will not change the test for compensation in deserving cases, as a person has to satisfy the criteria under the Guidelines (including proving their innocence on the balance of probabilities and that payment is in the interests of justice).
62. The number of potential applicants is relatively small. Relying on data from the past five years, on average, around 20 people per year are eligible to apply: 8 people per year fall inside Guidelines, and 12 people per year fall outside Guidelines. However, only a small proportion of people who are eligible actually apply (this is likely to be for a number of reasons), and only a small proportion of those who apply are successful. 8 out of 35 applications have been successful over the past 20 years.
63. In summary, while it is possible that there may be an increase in the number of applications made by persons who were previously outside Guidelines due to the simplified procedure, I anticipate that the number and rate of successful applications is unlikely to materially change.

### *Potential impact of Criminal Cases Review Commission on number of applications*

64. I have also considered the potential impact of the Criminal Cases Review Commission on the number of applicants, although I note this is not related to any proposed changes to the Guidelines. The vast majority of applications under the Guidelines result from convictions quashed during the normal appeal process. Those who apply as a result of a post-appeal mechanism, that is, following a successful Royal prerogative of mercy application, are a very small proportion (6 out of 35 applications, 2 of which were successful).
65. The establishment of the Criminal Cases Review Commission this year may result in more applications for referral back to the appeal courts, and potentially a higher number of convictions being quashed following a referral back, than under the

current Royal prerogative of mercy system. In turn, this may in time result in more applications for compensation under the Guidelines. However, I consider it is too early to say whether this will make a significant difference to the number of applications under the Guidelines, and as noted above, any such increase in applications is not related to the proposals in this paper.

#### *Effect of proposal on amount of compensation payable*

66. Appendix B includes an overview of payments made since 1998. The financial implications of the proposed changes are difficult to quantify because of the wide variety of circumstances of each applicant, and that each application is determined on a case by case basis. It is not possible to predict how many claims might be made in a given period (compared to the number of potential applicants), or the amount of compensation claimed. Accordingly, looking at the amounts paid in the past on an annualised basis is not helpful in terms of trying to predict or annualise the likely future costs.
67. The proposal to increase the base annual rate figure for non-pecuniary loss from \$100,000 to \$150,000 per year (capped at \$250,000 if there is an adjustment to reflect loss of earnings) will not necessarily result in higher awards than under the current Guidelines, as the High Court decision in *Pora* effectively requires a similar increase to be applied to the annual rate for non-pecuniary losses under the current Guidelines.

#### *Queen's Counsel not always required*

68. While there may be potential savings if Queen's Counsel are not required to be engaged in assessing applications, such savings are difficult to quantify given that each application will be fact-specific.

#### *Availability of legal aid*

69. I note that under the current Guidelines, applicants are eligible to apply for a grant of legal aid to assist with their application (whether an applicant is inside or outside Guidelines). This eligibility will not change under the proposed Guidelines. As such, the proposals in this paper do not have an impact on legal aid costs and consequently baselines, as those persons outside Guidelines have always been eligible to apply for a grant of legal aid.

#### *Appropriation*

70. When establishing the Guidelines, Cabinet agreed that it would decide on a case by case basis to appropriate funds for each compensation payment [STR (98) M 39/6]. I propose that Cabinet continue this arrangement because the number of applications that result in a compensation payment are relatively low, and experience shows that the amount to be paid cannot easily be predicted given the wide variation in the circumstances of each applicant.
71. The Ministry of Justice is not funded for any *ex gratia* or compensation payments in this area and is unable to make any cost reductions to absorb this payment. Such payments to date have been charged against the between-Budget operating

contingency to a non-departmental 'other expense' appropriation for compensation for wrongly convicted individuals. This process has worked in the past and I propose that it continues.

### **Legislative Implications**

72. There are no legislative implications.

### **Impact Analysis**

73. The impact analysis requirements do not apply.

### **Human Rights**

74. The proposals appear to be consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

### **Implications for Māori**

75. I recognise that Māori experience disproportionate rates of imprisonment. I also acknowledge that any existing structural barriers that may discourage eligible people from applying in general may have a disproportionate effect on Māori. However, as the number of applicants over the past 20 years has been small, it is difficult to draw meaningful insights regarding the proportion of applicants who are Māori.

76. I recognise that the proposals in this paper are focussed on compensating individuals (and not their wider whanau, hapū, or iwi) for losses arising from wrongful conviction and imprisonment. The proposals are intended to update the monetary rates and simplify the compensation process for eligible applicants. They are not intended to address systemic issues in the criminal justice system, which are the subject of a separate, ongoing work programme.

### **Gender Implications and Disability Perspective**

77. As I have noted above, the overall number of applicants is small, and it is difficult to draw meaningful insights regarding gender and disability. However, I recognise that New Zealand's prison population is overwhelming male, and, as a result, men may represent a higher proportion of applicants for compensation. I also recognise that a higher proportion of people in prison are likely to have intellectual and physical disabilities, and experience more mental health issues and substance abuse disorders than the general population.

78. The proposals in this paper deal mainly with technical adjustments. I consider that the few proposals that do relate to policy do not have a differential impact on the basis of gender or disability.

### **Publicity**

79. I propose to issue a press release once the new Compensation Guidelines have been issued by me and published on the Ministry of Justice's website.

80. I have instructed my officials to consider suitable means of informing relevant stakeholders of the new Compensation Guidelines, including, for example, lawyers and groups that work with sentenced prisoners.

### **Proactive Release**

81. I propose to proactively release this paper once the new Compensation Guidelines have been issued and published on the Ministry of Justice's website, with any necessary redactions as appropriate under the Official Information Act 1982.

### **Recommendations**

82. The Minister of Justice recommends that the Committee:

#### *Background*

1. **note** that, in December 1998, Cabinet first adopted guidelines to govern compensation, by way of *ex gratia* payments, to persons who are wrongly convicted and imprisoned of criminal offences;
2. **note** that the Guidelines currently comprise:
  - 2.1. *The Cabinet Criteria for Compensation or Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases* [CAB (98) M 46/6C, STR (98) M 39/6];
  - 2.2. *The Additional Guidelines on Quantum of Future Compensation* [CAB (00) M 24/6, POL (00) M 18/3];
  - 2.3. Amendments to the *Cabinet Criteria* [CAB (01) M 39/5, POL Min (01) 34/5];
3. **note** that no changes to the Guidelines have been made since the Amendments in December 2001;
4. **note** that because no adjustment had been made to the rates of compensation for non-pecuniary losses in the *Additional Guidelines* since they were set in July 2000, Cabinet decided to make inflation adjustments to the compensation payments for non-pecuniary loss made to:
  - 4.1. Teina Pora [CAB-17-MIN-0493]; and
  - 4.2. Tyson Redman [CAB-18-MIN-0082];

#### *New Compensation Guidelines and their purposes*

5. **agree** that experience since 1998 indicates that improvements to the Guidelines are warranted to ensure that their operation is more consistent and efficient, and fairer;
6. **agree** to replace the current Guidelines with new *Compensation Guidelines for Wrongful Conviction and Imprisonment* (the Compensation Guidelines) governing compensation for persons wrongly convicted and imprisoned;

7. **agree** that the purposes of the Compensation Guidelines are to:
- 7.1. Vindicate innocent defendants;
  - 7.2. Provide reasonable compensation for wrongful conviction and consequent loss of liberty;
  - 7.3. Enhance public confidence in the justice system;

*Main features of new Compensation Guidelines*

8. **agree** that the Compensation Guidelines have the following main features:

Character of Guidelines

- 8.1. There is no legal right to compensation for wrongful conviction and imprisonment and compensation considered and paid under the Guidelines is *ex gratia* at Cabinet's complete discretion;
- 8.2. Decisions to pay compensation under the Guidelines and the amount of such compensation must be made by Cabinet;
- 8.3. Compensation under these Guidelines may comprise:
  - (a) A monetary amount for compensable losses;
  - (b) A public statement of an applicant's innocence;
  - (c) Where appropriate, a public apology by the Crown.
- 8.4. An applicant who accepts an offer of compensation must agree to forgo and discontinue any other claims against the Crown about matters related to the compensation application, its assessment and the offer;
- 8.5. There is no right of appeal against any assessment of or decision made concerning a person's application under the Guidelines;

Eligibility

- 8.6. Eligibility is limited to persons who, having been convicted of an offence;
  - (a) Served all or part of a sentence of imprisonment in respect of that conviction; and either
    - (i) Had the conviction quashed or set aside and are not subject to any further proceedings in respect of the offence; or
    - (ii) Received a free pardon; and
  - (b) Are alive at the time of the application;
- 8.7. Eligibility (under paragraph 8.6) extends to persons convicted of an offence under military law;

### Procedure

- 8.8. Applications are to be made to the Minister of Justice, or in the case of a conviction under military law, the Minister of Defence;
- 8.9. The relevant Minister will decide whether an application merits further assessment and, if so, the procedure for such assessment, including whether or not to seek independent legal advice;
- 8.10. The relevant Minister may decline an application at any stage if the Minister is satisfied that the application does not or cannot meet the criteria for compensation specified in paragraph 8.12;
- 8.11. Where the Minister of Defence is responsible for assessment of an application, the Minister will consult with the Minister of Justice;

### Criteria for compensation

- 8.12. Compensation may be paid 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 to which the application applies;
  - (b) Compensation is in the interests of justice, having regard to the purposes of the Guidelines, and taking into account:
    - (i) The conduct of the applicant leading to the prosecution, conviction and any subsequent or related proceedings;
    - (ii) All other relevant circumstances; and
  - (c) The applicant has suffered compensable losses.

### Compensable losses

- 8.13. The following types of loss are compensable under the Guidelines:

#### *Non-pecuniary losses*

- (a) Loss of liberty (including time spent on restrictive bail or parole conditions);
- (b) Loss of reputation;
- (c) Loss or interruption of family or other personal relationships;
- (d) Loss or interruption of school or study opportunities; and
- (e) Mental and emotional harm;

*Pecuniary losses*

- (a) Loss of livelihood, including loss of earnings;
- (b) Loss of future earning capacity;
- (c) Loss of property or other consequential financial losses;
- (d) Reasonable costs incurred in obtaining a pardon or having the wrongful conviction quashed or set aside; and
- (e) Reasonable costs incurred in pursuing the applicant's application for compensation;

8.14. Non-pecuniary and pecuniary losses are compensable:

- (a) To the extent 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) Only in respect of the period following conviction;

Assessment of amount of compensation

8.15. The starting point for assessment of the amount of compensation is a base annual rate of \$150,000. The base rate provides compensation for:

- (a) loss of liberty;
- (b) loss of reputation;
- (c) loss or interruption of family or other personal relationships;
- (d) loss or interruption of school or study opportunities;
- (e) mental and emotional harm;
- (f) smaller pecuniary losses;

8.16. To the base rate is then added an amount to reflect annual loss of livelihood, up to \$100,000 per year. The amended rate is then multiplied by the number of years spent wrongly imprisoned;

8.17. Time spent on restrictive bail or parole conditions is compensated by multiplying the length of time spent on bail or parole by up to 50% of the base annual rate;

8.18. An amount between \$50,000 and \$250,000 may be awarded for significant loss of property or significant consequential financial loss;

- 8.19. Reasonable costs (both legal and non-legal professional costs) of challenging the wrongful conviction and pursuing a compensation claim may be compensated;
- 8.20. A transition allowance of up to \$50,000 is payable to cover some of the costs of reintegration into society and to provide a catch-up period to compensation for loss of future earning capacity;
- 8.21. A one-off adjustment, up or down (of up to \$150,000) can be made in appropriate cases to reflect any aggravating or mitigating features in respect of the conviction. These are limited to prosecution bad faith in bringing or continuing the prosecution, misconduct or negligence in conducting the investigation on which the prosecution was based, and blameworthy conduct on the part of the applicant contributing (wholly or in part) to the prosecution or conviction;

#### *Commencement and transitional arrangements*

9. **invite** the Minister of Justice to issue Compensation Guidelines that implement the decisions in paragraphs 6 to 8 above;
10. **agree** that the Compensation Guidelines come into effect on the date that they are issued by the Minister and that they apply to any application made:
- 10.1. On or after the date on which the Guidelines come into effect;
- 10.2. Before the date on which the Guidelines come into effect if the relevant Minister has not, at that date, decided whether the application merits further assessment;
11. **agree** that the Guidelines will otherwise continue to apply to any application made before the Compensation Guidelines come into effect;
12. **agree** that a person whose application for compensation for wrongful conviction and imprisonment was made and determined in accordance with the Guidelines is not eligible to make another application under the Compensation Guidelines in respect of the same matter;

#### *Availability of legal aid*

13. **note** that no changes are proposed to an applicant's existing ability to apply for a grant of legal aid to assist with their application;

#### *Appropriation*

14. **agree** that Cabinet continue to decide on a case by case basis for each compensation payment to appropriate funds to a non-departmental "Other Expense" appropriation;

*Review and amendment of Guidelines*

15. **direct** that every five years the Minister of Justice review all monetary rates and report back to Cabinet with recommendations on whether the rates should be maintained or adjusted;
16. **invite** the Minister of Justice, as the need arises, to:
  - 16.1. Publish information explaining the application or intended application of the Compensation Guidelines; and
  - 16.2. Amend the Guidelines to clarify their application;provided that any such explanation or amendment is consistent with the decisions in paragraph 8 above;

*Ex gratia payments under other authority not affected*

17. **note** that the operation of the Compensation Guidelines does not affect a department's authority to use a departmental appropriation it administers to incur expenses, including by way of *ex gratia* payment, in accordance with the requirements of the Cabinet Office Circular *Proposals with Financial Implications and Financial Authorities* – CO (18) 2 – and any succeeding circular;

*Publicity*

18. **note** that the Minister of Justice intends, at the time the Compensation Guidelines are issued, to:
  - 18.1. Issue a press release about the adoption of the Guidelines; and
  - 18.2. Publish this paper and related Cabinet decisions online, subject to consideration of any redactions that would be justified if the information had been requested under the Official Information Act 1982.

Authorised for lodgement

Hon Andrew Little

Minister of Justice

## Appendix A

### 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 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 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.

## Appendix B

### Background to the Guidelines and overview of applications

#### Background

1. Article 14(6) of the International Covenant on Civil and Political Rights ('ICCPR') provides that certain persons who are wrongly convicted shall be compensated "according to law". When New Zealand ratified the ICCPR in 1978, it entered a reservation preserving New Zealand's right not to apply article 14(6) in favour of a system of *ex gratia* payments to persons who are wrongly convicted and imprisoned.
2. There was no established scheme to govern such payments until, in 1997, Cabinet adopted interim criteria to deal with a claim by David Dougherty pending advice from the Law Commission on a general compensation scheme for the future.

#### Adoption and amendment of guidelines

3. After the Law Commission reported (*Report 49, Compensating the Wrongly Convicted*), in December 1998, Cabinet adopted the *Cabinet Criteria* to guide future decision-making.
4. Cabinet made a deliberate decision to maintain an *ex gratia* approach under which any compensation payments are made at Cabinet's discretion. Cabinet agreed that the purposes of the agreed compensation scheme were to:
  - 4.1. provide adequate compensation for losses, especially loss of liberty, resulting from wrongful conviction;
  - 4.2. vindicate innocent defendants; and
  - 4.3. enhance public confidence in the criminal justice system.
5. In 2000, Cabinet approved the *Additional Guidelines*, which aimed to standardise the assessment of non-pecuniary losses by way of a calculation formula, including a fixed annual rate for loss of liberty.
6. In 2001, the *Cabinet Criteria* were amended to cover wrongful convictions under military law and to amend the requirement that an applicant establish their innocence: from proof "beyond reasonable doubt" to proof of innocence on "the balance of probabilities" – the current position.

#### Overview of number of applications

7. Since the Guidelines were adopted, 35 applications have been decided, 32 of which followed the last amendments in 2001. One of the successful applicants was convicted of a military offence; he was the only military applicant.
8. 20 applications were considered under the Guidelines. 6 of these were successful and 14 were declined.
9. 15 applications were non-eligible and were therefore considered outside Guidelines under the "extraordinary circumstances" discretion. 2 claims were granted, 12 were declined, and one was concluded by an *ex gratia* payment for the claimant's expenses (David Bain).

#### Overview of compensation payments made

10. Of the 8 successful applications over the past 20 years, compensation payments ranged between approximately \$144,000 and \$3.5m (Mr Pora). The total amount paid to successful applicants is \$6,868,014.58, and is set out in the following table:

**Compensation payments made**

<b>Year claim Decided</b>	<b>Claimant</b>	<b>Compensable time in prison</b>	<b>Compensation paid</b>
<b>INSIDE GUIDELINES</b>			
2000	<b>David Dougherty</b> Abduction, sexual violation	3 years, 3 months	\$868,728
2000	<b>MRD (name suppressed)</b> Sexual offences with child	14 months	\$570,696
2005	<b>F (name suppressed)</b> Breach of military law – threatening to kill	1 month	\$144,221
2006	<b>Lucy Akatere McCushla Fuataha Tania Vini</b> Aggravated robbery	7 months	\$504,782 between the three claimants = approximately \$168,000 each
2016/2017	<b>Teina Pora</b> Murder, sexual violation, and aggravated robbery	19 years, 7 months	First payment (2016) - \$2,520,949.42  Second payment (2017) - inflation adjustment for non-pecuniary losses– \$988,099  Total = \$3,509,048.42
2018	<b>Tyson Redman</b> Wounding and injuring	2 years, 5 months	\$551,017.16 ex gratia payment; plus \$21,700 undertaking for treatment costs incurred
<b>OUTSIDE GUIDELINES</b>			
2010	<b>Aaron Farmer</b> Sexual violation	2 years, 3 months	\$351,575
2010	<b>Jaden Knight Phillip Johnston</b> Arson	9½ months	Knight - \$221,936 Johnston - \$146,011

## Appendix C

### How compensation would be calculated under new Compensation Guidelines

Where a person qualifies for compensation under the proposed Compensation Guidelines, their compensation award would 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 would 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 claim;
  - An amount to compensate for significant pecuniary losses.
3. The total of these calculations could then be adjusted – upwards or downwards – to reflect any aggravating or mitigating circumstances relating to the conviction.

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

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



# Cabinet Social Wellbeing Committee

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### New Compensation Guidelines for Wrongful Conviction and Imprisonment

Portfolio Justice

On 22 July 2020, the Cabinet Social Wellbeing Committee:

#### Background

- 1 **noted** that, in December 1998, Cabinet first adopted guidelines to govern compensation, by way of *ex gratia* payments, to persons who are wrongly convicted and imprisoned of criminal offences;
- 2 **noted** that the *Compensation Guidelines for Wrongful Conviction and Imprisonment* (the Guidelines) currently comprise:
  - 2.1 the Cabinet Criteria for Compensation or Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases [STR (98) M 39/6];
  - 2.2 the Additional Guidelines on Quantum of Future Compensation [POL (00) M 18/3];
  - 2.3 amendments to the *Cabinet Criteria* [POL Min (01) 34/5];
- 3 **noted** that no changes to the Guidelines have been made since the Amendments in December 2001;
- 4 **noted** that because no adjustment had been made to the rates of compensation for non-pecuniary losses in the *Additional Guidelines* since they were set in July 2000, Cabinet decided to make inflation adjustments to the compensation payments for non-pecuniary loss made to:
  - 4.1 Teina Pora [CAB-17-MIN-0493]; and
  - 4.2 Tyson Redman [CAB-18-MIN-0082];

#### New Compensation Guidelines and their purposes

- 5 **agreed** that experience since 1998 indicates that improvements to the Guidelines are warranted to ensure that their operation is more consistent and efficient, and fairer;
- 6 **agreed** to replace the current Guidelines with new *Compensation Guidelines for Wrongful Conviction and Imprisonment* (the Compensation Guidelines) governing compensation for persons wrongly convicted and imprisoned;

7 **agreed** that the purposes of the Compensation Guidelines are to:

- 7.1 vindicate innocent defendants;
- 7.2 provide reasonable compensation for wrongful conviction and consequent loss of liberty;
- 7.3 enhance public confidence in the justice system;

### **Main features of new Compensation Guidelines**

8 **agreed** that the Compensation Guidelines have the following main features:

#### **Character of Guidelines**

- 8.1 there is no legal right to compensation for wrongful conviction and imprisonment and compensation considered and paid under the Guidelines is *ex gratia* at Cabinet's complete discretion;
- 8.2 decisions to pay compensation under the Guidelines and the amount of such compensation must be made by Cabinet;
- 8.3 compensation under these Guidelines may comprise:
  - 8.3.1 a monetary amount for compensable losses;
  - 8.3.2 a public statement of an applicant's innocence;
  - 8.3.3 where appropriate, a public apology by the Crown;
- 8.4 an applicant who accepts an offer of compensation must agree to forgo and discontinue any other claims against the Crown about matters related to the compensation application, its assessment and the offer;
- 8.5 there is no right of appeal against any assessment of or decision made concerning a person's application under the Guidelines;

#### **Eligibility**

- 8.6 eligibility is limited to persons who, having been convicted of an offence;
  - 8.6.1 served all or part of a sentence of imprisonment in respect of that conviction; and either:
    - 8.6.1.1 had the conviction quashed or set aside and are not subject to any further proceedings in respect of the offence; or
    - 8.6.1.2 received a free pardon; and
  - 8.6.2 are alive at the time of the application;
- 8.7 eligibility (under paragraph 8.6) extends to persons convicted of an offence under military law;

**Procedure**

- 8.8 applications are to be made to the Minister of Justice, or in the case of a conviction under military law, the Minister of Defence;
- 8.9 the relevant Minister will decide whether an application merits further assessment and, if so, the procedure for such assessment, including whether or not to seek independent legal advice;
- 8.10 the relevant Minister may decline an application at any stage if the Minister is satisfied that the application does not or cannot meet the criteria for compensation specified in paragraph 8.12 below;
- 8.11 where the Minister of Defence is responsible for assessment of an application, the Minister will consult with the Minister of Justice;

**Criteria for compensation**

- 8.12 compensation may be paid under these Guidelines only if Cabinet is satisfied, on the relevant Minister's advice, that:
  - 8.12.1 the applicant is innocent on the balance of probabilities of the offence to which the application applies;
  - 8.12.2 compensation is in the interests of justice, having regard to the purposes of the Guidelines, and taking into account:
    - 8.12.2.1 the conduct of the applicant leading to the prosecution, conviction and any subsequent or related proceedings;
    - 8.12.2.2 all other relevant circumstances; and
  - 8.12.3 the applicant has suffered compensable losses;

**Compensable losses**

- 8.13 the following types of loss are compensable under the Guidelines:

**Non-pecuniary losses**

- 8.13.1 loss of liberty (including time spent on restrictive bail or parole conditions);
- 8.13.2 loss of reputation;
- 8.13.3 loss or interruption of family or other personal relationships;
- 8.13.4 loss or interruption of school or study opportunities;
- 8.13.5 mental and emotional harm;

**Pecuniary losses**

- 8.13.6 loss of livelihood, including loss of earnings;
- 8.13.7 loss of future earning capacity;

- 8.13.8 loss of property or other consequential financial losses;
- 8.13.9 reasonable costs incurred in obtaining a pardon or having the wrongful conviction quashed or set aside;
- 8.13.10 reasonable costs incurred in pursuing the applicant's application for compensation;
- 8.14 non-pecuniary and pecuniary losses are compensable:
  - 8.14.1 to the extent they are attributable to the applicant's wrongful conviction and imprisonment;
  - 8.14.2 to the extent they have been incurred by or on behalf of the applicant;
  - 8.14.3 only in respect of the period following conviction;

**Assessment of amount of compensation**

- 8.15 the starting point for assessment of the amount of compensation is a base annual rate of \$150,000, which provides compensation for:
  - 8.15.1 loss of liberty;
  - 8.15.2 loss of reputation;
  - 8.15.3 loss or interruption of family or other personal relationships;
  - 8.15.4 loss or interruption of school or study opportunities;
  - 8.15.5 mental and emotional harm;
  - 8.15.6 smaller pecuniary losses;
- 8.16 to the base rate is then added an amount to reflect annual loss of livelihood, up to \$100,000 per year, and the amended rate is then multiplied by the number of years spent wrongly imprisoned;
- 8.17 time spent on restrictive bail or parole conditions is compensated by multiplying the length of time spent on bail or parole by up to 50 percent of the base annual rate;
- 8.18 an amount between \$50,000 and \$250,000 may be awarded for significant loss of property or significant consequential financial loss;
- 8.19 reasonable costs (both legal and non-legal professional costs) of challenging the wrongful conviction and pursuing a compensation claim may be compensated;
- 8.20 a transition allowance of up to \$50,000 is payable to cover some of the costs of reintegration into society and to provide a catch-up period to compensation for loss of future earning capacity;

- 8.21 a one-off adjustment, up or down (of up to \$150,000) can be made in appropriate cases to reflect any aggravating or mitigating features in respect of the conviction, although these cases are limited to prosecution bad faith in bringing or continuing the prosecution, misconduct or negligence in conducting the investigation on which the prosecution was based, and blameworthy conduct on the part of the applicant contributing (wholly or in part) to the prosecution or conviction;

### Commencement and transitional arrangements

- 9 **invited** the Minister of Justice to issue Compensation Guidelines that implement the decisions in paragraphs 6 to 8 above;
- 10 **agreed** that the Compensation Guidelines come into effect on the date that they are issued by the Minister of Justice and that they apply to any application made:
- 10.1 on or after the date on which the Guidelines come into effect;
- 10.2 before the date on which the Guidelines come into effect if the relevant Minister has not, at that date, decided whether the application merits further assessment;
- 11 **agreed** that the Guidelines will otherwise continue to apply to any application made before the Compensation Guidelines come into effect;
- 12 **agreed** that a person whose application for compensation for wrongful conviction and imprisonment was made and determined in accordance with the Guidelines is not eligible to make another application under the Compensation Guidelines in respect of the same matter;

### Availability of legal aid

- 13 **noted** that no changes are proposed to an applicant's existing ability to apply for a grant of legal aid to assist with their application;

### Appropriation

- 14 **agreed** that Cabinet continue to decide on a case by case basis for each compensation payment to appropriate funds to a non-departmental "Other Expense" appropriation;

### Review and amendment of Guidelines

- 15 **invited** the Minister of Justice review all monetary rates and report back to Cabinet every five years with recommendations on whether the rates should be maintained or adjusted;
- 16 **invited** the Minister of Justice, provided that any such explanation or amendment is consistent with the decisions in paragraph 8 above, as the need arises, to:
- 16.1 publish information explaining the application or intended application of the Compensation Guidelines; and
- 16.2 amend the Guidelines to clarify their application;

**Ex gratia payments under other authority not affected**

- 17 **noted** that the operation of the Compensation Guidelines does not affect a department's authority to use a departmental appropriation it administers to incur expenses, including by way of *ex gratia* payment, in accordance with the requirements of the Cabinet Office Circular *Proposals with Financial Implications and Financial Authorities* – CO (18) 2 and any succeeding circular.

Charlotte Doyle  
Committee Secretary

---

**Present:**

Rt Hon Winston Peters  
Hon Kelvin Davis  
Hon Grant Robertson  
Hon Dr Megan Woods  
Hon Andrew Little  
Hon Carmel Sepuloni (Chair)  
Hon Nanaia Mahuta  
Hon Stuart Nash  
Hon Jenny Salesa  
Hon Damien O'Connor  
Hon Tracey Martin  
Hon Willie Jackson  
Hon Aupito William Sio  
Jan Logie, MP

**Officials present from:**

Office of the Prime Minister  
Officials Committee for SWC  
Office of the SWC Chair