

Legislative Council Panel on Administration of Justice and Legal Services

Information paper on matters arising from

the Panel's meeting on 28 April 2003:

Payment of compensation to persons wrongfully imprisoned

(Item V)

Introduction

Paragraphs 33 and 34 of the minutes of the Panel's meeting on 28 April 2003 requested action by the Administration as follows –

- “33. Referring to the statutory compensation scheme under Article 11(5) of the BORO, the Chairman pointed out that as advised by the Administration, compensation was payable to a person who had suffered punishment as a result of conviction of a criminal offence and when subsequently the conviction had been reversed or he had been pardoned on the ground that a new or newly discovered fact showed conclusively that there had been a miscarriage of justice. She requested the Administration to explain the grounds for the requirement of “new or newly discovered fact” to prove a miscarriage of justice, which appeared to be very stringent.
34. Regarding the administrative compensation scheme under Head 106 [now called “Subhead 284 Compensation”], the Chairman requested the Administration to provide information on the provisions available under the scheme as well as the actual amount of compensation payable from the scheme since 1987.”
2. At the 28 April meeting, the Administration also agreed to give further information on overseas compensation regimes and its proposals for publicising the compensation schemes.

Minutes, paragraph 33: “new or newly discovered fact”

3. Article 11(5) of the Hong Kong Bill of Rights Ordinance (Cap. 383) incorporates Article 14(6) (right to compensation for imprisonment based on a miscarriage of justice) of the International Covenant on Civil and Political Rights in Hong Kong law. Human rights texts (e.g. Nowak U.N. Covenant on Civil and Political Rights: CCPR Commentary, pp.269-271) note that the right to compensation was the most controversial provision of Article 14 (procedural guarantees in civil and criminal trials) when it was being drafted. The conditions for claiming compensation (namely, a subsequently acknowledged miscarriage of justice, absence of fault of the person convicted regarding belated disclosure of the miscarriage of justice, and serving a sentence because of the miscarriage of justice) represent compromises which enabled the right to compensation to be included in Article 14. The restriction on compensation regarding the untimely disclosure of a newly discovered fact rules out, for example, cases in which a person allows himself to be convicted in order to avoid betraying another who was truly guilty (Nowak, p.271).

4. In *Muhonen v Finland* (89/81), the author had been convicted in Finland of refusal to perform military service. He had failed at first instance to establish that he was a conscientious objector. His second application for conscientious objector status succeeded and he was pardoned and released after serving eight months of an 11-month sentence. The UN Human Rights Committee considered that Mr Muhonen’s pardon did not give rise to a right to compensation under Article 14(6) since the pardon was motivated not by a miscarriage of justice but by considerations of equity. Further, Mr Muhonen succeeded in persuading a statutory examining board of his conscientious objector status only after he personally appeared before it following his renewed application in 1980, while in 1977 he had failed to take the opportunity to be present when the examining board considered his case (Joseph, Schultz and Castan The International Covenant on Civil and Political Rights: Cases, Materials and Commentary, pp.335-336).

Minutes, paragraph 34: (a) provisions and (b) amounts

(a) Provisions for compensation

5. The provisions for the payment of compensation under the administrative scheme, including guidelines for payment and heads of loss, are summarised below.

(i) Guidelines for payment

6. It may be noted that the administrative guidelines include provisions for compensation in circumstances where the court could grant compensation under Article 11(5) and section 6(1) of the BORO. If a claim under Article 11(5) could not be settled administratively it would have to be adjudicated by the court like any other civil claim.

7. The administrative guidelines are –

- (a) Compensation may be payable to a person convicted of a criminal offence who has spent time in custody and has received a free pardon because his innocence has been established or his conviction has been quashed following a reference to the Court of Appeal by the Chief Executive or an appeal out of time.
- (b) Compensation may be payable where a person has spent time in custody following a wrongful conviction or charge resulting from serious default by the police or other public authority. For example, refusal of bail because of incorrect information given to the court by the prosecutor or the police, or police suppression of material evidence which would have helped to exonerate a convicted person. Compensation may also be payable on this basis where the wrongful act was that of a judge or magistrate but, to preserve the perceived independence of the judiciary,

payment in such cases should only be made on the recommendation of the judiciary itself.

- (c) Aside from guidelines (a) and (b), compensation may be payable in outstandingly deserving cases even where the loss was not caused by a wrongful act or omission by a public authority.
- (d) Compensation would not be paid simply because the prosecution was unable to prove its case beyond reasonable doubt in relation to a particular charge.
- (e) Compensation may be refused where there is serious doubt about the claimant's innocence, based on the argument that it would be repugnant to pay compensation out of public funds to a person who is probably guilty but, for example, whose conviction was quashed on a mere technicality.
- (f) Compensation may be refused or reduced proportionately where the claimant is wholly or partly to blame for his misfortune; for example, he deliberately withheld evidence which would have demonstrated his innocence.
- (g) From the perspective of public policy or administration, extending compensation beyond guidelines (a), (b) and (c) to persons who have suffered loss in the ordinary course of the criminal process (for example, to those to whom guideline (d) applies) would have substantial cost and other resource implications. There would be a much larger number of potential claimants and a tribunal or some other special machinery would be required to investigate each case and distinguish the claimants who are very probably innocent from those who were lucky to escape

conviction.

(ii) Heads of loss

8. Compensation may be paid in respect of all or any of the following heads of loss –

(1) Pecuniary losses

- (a) Loss of earnings (including, where relevant, loss of future earnings).
- (b) Losses and expenses reasonably incurred by the claimant's family.
- (c) Any other ascertainable losses, e.g. through forced sale of business assets rendered unusable by the claimant's conviction or punishment and investment income on money paid in fines.
- (d) In so far as they have been borne by the claimant or his family and have not already been reimbursed, such legal expenses as he reasonably incurred in the original proceedings in which he was convicted.

(2) Non-pecuniary losses

- (a) Loss of liberty.
- (b) Damage to character and reputation.

9. The claimant may also be reimbursed the expenses, legal or otherwise, reasonably incurred by him in pursuing his claim for compensation. Interim payments of compensation may be made in suitable cases of amounts which total less than the minimum likely final award.

(iii) Determination of eligibility for compensation

10. The power to authorise payments of compensation under Subhead 284 Compensation is vested in the Secretary for Financial Services and the Treasury.

While the Department of Justice has delegated authority to approve payment in certain cases where the Government is under a legal liability to pay, it also offers legal advice in respect of all other claims of compensation under the administrative scheme, including claims for *ex gratia* payments.

(iv) Modes of assessment

11. Independent assessment of whether a claimant qualifies for compensation may be appropriate where in the circumstances some blame attaches to the public authorities, or in particularly large or complicated cases. In other cases the assessment could adequately (and more efficiently and economically) be made by a member of the Department of Justice who is experienced in the relevant matters.

(b) Amounts of payments since 1987

12. The amounts payable under Subhead 284 Compensation are determined by the Secretary for Financial Services and the Treasury, taking into account the views of the Secretary for Justice and any other affected department or bureau. Each case is determined on its merits and there is no ceiling on the amount which may be paid. The provision under the Subhead in the 2003-2004 Estimates is \$39.2 million. This amount covers a wide range of payments in settlement of claims against the Government (other than compensation connected with land, public works and mail, and for civil servants under the Employees Compensation Ordinance), and for certain *ex gratia* payments made on moral or compassionate grounds.

13. The Secretary's records show that, since 1987, there have been two cases of out-of-court settlements, and three cases of *ex gratia* payments related to wrongful conviction or imprisonment. These cases are briefly itemised below.

A. Out-of-court settlements

Total: \$9,770,000

1. Pham Van Ngo and 110 others v AG (1992)

\$9,020,000

2. Civil action alleging unlawful arrest, detention and assault by police officers (1996). \$750,000

B. Ex gratia payments **Total: \$592,636**

1. Claimant wrongfully arrested and detained for two days (1987). \$3,000
2. Claimant taxi driver wrongfully convicted of careless driving and failing to stop after an accident on false testimony of a colleague. Fined \$5000 and disqualified from driving for two years (1985). \$492,284 (paid in 1989)

Claimant taxi driver wrongfully convicted of careless driving, refusing a hire and failing to stop after an accident on false testimony of the same colleague. Fined \$1050 with costs of \$250 (1986). \$7,352 (paid in 1989)

3. Claimant wrongfully tried twice for the same offence. Remanded in custody for 14 days (1994). \$90,000

Information on overseas practice

14. Information on the compensation system in the United Kingdom was given to the Panel by the Administration in a paper dated January 2002. An updated version of that information and summaries of the compensation systems in Australia, Canada, New Zealand and Ireland are included in the Annex to this paper.

Proposals for publicity

15. It is proposed that information on the compensation schemes be included on the website of the Department of Justice. We will also provide information on the schemes to the Bar Association, the Law Society and the law schools.

16. This approach is considered preferable to more public measures such as distributing leaflets in the magistracies. Cases of miscarriage of justice occur only rarely and it is possible, for example, that defendants who have been acquitted of a charge where the prosecution has not been able to prove its case beyond reasonable doubt may be misled into believing that they have a right to compensation.

17. The question whether a case may be suitable for a claim of compensation is appropriately a matter for the professional judgment of the legal representatives of both the defence and the prosecution (the latter particularly where a defendant is unrepresented). It is proposed that prosecuting counsel be instructed, in cases where issues of miscarriage of justice arise, to inform as appropriate the court, the defendant, or his legal representative of the possibility of making a claim under either of the compensation schemes.

Legal Policy Division
Department of Justice
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**Overseas practice on payment of compensation
to persons wrongfully imprisoned**

United Kingdom

As noted in our January 2002 paper, applications for compensation for wrongful conviction or charge are considered, first, under section 133 of the Criminal Justice Act 1988, and then, if necessary, under the *ex gratia* arrangements announced by the Home Secretary in the House of Commons on 29 November 1985.

2. Briefly, section 133 of the 1988 Act provides for compensation to be paid administratively where a conviction has been reversed on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted. Under section 133(5), “reversed” is defined as including a conviction having been quashed following an out of time appeal.

3. In the event that the requirements under section 133 are not met, the Home Secretary is prepared, in exceptional circumstances, to pay *ex gratia* compensation to persons who have spent a period in custody following a wrongful conviction or charge. Examples of such exceptional circumstances are where the Home Secretary is satisfied that the wrongful conviction or charge has resulted from serious default on the part of a member of a police force or some other public authority; or where facts emerge at a trial or on appeal within time which completely exonerate the accused person.

4. In *R (Mullen) v Home Secretary* [2003] 2 WLR 835 the Court of Appeal

held that “miscarriage of justice” in section 133 was wide enough to cover the situation where a conviction was quashed as an abuse of process notwithstanding that the defendant had not been proved to be innocent. Article 14(6) of the International Covenant on Civil and Political Rights (“ICCPR”) did not use the phrase in the narrow sense which required innocence to be proven. Further, the power of the Court of Appeal to set aside a conviction which was “unsafe” covered “unsafe” in the sense of either guilt or innocence or such abuse of process as would have prevented a trial.

Australia

5. When ratifying the ICCPR, Australia entered the following reservation to Article 14 –

“Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph six of Article 14 may be by administrative procedures rather than pursuant to specific legal provision.”

6. Presently, in most Australian jurisdictions, the process of compensation for miscarriage of justice is *ad hoc*, involving the Attorney-General or Minister for Justice, and other members of the government, assessing an application for compensation on an individual, *ex gratia* basis, and guidelines often do not exist, or are not publicly available. Assessors’ and consultants’ reports regarding possible compensation amounts are also generally confidential documents.

Canada

7. The Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons 1988 suggest the following prerequisites for eligibility for compensation –

- (a) the wrongful conviction must have resulted in imprisonment, all or part of which has been served;
- (b) compensation should only be available to the actual person who has been wrongfully convicted and imprisoned;
- (c) compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence;
- (d) as a condition precedent to compensation, there must be a free pardon under the relevant section of the *Criminal Code* or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under the relevant section; and eligibility for compensation would only arise when applications pursuant to the relevant section were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice. As compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to persons who are found not guilty), further criteria apply, namely –

a statement on the face of the pardon or on an investigation that the individual did not commit the offence; or

a statement by the Appellate Court to the effect that the person did not commit the offence

8. Compensation may not be available in all cases in which an individual has been convicted of an offence which he did not commit. Further, under the ICCPR, entitlement to recovery may be affected by non-disclosure on the part of the accused. On the other hand, the Guidelines provide that any blameworthy conduct or the lack of due diligence by the claimant may affect the quantum of recovery, not the entitlement.

New Zealand

9. Prior to November 1997, the following criteria applied when assessing compensation for persons wrongfully convicted of criminal offences –

- (a) whether the prosecution acted in good faith in bringing and continuing proceedings against the accused;
- (b) whether it took proper steps to investigate matters suggesting the accused might not be guilty;
- (c) whether it conducted its investigation in a reasonable and proper manner.

10. In December 1997 the Law Commission was asked to advise whether compensation should be paid to those who have been wrongly prosecuted or convicted of an offence and, if so, to recommend a systematic basis upon which compensation may be determined and paid.

11. Following the Law Commission report issued in September 1998, a new system was set up. A wider range of people can apply for compensation but a stringent test of innocence must be passed before a claim is approved. Persons eligible for compensation are those who have had their convictions quashed on appeal to the High Court or Court of Appeal, without order for retrial, or who have received a free pardon. Other eligibility criteria include –

- (a) the applicant must have served a period of imprisonment; and
- (b) claimants must establish beyond reasonable doubt that they are innocent, but they need not produce a new fact establishing a miscarriage of justice.

12. The assessment process will be conducted by a QC who will assess whether the claimant is “innocent beyond reasonable doubt”. If that test is met, the QC then makes a recommendation to the Minister of Justice on the appropriate level of compensation. The final decision on each claim will continue to be made by Cabinet.

13. The level of compensation will take into account such things as the way the prosecution was handled, the claimant’s own conduct, and the nature of the losses suffered by the claimant. Although the Law Commission recommended that the new criteria be established by statute, it was decided that the new system would remain within the Crown prerogative for three years.

14. Supplementary guidelines were adopted in 2000 to provide for certainty in the calculation of non-pecuniary losses to avoid inconsistent results. The new calculation guidelines involve three stages –

- (a) calculation of an appropriate amount for loss of liberty with a starting figure set at NZ\$100,000. This base figure is then multiplied on a *pro rata* basis by the number of years spent in custody so that an amount for loss of liberty is arrived at that is proportionate to the period of detention;
- (b) weighing up the factors agreed to in 1998 to determine an appropriate

amount for the non-pecuniary losses incurred by the claimant. Only cases with truly exceptional circumstances would attract an award greater than NZ\$100,000;

- (c) calculation of the claimant's pecuniary losses.

Ireland

15. Section 9 of the Criminal Procedure Act 1993 provides for compensation for miscarriage of justice. A person convicted of an offence and either –

“(a)(i) his conviction has been quashed by the Court [of Criminal Appeal for a miscarriage of justice] on an application under section 2 or on appeal, or he has been acquitted in any re-trial, and

(ii) the Court or the court of re-trial, as the case may be, has certified that a newly discovered fact shows that there has been a miscarriage of justice, or

(b)(i) he has been pardoned as a result of a petition under section 7 (petition for grant of pardon), and

(ii) the Minister for Justice is of opinion that a newly-discovered fact shows that there has been a miscarriage of justice,

the Minister shall, subject to procedural requirements, pay compensation to the convicted person, or, if he is dead, to his legal personal representatives unless the non-disclosure of the fact in time is wholly or partly attributable to the convicted person.”

16. Under section 9(5), a person who is dissatisfied with the amount of

compensation determined by the Minister may apply to the High Court to determine the amount which the Minister shall pay and the award of the High Court is final.

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