

For discussion
on 25 March 2014

**Legislative Council Panel on
Administration of Justice and Legal Services**

Compensation for Wrongful Conviction

BACKGROUND

At the Panel meeting of 28 January 2014, Members agreed that the issue of “compensation for wrongful conviction” be included in the list of items for discussion by the Panel. This paper informs Members of the current practice of the Government in awarding *ex gratia* payments in certain exceptional cases, where the claimant has spent time in custody following a wrongful conviction or charge. It will also brief Members on the current compensation scheme operated by the government for victims of miscarriage of justice in England and Wales.

2. There are currently two compensation schemes operated by the Government in respect of wrongful conviction, one under a statutory provision payable according to Art 11(5) of the Hong Kong Bill of Rights Ordinance (Cap 383) (“HKBORO”)¹ and the other under administrative arrangements which this paper will focus on (i.e. the administrative scheme on *ex gratia* payments).

THE ADMINISTRATIVE GUIDELINES ON *EX GRATIA* PAYMENT

3. As for the payment of *ex gratia* compensation (i.e. compensation NOT arising from any legal or statutory obligations) under the administrative scheme, the Solicitor General with the assistance of counsel within the Legal Policy Division of the Department of Justice is responsible for considering whether a particular case falls within the guidelines. If he decides that a case falls within the administrative guidelines, the amount payable is determined by

¹ Article 11(5) of the HKBORO provides as follows:-

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”

the Secretary for Financial Services and the Treasury, taking into account the views of the Department of Justice and any other affected department of bureau.

4. In short, the administrative guidelines for the payment of *ex gratia* compensation are summarised as follows:

- (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.
- (c) Aside from guidelines (a) and (b), compensation may be payable in outstandingly deserving cases.
- (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.
- (f) Compensation may be refused or reduced proportionately where the claimant is wholly or partly to blame for his misfortune.
- (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.

5. If a case falls within the guidelines, compensation would include:
- (a) Pecuniary losses
 - (i) Loss of earnings (including, where relevant, loss of future earnings).
 - (ii) Losses and expenses reasonably incurred by the claimant's family.
 - (iii) Any other ascertainable losses.
 - (iv) 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.
 - (b) Non-pecuniary losses
 - (i) Loss of liberty.
 - (ii) Damage to character and reputation.

6. Applications for *ex gratia* payments under the administrative scheme are handled by the Solicitor General with the assistance of counsel within the Legal Policy Division of the Department of Justice. Where necessary, outside independent counsel's advice will also be sought. The Solicitor General is solely responsible for the final decision having regard to the administrative guidelines and all relevant circumstances of each case. The Secretary for Justice is not involved in the consideration or determination process. In any event, in each application for *ex gratia* payment, an assessment is made as to whether a conflict of interests may arise on the part of the Secretary for Justice and relevant government departments. If the assessment outcome is in the affirmative, measures would be taken to avoid the potential conflicts such as briefing outside counsel to advise on the merits of the application.

NUMBER OF APPLICATIONS

7. The total number of applications for *ex gratia* payments under the administrative scheme in the past five years is nine. Out of these nine cases, seven applications were rejected, one application was considered by the Solicitor General to fall within the guidelines (pending determination of quantum) and one application is pending determination. The reason for the

rejection of those seven rejected applications is that those cases failed to satisfy the relevant criteria in the administrative guidelines set out in paragraph 4 above.

THE COMPENSATION SCHEME IN ENGLAND AND WALES

8. Until April 2006, the England and Wales government operated two compensation schemes for victims of miscarriages of justice: a discretionary scheme and a statutory scheme. However, the discretionary scheme, which was similar to our administrative scheme, has since been abolished. The statutory scheme, set up under section 133 of the *Criminal Justice Act 1988* (“The 1988 Act”)², gives the Secretary of State the power to determine whether a wrongly convicted person has a right to compensation.

9. If the Secretary of State decides that an applicant is eligible for compensation under section 133, the question of how much should be awarded is determined by an independent assessor as provided in section 133(4). He can make deductions for any conduct of the applicant that contributed to the conviction, for his criminal record and for “saved living expenses”. The total amount of compensation payable must not exceed £1 million in cases where the applicant has been imprisoned for at least 10 years when the conviction was reversed or the pardon granted, or £500,000 in all other cases.

10. The only way in which the victim of a miscarriage of justice can therefore now apply to the England and Wales government for compensation is via the statutory compensation scheme. Since the relevant wording of section 133(1) is based largely on the wording of Article 14(6) of the International Covenant on Civil and Political Rights (“ICCPR”)³, its government no longer awards payments on an *ex gratia* basis.

² Section 133 of the 1988 Act provides that:

“(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State...

³ HKSAR’s international obligations under Article 14(6) of the ICCPR are given domestic effect by Article 11(5) of the Bill of Rights of Hong Kong. The terms of Article 11(5) of the Bill of Rights are materially the same as Article 14(6) of the ICCPR. See footnote 1 above.

11. Moreover, the eligibility for compensation is still determined by the Secretary of State. The role of the independent assessor is limited to the assessment of quantum only.

MODE OF ASSESSMENT

12. Having considered all the relevant circumstances including the *ex gratia* and administrative nature of the scheme, the small number of applications under the scheme and having regard to development in England and Wales, we do not see any sufficient reason to change the current arrangement of having applications assessed by the Solicitor General of the Legal Policy Division of the Department of Justice. In circumstances where blame may attach to public authorities or in particularly large and complex cases, independent advice from outside counsel will be obtained. The Department of Justice will continue to follow the administrative guidelines, procedure and practice set out in paragraphs 3-6 above in the processing of applications for *ex-gratia* payment under the administrative scheme.

Department of Justice
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