

Preliminary Paper 31

COMPENSATION FOR
WRONGFUL CONVICTION
OR PROSECUTION

A discussion paper

*The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised.*

These should be forwarded to:
Padraig McNamara, Law Commission, PO Box 2590
DX SP 23534, Wellington
E-mail: PMcNamara@lawcom.govt.nz
by 22 May 1998

April 1998
Wellington, New Zealand

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The Commissioners are:

The Honourable Justice Baragwanath – President
Joanne Morris OBE
Judge Margaret Lee
DF Dugdale
Denese Henare ONZM
Timothy Brewer ED

The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534
Telephone: (04) 473–3453, Facsimile: (04) 471–0959
E-mail: com@lawcom.govt.nz

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Preliminary Paper/Law Commission, Wellington, 1998
ISSN 0113–2245 ISBN 1–877187–18–6
This preliminary paper may be cited as: NZLC PP31

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Preface

THE LAW COMMISSION has been asked to advise whether compensation should be paid to those who have been wrongfully convicted of or prosecuted for an offence; and if so, to recommend a systematic basis upon which compensation may be determined and paid. The current practice in New Zealand and many other countries of confining relief in deserving cases (eg, those who have been pardoned or had their convictions quashed) to ex gratia payments has been widely criticised.

The case for the innocent having a right to compensation is compelling. Identifying the “innocent” is not, however, the focus of our criminal justice system. The verdict in a criminal case is guilty or not guilty. The latter category includes many who are not in fact innocent. This paper examines whether it is desirable, or practicable, for innocence to be the touchstone for compensation – and if not, what the options might be.

[Chapter 1](#) contains a brief introduction to the values at stake in the criminal justice system, the system’s emphasis on individual liberty and its basic purposes. We then survey the types of misfortune that a person wrongfully convicted or prosecuted may suffer, and introduce some of the policy arguments for and against awarding compensation. In [chapter 2](#) we examine the limited remedies currently available in New Zealand, and consider relevant provisions in the International Covenant on Civil and Political Rights and compensation regimes in some overseas jurisdictions.

In [chapter 3](#) we focus on the key issue of who should be eligible for compensation. We discuss four options, including the current interim criteria for ex gratia payments adopted by Cabinet. In [chapter 4](#) we address the remaining issues concerning a compensation scheme:

- Who decides issues of eligibility and quantum?
- What losses should be compensated?
- What factors should influence quantum?
- What powers and procedures does the compensation body require?
- Should awards of compensation be subject to review?
- Is a statutory scheme necessary?

In the [appendix](#) we consider elements of Article 14(6) of the International Covenant.

We release this document as a preliminary paper to invite public comment on our proposals before we submit our final report and recommendations to the Minister of Justice. We would like to receive submissions by 22 May 1998. Submissions should be forwarded to: Pdraig McNamara, Senior Researcher, email PMcNamara@lawcom.govt.nz, Law Commission, PO Box 2590, DX SP 23534, Wellington (telephone (04) 473 3453, facsimile (04) 471 0959). Where possible we prefer to receive submissions via email.

Executive summary

The scope of a compensation scheme

- E1 **T**HIS PAPER is concerned with compensating the “wrongfully” convicted or prosecuted.¹ Potentially, claimants for compensation could include all those:
- arrested, detained in custody and released without charge;
 - held in custody and charged, but whose charges are dropped before their first court appearance;
 - denied bail and remanded in custody, but acquitted at trial;
 - convicted and imprisoned, but acquitted on appeal;
 - convicted and imprisoned having exhausted rights of appeal, but who are later pardoned, or have the conviction quashed without an order for retrial, or are acquitted on a retrial following a referral by the Governor-General under s 406 of the Crimes Act 1961.
- E2 Most of these potential claimants are unlikely to have a civil remedy enforceable by law against the police or another party. Such a remedy typically arises only in exceptional instances of malicious or unlawful conduct.
- E3 Under interim criteria adopted by the Cabinet in November 1997, compensation is currently paid, on an ex gratia basis, only to those in the last category in para E1.² The criteria require claimants to prove:
- that a new or newly discovered fact establishes miscarriage of justice conclusively, and
 - their innocence on the balance of probabilities.
- In practice this places a heavy burden on claimants, as the evidence supporting a verdict of not guilty may not affirmatively establish innocence.
- E4 Many of the losses for which someone pardoned of an offence might be compensated may be suffered by someone held in custody for a lengthy period before being acquitted at trial or on appeal. Moreover, the innocent person who is detained briefly in custody and released without charge may share with someone pardoned of an offence a sense of injustice or outrage.
- E5 We have considered four options as to the scope of a compensation scheme. Each option has advantages and disadvantages. We offer them for consideration and welcome the views of others before we prepare our final report.

¹ In this paper by “wrongful conviction” and “wrongful prosecution” we refer to the conviction or prosecution on indictment of a citizen who is innocent. We refer to conviction before prosecution in recognition of the fact that a person wrongfully convicted has necessarily been prosecuted; whereas a person wrongfully prosecuted is not necessarily convicted.

² An ex gratia payment is one which is made without there being any legal obligation to do so; see [para 62](#).

The first option

- E6 The first option is to provide compensation to all who satisfy the Minister of Justice at any stage of criminal proceedings (ie, before or after conviction and appeal) that they are, beyond reasonable doubt, innocent.

The second option

- E7 Another approach would be a narrower version of the first option. Payment of compensation would be confined to *post-appeal claimants* who prove to the Minister their innocence beyond reasonable doubt. Post-appeal claimants are those to whom a pardon has been granted, or who, outside the normal appeal process, have had a conviction quashed without an order for retrial, or been acquitted at a retrial. Payment would be declined to all those who secure acquittal in the course of trial or on appeal from the verdict. The prerogative power to award compensation in cases falling outside the option would, however, remain.

The third option

- E8 The third option is again to confine payment of compensation to post-appeal claimants. But there would be no threshold requirement to prove innocence. Post-appeal claimants would have an automatic right to apply for compensation. A compensation body, preferably an independent tribunal, would assess compensation taking account of the whole of the case, including an appraisal of the likelihood of innocence.³ The prerogative right to award compensation in cases falling outside the option would again remain.

The fourth option

- E9 The fourth option is to maintain the current interim criteria described in [para E3](#).

Who decides issues of eligibility and quantum?

- E10 We have considered four possibilities as to who should decide whether, and if so how much, compensation should be paid:
- the Cabinet on the advice of the Minister of Justice (the status quo);
 - the court which acquits the defendant or quashes the conviction;
 - another court;
 - an independent tribunal established to determine whether, and if so how much, compensation should be paid.
- E11 The Commission rejects the second and third possibilities but at this stage expresses no preference between the first and the fourth.

³ As we are yet to reach a final decision on whether Cabinet on the advice of the Minister of Justice or an independent tribunal should fix awards of compensation, we refer to this body as the *compensation body*.

What losses should be compensated?

- E12 Compensation should in our view be payable for pecuniary and non-pecuniary losses suffered by claimants, and pecuniary losses of their families.⁴ The claimant's family may also have suffered emotional harm, stigmatisation and loss of reputation as a result of the claimant's conviction, and it is possible that losses of this type should also be compensated. Costs incurred by the claimant, family and friends in obtaining a pardon or acquittal should be included in the award for compensation.

What factors should influence quantum?

- E13 If the third option is adopted, the likelihood that the claimant was innocent should be one factor influencing quantum. The first, second and fourth options, by contrast, already require the claimant to show innocence in order to be eligible for compensation: likely innocence is not therefore relevant at the quantum stage. Under all four options, we consider the following factors to be relevant when assessing quantum:
- the likelihood of the claimant's being guilty of an offence other than that with which he or she was charged (see [para 126](#));
 - the conduct of the claimant leading to the prosecution;
 - the seriousness of the offence with which the claimant was charged;
 - the severity of the sentence passed on the claimant;
 - the nature and extent of the loss resulting from the conviction and sentence;
 - whether the prosecution acted in good faith in bringing and continuing the case; and
 - whether the investigation was conducted in a reasonable and proper manner.
- E14 The compensation body should in our view be given enough flexibility to do justice in individual cases. We are undecided as to whether the factors we have specified should merely be guidelines or whether they should be mandatory considerations, and if the latter, whether they should be included in a statute. An award of compensation should take into account the amount of any award of costs under the Costs in Criminal Cases Act 1967. The claimant should not be compensated twice for the same loss.

Time limits and application procedure

- E15 We propose a requirement that any application for compensation be made within 6 months of the executive or judicial decision (such as a pardon or an acquittal) upon which the claim for compensation is founded. The application procedure should be kept as simple as possible.

⁴ Pecuniary losses include loss of livelihood, including loss of earnings and future earning abilities, loss of property and other consequential financial losses resulting from detention or imprisonment. Non-pecuniary losses include loss of liberty and the physical and mental harshness and indignities of detention or imprisonment, loss of reputation, loss or interruption of family or other personal relationships, and mental or emotional harm as a result of wrongful conviction, detention or imprisonment.

What powers and procedures does the compensation body require?

- E16 If compensation is left as a prerogative matter, then the compensation body may not require express statutory powers. If the third option is adopted and the preferred compensation body is an independent tribunal, it should have similar powers as the Ombudsmen and the Police Complaints Authority to gather information, summon witnesses and conduct hearings. In particular, it should have the power to determine its own procedure. At this stage we are undecided on whether the compensation body should be obliged to give reasons for its awards, and if so, whether only to the parties or to the public generally.

Appeal and review

- E17 We do not favour there being a right of *appeal* from compensation decisions. While there are general arguments of principle in favour of compensation decisions being open to *review* by the courts, there are also certain disadvantages in it. An ouster clause would be required to prevent review: but the courts have in general been reluctant to give effect to such clauses.⁵ Again, we are yet to finalise our views on this matter.

A shift to a statutory scheme?

- E18 Essentially, the choice is amongst:
- Maintaining compensation on a prerogative and *ex gratia* basis, thereby avoiding binding rules as to how awards are to be made and by whom.
 - A narrow statute specifying only the eligibility criteria, and possibly also containing an ouster clause preventing decisions on compensation being reviewed.
 - A broader statute specifying eligibility criteria, establishing an independent tribunal to determine awards of compensation, and defining its powers and procedures.
- E19 For the moment we refrain from reaching a conclusion on these matters, and invite public comment on the advantages and disadvantages of introducing a statutory scheme in either its broad or narrow form. We propose a 3-year trial period of whichever of the options in [paras E5–E9](#) (see [chapter 3](#) for detailed discussion) is selected, and retention of a non-statutory procedure in the meantime.

⁵ See [paras 146–154](#) for a discussion of the differences between appeal and review, and the use of ouster clauses.

Summary of questions

Chapter 3

- Q1 What are the advantages and disadvantages of the four options which we have proposed as to the scope of a compensation scheme? (paras 77–102)
- Q2 Which of the four options is the most suitable? (paras 77–102)

Chapter 4

- Q3 Who should make decisions regarding eligibility for compensation and quantum? The Minister of Justice, the courts, an independent tribunal, or another body? (paras 104–111)
- Q4 Should decisions regarding eligibility for compensation on the one hand, and quantum on the other, be entrusted to separate persons or bodies? (paras 112–114)
- Q5 What losses should be covered by a compensation regime? (paras 115–124)
- Q6 Should some types of loss (eg, non-pecuniary losses, or costs incurred in obtaining a pardon or acquittal) be recoverable only if incurred by the claimant, rather than by the claimant's family? (paras 115–124)
- Q7 Should the estate of a person eligible to claim compensation be able to pursue a claim? (para 125)
- Q8 What factors should be relevant in determining quantum? (paras 126–128)
- Q9 Should the factors we have listed as relevant to an assessment of quantum merely serve as guidelines, or be mandatory considerations for the compensation body? (para 128)
- Q10 Should these factors be specified in a statute? (para 128)
- Q11 What effect should conduct of the claimant leading to wrongful prosecution or conviction have on quantum (or eligibility)? (paras 129–133)
- Q12 Does the compensation body require formal powers to investigate claims and conduct hearings? If so, exactly what powers are required? (paras 136–139)
- Q13 Should the compensation body have freedom to regulate its own procedure? (paras 136–139)
- Q14 Should the compensation body be required to give reasons for its decision (whether as to eligibility or quantum)? If so, should reasons be given only to the parties, or made publicly available? (paras 140–143)

- Q15 Should there be a right of appeal against compensation decisions? (paras 144–145)
- Q16 Should compensation decisions be subject to judicial review? (paras 146–154)
- Q17 Should a compensation regime be placed on a statutory footing? What are the advantages and disadvantages of doing so? If a statutory scheme is preferable, should it be the broad or the narrow statute we discuss, or some further alternative? (paras 155–164)
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1

The values at stake

LIBERTY AND THE CRIMINAL JUSTICE SYSTEM

- 1 **T**HE ESSENCE OF A FREE SOCIETY is the right of a law-abiding citizen to freedom of action without exposure to interference by the state. Deprivation of that right by arrest or imprisonment is, in general, justifiable only when that citizen has engaged in conduct so damaging to the interests of others, or society as a whole, as to warrant application of the criminal law.⁶
- 2 The processes of the criminal law are invasive. At the very least the citizen is charged with an offence, usually required to attend a court hearing, publicly described as a suspect for the crime alleged, and turned into a defendant. The defendant may have been finger printed, and detained in a cell (possibly overnight) before the court hearing. At the hearing the defendant may be released on bail, perhaps with conditions such as where he or she must live and work, prohibitions on associating with certain people and a curfew. Despite the presumption of innocence, the defendant may be denied bail and have to spend the period between arrest and trial in prison. The very reliability of the criminal process invites the public to doubt the innocence of anyone brought before the court. Name suppression is exceptional.
- 3 Conviction and imprisonment bring with them more drastic consequences. Apart from loss of liberty, the harshness and indignities of prison life, and suspension of voting rights, imprisonment often involves loss of livelihood and future employment prospects; loss of one's home and other personal property; break-up of family, the loss of children and of other personal relationships; and stigmatisation and damage to reputation.
- 4 These are severe consequences. Our legal system has developed powerful safeguards to prevent the conviction or prosecution of the innocent. But there will always be cases where charges are brought and determined against someone who is in fact innocent, in what is perceived to be the public interest. In some of those cases, the safeguards will fail and innocent people will be sent to prison. What should the justice system do in these cases? This is the central concern of this paper.

THE PURPOSES OF THE CRIMINAL JUSTICE SYSTEM

- 5 The main purposes of the criminal justice system are the protection of individuals and society, and the reinforcement of society's central values by way of prevention or deterrence. In its preliminary paper *Criminal Prosecution* (NZLC PP28, 1997),

⁶ We exclude from our consideration emergency conditions and measures such as military conscription or alien internment in wartime.

the Law Commission set out what it considers to be the fundamental goals of the criminal justice system:

- The protection of the peace and common good of society from the blameworthy acts of members of society who threaten or impair it.
- The protection of all people and their property from injury by the blameworthy acts of others.
- The bringing of offenders to justice. (para 12)

6 Sentences imposed by the courts reflect the relative seriousness of offences, and give weight to aggravating and mitigating factors which, “if not explicit in the law, may be regarded as implicit in the legal culture” (Ashworth, 1991, 12). As our society places paramount value on individual freedom, the most severe sentence and highest form of condemnation is the deprivation of liberty by imprisonment.⁷

THE IMPORTANCE OF INDIVIDUAL LIBERTY

7 A major concern of New Zealand’s legal system is the protection of individual liberty, especially from the undue exercise of state power. The law provides protection from invasions of physical integrity, coercion, deception and fear, and also “positive” freedoms, for example, the freedom to join a public demonstration (Ashworth, 12). Criminal procedure also reflects a concern for individual liberty.

8 There are substantial safeguards against wrongful conviction both at common law and in statute. The most important are the burden and standard of proof. That a person is presumed innocent until proved guilty by law was stated by Lord Sankey LC in *Woolmington v DPP* [1935] AC 462: “throughout the web of the English criminal law one golden thread is always to be seen – that it is the duty of the prosecution to prove the prisoner’s guilt”. The prosecution has the burden of proving guilt *beyond reasonable doubt*. Other safeguards against wrongful conviction are found in rules of evidence that exclude relevant information that might nevertheless prejudice the jury’s proper consideration of the case.

9 Moreover, the New Zealand Bill of Rights Act 1990 contains a number of protections which were for the most part established at common law. Section 25 of the Act states that everyone charged with an offence has certain minimum rights:

- (a) The right to a fair and public hearing by an independent and impartial court;
- (b) The right to be tried without undue delay;
- (c) The right to be presumed innocent until proved guilty according to law;
- (d) The right not to be compelled to be a witness or to confess guilt;
- (e) The right to be present at the trial and to present a defence;
- (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;
- ...
- (h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both.

⁷ Following the Abolition of the Death Penalty Act 1989 life imprisonment is the maximum sentence which can be imposed in New Zealand.

- 10 While specifically expressed as the rights of persons charged, these minimum rights also protect the wider societal interest in ensuring the integrity of the criminal process and that the innocent are not wrongfully convicted while criminals remain at liberty.⁸ Sections 23 and 24 of the New Zealand Bill of Rights Act state the rights of persons arrested or detained and of persons charged. Other crucial safeguards against wrongful conviction or prosecution are the discipline and integrity of the police, and their freedom from political interference or public pressure.

THE TENSION BETWEEN AN ACQUITTAL AND A FINDING OF INNOCENCE

- 11 Criminal procedure is a complex web of interlocking factors, each of which affects and is influenced by the others. Change in one area can have unforeseen consequences upon the whole balance between prosecution and defence.
- 12 In jury trials the pronouncement of the verdict is, as a rule, the effective end of the proceeding. The jurisdiction of the Court of Appeal to set aside a verdict is limited by the Crimes Act 1961 s 385(5):
- (1) On any appeal against conviction the Court of Appeal shall allow the appeal if it is of opinion:
 - (a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
 - (b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
 - (c) That on any ground there was a miscarriage of justice; or
 - (d) That the trial was a nullity;and in any other case shall dismiss the appeal: . . .
- 13 Unless set aside on appeal, the consequence is that the verdict is, and is seen to be, a public proclamation of the result. Either the case is proved and the verdict is that of guilty, or the case is not proved and the verdict is that of not guilty. Issues of innocence, suspicion, and likelihood of guilt are not distinguished in the verdict and in a very practical sense the accused is either convicted or cleared.⁹ While acquitted defendants may apply for costs under the Costs in Criminal Cases Act 1967, they cannot in our view be seen to have received a “second class” acquittal if costs are not awarded. By no means does it follow from an award of costs that innocence has been established, or from the refusal of costs that there is a suspicion of guilt; although inevitably, demonstration of innocence will be likely to result in a substantial award of costs.

⁸ They may also have the effect, in particular cases, of allowing the guilty to remain at large, although implicitly this is considered preferable to the innocent being imprisoned and convicted.

⁹ The Supreme Court of Canada noted in *Grdic v R* (1985) 19 DLR (4th) 385, 389–390 that . . . as a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence

To reach behind the acquittal, to qualify it, is, in effect, to introduce the verdict of “not proven”, which is not, has never been and should not be a part of our law.

- 14 In considering the issue of compensation it is easy to overlook the tension between the fact of innocence and the procedures required to establish that fact. Any procedure for establishing innocence or guilt following acquittal or discharge will be an onerous one, imposing emotional pressures on the participants and costing them time and resources. If the procedure imposes a threshold that is too low, it allows claim by those who are guilty but dispute that fact. The result will be duplication of public resources already spent at trial, and doubt being cast on the verdict. There is a “floodgates” risk that in many cases the current processes of trial and appeal could be converted into the first stage of an effective double trial: the first of guilt and the second of innocence. This would undermine finality and certainty in criminal procedure.

“WRONGFUL CONVICTION” OR “WRONGFUL PROSECUTION”, AND “POST-APPEAL CASES”

- 15 In this paper the terms “wrongful conviction” and “wrongful prosecution” refer to the conviction or prosecution on indictment of a citizen who is innocent. That may result from deception or from a simple error on the part of the police, Crown witnesses, defence witnesses, counsel, judge or jury. We limit the category of cases to the indictable, to confine compensation to the serious cases charged under the Crimes Act 1961.
- 16 In the second, third and fourth options presented in [chapter 3](#), we distinguish between two classes of case. The first comprises those who are discharged before trial, are acquitted at trial (or in the case of a jury disagreement at a retrial), or whose conviction is quashed on an appeal from the verdict of a jury or of a judge sitting alone. The second comprises those who, outside the normal appeal process, have their conviction quashed without an order for retrial or who are acquitted at a retrial, or to whom a pardon has been granted. For convenience we refer to those in the second class as post-appeal claimants although the class can include those who do not in fact appeal.
- 17 We emphasise that our definitions of wrongful conviction and prosecution do not necessarily imply fault on the part of the police or the courts. The innocent may be convicted or prosecuted as a result of an honest and reasonable mistake (such as a misidentification of the defendant).¹⁰

WHO IS AFFECTED?

- 18 Being convicted and serving the full sentence for an offence may be the most severe misfortune to befall an innocent person. It entails the greatest loss of liberty and disruption to normal life. At the other end of the scale are those charged with a criminal offence but discharged without ever having been held in custody or brought to trial. For them, the injury or loss suffered may include a sense of injustice at having been wrongfully accused, stigma of being charged with an offence, and possible costs in preparing a defence before charges were dropped.¹¹

¹⁰ American studies of convictions of those who are innocent have shown the major causes of such convictions to be eyewitness identifications (52.3%), followed by perjury by witnesses (10.2%), negligence by criminal justice officials (9.3%) and pure error (7.8%): Givelber, 1997, 549.

¹¹ Legal costs may be partially offset by an award of costs under s 5 of the Costs in Criminal Cases Act 1967 (see [paras 40–45](#)).

- 19 Given the importance the law places on individual liberty, it may seem surprising that there is no established system for compensating those wrongfully convicted or prosecuted. They include those who are:
- arrested, detained in custody and released without charge;
 - held in custody and charged, but whose charges are dropped before their first court appearance;
 - denied bail and remanded in custody, but acquitted at trial;
 - convicted and imprisoned, but acquitted on appeal;
 - convicted and imprisoned having exhausted rights of appeal, but who are later pardoned,¹² or have the conviction quashed without an order for retrial or are acquitted on a retrial following a referral by the Governor-General under s 406 of the Crimes Act 1961.¹³
- 20 It is impossible to state accurately how many people fall within each of these categories every year in New Zealand. Figures obtained from the police do not fit neatly into these categories, but nevertheless are of some assistance. In 1996, a total of 178,681 informations were laid (excluding infringement notices): 72.13% resulted in conviction, 21.86% were diverted or otherwise withdrawn,¹⁴ and 5.94% were dismissed. This last percentage equates to 10,614 informations. The number of people this involved will be somewhat less, however, as in many cases several informations are laid against the same person. Between 1991 and 1995 the percentage of police informations which were dismissed ranged from 7–7.36%. It is unknown how many people charged with offences in these cases were denied bail and remanded in custody before trial.
- 21 In 1996 approximately 17% of criminal appeals (in both the High Court and the Court of Appeal) were successful (Crown Law Office figures). But these figures and those supplied by the police cannot tell us how many *innocent* people have gone through the system, as conviction and appeal figures record only those who have been found *not guilty*. In the United States it has been estimated that in 0.5–1% of cases an innocent person is convicted (Huff et al, 1996, 544).
- 22 There are few recorded instances of pardons having been granted in New Zealand. Those cases which have arisen have received little publicity, apart from the case of Arthur Allan Thomas. Since the establishment of the Ministry of Justice in October 1995, figures provided by the Ministry show it has assessed 16 applications for the exercise of the prerogative of mercy: no pardons have been granted but in three cases referrals to the Court of Appeal under s 406 of the Crimes Act were made. (At the time of writing three further applications were under consideration.)

¹² Section 407 of the Crimes Act deems the offence never to have been committed where a free pardon is granted.

¹³ In summary, s 406 of the Crimes Act allows the Governor-General, when considering an application for the exercise of the prerogative of mercy, to refer a conviction or sentence (or any point arising in a case) to the Court of Appeal or High Court (see further [para 57](#)).

¹⁴ Reasons for withdrawal might include a defendant pleading guilty to other charges, or witnesses being unable or unwilling to give evidence against the defendant. The 21.86% figure we have received is, we understand, made up almost entirely of diversions (which generally involve an admission of guilt), but as there is no breakdown of diversions and other withdrawals of charges it is impossible to enumerate the number of cases in which charges were withdrawn other than by diversion. (Please note that rounding off of the three percentages quoted here results in a total of only 99.93%, but they provide a sufficiently accurate picture of the “success rates” of prosecutions.)

- 23 The Crown has customarily made ex gratia payments of compensation only in the most serious cases of injustice, usually where a convicted person has been pardoned or had the conviction quashed without an order for retrial, or been acquitted on a retrial following a referral under s 406 of the Crimes Act.¹⁵ Detention or imprisonment in the other circumstances listed in [para 19](#), is not, however, *qualitatively* different from the defendant’s point of view. Many of the losses for which someone pardoned of an offence might be compensated, such as loss of employment or loss of reputation, may be suffered by someone held in custody for a lengthy period before being acquitted at trial or on appeal. An innocent person who is detained in custody and then released without charge, may share with someone convicted and then pardoned of an offence the same sense of injustice or outrage.
- 24 In *Crown Liability and Judicial Immunity: A Response to Baigent’s case and Harvey v Derrick* (NZLC R37, 1997), we raised the possibility of enacting legislation to give effect to Article 14(6) of the International Covenant on Civil and Political Rights (see [para 64](#)). We noted in *Crown Liability and Judicial Immunity* that because of the doctrine of judicial immunity there were few remedies for those who had suffered a miscarriage of justice, and that this represented a gap in our current law (para 180).
- 25 Article 9(5) of the International Covenant has a different focus from that of Article 14(6). It states that anyone “who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. Many European countries, such as Germany (see [para 74](#)), compensate those who have been wrongfully convicted or detained in custody pending a trial at which they were acquitted, or against whom charges have been withdrawn at or before trial (Justice, 1982, 24–25). In New Zealand, a remedy in tort or under the New Zealand Bill of Rights Act 1990 arises only if the detention was unlawful, and not simply because the person was acquitted.

ARGUMENTS FOR COMPENSATION

- 26 There are several arguments which make the case for compensating those who have been wrongfully convicted or prosecuted. The first is that occasionally individuals are unjustly accused or convicted as a result of the state’s coercive power, in spite of the protections and safeguards offered by the law. The state should compensate for losses it has caused, in the same way as it would, for example, if land were compulsorily acquired. We noted at [para 37](#) of *Crown Liability and Judicial Immunity* that in the European Union the principle that the state should compensate for losses resulting from serious breaches of fundamental rights is well advanced.
- 27 Mistakes may happen, in part, as a result of the system that the state employs. Under the accusatorial system of criminal trial, the state brings charges and the responsibility for presenting evidence to the court then rests entirely with the parties. An innocent defendant who makes an unreliable confession or other prejudicial statement, or engages an incompetent defence counsel, is susceptible to being wrongfully convicted.¹⁵ Judges are prevented from overriding the verdict

¹⁵ Kirby, Hon Justice, “Miscarriages of Justice – Our Lamentable Failure?” [1991] Commonwealth Law Bulletin 1037, 1040 notes arguments that the accusatorial system of trial “disclaims a search for the truth and prefers, instead, to enhance liberty by imposing a duty on the Crown to prove its case beyond reasonable doubt” for the purpose of “controlling and limiting the intrusions of the state in the life of the individual”.

of a jury save in limited circumstances,¹⁶ and proposals to allow judges greater discretion have gained little acceptance (see Spencer, 1997, 458). While there are good reasons for these features of our criminal procedure, they can sometimes work against an innocent defendant and we should be prepared to compensate when this occurs.

- 28 An overlapping justification for awarding compensation is that if the criminal justice system is truly concerned with individual liberty, it must also be concerned with instances of its deprivation resulting from error. The anguish of those deprived of liberty will be heightened if they have been wrongfully convicted or prosecuted.
- 29 A further justification focuses on the continuing effects of conviction and imprisonment, and the cost to both the individual and society. Rehabilitation is a significant goal of any civilised criminal justice system. While the payment of compensation obviously will not undo the wrong done, it can have some ameliorative effects. It can minimise stigmatisation and contribute to a feeling of vindication for the innocent defendant. It can help that person readjust to society and plan for the future (Kaiser, 1989, 102).
- 30 A fourth justification for compensation derives from theories about the relationship between the state and the individual. Citizens accept the law and the jurisdiction of those authorised to administer and enforce it, in return for protection from the criminal acts of other citizens, and the right not to be convicted of crimes of which they are innocent (Kaiser citing Dworkin, 1981, 207). Compensation for wrongful conviction and prosecution may be justified as a remedy for the state's failure to fulfil its side of the social contract.
- 31 A final justification for compensation concerns public confidence in the justice system. A reluctance to compensate may stem from concerns that evidence of "malfunction" will undermine confidence in the criminal justice system. But if the cost of malfunctions is borne by individuals and not by the state, the financial and policy implications of a malfunctioning criminal justice system will be concealed. Some have therefore argued that acknowledgement of error and payment of compensation show that the criminal justice system takes its mistakes seriously. This may then enhance confidence in the system (Kaiser, 102–103).

ARGUMENTS AGAINST COMPENSATION

- 32 The first argument against compensation is that the system's safeguards against convicting the innocent, such as the burden of proof, standard of proof, and rules of evidence that exclude relevant (but prejudicial) information, require the prosecution's case to be very strong to secure a conviction. They also mean that it cannot be assumed from an acquittal that the defendant did not commit the crime. While there is a moral basis for compensating the innocent, there is no practical method by which to separate the truly innocent from those found not guilty. Any attempt to do so would undermine the not guilty verdict and

¹⁶ The jurisdiction to discharge under s 347 of the Crimes Act is rarely used after conviction. Section 385 of the Crimes Act provides for the Court of Appeal to allow the appeal if it considers the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence (see [para 12](#)); while under s 386 where it appears to the Court of Appeal that the jury must have been satisfied of facts which proved the defendant guilty of an offence other than that for which the jury has found the defendant guilty, the court may substitute for the verdict found by the jury a verdict of guilty of that other offence.

the presumption of innocence. Embarking on an inquiry into whether a defendant should be compensated would in practice create a hierarchy of acquittals: “real” acquittals in which compensation is paid, and “second-class” acquittals in which compensation is denied. To follow this argument it is best to refuse compensation save in exceptional cases where the prerogative of mercy has been exercised.

- 33 A second argument is that while errors are inevitable and often excusable in a legal regime which defends citizens against crime, their discovery shows the vigour of the system. The criminal justice system, seen as a whole, contains a series of self-correcting mechanisms which mean that rarely, if ever, does the system itself fail as a result of a mistake in the prosecution process or at trial. By far the majority of mistakes are remedied on appeal, and even a person whose wrongful conviction is upheld, and who is then imprisoned, has an adequate (albeit exceptional) remedy in the prerogative of mercy. That the prerogative is rarely exercised may be seen to indicate that few mistakes are in fact made.¹⁷
- 34 Thirdly, it may be argued that a compensation scheme is not necessary as there are already other remedies available. These include an award of costs under the Costs in Criminal Cases Act 1967 for a successful defendant, and remedies in tort and under the New Zealand Bill of Rights Act 1990 where there has been serious misconduct or infringement of the rights of the defendant.
- 35 A fourth argument emphasises the wider effects of paying compensation. The prospect of compensation could deter police and prosecutors from prosecuting even where the case against the defendant meets the Solicitor-General’s prosecution guidelines. Dissuading those authorities from pursuing their work vigorously and without fear of the consequences would prejudice the public interest in the administration of justice. Ostensibly extraneous considerations might be built into decisions on prosecutions. A right to compensation for those acquitted at trial could complicate already difficult decisions on whether or not to grant bail. Some argue further that juries might be less willing to acquit a defendant if that person could then be entitled to compensation (Kaiser, 109).
- 36 A fifth argument looks to the cost of a compensation scheme and the practical problems in predicting the extent of the state’s liability under it. Objections may also be raised as to why a compensation scheme should be introduced for one group, while other participants in the criminal justice system such as victims, jurors and witnesses in criminal trials are not adequately compensated.¹⁸

¹⁷ On the other hand, it might be argued that the rarity of cases in which pardons are granted or the prerogative is otherwise exercised tells against challenges to a compensation scheme on grounds of cost.

¹⁸ The Criminal Injuries Compensation Act 1963 set up a Crimes Compensation Tribunal to award compensation to a person injured by an act constituting one of a number of specified offences, or to dependants where the victim of the offence was killed. The Accident Compensation Amendment Act 1974 repealed this Act and vested the functions of the Tribunal in the Accident Compensation Commission. A claim under the Accident Rehabilitation and Compensation Insurance Act 1992 is now the primary remedy for victims of criminal offences. Most physical injuries are likely to constitute personal injury by accident and so fall within the Act: under s 14 of the 1992 Act the victim therefore loses the right to sue for compensatory damages. A claim for exemplary damages, meanwhile, may not be brought where the acts relied upon have been or are likely to be the subject of criminal proceedings: *Daniels v Thompson* (unreported, 12 February 1998, CA86/96). The other statutory provision which may assist a victim is the power in s 22 of the Criminal Justice Act 1985 to sentence an offender to

THE DECISION TO BE MADE

- 37 Ultimately a policy decision must be made: whether certain hardships arising from the justice system are to be borne by individuals or by society; and in what circumstances and to what extent.¹⁹
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make reparation to the victim. It is questionable whether reparation under this section and compensation under the Accident Rehabilitation and Compensation Insurance Act 1992 sufficiently compensate victims for their suffering.

Jurors are currently reimbursed \$25 for up to 3 hours, \$50 per day for trials of up to 5 days, and \$70 per day for trials longer than 5 days: see the Second Schedule to the Juries Rules 1990.

Witnesses may be eligible for compensation under the Criminal Justice Assistance Reimbursement Scheme administered by the Department for Courts. This scheme covers loss of earnings, property damage and related expenses (such as alternative accommodation or transport if a house or vehicle is damaged) incurred as a result of acting as a witness in criminal proceedings, assisting in the administration of justice (eg, by reporting a crime) or being a close family member of a witness or person who assisted in the administration of justice. Physical, mental or emotional harm and loss of enjoyment of life are not covered; nor are costs covered by other means such as insurance. There is a maximum amount payable of \$30 000. Claims are assessed by an individual assessor who makes a recommendation to the Department for Courts. We understand the scheme is little used (possibly because of poor publicity), and that over the past 2 years approximately \$60 000 has been paid out.

¹⁹ Mason, quoted in [1985] *Reform* 108.

2

The law in New Zealand and overseas

NEW ZEALAND

Existing remedies for those acquitted of criminal charges

- 38 **T**HE BEST MEANS OF VINDICATING AN INNOCENT DEFENDANT is for the court to enter an acquittal. If convicted at trial, a defendant has a right of appeal to the High Court or Court of Appeal under s 115 of the Summary Proceedings Act 1957 (in the case of summary offences) or s 383 of the Crimes Act 1961 (in the case of indictable offences). A number of possible remedies are available to those tried for an offence they did not commit:
- an award of costs under the Costs in Criminal Cases Act 1967;
 - the tort remedies of malicious prosecution, false imprisonment or misfeasance in public office; and
 - remedies under the New Zealand Bill of Rights Act 1990.
- 39 A person convicted of a criminal offence and unsuccessful on an initial appeal may apply for:
- the exercise of the prerogative of mercy; and/or
 - an ex gratia payment from the Crown, once the conviction has been quashed on a reference to the Court of Appeal, or a pardon has been granted.

The Costs in Criminal Cases Act 1967

- 40 The Costs in Criminal Cases Act 1967 provides for reimbursement of legal and related fees, rather than payment of compensation, to those acquitted of criminal charges. In the 1966 *Report of the Committee on Costs in Criminal Cases* it was said:

It would we think be common ground that by accepting the benefits of an ordered society the citizen becomes subject to various dangers and risks, among them the risks of being suspected, of being arrested and of being prosecuted for offences he has not committed. These dangers are minimised by the provision of fair procedures, trained and upright police forces, and speedy and efficient access to the Courts. Nevertheless, there are and will always be, cases where innocent men are prosecuted without any fault being necessarily laid at the door of the police. It does not seem to us to follow that in these circumstances the citizen must also be expected to bear the financial burden of exculpating himself. Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences. The proposition that a person wrongfully accused of an offence should not suffer financially for having to establish his innocence in Court would, we believe, commend itself to public opinion generally. (10–11)

- 41 The rationale for awarding costs to successful defendants (that those found not guilty should not suffer financially for having been charged) has some analogy to that for paying compensation to those who have been acquitted. But not all those found *not guilty* are in fact innocent or deserve costs. Section 5(3) of the Costs in Criminal Cases Act therefore provides that there shall be no presumption for or against granting costs in any case. Section 5(4) adds that a defendant shall be not granted costs by reason only of the fact that he or she was acquitted or discharged or that the information was dismissed or withdrawn. Section 8(2) similarly provides that no defendant or convicted defendant shall be granted costs by reason only of the fact that their appeal has been successful. These provisions recognise the necessary limits of the not guilty verdict as a source of “rights”.
- 42 Under s 5 of the Costs in Criminal Cases Act a defendant may be awarded costs where:
- he or she is acquitted of an offence; or
 - the information charging the defendant with an offence is dismissed or withdrawn, whether upon the merits or otherwise; or
 - he or she is discharged under s 167 of the Summary Proceedings Act.²⁰
- 43 The Costs in Criminal Cases Act s 5(2) sets out a number of factors to which the judge shall have regard when deciding whether to award costs. These are whether:
- the prosecution acted in good faith in bringing and continuing the case;
 - the prosecution had sufficient evidence to support conviction at the beginning of the case in the absence of contrary evidence;
 - the prosecution investigated any matter which came into its hands, suggesting that the defendant may be innocent;
 - the investigation was conducted in a reasonable and proper manner;
 - the evidence as a whole supported a finding of guilt but the information was dismissed on a technicality;
 - the information was dismissed because it was established (by whatever means) that the defendant was not guilty; and
 - the behaviour of the defendant in relation to either the alleged offence or the proceedings themselves was such that an award of costs should be made.
- 44 The Costs in Criminal Cases Act provides a very limited remedy for those who have been acquitted either at first instance or on appeal, or have had charges against them withdrawn, or have been discharged under s 167 of the Summary Proceedings Act. Under s 2 of the Costs in Criminal Cases Act, “costs” which may be recovered are confined to “expenses properly incurred by a party in carrying out a prosecution, carrying on a defence, or in making or defending an appeal” (s 2). That Act does not cover other losses which the defendant may suffer as a result of being prosecuted, detained or imprisoned, or convicted.
- 45 The Law Commission’s recent issues paper, *Costs in Criminal Cases* (NZLC MP12, 1997), analysed 77 cases between 1968 and 1996 in which defendants sought

²⁰ Note that the Summary Proceedings Act does not apply in the exceptional case of a conviction being quashed without an order for retrial, or if a pardon has been granted.

costs, and found that awards were made in 75% of those cases.²¹ Moreover, costs are awarded according to a scale with the result that in 48 cases from 1991–1996 defendants were awarded on average about 19% of their actual costs. The scale was last updated in 1988, and has been criticised by courts and commentators as both unrealistic and miserly.²²

Tort remedies

- 46 Only in exceptional circumstances will the tort remedies of malicious prosecution, misfeasance in public office or false imprisonment be of use to a person who has been wrongfully convicted or prosecuted.
- 47 To succeed in an action for malicious prosecution, the plaintiff must prove that the defendant prosecuted the plaintiff; that the prosecution ended in the plaintiff's favour; that the defendant lacked reasonable and probable cause for bringing the prosecution; that the defendant acted maliciously; and that the plaintiff suffered damage as a result of the prosecution (Todd et al, 1997, 981). Proving the mental elements in particular represents a major hurdle for most plaintiffs bringing actions against the police or other prosecuting authorities.
- 48 The outlook is similar for the plaintiff seeking to bring an action for misfeasance in public office. This tort covers malicious acts or omissions of a public officer in the exercise or purported exercise of his or her office, which are in breach of a duty owed to the plaintiff and cause loss to the plaintiff (Todd et al, 1011). Malice in this context includes spite, ill-will or any other improper motive, and also knowledge that a particular action was invalid and likely to harm the plaintiff or people in the plaintiff's position: *Garrett v Attorney-General* [1993] 3 NZLR 600 (CA). In England a claim for misfeasance in public office against a police officer has been dismissed as more appropriately brought under the head of malicious prosecution: "*Silcott v Commissioner of Police of the Metropolis*", *Times*, 9 July 1996. No such requirement, however, appears to exist in New Zealand. The Court of Appeal has also held that an action for misfeasance in public office can be brought against a District Court judge: *Rawlinson v Rice* (unreported, 9 September 1997, CA 246/96). Nevertheless, it is unlikely that the police or the judiciary would have acted with the necessary malice, and even if they had, this could be extremely difficult to prove.
- 49 The tort of false imprisonment provides a remedy where the plaintiff has been detained or imprisoned by the authorities without lawful justification. Thus the police may be sued for false imprisonment if they detain a person for questioning

²¹ *Costs in Criminal Cases*, 5. These figures were revealed by legal database searches and the Law Commission's own inquiries. The New Zealand situation may be contrasted with the position in England and Wales, where costs are normally awarded to a successful defendant unless he or she is somehow blameworthy or was acquitted on a technicality (see Practice Note at [1991] 2 All ER 924); and the Australian situation where, in *Latoudis v Casey* (1990) 170 CLR 534 (HCA), Mason CJ and Toohey J observed that in ordinary circumstances an order for costs should be made in favour of a successful defendant, although the conduct of a successful defendant before the charge was laid or in defending the prosecution might justify a refusal of costs.

²² *R v Brunton* (unreported, HC, New Plymouth, 27 April 1992, T14/91); *Y v R* (unreported, HC, Auckland, 21 July 1997, T281/96) and Rowan, "Costs in Criminal Cases" [1994] NZLJ 451, 454.

without making an arrest: *R v Goodwin* (No 2) [1993] 2 NZLR 390. But the police can only be liable for false imprisonment during the period before that person is brought before a court; thereafter any liability will be in malicious prosecution or misfeasance in public office (Todd et al, 981). False imprisonment will therefore not provide an adequate remedy to a person seeking compensation for being remanded in custody, convicted and subsequently imprisoned. Judicial immunity from civil suit for false imprisonment and other torts will in most cases frustrate an action against a judge by a person who has been wrongfully convicted (see generally *Crown Liability and Judicial Immunity: A Response to Baigent's case and Harvey v Derrick* (NZLC R37, 1997), paras 134–153).

- 50 The stringency of these tort remedies suggests that they will benefit a plaintiff claiming against the Crown only where there has been police or judicial misconduct, or at the very least breach of police powers. Yet few cases in which an innocent person is prosecuted or convicted will be attributable to these causes. Most cases will arise out of honest human error such as an incorrect identification of the defendant (see [para 17](#)). These cases may have been properly brought by the police, or properly decided by the court on the evidence then available, but later shown, in light of fresh evidence, to have been wrongfully brought or decided. In these circumstances the defendant's loss may equal that of someone who has suffered as a result of police misconduct or a malevolent witness, but there is no tort remedy available.
- 51 Most textbooks note that claims based on malicious prosecution and misfeasance in public office are seldom brought and even less likely to succeed. The decline of these torts has been hastened by the availability of a remedy under the New Zealand Bill of Rights Act, and an expectation that damages awarded under that Act may be higher than those normally awarded in tort.²³ The Law Commission is soon to investigate whether these tort remedies need revision, especially given the parallel New Zealand Bill of Rights Act remedies.

Remedies under the New Zealand Bill of Rights Act 1990

- 52 The New Zealand Bill of Rights Act 1990 (NZBR Act) sets out the following rights which may be invoked by those who have been wrongfully detained, imprisoned or convicted:
- the rights of persons arrested or detained (s 23),
 - the rights of persons charged (s 24),
 - minimum standards of criminal procedure (s 25), and
 - rights to justice (s 27).

Provisions relevant to this discussion are contained in ss 23 and 25:

- the right of a person arrested for an offence to be charged promptly or to be released (s 23(2)),
- the right of a person arrested and not released to be brought as soon as possible before a court or competent tribunal (s 23(3)), and
- the right of a person charged with an offence to be tried without undue delay (s 25(b)).

²³ This view is likely to stem from the observations of Cooke P in *Simpson v Attorney-General* (*Baigent's case*) [1994] 3 NZLR 667, 678 about the appropriate level of damages in that case, and the award of \$15 000 made in *Upton v Green* (1995) 2 HRNZ 305 (see also [para 53](#)).

- 53 The significance of the omission from the NZBR Act of any equivalent to Article 14(6) of the International Covenant, and indeed of any other remedies provisions, is a matter on which opinions differ. *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 subsequently established damages as a remedy which may, on appropriate occasions, be granted for breach of the NZBR Act. Cooke P emphasised in *Baigent's case* that damages were not analogous to common law damages but rather amounted to public law compensation for a wrong attributable to the state. The case has not escaped criticism, but in the later case of *Upton v Green* (1995) 2 HRNZ 305 a plaintiff who alleged that he was denied the opportunity to be heard before being sentenced by a District Court judge. The plaintiff was awarded \$15 000 damages for breach of the right to a fair and public hearing under s 25(a) of the NZBR Act, and breach of natural justice under s 27 (see *Crown Liability and Judicial Immunity*, paras 9–13 and 68).
- 54 In *Martin v District Court at Tauranga* [1995] 2 NZLR 419, the Court of Appeal hinted at remedies which would protect at least some of the interests recognised in Article 14(6) and its cousin, Article 9(5). In granting a stay of proceedings to remedy a breach of s 25(b) of the NZBR Act, the court recognised that undue delay had prejudiced not only the appellant's right to a fair trial but also his "liberty interest" (as his bail had been subject to onerous reporting conditions). Richardson J suggested that where delay had not prejudiced the right to a fair hearing under s 25(a), "it is arguable that vindication of the appellant's rights does not require the abandonment of the trial processes: that the trial should be expedited rather than aborted and the breach of s 25(b) should be met by an award of monetary compensation" (427).
- 55 As the authors of *Adams on Criminal Law* note, Richardson J's approach "has the advantage that rights could be vindicated while also calling the defendant to account for the alleged crime" (Robertson (ed), 1992, Ch 10.15.07). By contrast, Cooke P in *Martin v District Court at Tauranga* saw "some incongruity in any suggestion that, although undue delay has been found, the state should continue with a prosecution and, even if it results in conviction and imprisonment, accompany it with an award of compensation" (425). We consider that this difference may be resolved by adjusting the quantum of a NZBR Act award to reflect the claimant's conduct. There is a close analogy with the quantum factors discussed in [paras 126–128](#).
- 56 Remedies, including possibly damages, might therefore be available where the right to be tried without undue delay, or another right in s 25 of the NZBR Act, has been breached.

The prerogative of mercy

- 57 The prerogative of mercy includes, but is wider than, the powers in ss 406 and 407 of the Crimes Act 1961. In New Zealand the prerogative of mercy is exercised by the Governor-General on the advice of the Minister of Justice. In practice, lawyers within the Legal Services Group of the Ministry of Justice are asked to investigate any claims which the Minister regards as having substance. Section 406 of the Crimes Act allows the Governor-General in Council, when considering an application for the exercise of the prerogative, either on his or her own initiative or on the application of a convicted person, to:
- refer the question of the conviction or sentence to the Court of Appeal or High Court; or
 - refer to the Court of Appeal for its opinion any point arising in the case.

- 58 The Crimes Act is silent as to when the Governor-General may exercise this power. Nor has the government issued any guidelines or a formal policy statement concerning the exercise of the power.²⁴ In practice, however, it is most commonly exercised when new evidence comes to light which might cast doubt on the conviction or sentence, and after the defendant's appeal rights have been exhausted. A person who has already unsuccessfully appealed his or her conviction or sentence can apply only to the Governor-General to exercise the prerogative and/or the powers under s 406. The Court of Appeal cannot hear a second application for leave to appeal against conviction or sentence even where there are new grounds for the application; nor does the court have the power to request the Governor-General to refer a matter to it: *R v Wickliffe* [1986] 1 NZLR 4 (CA).
- 59 The reference of a conviction or sentence to the Court of Appeal under s 406 is to be heard and determined as if it were an appeal by the defendant against conviction or sentence. Where the Court of Appeal considers new evidence to be of such importance that, had it been available at trial it might have led the jury to return a different verdict, it will rule that the convictions cannot stand: *R v Fryer* [1981] 1 NZLR 748 (CA), *R v Dougherty* [1996] 3 NZLR 257 (CA). The court will normally order a retrial: *Re Farmer* [1991] 3 NZLR 450 (CA).
- 60 Where a person convicted of any offence is granted a free pardon by the Queen or the Governor-General, under the Crimes Act s 407 that person is deemed never to have committed that offence.²⁵ Section 407 concerns only a free pardon. While there is no standard form of pardon, and the effect of a pardon depends on the terms in which it is granted, the two other "types" of pardon are the conditional pardon, which substitutes one form of punishment for another (eg, commuting the death penalty to life imprisonment), and remission of sentence, which reduces a sentence without changing its character (eg, on compassionate grounds) (see Smith, 1983, 417–426).
- 61 In England the power to refer cases to the Court of Appeal Criminal Division, under the equivalent to s 406 of the Crimes Act, has passed from the Home Secretary to an independent commission, the Criminal Cases Review Commission (see [para 72](#)). Underlying this shift is the notion that matters of such gravity should not be left to individual discretion. The discretion is not unfettered. The New Zealand Court of Appeal in *Burt v Governor-General* [1992] 3 NZLR 672 accepted that the prerogative of mercy may be subject to judicial review, as did the English Divisional Court in *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349.²⁶ If compensation is to be paid to those who have

²⁴ In November 1997, Cabinet adopted interim criteria relating to the making of ex gratia payments, but these do not cover the earlier exercise of the power to refer cases to the Court of Appeal or High Court under s 406 of the Crimes Act or other exercises of the prerogative.

²⁵ There has, however, been at least one occasion on which it was discovered that a person convicted and pardoned of an offence in fact committed the crime of which he was pardoned: see *R v Meagher* (1896) 17 LR (NSW) 157 (noted in 114 (1998) LQR 63, 73).

²⁶ In particular the court held that failure by the Home Secretary to consider a form of pardon appropriate to the facts of the case was reviewable, and ordered the Home Secretary to consider afresh whether the prerogative could be exercised "in such a way as to give full recognition to the now generally accepted view that [Bentley] should have been reprieved" (365). Note, however, that the Privy Council, considering an appeal from the Bahamas, took the view that the prerogative of mercy, at least in the Bahamas, was not amenable to review: *Reckley v Minister of Public Safety & Immigration* (No 2) [1996] 1 AC 527.

been wrongfully convicted, it is critical that a convicted person's application to have a case reopened be treated impartially and transparently.

Ex gratia payments

- 62 The Crown may make an ex gratia payment to a person who has been pardoned by the Queen or Governor-General or whose conviction has been quashed following a referral under s 406 of the Crimes Act. But as the term suggests, there is no obligation to do so. The decision whether or not to make a payment is made by Cabinet, but on the advice of the Minister of Justice, who in turn relies on officials within the Ministry to consider the application. Under interim criteria adopted by Cabinet on 17 November 1997, it was agreed that the category of claimants who should be eligible for compensation or an ex gratia payment should be limited to those:
- i who receive a free pardon under section 407 of the Crimes Act 1961; or
 - ii whose cases are referred to the Court of Appeal under section 406 of the Crimes Act 1961 resulting in either:
 - A the quashing of the relevant conviction or convictions with no order for a retrial; or
 - B the quashing of the relevant conviction or convictions followed by an acquittal at a retrial; and
 - iii in the case of persons to whom either paragraph (i) or (ii) above apply, whose conviction is quashed, or in respect of whom a pardon is granted on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice (except where the non-disclosure of the unknown fact in time is wholly or partly attributable to the person) and who are alive at the time an application for compensation or ex gratia payment is made.
- 63 It was also agreed that a claimant be required to establish, on the balance of probabilities, that he or she is innocent. Note that the wording of para (iii) of the interim criteria reflects that of Article 14(6) of the International Covenant on Civil and Political Rights.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

- 64 Article 14(6) of the International Covenant on Civil and Political Rights states:
- 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.
- 65 Article 14(6) is discussed further in the [appendix](#) of this paper. When New Zealand ratified the Covenant in 1978 it made a reservation to Article 14(6) in the following terms:
- New Zealand reserves the right not to apply Article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice. (Ministry of Foreign Affairs, 1989, 8)
- 66 We have been unable to locate any contemporaneous statement by the government as to why it made a reservation in 1978. In New Zealand's report to the Human Rights Committee in 1983, however, it was stated:

It has always been considered advisable to deal with compensation for such cases on an ex gratia basis so that every case can be considered entirely on its merits and that the body which, after due consideration of all the facts, has decided to reverse or interfere with a decision arrived at according to law should also have the full authority and responsibility for deciding on the amount of compensation to be granted. There are therefore no binding legal rules for assessing compensation but in the past it has been the practice to take account of pecuniary losses eg, loss of earnings, legal costs and other expenses incurred by detention as well as non-pecuniary losses such as damage to character and reputation, mental suffering etc. (Ministry of Foreign Affairs, 1984, 50)

- 67 The Human Rights Committee has held that ex gratia payments do not meet the requirement that a person be compensated “according to law” (Stavros, 1993, 300). There is also a sound jurisprudential basis for the view that “law” in this context means a system of rules which is both clearly defined and consistently applied, neither of which is a characteristic of an ex gratia compensation regime (Ashman, 1986, 498).
- 68 Because it entered a reservation, New Zealand has not accepted an obligation at international law to enact legislation giving effect to Article 14(6). The Human Rights Committee does comment on reservations to the International Covenant, however: when presenting New Zealand’s second periodic report to the committee in 1989 the New Zealand delegation was asked whether it was intended that the reservation in respect of Article 14(6) be maintained (Ministry of External Relations and Trade, 1990, 40). The Human Rights Committee is therefore able to impose a form of moral pressure to enact a statutory compensation scheme.
- 69 Article 14(6) is an important normative statement by the international community and serves as a reference point for domestic compensation schemes. We have, however, arrived at our preliminary conclusions regarding the scope and other features of a compensation scheme without relying on Article 14(6).

THE LAW OVERSEAS

Australia

- 70 In Australia, state and Commonwealth governments pay compensation on an ex gratia basis to those who have been wrongfully prosecuted, imprisoned or convicted. There is no automatic right to compensation where the subsequent discovery of new facts shows a conviction to have been wrongful. This state of affairs has been criticised over the past 2 decades, particularly in light of high profile cases such as *Condren* and *Rendell*.²⁷ The Aboriginal Justice Advisory Committee, set up by the Queensland government in 1993, recommended that the government request the chairperson of the Criminal Justice Commission to report on compensation for miscarriages of justice. In particular, the recommendation sought consideration of whether compensation should be addressed in specific legal provisions, or be left to administrative practices (Lofgren, 1994, 11). No effect has been given to this recommendation.

²⁷ See [1985] *Reform* 105; Lofgren, 1994, 10; and Walsh, 1994, 32. The Law Reform Commission of Western Australia published a working paper in 1976, *Compensation for persons detained in custody who are ultimately acquitted or pardoned*, but the project was thereafter shelved.

England

- 71 In England, s 133 of the Criminal Justice Act 1988 replaced the practice of making ex gratia payments with a statutory scheme.²⁸ For cases outside s 133 an ex gratia scheme has been retained under which the Home Secretary may make a payment

where the applicant has spent time in custody, for example where there is serious default by a public authority, such as the police, or if an accused person is completely exonerated (whether at trial or on appeal). (Home Office, 1997)²⁹

Under both s 133 and the ex gratia scheme, the decision as to entitlement is made by the Home Secretary; an independent assessor then determines the amount of an award.

- 72 Section 133 is only as wide as Article 14(6) of the International Covenant and provides for compensation only after:
- the quashing of a conviction on an appeal out of time or following a reference to the Court of Appeal by the Criminal Cases Review Commission or
 - the granting of a pardon.

The Criminal Cases Review Commission has been responsible for referring cases to the Court of Appeal since 1995. In 1993 the report of the Royal Commission on Criminal Justice observed that successive Home Secretaries would not refer cases to the Court of Appeal if there was no real possibility of the court's view differing from that taken on appeal. The Royal Commission also considered that the Home Secretary's role under s 17 was incompatible with the constitutional separation of powers between the courts and the executive, and the Home Secretary's responsibility for law and order and the police.³⁰ The Commission recommended the creation of a new Criminal Cases Review Authority to consider alleged miscarriages of justice, supervise their investigation if further inquiries were needed, and refer appropriate cases to the Court of Appeal (HMSO, 1993, 181–183). Before that, references were made by the Home Secretary under a provision similar to s 406 of the Crimes Act in New Zealand.

Canada

- 73 In Canada there has also been criticism of the limited rights to reopen criminal cases where new evidence has been discovered. In 1988 *Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* were

²⁸ The *Report of the Human Rights Committee (A/40/40)* in 1985 regarding the United Kingdom's ex gratia compensation regime had stated:

With reference to Article 14, paragraph 6, members expressed regret that there was no statutory basis in the United Kingdom for the right of compensation for miscarriages of justice and urged that appropriate measures be taken to ensure full compliance with that article.

²⁹ The Home Secretary in 1985 explained the policy, which still applies to the ex gratia scheme, that compensation will not be paid simply because at trial or on appeal the prosecution has been unable to meet the burden of proof: 87 HC Official Report (6th series), written answers columns 691–692, Home Office, 1997, annex A.

³⁰ Unlike in New Zealand where the Minister of Justice advises the Governor-General on referrals under s 406, but the justice and police portfolios are distinct. The Attorney-General is a separate portfolio which is currently held by Hon Douglas Graham concurrently with that of Justice.

adopted by Canadian Justice Ministers (Kaiser, 1989, 152). These guidelines were formulated having regard to Article 14(6) but fall short of creating a right to compensation, so that payments are still made on an *ex gratia* basis. The guidelines expressly state that “compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to those found not guilty)” (Kaiser, 152). As the guidelines make a pardon or reversal of a conviction a prerequisite to compensation, it has been argued that a convicted person should be able to re-apply for leave to appeal where there is new evidence (Kaiser, 129). In Canada, as in New Zealand, this could jeopardise the finality of convictions, but would, on the other hand, take the decision whether or not to retry a case out of the Minister’s discretion.

Germany

- 74 In Europe, several countries provide compensation to defendants who have been detained in custody and then acquitted at trial. Eligibility criteria under these compensation schemes tend to be far broader than those under the English statutory scheme or the interim criteria adopted in New Zealand. In Germany an Act of Parliament (the Law on Compensation for Criminal Prosecution Proceedings) passed in 1971 specifies that whoever has suffered damage as a result of a criminal conviction which is later quashed or lessened (ie, the “applicant”) is compensated by the state (Article 1). The state also compensates a person who has suffered damage as a result of a remand order or certain other types of detention, provided he or she is acquitted or the prosecution is suspended or abandoned (Article 2). The state’s obligation to compensate is determined by the court at the conclusion of the criminal case, or after a subsequent hearing of the parties (Article 8). There is no requirement in the Act that the applicant show innocence; but compensation is only paid to the extent that it is equitable in the circumstances of the case. Under Article 8 there is a right of appeal against the court’s decision regarding compensation.
- 75 Several provisions in the Act serve to exclude or limit the state’s liability. Compensation is excluded under Article 5 to the extent that the applicant wilfully or by gross negligence induced the criminal proceedings; but liability is not excluded solely because the applicant failed to make a statement or lodge an appeal. Compensation may also be fully or partially denied if the applicant caused the proceedings by incriminating him or herself by not telling the truth, or by making contradictory statements, or by withholding exonerating evidence (Article 6). Article 7 limits compensation to “asset” and “non-asset” damage; compensation for the latter is payable at the rate of DM10 per day of imprisonment (at the time of writing roughly \$NZ10).
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The options

76 CHAPTER 1 HIGHLIGHTED THE ADVANTAGES AND DISADVANTAGES of the state compensating the wrongfully convicted and prosecuted. Our preliminary conclusion is that the advantages outweigh the disadvantages and that some form of compensation scheme is required. What must be avoided, however, is a remedy for the problem that creates greater difficulties elsewhere, or sacrifices simplicity and clarity in criminal procedure. Since a perfect result in every instance is unattainable, what is needed is the best system that will work effectively. It is not in our view feasible to expend public resources reviewing every acquittal or discharge to determine the defendant’s innocence. We have considered four main options, assessing them in terms of the competing values described in [chapter 1](#).

The first option

77 The first option is to provide compensation to all who satisfy the Minister of Justice – at any stage of the proceedings – that they are innocent *beyond reasonable doubt*. Imposing such a high onus on the claimant would prevent an excessive number of claims.

78 Some post-appeal claimants who are in fact innocent will be unable to prove this. Inability to prove innocence may result from factors beyond their control, such as the death of a key witness. (We define post-appeal claimants as those to whom a pardon has been granted, or who, outside the normal appeal process, have had a conviction quashed without an order for retrial, or been acquitted at a retrial.) In this and the other options offered, we propose that the compensation body not be bound by the laws of evidence.

79 We have employed the familiar criminal law test of proof beyond reasonable doubt rather than that of Article 14(6) of the International Covenant on Civil and Political Rights (“conclusively”) to express the burden of proof on the applicant.

80 Considered solely from the standpoint of the person who is innocent, a lower test might indeed be seen as preferable. But seen in the wider perspective of the overall administration of justice we consider that the threshold for compensation must be high. This option is *not* intended as another stage in the conventional process of trial; for the reasons considered in [paras 11–14](#) this would be unacceptable.

81 This option would:

- impose a burden of proof on the claimant; and
- restrict the making of applications to those cases where innocence is proved beyond reasonable doubt.

- 82 The advantages of this option are:
- Simplicity;
 - It compensates those in the criminal justice system who suffer the greatest miscarriage of justice – the innocent; and
 - It is *claimant-centred* in that it allows the innocent to recover regardless of whether they were acquitted at first instance, on appeal, or finally vindicated through the granting of a pardon.
- 83 This option has the following disadvantages:
- It could be seen as giving rise to two classes of acquittal – that of innocence, where compensation is paid, and that of doubtful innocence where it is refused;
 - A person who is innocent but who cannot prove that fact beyond reasonable doubt is not compensated;
 - It does not deal with those who, innocent or not, have been granted a pardon following another form of miscarriage, such as being convicted on false evidence;
 - It is unprecedented in the jurisdictions with which we are familiar. There is no empirical evidence as to the number of claims that could be expected, the difficulty of dealing with such claims and the cost of doing so. The figures we noted in [para 20](#), however, coupled with the possibility that even a guilty claimant might seek vindication in the form of compensation, suggest that the number of claimants under this option would be significantly higher than under the current arrangements;
 - We have concerns about the incentives it might create and the intangible effect upon the conduct of the police or other prosecuting authority, jury and defence. Knowledge that a compensation order could result from acquittal might influence decisions to prosecute, the level of charges, the entry of pleas, and the verdict of the jury;
 - It might cause unacceptable change in the balance between the interests of protecting the innocent, and dealing suitably with the guilty; and
 - Most important of all, it could adversely affect criminal procedure, and convert the current definitive trial/appeal procedure into the first stage of a double trial (see [para 14](#)).

The second option

- 84 Another approach would be a narrower version of the first option. Payment of compensation would be confined to post-appeal claimants who prove to the Minister of Justice their innocence beyond reasonable doubt.³¹ Payment would be declined to all those who secure acquittal in the course of trial or on appeal from the verdict. The prerogative right to award compensation in such cases would, however, remain.

³¹ There is some political opposition in New Zealand to limiting compensation to post-appeal claimants only. It has been suggested that someone who has a conviction overturned on appeal to the Court of Appeal should have the same entitlement to compensation as someone whose conviction has been overturned after a reference back to the Court of Appeal under s 406 of the Crimes Act. See, for example, Hon Phil Goff's discussion (1997) NZPD 5626; and Hon Douglas Graham: "[I]t is a very fatuous argument to say that this man cannot even get any compensation considered, because the case did not get right to the end – to the Governor-General – because it had been thrown out earlier. That is a totally untenable position, and I am not taking it" (1997) NZPD 5629.

- 85 This option would:
- impose a burden of proof on the claimant to prove innocence beyond reasonable doubt; and
 - limit applications as of right to those that are truly exceptional – where the innocent accused has not been discharged or acquitted at any stage up to and including the appeal.
- 86 Advantages of this option include:
- Relative simplicity;
 - It compensates those in the criminal justice system who suffer the greatest miscarriage of justice – the innocent; and
 - It meets our general concern that the first option may see a significant increase in the number of claimants.
- 87 The second option would have the following disadvantages:
- Like the first option it could give rise to the same two classes of acquittal.
 - A person who is innocent but who cannot prove that fact beyond reasonable doubt is not compensated;
 - It does not deal with those who, innocent or not, have been granted a pardon following another form of miscarriage, such as being convicted on false evidence; and
 - It does not compensate those who are discharged on or before appeal;
 - It leaves the uncertainty of using the prerogative in cases it does not cover.

The third option

- 88 Another approach would be a wider version of the second option, built on the principles of the Costs in Criminal Cases Act 1967. However, unlike the second option, there would be no burden of proof on the claimant to show innocence.
- 89 Under this option payment of compensation would again be confined to post-appeal claimants, but there would be no threshold requirement to prove innocence. Post-appeal claimants would have an automatic right to apply for compensation to the compensation body (preferably an independent tribunal). The compensation body's assessment of compensation would take account of the whole of the case, including an appraisal of the likelihood of innocence. There might, for example, be an abatement by say 75% if the compensation body considered that the claimant was probably guilty but had been subjected to false evidence. The prerogative right to award compensation to those who were not post-appeal claimants would again remain.
- 90 This option would avoid the harshness of the first and second options, which would not cover an innocent claimant who, for whatever reason, could not prove innocence beyond reasonable doubt would not be eligible for compensation. However, removing a requirement to show innocence would not see an explosion in the number of potential claimants: this would be confined by the scheme being limited to post-appeal claimants.
- 91 This option would:
- not impose a burden of proof on the claimant;
 - not restrict the making of applications to those cases where innocence is proved beyond reasonable doubt; and
 - limit the number of applications to those that are truly exceptional – where the accused has not been discharged at any stage up to and including the appeal from the verdict.

- 92 Advantages of the third option include:
- A person who is innocent but who cannot prove that fact beyond reasonable doubt could still be compensated;
 - It can deal with those who, innocent or not, have been granted a pardon following another form of miscarriage, such as being convicted on false evidence; and
 - It meets our concern with the first option that eligibility is too broad; on the other hand it removes the strenuous burden of proof of both the first and second options thereby making compensation more widely available.
- 93 This option would have the following disadvantages:
- It has the disadvantage of uncertainty as to quantum, because the likelihood of innocence would be a major factor to be considered in determining the *level* of compensation, rather than a precondition of *eligibility* as in the first, second and fourth options;
 - It compensates only post-appeal claimants and not those who are acquitted or discharged on or before appeal; and
 - It could give rise to awards that would demonstrate the opinion of the compensation body that the claimant was in fact guilty. The integrity of an acquittal could be damaged if followed by a compensation award abated heavily because of probable guilt.³²

The fourth option

- 94 This is to retain the status quo – the interim criteria described in [paras 62–63](#).
- 95 This option is confined to post-appeal claimants and requires them to establish:
- conclusively, that a new or newly discovered fact shows that there has been a miscarriage of justice; and
 - on the balance of probabilities, that they are innocent.
- 96 Advantages of this option include:
- It compensates the innocent who have been wrongfully convicted; and
 - Because it is confined to post-appeal claimants, it meets our concern with the first option that eligibility is too broad.
- 97 This option would have the following disadvantages:
- Like the first and second options it could be seen as giving rise to two classes of acquittal: that of innocence, where compensation is paid; that of doubtful innocence where it is refused;
 - It does not compensate those who are acquitted or discharged on or before appeal; and
 - In addition to innocence (proved on the balance of probabilities) it is necessary to prove beyond reasonable doubt miscarriage of justice, an indeterminate concept which may be regarded as a distraction from the essential question of innocence. Miscarriages of justice other than conviction of the innocent are better dealt with separately, as by appeal to a higher court or by a civil claim for damages.

³² However, it is perhaps unlikely that many post-appeal claimants would be guilty. The discovery of a new fact giving rise to a reference to the Court of Appeal and eventual acquittal or a pardon might well have had the effect of exonerating the claimant.

COMMENT

- 98 There are advantages and disadvantages associated with each option. The fundamental questions, which the options address in various ways, are:
- Should a person who has been wrongfully prosecuted as opposed to wrongfully convicted be eligible for compensation?
 - Should compensation be available if the criminal justice system “worked” – that is, an acquittal was secured other than on a post-appeal process?
 - Should compensation be available only to the demonstrably innocent, and if so what standard of proof should be required?
- 99 The answers to these questions will determine which of these options is ultimately preferred.
- 100 The crisp simplicity of the first option has possible consequences that may prove unacceptable, particularly the creation of a second trial to determine innocence. The threshold in the second option is very high and the scope of the scheme is narrow. The abandonment in the third option of a requirement to prove innocence, and the possibility of a decision that suggests guilt, are potential disadvantages. The fourth option introduces the imprecise concept of miscarriage of justice which, despite its use in Article 14(6), is confusing rather than helpful.
- 101 Were the first option to be tried, the risks we have identified as possible *might* not eventuate. It may be that the second option, coupled with the exercise of the prerogative in cases which fall outside it, would be workable. Or it may be that the third option would, after all, be feasible, as the prospect of decisions suggesting guilt is theoretical because no claimant would risk exposure to such result, and claims would in any event be few. At this stage it is impossible to be sure. For that reason we propose that the option eventually chosen undergo a 3-year trial period, at the conclusion of which its operation may be reviewed.
- 102 We will state our preferred option in our final report after considering responses to this paper.

What are the advantages and disadvantages of the four options which we have proposed as to the scope of a compensation scheme?

Which of the four options is the most suitable?

4

Elements of a compensation scheme

103 **T**HIS CHAPTER ADDRESSES THE REMAINING ISSUES concerning a compensation scheme:

- Who determines eligibility and quantum?
- What losses should be compensated?
- What factors should influence quantum?
- What powers and procedures does the compensation body require?
- Should awards of compensation be subject to review?
- Is a statutory scheme necessary?

WHO DETERMINES ELIGIBILITY AND QUANTUM?

104 There appear to us to be at least four possibilities as to who should determine eligibility and/or quantum:

- Cabinet on the advice of the Minister of Justice (the status quo). The responsibility for deciding eligibility, where necessary, and quantum could be kept with the Minister of Justice, under the prerogative or under a statutory scheme;³³
- The court which acquits the defendant or quashes his or her conviction. This would require an order for payment of compensation, in addition to the verdict of not guilty. The court could fix quantum, or alternatively leave the assessment to a separate court. A separate system would be required in the case of pardons;
- A court other than the one which acquitted the defendant or quashed the conviction could rule on eligibility and quantum, or solely the latter if the earlier court had ordered that compensation was payable. Again a separate system would be required for pardons; or
- An independent body established to determine whether, and if so how much, compensation should be paid.

Cabinet on the advice of the Minister

105 Each of these options is open to criticism, the precise nature of which will depend on which of the eligibility options in [chapter 3](#) is adopted. Leaving the decision as to eligibility in the hands of the Cabinet, on the advice of the Minister of Justice, could risk being perceived as insufficiently open and transparent. It could be said to challenge the separation of powers doctrine whereby decisions

³³ In the United Kingdom, under s 133 of the Criminal Justice Act 1988 the Home Secretary decides whether there is a right to compensation, but quantum is set by an independent assessor.

on rights are vested in the judiciary. Decisions as to quantum might be seen as discretionary, even if guidelines as to quantum were published. Ministry of Justice officials currently provide advice to the Minister in respect of ex gratia payments. Even assuming that the tasks of deciding whether compensation was payable and fixing quantum were delegated (eg, to a barrister who then made recommendations to the Minister), there could be no certainty that each case would be investigated with the vigour or sympathy that might be expected of a court or tribunal. Finally, the possibility that political pressure or public opinion might be brought to bear on individual decisions cannot be completely excluded.

- 106 However, it may be desirable to provide some continuity and consistency between the old and new schemes, particularly in the case of option three where there is no requirement to show innocence on the balance of probabilities. Ministry officials are experienced in handling applications for compensation and are likely to be familiar with a claim through providing advice to the Minister regarding referral to the Court of Appeal under s 406 of the Crimes Act or the granting of a pardon. This contributes greatly to applications being processed both efficiently and at minimal cost.

The courts

- 107 Leaving the decision in the hands of the court which reconsidered the verdict would impose upon it a responsibility distinct from its primary task. In the case of a jury, or a judge sitting alone, this is to decide whether the case against the defendant has been proved beyond reasonable doubt. In the case of the Court of Appeal, it is to determine whether the verdict was reasonable and could be supported having regard to the evidence, or whether there was an error of law or miscarriage of justice (Crimes Act s 385; see [para 12](#)). Furthermore, in cases referred to the Court of Appeal under s 406 of the Crimes Act it would usually be inconvenient for that court to embark upon what is essentially an exercise in fact finding as well as judgment.
- 108 Neither at trial nor on appeal is the defendant's innocence the matter in issue. To involve a court, even one other than that which heard the criminal proceedings, would result in an adjudication upon the issue of innocence. In cases where the court awarded little or no compensation, the verdict of not guilty would be seriously undermined. But equally the concern about undermining the verdict could apply if awards of compensation were made by Cabinet on the advice of the Minister, or an independent tribunal.

An independent tribunal

- 109 Establishing an independent tribunal might be criticised on the grounds of cost when compared to the option of retaining effective decision-making with the Minister (and Ministry) of Justice. It might also be seen as unnecessary, in that the concerns about transparency which weigh in favour of a tribunal to assess eligibility would be reduced by the formulation of clear eligibility criteria.
- 110 An independent tribunal would, however, have the advantage of being separate from both the executive and the courts. Ministers may be perceived as susceptible to public opinion, and departments and ministries as potentially subject to

political pressure. On the other hand, courts may be perceived as reluctant to interfere with matters which have apparently been settled by another trial or appeal court.

- 111 A tribunal could be established either in the exercise of the prerogative or by statute, and its membership appointed by the Attorney-General or Minister of Justice and chosen from the senior bar. Although the number of cases likely to come before a tribunal annually would be small, so that there would be no need to employ full-time staff, a single member might be unavailable when a case arose. Having two members would allow the member assessing quantum to confer with his or her colleague on the appropriate size of the award. An alternative is to appoint as the sole member of the tribunal a retired judge, or retired barrister or solicitor of appropriate experience. This may be less costly than having two appointees in current legal practice, and would ensure that all cases could be attended to promptly. Administrative and secretarial services to the tribunal could be provided as necessary by the Department for Courts. The tribunal would be expected to provide an annual report to the Minister of Justice.

Who should make decisions regarding eligibility for compensation and quantum?
The Minister of Justice, the courts, an independent tribunal, or another body?

Eligibility

- 112 If the first, second or fourth option discussed in [chapter 3](#) were adopted, it would be constitutionally acceptable for the Minister, or a delegate, to determine issues of eligibility. Since wrongful conviction or prosecution is exceptional in that the ordinary judicial processes have not worked, it is appropriate for the Minister in exercise of the prerogative of mercy to deal with this event. Recourse to the courts or a tribunal to determine eligibility, on the other hand, would mean another stage in the judicial process, which it is important to avoid (see [para 14](#)).
- 113 To maximise the values of transparency and consistency, the procedures employed by the Minister would be published. They might entail referring claims to officers within the Ministry; an alternative would be referral to independent counsel.

Quantum

- 114 In the case of the first, second or fourth options, following the Minister's determination of eligibility we consider quantum should be assessed by an independent tribunal. In the case of the third option, eligibility would not be in issue, as a person's status as a post-appeal claimant (which is the only eligibility criteria under this option) is a matter of record. The tribunal's function would be confined to assessing quantum.

Should decisions regarding eligibility for compensation on the one hand, and quantum on the other, be entrusted to separate persons or bodies?

WHAT LOSSES SHOULD BE COMPENSATED?

- 115 In 1980 a Royal Commission awarded a total of \$1 087 450.35 to Arthur Allan Thomas, stating that “[c]ommon decency and the conscience of society at large demand that Mr. Thomas be generously compensated”.³⁴
- 116 Most compensation regimes distinguish between pecuniary and non-pecuniary losses suffered by the claimant. Pecuniary losses include loss of earnings or other income, and loss of future earning capacity. Non-pecuniary losses such as loss of liberty, mental and emotional harm and loss of social status may be more important than the material losses suffered by the claimant, especially to someone with a relatively low income or low earning potential. Some overseas compensation regimes limit compensation to pecuniary losses because of the difficulty in quantifying non-pecuniary losses,³⁵ while others impose limits on either category of loss.³⁶ We do not consider either approach to be fair or necessary to prevent unduly large awards.
- 117 Then there is the question whether there should be an upper limit for total awards of compensation. We think not: the compensation body should be relied upon to apply the same principles of full and fair compensation that are employed by a judge or civil jury in analogous cases. The number of cases in which serious miscarriages of justice have occurred is likely to be low, so that not having a limit is unlikely to pose significant cost to the state. The first few cases before the compensation body in the 3-year trial period we propose would provide a yardstick against which future awards could be measured.
- 118 We consider that compensation should cover the following types of loss based on the categories specified in the Canadian *Federal Provincial-Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons*:

NON-PECUNIARY LOSSES

- (a) Loss of liberty and the physical and mental harshness and indignities of detention or imprisonment
- (b) Loss of reputation which would take into account a consideration of any previous criminal record
- (c) Loss or interruption of family or other personal relationships
- (d) Mental or emotional harm as a result of wrongful conviction or detention or imprisonment³⁷
(Non-pecuniary losses might be aggravated by outrageous conduct by persons in authority; but there can be no basis for payment of exemplary damages under a compensatory regime)

³⁴ *Report of the Royal Commission to Inquire into the circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (Government Printer, Wellington, 1980), para 486. The award was made up as follows: \$49 163.35 for expenses including legal and valuers’ fees; \$38 287.00 in respect of services of his family members (help on the farm after Mr Thomas’ arrest, and expenses incurred in visiting him in prison); \$50 000 in payment of scientific services rendered by Dr Spratt; and \$950 000 in compensation, including \$450 000 in respect of the farm, stock, plant and personal effects to restore Mr Thomas to the position he would have been in but for the wrongs done to him.

³⁵ For example, Norway and Romania; see Shelbourn, 1978, 27.

³⁶ See the limitations in Germany noted in [para 75](#); also note the \$100 000 limit on compensation for non-pecuniary losses under the Canadian guidelines: Kaiser, 1989, 148.

³⁷ Note that mental or emotional harm is not covered by the Canadian guidelines.

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

COSTS TO THE CLAIMANT

Costs incurred by the claimant in obtaining a pardon or acquittal should be included in the award for compensation

- 119 We would also add to this list pecuniary losses suffered by family members arising from conviction or imprisonment, and expenses incurred by family and friends of the claimant in obtaining a pardon or acquittal. It is likely that the claimant's family will suffer financially from the loss of an earner or caregiver. Moreover, the claimant's family and friends may also be the ones who incur the cost of engaging lawyers and others (such as forensic scientists) required to prepare a case which is sufficiently compelling to justify referral to the Court of Appeal under s 406 of the Crimes Act for quashing of the conviction or a pardon.
- 120 The claimant's family may also have suffered emotional harm, stigmatisation and loss of reputation as a result of the claimant's conviction. Our preliminary view is that such losses are too remote to be covered by a compensation scheme.
- 121 An award of compensation should take into account the amount of any award of costs in favour of the claimant under s 8 of the Costs in Criminal Cases Act 1967: the claimant should not be compensated twice for the same loss. The same principle dictates that account also be taken of any award under the ACC scheme arising out of the conduct of police or other prosecuting authorities. This raises the wider question of the relationship between an award and any other remedy the claimant may have.
- 122 The Royal Commission in Arthur Allan Thomas' case quoted from an explanatory note issued by the British Home Secretary regarding *ex gratia* compensation, which stated:
- The claimant is not bound to accept the offer finally made: it is open for him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstances of his prosecution or conviction, or his detention in either or both of these connections. (para 477)
- 123 We agree that a claimant should be entitled to reject an award by the compensation body. In practice this is only likely to happen if the claimant feels a more lucrative tort remedy may be available (eg, if there were a case of gross police misconduct for which significant damages, perhaps including exemplary damages, might be justified). We also agree that a claimant should have to sign a waiver of all rights and remedies arising out of the prosecution or conviction if the award is accepted – again, to prevent the same losses being compensated twice over.
- 124 Our only disagreement with the passage quoted in para 123 is with an award being made without any admission of liability. This is understandable in the

context of an ex gratia payment. But if a right to apply for compensation is created, the state has already acknowledged the possibility of wrongful prosecution or conviction occurring and it is right that error be acknowledged in the particular case. From the claimant's point of view an admission of error is likely to be an important vindication, alongside the financial succour of an award. The admission need take no more specific form than that the claimant was wrongfully convicted. Indeed, if the reason for the wrongful conviction was an honest misidentification of the defendant, there may be no greater fault on the part of the authorities.

What losses should be covered by a compensation regime?

Should some types of loss (eg, non-pecuniary losses, or costs incurred in obtaining a pardon or acquittal) be recoverable only if incurred by the claimant, rather than by the claimant's family?

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- 125 Finally, there is also the issue of whether the estate of a qualifying claimant should be able to claim compensation. Our preliminary view is that it should not: the remedy of compensation is essentially a personal one, recognising the fact that the losses suffered are mostly borne by the wrongfully convicted person. Compensation to that person's family is an exception to this principle in recognition of the circumstances noted in [para 119](#). But in our view a compensation claim must die with the person wrongfully convicted. To allow claims by the estate could see old cases reopened with the impracticability this would entail (especially with the death of the central figure in the claim), and undermine finality in the justice system.

Should the estate of a person eligible to claim compensation be able to pursue a claim?

RELEVANT FACTORS IN DETERMINING QUANTUM

- 126 To make the process of awarding compensation more transparent, we propose spelling out the factors the compensation body should take into account in determining the amount of compensation to be paid. In the case of the first, second and fourth options where innocence is a threshold requirement it should not also be a factor in determining quantum. By contrast, if the third option were adopted the likelihood of innocence would be a factor influencing quantum as there is no threshold requirement to show innocence under this option. As noted above, the third option would be likely to result in greater variability in awards than the other options. Other factors, which in our view are relevant to an assessment of quantum under any of the options, include:
- the likelihood of the claimant's being guilty of an offence other than that with which he or she was charged;³⁸

³⁸ This factor might be relevant, for example, where newly discovered DNA evidence excluded the possibility of the defendant being guilty of rape, but other evidence such as the victim's identification evidence left open the possibility that the defendant was guilty of a lesser charge of sexual violation.

- conduct of the defendant leading to the prosecution or conviction (see paras 129–133);
 - whether the prosecution acted in good faith in bringing and continuing the case; and
 - whether the investigation was conducted in a reasonable and proper manner.³⁹
- 127 Further relevant factors which have some analogy with the existing law of tort damages are:
- the seriousness of the offence alleged;
 - the severity of the sentence passed;
 - the nature and extent of the loss resulting from the conviction and sentence.
- 128 These factors could be listed as mandatory considerations for the compensation body to take into account in a statute that could also set out eligibility criteria, and establish an independent tribunal. This approach would provide clarity to the compensation body, the claimant and the public. Mandatory considerations would encourage the compensation body to adopt a consistent approach to fixing awards. Even with mandatory considerations the compensation body could be given a residual discretion to have regard to such other matters as it considers relevant to an assessment of quantum. An alternative is that these factors merely be guidelines published by the compensation body. In that event the guidelines would not need to be included in legislation.

What factors should be relevant in determining quantum?

Should the factors we have listed as relevant to an assessment of quantum merely serve as guidelines, or be mandatory considerations for the compensation body?

Should these factors be specified in a statute?

Conduct of the claimant

- 129 Both Article 14(6) and the interim criteria exclude compensation if non-disclosure of a new or newly discovered fact is “wholly or partly attributable to the claimant”. This requirement has been criticised. First, it may almost always be argued that wrongful prosecution or conviction is partly due to the conduct of the claimant who, while a suspect or defendant, could have done more to prevent the occurrence of the injustice. Secondly, there is concern that this requirement could be used to punish the naive, the youthful, or the powerless (Kaiser, 1989, 136).
- 130 Thirdly, and importantly, what if the reason for the fact being suppressed is that the claimant, while a suspect or defendant,
- (i) accepted a lawyer’s advice to say nothing and therefore lost the chance to rebut the accusations made, or
 - (ii) failed to adduce forensic evidence that might have been exculpatory, or
 - (iii) incompetent counsel failed to conduct a proper cross examination of one of the prosecution witnesses?

³⁹ Cabinet’s interim criteria contain four criteria “for the purpose of determining quantum”; two of these criteria are reflected in the final two factors we propose here. These two factors are taken directly from s 5(2) of the Costs in Criminal Cases Act 1967: lawyers and the compensation body itself might be assisted by cases under that Act.

In the second and third cases non-disclosure of a fact is arguably not *attributable to the claimant*. Nevertheless these cases illustrate the potential unfairness in excluding compensation whenever part of the reason for the non-disclosure of a fact is attributable to the claimant.

- 131 In the [appendix](#) we conclude that the requirement in both Article 14(6) and the interim criteria that there be a new or newly discovered fact is undesirable. The extra requirement that non-disclosure of that fact be not attributable to the claimant therefore becomes superfluous.
- 132 Nevertheless, where claimants have contributed to their predicament through negligence or intentional acts while a suspect or defendant (as by not cooperating with the police investigation), it is reasonable to reduce compensation in proportion with claimants' responsibility for their own misfortune. Inclusion of the claimant's conduct as a factor affecting not eligibility but quantum allows individual cases to be treated fairly.
- 133 Our preliminary conclusion is that claimants for compensation should not be disentitled by reason of the fact that wrongful detention, prosecution, or conviction was wholly or partly attributable to their conduct. This fact should, however, be relevant to the assessment of quantum.

What effect should conduct of the claimant leading to wrongful prosecution or conviction have on quantum (or eligibility)?

TIME LIMIT FOR APPLICATIONS AND APPLICATION PROCEDURE

- 134 We suggest a requirement that any application for compensation be made within 6 months of the judicial or executive decision upon which the claim for compensation is based. It is desirable that the error implicit in any payment of compensation be vindicated as soon as possible. Also, claimants should be prevented from sitting on their right to apply for compensation.
- 135 The application procedure should be kept as simple as possible. The compensation body could issue guidance to claimants as to the contents of an application. Applications should be made in writing accompanied by a copy of the judgment acquitting the claimant or quashing the conviction and ordering that there be no retrial, or a copy of the pardon, as the case may be. Claimants should attach a schedule of their alleged losses for which they seek compensation, accompanied by supporting documentation where possible. Details of any award already made under the Costs in Criminal Cases Act 1967 should be provided. Any current or contemplated civil proceedings against the police or other authorities or persons arising out of the prosecution or conviction should also be disclosed.

COMPENSATION BODY'S POWERS AND PROCEDURES

Powers to gather information

- 136 The informality of the current arrangements means that the Minister of Justice has no statutory powers to compel the production of evidence or attendance of

witnesses. In exceptional cases a Commission of Inquiry could be appointed to recommend whether compensation should be paid, with that commission having powers under the Commissions of Inquiry Act 1908.

- 137 If compensation is left as a prerogative matter, the absence of express powers to gather information would presumably continue. If, however, Parliament were to adopt a statutory scheme under which a tribunal was created, then it would be appropriate for statute to set out the tribunal's powers. An obvious model might be the Commissions of Inquiry Act which gives commissions powers to:
- receive as evidence any information which might assist it, whether or not that information would be admissible in a court (s 4B(1));
 - inspect and examine any papers, documents, records, or things (s 4C(1)(a));
 - require any person to produce for examination any papers, documents, records, or things in that person's possession or under that person's control (s 4C(1)(b); and
 - summon witnesses (s 4D(1)).⁴⁰
- 138 Similar powers are conferred on the Police Complaints Authority under ss 24–25 of the Police Complaints Authority Act 1988, which may provide a useful model for legislation if a statutory compensation scheme is ultimately favoured.

Hearings and deliberations

- 139 The Police Complaints Authority Act also provides that the authority's investigation is to be conducted in private, and gives the authority express power to regulate its own procedure. Both of these features would in our view be appropriate to the compensation body's procedures. In particular, the compensation body should be able to decide that it is not necessary to hold a hearing; and no person should be entitled to be heard as of right.⁴¹ This would reduce the likelihood that a court challenge to the decision on narrow procedural grounds would succeed, although the compensation body would normally be expected to observe the laws of natural justice.

Does the compensation body require formal powers to investigate claims and conduct hearings? If so, exactly what powers are required?

Should the compensation body have freedom to regulate its own procedure?

Reasons for decisions

- 140 As a general principle of administrative law a tribunal, or a government agency making a determination affecting the rights of an individual, should usually give reasons for its decisions. The principle is reflected in s 23(1) of the Official Information Act 1982, although that subsection is subject to s 23(4) which

⁴⁰ The corollary of giving a compensation tribunal the power to summon witnesses and compel the production of evidence would be to confer on every witness giving evidence and counsel the same privileges and immunities as witnesses and counsel would have in a court of law.

⁴¹ See also the comparable provisions in s 18(3) of the Ombudsmen Act 1975.

provides that nothing in s 23 “entitles any person to obtain a written statement of advice given to the Sovereign or her representative”.⁴²

- 141 Reasons can increase the legitimacy of a decision and its acceptance by the parties and the public. They help demonstrate that a decision-maker has followed fair procedures and taken into account relevant considerations while disregarding irrelevant ones. By contrast, for the compensation body simply to award an amount could leave all concerned wondering whether there was any method to the compensation body’s deliberations and conclusions. Finally, giving reasons could in the present circumstances be a valuable discipline for the compensation body and encourage it to develop a consistent approach to determining levels of compensation (see Wade and Forsyth, 1994, 942).
- 142 The current practice for decisions in respect of ex gratia compensation is that they are accompanied by a statement of reasons. The Minister of Justice includes a statement of reasons in the letter indicating whether compensation will be paid. In the event that compensation is refused, it is possible that the grounds for refusal stated in the letter will form the basis of an application for judicial review (see [paras 146–154](#)).
- 143 We are at present inclined to the view that candour in the administration of justice requires that the compensation body should have to give reasons. However, we accept that providing reasons might encourage unmeritorious applications for judicial review, with claims that relevant considerations were ignored or irrelevant considerations were included in the decision-making process. Whether such claims would succeed is another matter (see [para 153](#)). In addition, the compensation body might be expected to include in its decision a statement that all relevant considerations had been taken into account, even if it chose only to highlight particular ones.

Should the compensation body be required to give reasons for its decision (whether as to eligibility or quantum)? If so, should reasons be given only to the parties, or made publicly available?

Appeals

- 144 The Legislation Advisory Committee has acknowledged that there may be circumstances which justify denying or limiting a right of appeal, including the “need for early finality” and the expertise of the body making the original

⁴² Section 23(1) states:

Subject to section 6 (a) to (d), section 7, section 9 (2) (b), and section 10 of this Act and to subsections (2), (4), and (5) of this section, where a Department or Minister of the Crown or organisation makes, on or after the 1st day of July 1983, a decision or recommendation in respect of any person, being a decision or recommendation in respect of that person in his or its personal capacity, that person has the right to and shall, on request made within a reasonable time of the making of the decision or recommendation, be given a written statement of:

- (a) The findings on material issues of fact; and
- (b) Subject to subsection (2A) of this section, a reference to the information on which the findings were based; and
- (c) The reasons for the decision or recommendation.

decision (Legislation Advisory Committee, 1991, para 157). The first of these factors in particular is relevant to compensation claims. There will have already been a trial, in all likelihood an appeal, a further hearing before the Court of Appeal under s 406 of the Crimes Act, and probably a retrial thereafter, before the case reaches the compensation body. The chance for *early* finality will already have been lost: it nevertheless remains important to put an end to proceedings arising out of the same facts and allow – or force – all parties concerned to get on with their lives.

- 145 Currently there is no right of appeal against decisions concerning ex gratia payments, decisions under s 406 of the Crimes Act, or any other exercises of the prerogative. Our preliminary conclusion is that neither should there be a right of appeal from compensation decisions under any of our proposed options.

Should there be a right of appeal against compensation decisions?

REVIEW OF COMPENSATION DECISIONS

- 146 A significant issue is whether decisions on compensation should be subject to judicial review. There is an important distinction between appeal and review: appeal is concerned with the merits of a case and allows the appellate body to substitute its own decision for that of the original compensation body; review is concerned with the validity of the decision (see Craig, 1994, 7). Whereas rights of appeal are necessarily conferred by statute, superior courts (the High Court and Court of Appeal) have an inherent jurisdiction to review administrative decisions. This power can only be ousted by specific statutory provisions (see [para 151](#)). The current position in New Zealand is that even an exercise of the prerogative of mercy might be susceptible to review (as noted in [para 61](#)). It may be that a decision to refuse to make, or consider making, an ex gratia payment on unreasonable grounds could also be reviewed.

- 147 In *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, Lord Templeman stated:

Judicial review was a judicial invention to secure that decisions are made by the executive or by a public body according to law even if the decision does not otherwise involve an actionable wrong. (388)

- 148 Judicial review has generally, although not exclusively, been concerned to safeguard the *processes* by which decisions are reached.⁴³ This is reflected in the more common grounds for review focusing on the power to act (illegality), the procedure adopted by the compensation body (procedural impropriety), and the nature of the deliberative process (unreasonableness). Judicial review initially developed around the doctrine of *ultra vires*, which is concerned to prevent excesses of statutory power. Gradual relaxation of the laws of standing (which concern who may bring claim for review) reflect the wider public interest in securing compliance with the law and the proper exercise of non-statutory powers: see, for example, *O'Neill v Otago Area Health Board* (unreported, HC,

⁴³ Some inroads into this principle may be seen in the development of breach of legitimate expectation, and improper purpose in the exercise of powers, as grounds for review: for discussion of the latter see Selway, 1996.

Dunedin, CP 50/91, 10 April 1992). Recent rights-based approaches to judicial review have culminated in section 27(2) of the New Zealand Bill of Rights Act, which states:

Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

- 149 The justifications for judicial review apply in the case of compensation decisions. Both the claimant and the public as a whole have an interest in ensuring the fairness and regularity of compensation decisions. The susceptibility of such decisions to review, even if in practice few claims are brought, acts as an important safeguard against the unlikely event of the compensation body acting arbitrarily or unlawfully. From the claimant's perspective, the need for judicial review as a safeguard in such cases is not eliminated simply because compensation decisions are complex, or because review could potentially undermine public confidence in the justice system.
- 150 Certain considerations suggest that it might be undesirable for compensation decisions to be challenged by judicial review. First, hearing a claim for compensation results from the unhappy need to depart from the principle of finality of criminal decisions. A review of the decision on compensation could see the court look to the compensation body's processes and, if it upheld the grounds for review, order the compensation body to reconsider its award. The compensation body might react by playing safe and undertaking a detailed inquiry, eliciting material from witnesses and possibly even victims years after the offence occurred and accepting the inevitable distress and cost that would result.

An ouster clause?

- 151 To prevent compensation decisions from being reviewed would require a privative or "ouster" clause: a statutory provision which attempts to limit or prevent a court from reviewing the exercise of a statutory power. Even before s 27(2) of the New Zealand Bill of Rights Act, courts were reluctant to give effect to such clauses: *Bulk Gas Users Group Ltd v Attorney-General* [1983] NZLR 129 (CA). The Court of Appeal held in this case that an ouster clause does not protect a decision where an error of law is apparent on the face of the record. The Legislation Advisory Committee, in *Legislative Change: Guidelines on Process and Content*, has stated that as a matter of legislative policy, ouster clauses should not be used except in the most unusual cases, observing that

[t]o the extent that such provisions have effect, they remove part of the power of the courts to enter the legal arena as essentially determined by Parliament, an exclusion that is difficult to justify in principle. (para 154)

But an effective ouster clause is not impossible and in the end the courts must do as Parliament directs.

- 152 Moreover, as noted in para 150, there are policy reasons against reopening compensation decisions (and the court decisions which preceded them) which might lead the courts to give full effect to an ouster clause, notwithstanding their traditional reluctance to do so.
- 153 But it may also be strongly argued that there should be no attempt to block review. First, the prospect of compensation decisions being constantly open to review is an unrealistic one. There are unlikely to be many applicants for review

simply because the pool of claimants eligible for compensation will be small (especially in the second, third or fourth options). Secondly, the courts are likely to be mindful of the need for finality in this area and to adopt a hands-off approach to review. Such an approach is taken, for example, with decisions of the Ombudsmen,⁴⁴ or perhaps even more to the point, parole decisions of District Prisons Boards: *Midwood v Paremoremo Medium Security Prison Superintendent* [1991] 1 NZLR 442 (CA); *Hawkins v District Prisons Board* [1995] 2 NZLR 14 (CA). We would expect the courts to make clear that only in cases of a serious abuse of process or departure from the standards of fairness would a challenge to the compensation decision be upheld.

- 154 We have identified both the general arguments in favour of review, and the more specific reasons why it might be undesirable for compensation decisions to be challenged in the courts. We would like to hear the views of others on this matter before we finalise our opinion.

Should compensation decisions be subject to judicial review?

A SHIFT TO A STATUTORY SCHEME?

- 155 In the light of our proposed changes to the way compensation should be paid, does New Zealand require legislation setting out the eligibility requirements, and maybe also key elements of a compensation scheme? The arguments in favour of compensation, canvassed in [paras 26–31](#), do not necessarily favour one form of compensation scheme over another. Essentially, the choice is among the following:
- Maintaining compensation on a prerogative and ex gratia basis, thereby avoiding binding rules as to how, and by whom, awards are to be made;
 - A narrow statute specifying only the eligibility criteria; possibly also containing an ouster clause preventing compensation decisions being reviewed;
 - A broader statute specifying eligibility criteria, establishing an independent tribunal to determine awards of compensation, and defining its powers and procedures.
- 156 There are four arguments for a statutory scheme: some apply to both the broad and narrow options noted above, while others apply only to the broad option.
- 157 First, a statutory scheme would reduce the scope for compensation claims to be dealt with in a discretionary or arbitrary way. The Cabinet's interim criteria provide greater clarity than previously existed as to who is eligible to receive an ex gratia payment. But certainty as to eligibility is not matched by certainty as to how, or by whom, a claim for compensation is to be assessed. A broad statute, by contrast, could establish an independent tribunal to handle all compensation claims in a like manner and could help to minimise perceptions that some claimants were favoured over others without good reason.
- 158 Secondly, a statutory scheme expresses the state's recognition of the importance of compensating the wrongfully convicted and prosecuted. An ex gratia payment,

⁴⁴ See *Wyatt Co (NZ) Ltd v Queenstown–Lakes District Council* [1991] 2 NZLR 180, 191 in which Jeffries J stated that the Ombudsmen's tasks involved a balancing exercise and that the court would "only intervene where the Chief Ombudsman is plainly and demonstrably wrong".

as the term itself suggests, is made at the grace of the state and without any admission of liability. It perpetuates the fiction that nothing has really gone wrong. A statutory scheme, on the other hand, acknowledges that the law must provide for the possibility of wrongful conviction or prosecution, and confers upon a claimant eligibility to apply for compensation. That eligibility could only be reduced or removed by an Act of Parliament, whereas the ability to apply for ex gratia compensation can be effectively rendered meaningless if the executive, in its discretion, decides to stop making awards. Moreover, a statutory scheme would mean that the eligibility criteria and any other components of the statute would be debated in Parliament, and the public would have an opportunity to comment on the proposed scheme through the select committee process. A prerogative, ex gratia scheme would not require either of these processes. A statutory scheme would therefore better reflect, at least potentially, the views of Parliament, the electorate and the public.

- 159 Thirdly, to maintain public confidence in the administration of justice, decisions concerning the rights of citizens should in general be vested in independent bodies free of executive influence or power. Decisions as to eligibility for compensation should be no different. It might be replied that an independent tribunal or assessor could still exist under a prerogative, ex gratia scheme; but the independence of such a body is, and is seen to be, recognised and protected if it is created by statute.
- 160 Finally, a statutory scheme may, depending on its precise wording, allow New Zealand to comply fully with Article 14(6), and in particular the requirement that those who have been wrongfully convicted (and meet certain other criteria) be compensated “according to law” (see [para 67](#), and [paras A5–A6](#) in the appendix).
- 161 The main disadvantage of a statutory scheme is that it lacks the flexibility of a prerogative, ex gratia scheme. The current scheme allows each case, in what is an anomalous category of cases, to be dealt with on its own merits, as New Zealand’s 1983 report to the Human Rights Committee emphasised (see [para 66](#)). The interim criteria reduce that flexibility somewhat, in particular by requiring that a claimant show innocence on the balance of probabilities. But these criteria are no more than guidelines and the government may depart from or change them at any time. A prerogative, ex gratia scheme allows the government to set appropriate levels of compensation and ensure that the amounts paid do not escalate out of hand.
- 162 A further advantage of the current practice is that it allows the issue of compensation to be addressed without retrying the case or requiring victims or witnesses to give evidence again. Furthermore, the current process of deciding claims creates no procedural rights which might, were they breached, give rise to a claim for review.⁴⁵ The discretion given to the Minister minimises the likelihood of review and examination of the underlying reasons for compensation decisions (and earlier court verdicts) that this would entail.
- 163 We do not find the arguments in the previous two paragraphs to be conclusive. Even the broad statutory scheme mentioned above could leave an independent tribunal with sufficient flexibility to consider the merits in each case, particularly

⁴⁵ But see the discussion in [para 61](#) which notes that the court in *Burt v Governor-General* [1992] 3 NZLR 672 stated that an exercise of the prerogative may be reviewed.

if the quantum factors we have listed were omitted from the statute. The narrow statutory scheme of course would be even more flexible. As to the second point about the effect on witnesses and victims, the tribunal is likely to be sensitive to their position and vulnerability. Nothing would be served by compelling a victim to give evidence where the trauma this could cause would outweigh the assistance it would give the tribunal. The tribunal could also regulate its own procedure in such a way as to prevent its inquiry from turning into a rehearing of the criminal case.

- 164 If a statute still allows discretion and flexibility in the making of awards, it may be said that the very basis of its advantage over the current arrangements would be eliminated. Others will say that some improvements in consistency and openness are better than none at all. For the moment we refrain from reaching a conclusion on these matters, and invite public comment on the advantages and disadvantages of shifting to a statutory scheme in either its broad or narrow form, subject to the experience of the 3-year trial period which we propose. That trial should be conducted under the prerogative, and any decision to legislate should follow its conclusion.

Should a compensation regime be placed on a statutory footing? What are the advantages and disadvantages of doing so? If a statutory scheme is preferable, should it be the broad or the narrow statute we discuss, or some further alternative?

APPENDIX
Elements of Article 14(6) of the
International Covenant on Civil
and Political Rights

A1 **B**ECAUSE NEW ZEALAND IS PARTY to the the International Covenant on Civil and Political Rights but has entered a reservation to Article 14(6) (see [para 63–68](#)) some discussion is warranted. Article 14(6) provides:

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.

“A miscarriage of justice”

A2 The article provides that for there to be an obligation to compensate, a person must show conclusively that there has been a miscarriage of justice. This is also required under the interim criteria which state that, in addition, a claimant must establish, on the balance of probabilities, that he or she is innocent. The requirement to establish innocence under the first, second and fourth options we propose would demonstrate the most fundamental kind of miscarriage.

A3 We gave thought to whether the test should be not that of innocence but the wider one that there has been a miscarriage of justice; the third option would permit that to be taken into account. Definitions of miscarriage of justice vary considerably, which in itself makes a requirement to show a miscarriage of justice problematic. According to one definition, miscarriage of justice:

does not merely mean that a guilty man has escaped, or an innocent man has been convicted, but is also applicable where an acquittal or conviction has resulted from a form of trial in which the essential rights of the accused or the people were disregarded. (*People v Wilson*, 138 P. 971, 975: 23 Cal App 513 (1913), quoted in Kaiser, 1989, 137)

A4 Until we have received responses to our four proposed options we do not take this point any further.

“Shall be compensated according to law”

A5 The 1982 Justice report recommended that those who had been pardoned or had their conviction quashed without an order for retrial or were then acquitted outside the normal appeal process (ie post-appeal claimants) should be automatically entitled to compensation. The difficulty with the proposal is that it

would include those who may in fact be guilty. Under the first, second and fourth options we propose, they would necessarily be ineligible for compensation; while under the third option likely guilt could reduce the amount of an award to zero. The guilty who have nevertheless suffered a miscarriage of justice may, however, have a remedy for breach of the New Zealand Bill of Rights Act 1990, or a remedy in tort.

- A6 Adoption of any of our options would not allow New Zealand to withdraw its reservation to Article 14(6) but would reduce the extent of non-compliance. We noted in [para 67](#) that the words “according to law” have been interpreted as requiring a statutory compensation scheme, and address the issue whether a statutory scheme is desirable in [paras 155–164](#).

“Suffered punishment”

- A7 Article 14(6) requires that a person has “suffered punishment” as a result of the conviction. In a report of the Canadian Sentencing Commission, punishment was defined as “the imposition of severe deprivation on a person found guilty of wrongdoing . . . associated with a certain harshness” (quoted in Kaiser, 141). Kaiser argues that this “would seem to contemplate punishment as including, for example, a fine, most probation orders and obviously any incarceration”.
- A8 This definition is wider than may be required for a scheme whose main concern is the deprivation of liberty. It might be thought desirable to limit eligibility to those who have suffered detention or imprisonment. However, the Canadian Task Force Report which preceded the adoption of guidelines in that country (see [para 73](#)), stated that this limitation would be contrary to unconditional accession to Article 14(6) (Kaiser, 141).
- A9 In England, s 133(6) of the Criminal Justice Act 1988 provides that a person suffers punishment as a result of a conviction when sentence is passed for the offence for which he or she was convicted. We accept this as the correct approach, although we do not consider it necessary to include the words “suffered punishment” in any formulation of the eligibility criteria for compensation. Anyone who has been pardoned or had a conviction quashed and then been acquitted following a s 406 reference to the Court of Appeal, will have inevitably “suffered punishment”.
- A10 We conclude that there should be no requirement on claimants to show that they have suffered punishment.

“New or newly discovered fact”

- A11 Article 14(6) requires that a miscarriage of justice be shown by a “new or newly discovered fact”. The inclusion of this requirement has been criticised in Canada (Kaiser, 134–135). While there is nothing objectionable in paying compensation where the discovery of previously unknown facts leads to the quashing of a conviction, it may be undesirable to deny compensation if the quashing is partially or fully attributable to other factors. It is likely that the requirement of a new or newly discovered fact is based on the assumption that other reasons for error will be normally uncovered on appeal. This may not, however, be a safe assumption. A wrong verdict could conceivably be entered for some other reason such as extraordinary community pressure for a conviction (Kaiser, 134).

- A12 It may be that nearly all instances of guilty verdicts being quashed outside the usual appeal process can be said to derive from new facts. Arguably, however, some kind of residual clause should be inserted to provide for cases which do not fall within the criteria but are nonetheless worthy of compensation. Kaiser suggests that the words “or any other factor” be added (135).
- A13 We agree that there is no reason in principle to limit eligibility to situations where there is a new or newly discovered fact. Rather than add the words “or any other factor”, it would be preferable to omit the requirement of a “new or newly discovered fact” altogether.

“Unless wholly or partly attributable to the claimant”

- A14 Article 14(6) excludes compensation if non-disclosure of a new or newly discovered fact is “wholly or partly attributable to the claimant”.
- A15 For reasons we discuss in [paras 129–133](#) of the main paper, we conclude that a claimant for compensation should not be disentitled by reason of the fact that wrongful detention, prosecution, or conviction was wholly or partly attributable to the claimant’s conduct. This fact should, however, be relevant to the assessment of quantum.
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Select bibliography

TEXTS

Ashworth, *Principles of Criminal Law* (Clarendon Press, Oxford, 1991)

Burston, *Criminal Procedure (vol 9: The Laws of New Zealand)* (Butterworths, Wellington, 1995)

Craig, *Administrative Law* (3rd ed, Sweet & Maxwell, London, 1994)

Robertson (ed), *Adams on Criminal Law* (Brooker's Ltd, Wellington, 1992)

Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff Publishers, Dordrecht, 1993)

Todd et al, *The Law of Torts in New Zealand* (2nd ed, Brooker's Ltd, Wellington, 1997)

Wade and Forsyth, *Administrative Law* (7th ed, Clarendon Press, Oxford, 1994)

ARTICLES

Ashman, "Compensation for Wrongful Imprisonment" [1986] NLJ 497

Buxton, "Miscarriages of Justice and the Court of Appeal" (1993) 109 LQR 66

Dworkin, "Principle, Policy, Procedure" in Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, London, 1981)

Givelber, "Convicting the Innocent: Does Procedure Make a Difference?", in Nijboer and Reijntjes (eds), *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence, The Hague, Netherlands, December 1-5 1995* (Koninklijke Vermande BV, Lelystad, 1997)

Hodge, "The Prerogative of Pardon" [1980] NZLJ 163

Huff et al, "Guilty until proven innocent: Wrongful conviction and public policy" (1986) *Crime and Delinquency* 518

Kaiser, "Wrongful Conviction and Imprisonment: Towards an end to the Compensatory Obstacle Course" (1989) 9 *Windsor Yearbook of Access to Justice* 96

Hon Justice Kirby, "Miscarriages of Justice – Our Lamentable Failure?" [1991] *Commonwealth Law Bulletin* 1037

Lofgren, "Kelvin Condren considered by the AJAC" (1994) 3 *Aboriginal Law Bulletin* No 66, 10

Rowan, "Costs in Criminal Cases" [1994] *NZLJ* 451

Selway, "The Rise and Rise of the Reasonable Proportionality Test in Public Law" (1996) 7 *Public Law Review* 212

Shelbourn, "Compensation for Detention" [1978] *Criminal Law Review* 22

Smith, "The Prerogative of Mercy, the Power of Pardon and Criminal Justice" [1983] *Public Law* 398

Spencer, "Glanville Williams" [1997] *Cambridge LJ* 437

Sutherland, "Compensation for Wrongful Imprisonment" (1993) 18 *Alternative Law Journal* 40

Walsh, "Injury by Justice: Inadequacy of ex gratia Compensation for Wrongful Conviction" [1994] *Law Society Journal* 32

Zuckerman, "Miscarriage of Justice and Judicial Responsibility" [1991] *Criminal Law Review* 492

REPORTS

New Zealand

Ministry of External Relations and Trade, *Human Rights in New Zealand: Ministry of External Relations and Trade Information Bulletin No. 30* (Wellington, 1990)

Ministry of Foreign Affairs, *Human Rights in New Zealand: The Presentation of New Zealand's Report under the International Covenant on Civil and Political Rights, Ministry of Foreign Affairs Information Bulletin No 6* (Wellington, 1984)

Ministry of Foreign Affairs, *International Covenant on Civil and Political Rights: New Zealand Treaty Series 1978, No. 19* (Wellington, 1989)

Law Commission, *Costs in Criminal Cases* (NZLC MP12, 1997)

Law Commission, *Criminal Prosecution* (NZLC PP28, 1997)

Law Commission, *Crown Liability and Judicial Immunity: A Response to Baigent's case and Harvey v Derrick* (NZLC R37, 1997)

Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content*, (Report 6, rev ed, Wellington, 1991)

Report of the Committee on Costs in Criminal Cases (Wellington, 1966)

Report of the Royal Commission to Inquire into the circumstances of the Convictions of

Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe (Government Printer, Wellington, 1980)

United Kingdom

Home Office, *Compensation for Wrongful Conviction: A General Guide* (London, 1997)

Justice, British section of the International Commission of Jurists, *Compensation for Wrongful Conviction* (London, 1982)

HMSO, *Report of the Royal Commission on Criminal Justice* (London, 1993)

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