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

**Background brief prepared by the Legislative Council Secretariat  
for the meeting on 25 March 2014**

**Compensation for wrongful conviction**

**Purpose**

This paper provides information on the past discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on compensation for wrongful conviction.

**Background**

2. It is the Administration's policy to pay compensation to persons who have suffered miscarriages of justice, including persons who have been wrongfully imprisoned. The rationale of the policy is that it is just that such persons should be compensated for the resulting losses, such as the loss of liberty and loss of earnings.

3. There are two compensation schemes, one under statutory provisions and the other under administrative arrangements.

No general entitlement

4. According to the Administration, there is no general entitlement to recompense for wrongful conviction or charge. For example, compensation will not be awarded in cases where at the trial or on appeal the prosecution was unable to prove its case beyond reasonable doubt against the accused person, or where the conviction was quashed on a technicality. Where circumstances are such that compensation could be awarded, it may be refused or reduced if the claimant was wholly or partly to blame for his/her misfortune, for instance,

where he/she deliberately withheld evidence which would have demonstrated his/her innocence. The Department of Justice ("DoJ") will nevertheless consider any application which is made, examining it as appropriate under the statutory provisions and the ex gratia arrangements.

#### Statutory provisions

5. Under the statutory compensation scheme, compensation is payable under Article 11(5) of the Bill of Rights Ordinance (Cap. 383) to a person who had suffered punishment as a result of a conviction of a criminal offence and when subsequently his/her conviction had been reversed or he/she had been pardoned on the ground that a new or newly discovered fact showed conclusively that there had been a miscarriage of justice. A claim for compensation is to be determined by the court.

#### Ex gratia arrangements

6. Under the administrative ex gratia scheme, compensation is payable for damages done by the Government where it is not legally liable. The Secretary for Financial Services and the Treasury determines the amount of compensation after considering the circumstances of individual cases and the views of the Secretary for Justice and other departments or bureaux concerned.

#### **Past discussions**

7. The Panel held one meeting on 28 April 2003 to discuss the issue of payment of compensation to persons wrongfully imprisoned. Major views and concerns expressed are set out in the ensuing paragraphs.

#### Statutory compensation scheme

8. Members noted that compensation was payable to a person under Article 11(5) of Cap. 383 who had suffered punishment as a result of conviction of a criminal offence and when subsequently the conviction had been reversed or he/she had been pardoned on the ground that a new or newly discovered fact showed conclusively that there had been a miscarriage of justice. The Administration was requested 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.

9. The Administration advised that Article 11(5) of Cap. 383 incorporated 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) noted 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, represented 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 ruled out, for instance, cases in which a person allowed himself/herself to be convicted in order to avoid betraying another who was truly guilty (Nowak, p. 271).

#### Ex gratia administrative scheme

10. Members noted that compensation for persons who had spent time in custody after having been charged and refused bail but subsequently the prosecution dropped the charge against them before or at the trial as well as for persons whose bail was refused because of objections by the prosecution but who was found subsequently by court to have no case to answer could be covered by the administrative ex gratia compensation scheme depending on the merits of the case.

11. On the guidelines for payment under the ex gratia administrative scheme, the Administration advised that:

- (a) compensation might be payable to a person convicted of a criminal offence who had spent time in custody and had received a free pardon because his/her innocence had been established or his/her conviction had been quashed following a reference to the Court of Appeal by the Chief Executive or an appeal out of time;
- (b) compensation might be payable where a person had spent time in custody following a wrongful conviction or charge resulting from serious default by the police or other public authority. For instance, 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 might 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 the guidelines in (a) and (b) above, compensation might 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 might be refused where there was 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 was probably guilty but, for instance, whose conviction was quashed on a mere technicality;
- (f) compensation might be refused or reduced proportionately where the claimant was wholly or partly to blame for his/her misfortune; for instance, he/she deliberately withheld evidence which would have demonstrated his/her innocence; and
- (g) from the perspective of public policy or administration, extending compensation beyond the guidelines in (a), (b) and (c) above to persons who had suffered loss in the ordinary course of the criminal process (for instance, to those to whom guideline (d) applied) 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 were very probably innocent from those who were lucky to escape conviction.

12. On appointing an independent person to assess the amount of ex gratia compensation payable to persons wrongfully imprisoned and whose recommendation should be binding upon the Secretary for Financial Services and the Treasury, the Administration did not consider it necessary to have an independent assessor in every case of ex gratia payment. However, such assessment might be appropriate in the circumstances where some blame should be borne by the public authorities or in particularly large or complicated cases. In other cases, the assessment could adequately (and more cheaply and quickly) be made by a member of the DoJ who was experienced in these matters.

13. A member suggested that the scope of the ex gratia payment under the administrative compensation scheme, which was not limited to cases of serious miscarriage of justice or default of the Government, should be clearly defined. She cited the example of persons or parties suffering losses because their assets had been wrongly frozen by the Government under the provisions of the anti-terrorism legislation. In her view, the Government might be under a moral obligation to compensate for the resulting losses in such cases under the administrative compensation scheme.

#### Proposals for publicity

14. Noting that there was only one application made in 2001 for compensation for wrongful imprisonment, concern was raised as to whether this was due to inadequate publicity given to the compensation schemes.

15. The Administration advised that cases of wrongful imprisonment or serious miscarriage of justice were extremely few. Where such cases arose, the Government would actively consider the need to make compensation to the victims. In other types of cases, claims against the Government for compensation by exonerated persons were also rare, particularly with regard to cases where the charge was dropped, or the conviction was quashed, for technical reasons as they did not involve miscarriage of justice.

16. Members considered that persons who had suffered losses which were attributable to the action of the Government should have a rightful claim against the Government, regardless of whether the claim was legally enforceable. The Administration was urged to strengthen publicity particularly on the administrative compensation scheme, as its scope was broader than the statutory compensation scheme. Appropriate measures could include publication of information leaflets and annual reports on the objective and operation of the schemes, the method of assessment of compensation and the procedures of application, etc. Information on the compensation schemes should be widely disseminated to relevant parties, such as members of the Judiciary, the legal professional bodies, organizations involved in the provision of legal aid, frontline social workers, Members of the Legislative Council and District Councils and their assistants etc. Measure should also be introduced to ensure that acquitted persons were properly informed of their right to claim for compensation under the compensation schemes and the procedures for lodging claims.

17. The Law Society of Hong Kong ("the Law Society") suggested that matters relating to compensation payable under the administrative and statutory

schemes could be incorporated into the academic syllabus of law courses and professional training of legal practitioners.

18. The Administration advised that information on the compensation schemes would be included on the website of the DoJ. The Administration would also provide information on the schemes to the Hong Kong Bar Association, the Law Society and the law schools.

### **Latest position**

19. Hon Dennis KWOK raised a written question on compensation for persons wrongfully imprisoned at the Council meeting of 22 January 2014.

20. At its meeting held on 25 February 2014, the Panel agreed to discuss the issue of compensation for wrongful conviction at its next regular meeting scheduled for 25 March 2014.

Council Business Division 4  
Legislative Council Secretariat  
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