

*Report 49*

# Compensating the Wrongly Convicted

*September 1998*  
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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30 September 1998

Dear Minister

I am pleased to submit to you Report 49 of the Law Commission,  
*Compensating the Wrongly Convicted*.

Yours sincerely

*The Hon Justice Baragwanath*  
President

*The Right Hon Douglas Graham MP*  
Minister of Justice  
Parliament Buildings  
Wellington



# Preface

IN DECEMBER 1997 THE LAW COMMISSION was asked to advise whether compensation should be paid to those who have been wrongly prosecuted or convicted of an offence; and if so, to recommend a systematic basis upon which compensation may be determined and paid. The current practice in New Zealand and many other countries of only making *ex gratia* payments where a pardon has been granted or a conviction quashed has been widely criticised.

In April 1998 we published a discussion paper, *Compensation for Wrongful Conviction or Prosecution* (NZLC PP31). That paper considered four possible compensation schemes, including the status quo, and posed a number of specific questions for discussion. We are grateful for the submissions by individuals, organisations, law societies and others. These have assisted us greatly in reaching the conclusions in this report. As some submissions from individuals requested confidentiality, we have not acknowledged in an appendix those who made submissions. We do, however, record our particular thanks to Dr Rodney Harrison QC, the New Zealand Law Society and the Wellington and Otago District Law Societies, whose contributions have significantly influenced our thinking.

Chapter 1 contains a brief introduction to the criminal justice system, its emphasis on individual liberty and its basic purposes. We then survey the types of misfortune that a person wrongly accused, imprisoned or convicted 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, including the interim criteria for *ex gratia* payments which Cabinet agreed to in November 1997. We also consider relevant provisions in the International Covenant on Civil and Political Rights and compensation regimes in overseas jurisdictions.

In chapter 3 we propose a new scheme for compensating those who have been wrongly convicted, which would replace the current interim criteria. Our main focus is on the key issue of who should be eligible for compensation. In chapter 4 we address the remaining issues concerning a compensation scheme:

- Should there be a requirement to prove innocence?
- Who decides issues of eligibility and quantum?

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

The consultation process has confirmed what we had identified as the advantages and disadvantages of the current interim criteria and the other options proposed in our discussion paper. There are also merits and demerits in the scheme we recommend in this report. The scheme seeks to combine the best features of several of the options, and draws heavily on the submissions received.

Our report focuses on the principles which we have identified as being relevant. We have not commissioned a study of the likely costs of our proposals; consideration of how the principles are to be applied, and the appraisal of these against other priorities, are properly the function of the government. We hope that our recommendations add consistent principle, clarity and certainty to this area of the law.

This report is also available at the Commission's internet site: [www.lawcom.govt.nz](http://www.lawcom.govt.nz)

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# Executive summary

## *The importance of individual liberty*

- E1 A MAJOR VALUE OF NEW ZEALAND'S LEGAL SYSTEM is the protection of individual liberty, especially from the undue exercise of state power. The criminal justice system reflects this concern for individual liberty in common law and statutory rules which limit the extent to which citizens can be deprived of their liberty before they are brought to trial; and in rules which aim to prevent the innocent being convicted and imprisoned by protecting the integrity of the trial itself. The burden and standard of proof – which require the prosecution to prove the defendant's guilt beyond reasonable doubt – are the law's most important safeguards against citizens being wrongly convicted.
- E2 Occasionally, however, these safeguards fail, with the result that innocent people are prosecuted for or convicted of offences. They and their families may suffer serious pecuniary and non-pecuniary losses as a result. Given the importance the law attaches to individual liberty, it may seem surprising that there is no established system for compensating these people.

## *Compensation and the reasons for it*

- E3 Under interim criteria adopted by the Cabinet in November 1997, eligibility for compensation, paid on an ex gratia basis (ie, with no legal obligation), is currently confined to those who:
- receive a free pardon under s 407 of the Crimes Act 1961; or
  - following a referral by the Governor-General under s 406 of the Crimes Act, are acquitted on a retrial or have the conviction quashed without an order for retrial.
- The criteria also require claimants to prove:
- that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice; and
  - that they are innocent on the balance of probabilities.
- E4 The interim criteria do not cover innocent people who have been:
- arrested, detained in custody, and released without charge;
  - held in custody and charged, only for the charges to be dropped before their first court appearance;

- denied bail and remanded in custody, but acquitted at trial; or
- convicted and imprisoned, but acquitted on appeal.

E5 There are a number of arguments as to why the state should compensate those who have been wrongly convicted:

- As a general principle the state should compensate for losses caused as a result of the application of its coercive power.
- If the criminal justice system is truly concerned with liberty, it must be concerned to make good losses incurred when a person has been wrongly deprived of that liberty.
- Payment of compensation can vindicate the innocent defendant, help that person readjust to society and plan for the future, and minimise stigmatisation.
- Compensation is a remedy for the state's failure to fulfil its side of the "social contract" by breaching the right of citizens not to be convicted of crimes of which they are innocent.
- Compensation shows that the criminal justice system takes its mistakes seriously, and thereby enhances public confidence in the system.

### *A wider compensation scheme*

E6 These arguments, considered in isolation, would suggest widening eligibility far beyond the fairly narrow class of people currently eligible under the interim criteria. Many of the losses for which someone pardoned of an offence might be compensated under the interim criteria may also be suffered by someone held in custody for a long time before being acquitted at trial or on appeal. Indeed the innocent person who is detained briefly in custody and released without charge may share the same sense of injustice or outrage as someone pardoned of an offence.

E7 It is, however, necessary to consider the consequences of a wider scheme:

- It is impossible to limit applications for relief to those who are in fact innocent; deserving cases must be distinguished from the undeserving.
- Any widening of the scheme entails diverting public resources to operate it, as well as paying the amounts of compensation awarded. Operational costs must be considered as an element of the decision. In particular, it is undesirable to convert the present efficient system of establishing guilt into a protracted double examination – first of guilt and then of innocence.

E8 It is desirable to approach as close as practicable the unattainable ideals – of compensating everyone who is innocent, excluding from

compensation all who are not, and avoiding both waste of public resources and the burden of delay in administering justice. A practical solution must entail balance among these ideals.

- E9 We have concluded that the scheme for compensation should be limited to those exceptional cases where:
- (i) it is clearly established that the claimant is innocent;
  - (ii) the criminal justice system has failed to discharge the claimant at or before verdict; and
  - (iii) the conviction has resulted in imprisonment.

- E10 We recommend that the government adopt, for an initial trial period of 3 years, a new compensation scheme. This would involve a right to an assessment of compensation for those who have served all or part of a sentence of imprisonment, and are subsequently acquitted on appeal (including a reference under s 406 of the Crimes Act 1961), or have their conviction quashed without an order for retrial, or are pardoned.<sup>†</sup> An independent tribunal – the Compensation Tribunal – would also need to be satisfied beyond reasonable doubt of the person’s innocence. If satisfied, the Tribunal would proceed to assess quantum, considering, among other matters, the conduct of claimant leading to prosecution and conviction, and the nature and extent of losses resulting from the conviction and sentence. The Minister of Justice would retain the authority to exercise the Crown’s prerogative power to consider the case of any other person falling outside the scope of the scheme.

- E11 The scheme could be established in the exercise of the prerogative. Alternatively, it could be given effect in a new section of the Crimes Act 1961 (*section 407A*) as follows:

**407A Compensation**

- (1) A person who
- (a) has been convicted of a criminal offence and acquitted on appeal (including a reference under section 406 of this Act) or pardoned of that offence or had the conviction quashed without an order for retrial; and
  - (b) has served all or part of a term of imprisonment imposed in respect of that offence
- may apply to the Compensation Tribunal for an assessment of compensation for losses resulting from being convicted and imprisoned in respect of that offence.

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<sup>†</sup> In which case the person pardoned is deemed never to have committed the offence: s 407 (see para 62).

- (2) The Compensation Tribunal shall assess compensation only if satisfied beyond reasonable doubt that the person was innocent of the offence charged.
- (3) In assessing compensation under this section the Compensation Tribunal shall decide on a sum which fairly compensates for pecuniary and non-pecuniary losses suffered as a result of the person being convicted and imprisoned in respect of the offence, and shall have regard to the following factors:
  - (a) the conduct of the person leading to prosecution and conviction;
  - (b) whether the prosecution acted in good faith in bringing and continuing the case;
  - (c) whether the investigation was conducted in a reasonable and proper manner;
  - (d) the seriousness of the offence alleged;
  - (e) the severity of the sentence passed; and
  - (f) the nature and extent of the loss resulting from the conviction and sentence.
- (4) Nothing in this section affects the Crown's prerogative of mercy.
- (5) In this section the losses are in respect only of the period following conviction and are defined as follows:
 

**non-pecuniary losses** means

  - (a) loss of liberty;
  - (b) loss of reputation (taking into account the effect of any apology to the person by the Crown);
  - (c) loss or interruption of family or other personal relationships; and
  - (d) mental or emotional harm:

**pecuniary losses** means

  - (a) loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;
  - (b) loss of future earning abilities;
  - (c) loss of property or other consequential financial losses resulting from detention or imprisonment; and
  - (d) costs incurred by or on behalf of the person in obtaining a pardon or acquittal.

### *A requirement to prove innocence?*

E12 Under our proposed scheme a claimant would be required to satisfy the Compensation Tribunal beyond reasonable doubt that he or she was innocent. This requirement is more onerous than the current requirement in the interim criteria, which is that a claimant prove innocence on the balance of probabilities including cases where the successful appellant has in fact committed the offence.

There, however, an undefined miscarriage of justice must also be proved conclusively and those discharged on initial appeal are ineligible. We accept that raising the standard will indeed place an onerous requirement on claimants. We see this as required to deter application for what would entail virtual retrial in all or most cases where the appellant has been discharged on appeal. Discharges occur not only where the appellate court considers the appellant to be innocent, but where there has been some procedural deficiency in the case and it is not appropriate either to dismiss the appeal because the verdict was inevitable (by applying the proviso to s 385 of the Crimes Act 1961) or to order a retrial. A retrial may be declined because a witness is no longer available or the sentence has been substantially served, even if the court does not doubt the guilt of the appellant. On the other side there will remain a class of innocent persons who are discharged at or before verdict, or who cannot meet the onus and standard of proof. The cost of that deficiency in the system must be accepted as the price for avoiding destabilisation of the administration of justice by routinely diverting scarce police and other investigative resources to meritless cases.

### *A new Compensation Tribunal*

- E13 A Compensation Tribunal could be created by statute. This would enhance its independence and accountability to Parliament, and protect it from the possibility, however remote, of interference from the government of the day. Alternatively, the Tribunal could be created under the prerogative. The Tribunal would have three members and include at least one retired judge or a barrister or solicitor of appropriate experience, and one lay person. A cheaper but still effective alternative would be for the Tribunal to consist of a single member who would be a retired judge or a barrister or solicitor of appropriate experience. In either case the Tribunal's membership should be appointed by the Minister of Justice. Administrative and secretarial services to the Tribunal could be provided as necessary by the Department for Courts. The Tribunal would be required to provide an annual report to Parliament.

### *Losses covered by the scheme*

- E14 The provisions we have drafted cover (and define) both pecuniary and non-pecuniary losses in relation to events following conviction and sentence of imprisonment. Prior losses may justify an award of costs to the claimant under s 8 of the Costs in Criminal Cases Act

1967. Losses which may be compensated are not confined to those incurred by the person who has been wrongly convicted. They include 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. The claimant's family may also have suffered non-pecuniary losses such as emotional harm, stigmatisation and loss of reputation as a result of the claimant's conviction. However, we consider non-pecuniary losses of the claimant's family to be too remote to be covered by a compensation scheme. Claims by an estate should be limited to pecuniary losses only.

- E15 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: the claimant should not be compensated twice for the same loss. That principle also requires that the Tribunal take into account any award under the Accident Rehabilitation and Compensation Insurance Act 1992 arising out of the conduct of police or other prosecuting authorities. A claimant should be entitled to reject an award by the Tribunal, but be required to sign a waiver of all rights and remedies arising out of the prosecution or conviction if the award is accepted.

### *Factors influencing quantum*

- E16 Factors which the Tribunal should take into account are specified in the provisions we propose.

### *Time limits and application procedure*

- E17 Any application for compensation should 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. Legal aid would be available to a claimant whose means and the merits of whose case justify an award. Claims by an estate should be made within 6 months of the claimant's death. This would both ensure that old cases do not clog up the scheme and discourage an estate from delaying the exercise of its rights.

### *The Tribunal's powers and procedures*

- E18 The Tribunal should have similar powers to the Ombudsmen and the Police Complaints Authority to gather information, summon witnesses and conduct hearings. It should have the power to determine its own procedure. The Tribunal would be expected to observe

the laws of natural justice, and should give the parties reasons for its award. The decision on the amount of an award and the factors underlying it should be published.

### *Appeal and review*

E19 We do not favour a right of appeal from compensation decisions. The Tribunal's assessment of compensation should be open to judicial review. A decision of the Minister in respect of a person falling outside the scheme would potentially be susceptible to review, within the limits of the principles applied by the courts in relation to exercise of the prerogative.

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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 freedom of a law-abiding citizen to act without 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.<sup>1</sup>
- 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, 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. Alternatively, 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 the following: loss of livelihood and future employment prospects; loss of home and other personal property; break-up of family, the loss of children and of other personal relationships; and damage to reputation.
- 4 These are severe consequences. Occasionally they are suffered by citizens who are innocent of the offence for which they have been

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<sup>1</sup> We exclude from consideration emergency conditions and measures such as military conscription or alien internment in wartime.

prosecuted or convicted. What should the justice system do in these cases? This is the central concern of this report.

- 5 This report uses the term “wrongly convicted” to refer to the conviction of a citizen who is innocent. That may result from deception, but also from simple error on the part of the police, Crown witnesses, defence witnesses, counsel, judge or jury. We emphasise that our definitions of wrongly convicted and prosecuted 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 misidentification of the defendant). We have departed from the adjective “wrongful”, which we used in our discussion paper, because it may imply fault in circumstances where this is not warranted.<sup>2</sup>

### *The purposes of the criminal justice system*

- 6 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 *Criminal Prosecution* (NZLC PP28 1997), the Law Commission set out what we consider 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 20)

- 7 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.<sup>3</sup>

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<sup>2</sup> American studies of convictions of those who are innocent have shown the major causes of such convictions to be eyewitness identifications (52.3 percent), followed by perjury by witnesses (10.2 percent), negligence by criminal justice officials (9.3 percent) and pure error (7.8 percent) (Givelber 1997 549).

<sup>3</sup> Following the Abolition of the Death Penalty Act 1989 life imprisonment is the maximum sentence which can be imposed in New Zealand.

## *The importance of individual liberty*

- 8 A major value 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).
- 9 The concern of the criminal justice system for individual liberty is reflected, first, in common law and statutory rules which limit the extent to which citizens can be deprived of their liberty before they are brought to trial, and secondly, in rules which aim to prevent the innocent being convicted and imprisoned by protecting the integrity of the trial itself. Section 22 of the New Zealand Bill of Rights Act 1990 (NZBR Act) provides that everyone has the right not to be arbitrarily arrested or detained. Sections 23 and 24 of the NZBR Act state the rights of persons arrested or detained and of persons charged. These protections were for the most part established at common law. Under s 23 everyone arrested or detained under any enactment:
- (a) Shall be informed at the time of the arrest or detention of the reason for it; and
  - (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
  - (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful; . . .
- 10 Section 23(2) states that a person arrested for an offence has the right to be charged promptly or to be released, while s 23(3) states that if not released the person shall be brought as soon as possible before a court or competent tribunal. Under s 24(b) everyone who is charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention. The policy of each provision is that deprivation of a person’s liberty must be no greater or longer than necessary.
- 11 Then there are the rules which protect the integrity of criminal trials. Because of the seriousness of being convicted and possibly deprived of liberty as a result, both common law and statute have developed powerful safeguards against citizens being wrongly convicted. 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 conviction of the innocent are found in rules of evidence that exclude relevant information that might nevertheless prejudice the jury's proper consideration of the case.

12 The NZBR Act is also concerned with the trial process. Section 25 of the Act states that everyone charged with an offence has certain minimum rights which, again, derive from the common law:

- (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.

13 While specifically expressed as the rights of persons charged, these minimum rights also protect the wider societal interest in ensuring both the integrity of the criminal process and that the innocent are not wrongly convicted.<sup>4</sup> Other crucial safeguards against citizens being wrongly convicted or prosecuted are the discipline and integrity of the police, and their freedom from political interference or public pressure.

### *Conviction and acquittal, and innocence*

14 While conviction amounts to a final determination of the case against the defendant, it also marks the point from which a number of continuing consequences, described in para 3, begin or intensify.

15 The jurisdiction of the Court of Appeal to set aside a verdict is limited by the Crimes Act 1961 s 385:

- (1) On any appeal against conviction the Court of Appeal shall allow the appeal if it is of the opinion:

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<sup>4</sup> 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.

- (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:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

- (2) Subject to the special provisions of this Part of this Act, the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and in its discretion direct a judgment and verdict of acquittal to be entered, or direct a new trial, or make such other order as justice requires.
- 16 The grounds upon which the High Court, acting in its criminal appellate jurisdiction, may allow an appeal are not so limited: Summary Proceedings Act 1957 s 121(2). In practice, however, the High Court is likely to adopt a similar approach to appeals to that of the Court of Appeal (see para 90).
- 17 Unless set aside on appeal 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. This makes acquittal equivalent, in practical effect, to a finding of innocence, as the Supreme Court of Canada noted in *Grdic v R* (1985) 19 DLR (4th) 385, 389–390:
- . . . 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.
- 18 While acquitted defendants may apply for costs under the Costs in Criminal Cases Act 1967, an acquittal cannot in our view be seen to have been “second class” if costs are not awarded. It by no means follows 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.

- 19 In considering the issue of compensation it is essential not to overlook the distinction between the fact of innocence and the procedures required to establish that fact. Any procedure for establishing innocence or guilt following acquittal or discharge, in order to secure compensation, will be an onerous one, imposing emotional pressures on the participants and costing them time and resources. A drawback of imposing a requirement to prove innocence, therefore, is that some innocent claimants will still be unable to meet it. On the other hand, if the requirements on a claimant are too lenient, it will encourage claims 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 would 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.

## WHO IS WRONGLY CONVICTED OR PROSECUTED?

- 20 Given the importance the law places on individual liberty, it may seem surprising that there is no established system for compensating those who are wrongly convicted or prosecuted. Such people may have been:
- arrested, detained in custody and released without charge;
  - held in custody and charged, only for the charges to be 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 later pardoned,<sup>5</sup> or had the conviction quashed without an order for retrial or been acquitted on a retrial following a referral by the Governor-General under s 406 of the Crimes Act 1961.<sup>6</sup>
- 21 It is impossible to state accurately how many people fall within each of these categories every year in New Zealand. Figures

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<sup>5</sup> Section 407 of the Crimes Act deems the offence never to have been committed where a free pardon is granted.

<sup>6</sup> 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 59).

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 percent resulted in conviction, 21.86 percent were diverted or otherwise withdrawn,<sup>7</sup> and 5.94 percent 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 percent. It is unknown how many people charged with offences in these cases were denied bail and remanded in custody before trial.

- 22 In 1996 approximately 17 percent of criminal appeals (in both the High Court and the Court of Appeal) were successful (Crown Law Office figures). In 1997, the Court of Appeal allowed 24 out of 105 appeals against conviction and sentence (including five cases in which only the appeal against sentence was allowed), and 11 out of 94 appeals against conviction only (*Report of the New Zealand Judiciary 1997* 20). 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 percent of cases an innocent person is convicted (Huff et al 1996 544).
- 23 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 18 applications for the exercise of the prerogative of mercy: no pardons have been granted but in four cases referrals were made to the Court of Appeal under s 406 of the Crimes Act. At the time of writing four further applications were under consideration.

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<sup>7</sup> 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 percent 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 in the text results in a total of only 99.93 percent, but they provide a sufficiently accurate picture of the “success rates” of prosecutions.)

## *How should the state respond?*

- 24 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.<sup>8</sup> Detention or imprisonment in the other circumstances listed in para 20, 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 a long time before being acquitted at trial or on appeal. An innocent person who is detained briefly in custody and released without charge may share the same sense of injustice or outrage as someone pardoned of an offence.
- 25 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 66). We noted in that report 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 (NZLC R37 para 180).
- 26 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 77), compensate those who have been detained in custody pending a trial at which they are 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 NZBR Act arises only if the detention was unlawful, and not simply because the person was acquitted.

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<sup>8</sup> The Crown makes so-called "ex gratia payments" in certain instances, and on terms of confidentiality, to those who have been wrongly detained (eg, someone arrested and held in custody overnight for breach of an order to pay fines imposed by the court, when the fines have in fact been paid). However, such payments are in settlement of potential liability in tort or for breach of the New Zealand Bill of Rights Act 1990; and so though expressed to be made without any admission of liability, they cannot be properly characterised as *ex gratia* payments. There are no guidelines concerning such payments analogous to the interim criteria concerning payments to the wrongly convicted (see para 64).



## ARGUMENTS FOR COMPENSATION

- 27 There are several arguments for compensating those who have been wrongly convicted or prosecuted. The first starts with the general principle that the state should compensate for losses caused as a result of the application of its coercive power. It already does this in other circumstances: for example, when land is 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.
- 28 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 incompetent counsel, is at risk of being wrongly convicted.<sup>9</sup> Judges may not override the verdict of a jury save in limited circumstances,<sup>10</sup> 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.
- 29 A second, overlapping justification for awarding compensation is that if the criminal justice system is truly concerned with liberty, it must be concerned to make good losses incurred when a person has been wrongly deprived of that liberty.
- 30 A third 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

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<sup>9</sup> Kirby, “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”.

<sup>10</sup> 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 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 (see para 15); 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.

system and the payment of compensation can have ameliorative effects. It can minimise stigmatisation and contribute to a feeling of vindication for the innocent defendant and can help that person readjust to society and plan for the future (Kaiser 1989 102).

- 31 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). Payment of compensation to those wrongly convicted or prosecuted may be justified as a remedy for the state's failure to fulfil its side of the social contract.
- 32 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. If the state must pay compensation, it has an incentive to ensure that mistakes are kept to a minimum. These factors may then enhance public confidence in the system (Kaiser 1989 102–103).

## ARGUMENTS AGAINST COMPENSATION

- 33 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 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.
- 34 A second argument is that while errors are inevitable and perhaps 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 an innocent person whose 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.<sup>11</sup>

- 35 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, and remedies in tort and under the NZBR Act where there has been serious misconduct or infringement of the defendant's rights.
- 36 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.<sup>12</sup> It could restrict the laying of charges to open and shut cases, dissuade prosecuting authorities from pursuing their work vigorously and without fear of the consequences, and add extraneous considerations to decisions on prosecutions. This would prejudice the public interest in the administration of justice. 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).
- 37 A fifth argument looks to the recourse and other costs of a compensation scheme and the practical problems in predicting the extent of the state's liability under it. Questions may also be asked as to how far compensation should extend for one group of participants in the criminal justice system while others, such as victims, jurors and witnesses in criminal trials, are not adequately compensated for the losses they suffer (see *Compensation for Wrongful Conviction or Prosecution* (NZLC PP31 1998), para 36).

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<sup>11</sup> Equally, 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.

<sup>12</sup> Prosecution Guidelines (9 March 1992), Crown Law Office, Wellington, reproduced in *Criminal Prosecution* (NZLC PP28 1997), appendix B.

## THE DECISION TO BE MADE

- 38 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.
- 39 Ultimately a policy decision must be made: Should certain hardships arising from the justice system be borne by individuals or by society? If by society, then in which circumstances and to what extent?<sup>13</sup>
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<sup>13</sup> See [1985] *Reform* 108.

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## 2

# The law in New Zealand and overseas

### NEW ZEALAND

#### *Existing remedies for those acquitted of criminal charges*

- 40 **T**HE BEST MEANS OF VINDICATING an innocent defendant is 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.
- 41 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 High Court, or a pardon has been granted.

#### *The Costs in Criminal Cases Act 1967*

- 42 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. The 1966 *Report of the Committee on Costs in Criminal Cases* stated:

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 wrongly 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)

- 43 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”.
- 44 Under s 5 of the Costs in Criminal Cases Act a defendant may be awarded costs when:
- acquitted of an offence; or
  - the information charging the defendant with an offence is dismissed or withdrawn, whether upon the merits or otherwise; or
  - discharged under s 167 of the Summary Proceedings Act.<sup>14</sup>
- 45 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;

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<sup>14</sup> Note that the Summary Proceedings Act does not apply in the exceptional case of the quashing of a conviction without an order for retrial, or if a pardon has been granted.

- 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.
- 46 The Costs in Criminal Cases Act provides a very limited remedy for those who claim under s 5. Under s 2 of that 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). The Act does not cover other losses which the defendant may suffer as a result of being prosecuted, detained or imprisoned, or convicted.
- 47 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 costs, and found that awards were made in 75 percent of those cases.<sup>15</sup> Moreover, costs are awarded according to a scale; our research shows that in 48 cases from 1991–1996 defendants were awarded on average about 19 percent of their actual costs. The scale was last updated in 1988 and has been criticised by courts and commentators as both unrealistic and miserly.<sup>16</sup>

### *Tort remedies*

- 48 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 wrongly convicted or prosecuted.

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<sup>15</sup> *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.

<sup>16</sup> *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.

- 49 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.
- 50 The position 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 was dismissed as the court considered that the claim needed to be brought under the head of malicious prosecution: *Silcott v Commissioner of Police of the Metropolis*, Times LR 9 July 1996.<sup>17</sup> 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* [1998] 1 NZLR 454 (CA).
- 51 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 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 bar an action against a judge by a person who has been wrongly convicted (see generally *Crown Liability and Judicial*

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<sup>17</sup> The decision is unlikely to survive *Gibbs v Rea* [1998] 3 WLR 72 (PC) in which Gault J delivered the judgment of the majority.



*Immunity: A Response to Baigent's case and Harvey v Derrick* (NZLC R37 1997), paras 134–153).

- 52 The limitations upon 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, knowing 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 incorrect identification of the defendant (see footnote 2). 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 wrongly 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.
- 53 Several textbooks note that claims based on malicious prosecution and misfeasance in public office are seldom brought and are even less likely to succeed.<sup>18</sup> 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*

- 54 The New Zealand Bill of Rights Act 1990 (NZBR Act) sets out the following rights which may be invoked by those who have been wrongly detained, imprisoned or convicted:
- the right not to be arbitrarily arrested or detained (s 22),
  - 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 which are particularly relevant to this discussion are s 22, and 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)).

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<sup>18</sup> See, for example, Todd et al 1997 981; and Fleming 1992 609.

- 55 The significance of the omission from the NZBR Act of any equivalent to Article 14(6) of the International Covenant on Civil and Political Rights (see paras 66–71), 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.<sup>19</sup> In the later case of *Upton v Green* (1995) 2 HRNZ 305, a plaintiff 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).
- 56 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 Articles 14(6) and 9(5) of the International Covenant on Civil and Political Rights. 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)

- 57 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 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)

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<sup>19</sup> See, for example, Allan (1994) 1 Bill of Rights Bulletin 2, and Smillie (1995) 111 LQR 209. The Law Commission supports the *Baigent* remedy (see *Crown Liability and Judicial Immunity*).

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 152–156.

- 58 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*

- 59 The prerogative of mercy includes, but is wider than, the powers conferred by 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, to:

- refer the question of the conviction or sentence to the Court of Appeal or High Court; or
- refer any point arising in the case to the Court of Appeal for its opinion.

- 60 The Crimes Act is silent as to when the Governor-General may exercise this power. Nor has the government issued any guidelines or formal policy statement concerning the exercise of the power.<sup>20</sup> In practice 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 the conviction or sentence may apply to the Governor-General to exercise the prerogative 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).

- 61 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. Where the Court of Appeal considers new

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<sup>20</sup> Cabinet's interim criteria relating to the making of ex gratia payments, adopted in November 1997, do not cover the earlier stage of 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.

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 conviction cannot stand: *R v Fryer* [1981] 1 NZLR 748 (CA); *R v Dougherty* [1996] 3 NZLR 257 (CA). In such cases it will normally order a retrial: *Re Farmer* [1991] 3 NZLR 450 (CA).

62 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.<sup>21</sup> 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, and remission of sentence, which reduces a sentence without changing its character (eg, on compassionate grounds) (see Smith 1983 417–426).

63 If compensation is to be paid to those who have been wrongly convicted, it is critical that a convicted person’s application to have a case reopened be treated impartially and transparently. 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 75). Underlying this shift is the notion that matters of such gravity should not be left to individual discretion. The discretion which remains in New Zealand is not, however, unfettered. The Court of Appeal in *Burt v Governor-General* [1992] 3 NZLR 672 accepted that the prerogative of mercy may be subject to judicial review, a decision followed by the English Divisional Court in *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349.<sup>22</sup>

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<sup>21</sup> 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 (1998) 114 LQR 63, 73).

<sup>22</sup> In particular the court held that failure by the Home Secretary to consider a form of pardon appropriate to the facts of the case could be reviewed, 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.

## *Ex gratia payments*

- 64 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, on the advice of the Minister of Justice, who in turn relies on officials within the Ministry of Justice to consider the application. Under Cabinet's interim criteria 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.
- 65 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 criteria reflects that of Article 14(6) of the International Covenant on Civil and Political Rights.

## THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

- 66 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.

67 Article 14(6) is discussed further in the appendix to this paper. New Zealand ratified the Covenant in 1978 but 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)

68 We have been unable to locate any contemporary statement by the government as to why it made a reservation in 1978. New Zealand's report to the United Nations Human Rights Committee in 1983, however, 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)

69 The Human Rights Committee has stated that ex gratia payments do not meet the requirement that a person be compensated "according to law" (Stavros 1993 300). There is a sound argument 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).

70 Having 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, however, comment on reservations to the Covenant. The Committee asked the delegation presenting New Zealand's second periodic report to the Committee in 1989 whether it was intended that the reservation in respect of Article 14(6) be maintained (Ministry of External Relations and Trade, 1990, 40). The Committee is therefore able to impose a form of moral pressure to enact a statutory compensation scheme.

71 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 conclusions regarding the scope and other features of a compensation scheme without particular reliance on Article 14(6).

## THE LAW OVERSEAS

### *Australia*

- 72 In Australia, state and Commonwealth governments pay compensation on an ex gratia basis to those who have been wrongly prosecuted, imprisoned or convicted. There is no automatic right to compensation where the subsequent discovery of new facts shows a conviction to have been in error. This state of affairs has been criticised over the past two decades, particularly in the light of such cases as *Condren and Rendell*.<sup>23</sup> 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.

### *England*

- 73 In England, s 133 of the Criminal Justice Act 1988 partially replaced the practice of making ex gratia payments with a statutory scheme.<sup>24</sup> 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)<sup>25</sup>

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.

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<sup>23</sup> 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 shelved.

<sup>24</sup> The *Report of the Human Rights Committee* (A/40/40) in 1985 regarding the United Kingdom's ex gratia compensation regime 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.

<sup>25</sup> 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.

- 74 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.
- 75 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.<sup>26</sup> The Royal 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 1961 in New Zealand.

### *Canada*

- 76 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 Wrongly Convicted and Imprisoned Persons* were 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

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<sup>26</sup> By contrast, in New Zealand 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 the Rt Hon Douglas Graham concurrently with that of Justice.



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*

- 77 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 (the "applicant") shall be compensated by the state (Article 1). The state shall also compensate 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.
- 78 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 \$NZ9.30).

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### 3

## The scope of a new compensation scheme

- 79 CHAPTER 1 HIGHLIGHTED the advantages and disadvantages of state compensation for the wrongly convicted. The response to our discussion paper confirmed our preliminary conclusion 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.
- 80 It is necessary to consider the consequences of a wider scheme:
- It is impossible to limit applications for relief to those who are in fact innocent; deserving cases must be distinguished from the undeserving.
  - Any widening of the scheme entails diverting public resources to operate it, as well as paying the amounts of compensation awarded. Operational costs must be considered as an element of the decision. In particular, it is undesirable to convert the present efficient system of establishing guilt into a protracted double examination – first of guilt and then of innocence.
- 81 It is desirable to approach as close as practicable the unattainable ideals – of compensating everyone who is innocent, excluding from compensation all who are not, and avoiding both waste of public resources and the burden of delay in administering justice. A practical solution must entail balance among these ideals.
- 82 We have concluded that the scheme for compensation should be limited to those exceptional cases where:
- (i) it is clearly established that the claimant is innocent;
  - (ii) the criminal justice system has failed to discharge the claimant on or before verdict; and
  - (iii) the conviction has resulted in imprisonment.

83 We recommend that the government adopt, for an initial trial period of 3 years, a new compensation scheme. This would involve a right to an assessment of compensation for those who have served all or part of a sentence of imprisonment, and are subsequently acquitted on appeal (including a reference under s 406 of the Crimes Act 1961), or have their conviction quashed without an order for retrial, or are pardoned. An independent tribunal – the Compensation Tribunal – would also need to be satisfied beyond reasonable doubt of the person’s innocence. If satisfied, the Tribunal would proceed to assess quantum, considering, among other matters, the conduct of the claimant leading to prosecution and conviction, and the nature and extent of losses resulting from the conviction and sentence. The Minister of Justice would retain the authority to exercise the Crown’s prerogative power to consider the case of any other person falling outside the scope of the scheme.

*A right to have compensation assessed*

84 The scheme confers a right to have compensation assessed. This is a significant departure from the current procedure of application to the Minister of Justice for the exercise of a discretionary power to grant compensation pursuant to the Cabinet’s interim criteria. A right to have compensation assessed signifies that the state takes conviction of the innocent seriously. The very facts of conviction and imprisonment followed by acquittal on appeal, quashing of the conviction with no order for retrial, or pardon, shows that something has gone wrong. These facts, coupled with clear proof of innocence, make the case for compensation to be assessed. By contrast, under the interim criteria compensation is currently paid at the state’s discretion and without any admission of liability or fault.

85 A right to have compensation assessed introduces greater certainty to this area of the law. The eligibility criteria can be stated clearly and succinctly in a statute, or in guidelines if the scheme is established under the prerogative. To repeat, a claimant would fall within them simply upon being acquitted on appeal, having the conviction quashed with no order for retrial, or being pardoned – and in each case having served all or part of a custodial sentence. The claimant would also need to satisfy the Tribunal beyond reasonable doubt of his or her innocence.

86 Those with a right to have compensation assessed would have already been through the filtering process of an appellate court

hearing, and this is an important factor in our decision. Different statutory provisions govern appeals from the High Court to the Court of Appeal and from the District Court to the High Court. Under s 385(1) of the Crimes Act to allow an appeal the Court of Appeal must find:

- (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;

...

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

87 The proviso means that even if the grounds of appeal are satisfied, if there was no substantial miscarriage of justice the court may dismiss the appeal. If the Court of Appeal accepts that the grounds of appeal are established but still has doubts about acquitting the defendant it is likely to order a retrial under s 385(2) of the Crimes Act.

88 We emphasise that it would only be where the defendant is acquitted *by the Court of Appeal, or the High Court on appeal* that the defendant would fall within the proposed statutory right to an assessment of compensation. If the Court of Appeal or High Court ordered a retrial at which the defendant was acquitted, the defendant would have no right to assessment. The appellate court has the choice of acquitting a defendant or ordering a new trial. As to when the Court of Appeal will direct acquittal rather than retrial, while the matter is within the court's discretion, the two main grounds are where the prosecution case is weak, and where the nature of the offence is trivial.<sup>27</sup> Those whose case is remitted to a

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<sup>27</sup> Garrow and Turkington discuss when weakness of the prosecution case is likely to be found and result in an acquittal:

An acquittal should be directed when an appeal is allowed on the ground that the verdict is unreasonable or cannot be supported: *Sunde* [1947] NZLR 141; or on the ground that the trial Judge has wrongly ruled that there is sufficient evidence to go to the jury. Similarly an acquittal will generally be directed where the evidence for the prosecution, apart from any evidence wrongly admitted, is weak: *Hargan* (1919) 27 CLR 13, and *Tighe and Maher* (1926) 26 NSW SR 94; and where a conviction is

lower court for a retrial are more likely to be guilty of the offence than those whom the appellate court has the confidence to acquit. The retrial must be treated as equivalent to an original trial: for the reasons stated in paras 94–98, we do not favour a right to have compensation assessed for those acquitted at first instance.

89 Determination of appeals from the District Court to the High Court is governed by s 121(2) of the Summary Proceedings Act which provides:

- (2) In the case of an appeal against conviction, the High Court may
  - (a) Confirm the conviction; or
  - (b) Set it aside; or
  - (c) Amend it and, if the Court thinks fit, quash the sentence imposed and either impose any sentence (whether more or less severe) that the convicting Court could have imposed on the conviction as so amended, or deal with the offender in any other way that the convicting Court could have dealt with him on the conviction as so amended.

90 The overall effect of this section is to give the High Court acting on appeal similar powers to the Court of Appeal in determining appeals against conviction or sentence. Despite the absence of a proviso, the High Court has wide powers to dispose of an appeal as it thinks fit. Under s 131(1) of the Summary Proceedings Act 1957 the High Court may remit the determination appealed against to the District Court with a direction that the information or complaint to which it relates be reheard.

91 These provisions make it unlikely that the High Court will acquit a defendant where a procedural irregularity has occurred but the evidence suggests that the defendant is guilty, unless there are particular reasons for refusing to order a retrial.

92 Under our proposed scheme a claimant would be required to satisfy the Compensation Tribunal beyond reasonable doubt that he or she was innocent. This requirement is more onerous than the current requirement in the interim criteria, which is that a claimant prove innocence on the balance of probabilities including cases

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improbable: *Blyth* [1947] NZLR 402. The probability of conviction should not be accorded undue weight. The belief that a conviction is improbable, in the sense that an acquittal is more likely than a conviction, is not always conclusive for there may be cases where it is in the interest of the public, the prosecutor and the appellant himself that the question of guilt or innocence should be determined finally, rather than that it be left in a state of uncertainty by reason of a defect in legal machinery: *Au Pui-kuen v Attorney-General of Hong Kong* [1979] 1 All ER 769, 773–774 per Lord Diplock; and see *Ng Yuk Kin* (1955) 39 Hong Kong LR 49, 60 per Gould ACJ. (1991 S 385.21 )

where the successful appellant has in fact committed the offence. There, however, an undefined miscarriage of justice must also be proved conclusively and those discharged on initial appeal are ineligible. We accept that raising the standard will indeed place an onerous requirement on claimants. We see this as required to deter application for what would entail virtual retrial in all or most cases where the appellant has been discharged on appeal. Discharges occur not only where the appellate court considers the appellant to be innocent, but where there has been some procedural deficiency in the case and it is not appropriate either to dismiss the appeal because the verdict was inevitable (by applying the proviso to s 385 of the Crimes Act 1961) or to order a retrial. A retrial may be declined because a witness is no longer available or the sentence has been substantially served, even if the court does not doubt the guilt of the appellant. On the other side there will remain a class of innocent persons who are discharged at or before verdict, or who cannot meet the onus and standard of proof. The cost of that deficiency in the system must be accepted as the price for avoiding destabilisation of the administration of justice by routinely diverting scarce police and other investigative resources to meritless cases.

- 93 There are many cases in which a person is acquitted of an offence not because of innocence but because the prosecution could not reach the required standard of proof. The verdict is of course simply “not guilty” – we do not know whether the court that acquitted on appeal thought that the defendant was in fact innocent. But once the issue is one of compensation, it is reasonable to require a claimant to show something more than that they were found not guilty: the criminal standard is set to protect people from being wrongly imprisoned, rather than provide the basis for civil remedies. When claiming compensation the burden of proof should be on the claimant, to discourage claims by those who are not innocent and merely seeking to take advantage of their acquittal to secure a windfall from the state.

### *Excluding the wrongly prosecuted*

- 94 Many of the arguments for widening compensation beyond those eligible under the interim criteria suggest not only that all those acquitted on appeal should be compensated; but that those acquitted at trial should be too. We have concluded that the latter should be treated differently from (and less favourably than) the former. Under our proposals the wrongly prosecuted could recover compensation only pursuant to an exercise of the prerogative. There are a number of reasons for this.

- 95 First, the right in s 22 of the New Zealand Bill of Rights Act 1990 not to be arbitrarily arrested or detained must, like other rights, be considered alongside s 5 of that Act. Section 5 states that “the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Protection of the public depends on the ability of the police to prosecute, and the court to deny bail: both can be characterised as reasonable limits on the s 22 right in terms of s 5. If acquittal or discharge occurs at or before verdict the system has functioned rather than failed. While the defendant would prefer never to have entered the system, some incidence of being wrongly prosecuted, and in some cases remanded in custody, may be seen as an inherent hardship which may result from the operation of the criminal justice system. Living in society has many benefits; some cost must be accepted – including subjection to bona fide investigation and in some cases trial. Partial compensation is available under the Costs in Criminal Cases Act 1967; but proceedings for total compensation in such cases would give rise to the diversion of resources that we wish to avoid (see para 92). If only the innocent required consideration, compensating them would be of little concern. The problem is of deciding who is innocent and of avoiding delay.
- 96 A second, related argument for drawing this distinction is that the police must prosecute to bring offenders to justice; and of course not all prosecutions will succeed. It is not feasible to require the police to have a watertight case in order to bring a prosecution. The wording used when a criminal charge is brought – “have just cause to suspect” – reflects the lesser standard required.<sup>28</sup> Were the wrongly prosecuted to fall within the scope of a compensation scheme, this might have a chilling effect on police and prosecution decisions, even if this could be partially countered by the consolidated fund rather than the police paying for any award.
- 97 A third argument is that because of the presumption of innocence, it is only on conviction that a defendant is truly stigmatised. The submissions we received commenting on the devastating effects of unsuccessful prosecutions for sex offences show that this argument cannot be taken too far. Nevertheless, while stigmatisation may exist on prosecution it increases with conviction. Moreover, conviction has continuing consequences in law, for example, it may prevent entry into other countries or the ability to serve on a jury.

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<sup>28</sup> Forms of information for summary and indictable offences, Summary Proceedings Act 1957, sched 2.

98 Finally, although our proposals distinguish sharply between those wrongly convicted and wrongly prosecuted, the *most serious* injustices arising out of the latter can and should still be compensated in the exercise of the prerogative.

### *A requirement of imprisonment*

99 We propose that compensation be limited to those who are imprisoned following conviction and then in relation only to events following conviction. While the Costs in Criminal Cases Act 1967 affords some redress in respect of events prior to conviction, we regard conviction as the point at which the defendant's status is radically changed. We regard it as a practical starting point for the compensation regime once its conditions are satisfied.

### *Eligibility criteria*

100 The scheme could be established in the exercise of the prerogative. Alternatively, its elements could be set out in a new section of the Crimes Act 1961 (*section 407A*) as follows:

#### **407A Compensation**

- (1) A person who
  - (a) has been convicted of a criminal offence and acquitted on appeal (including a reference under section 406 of this Act) or pardoned of that offence or had the conviction quashed without an order for retrial; and
  - (b) has served all or part of a term of imprisonment imposed in respect of that offencemay apply to the Compensation Tribunal for an assessment of compensation for losses resulting from being convicted and imprisoned in respect of that offence.
- (2) The Compensation Tribunal shall assess compensation only if satisfied beyond reasonable doubt that the person was innocent of the offence charged.
- (3) In assessing compensation under this section the Compensation Tribunal shall decide on a sum which fairly compensates for pecuniary and non-pecuniary losses suffered as a result of the person being convicted and imprisoned in respect of the offence, and shall have regard to the following factors:
  - (a) the conduct of the person leading to prosecution and conviction;
  - (b) whether the prosecution acted in good faith in bringing and continuing the case;
  - (c) whether the investigation was conducted in a reasonable and proper manner;
  - (d) the seriousness of the offence alleged;



- (e) the severity of the sentence passed; and
  - (f) the nature and extent of the loss resulting from the conviction and sentence.
- (4) Nothing in this section affects the Crown's prerogative of mercy.
- (5) In this section the losses are in respect only of the period following conviction and are defined as follows:
- non-pecuniary losses** means
- (a) loss of liberty;
  - (b) loss of reputation (taking into account the effect of any apology to the person by the Crown);
  - (c) loss or interruption of family or other personal relationships; and
  - (d) mental or emotional harm:
- pecuniary losses** means
- (a) loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;
  - (b) loss of future earning abilities;
  - (c) loss of property or other consequential financial losses resulting from detention or imprisonment; and
  - (d) costs incurred by or on behalf of the person in obtaining a pardon or acquittal.

### *The four options in our discussion paper*

- 101 Our conclusions as to the scope of a new compensation scheme have been influenced by the responses to the four options proposed in our discussion paper.
- 102 *The first option* we proposed was 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. An alternative is to employ another decision-maker.
- 103 We noted that this option has the advantages of being simple and *claimant-centred*, allowing the innocent to recover regardless of whether they were acquitted at first instance, on appeal, or finally vindicated through the granting of a pardon. Many submissions suggested that the likelihood that this option could see a significant increase in the number of claims is irrelevant: in principle the innocent should be compensated unless that course is impracticable. But this option would adversely affect the criminal process. Knowledge that a compensation order could result from any acquittal might influence decisions to prosecute, the level of charges, the entry of pleas, and the verdict of the jury. This option might convert the current definitive trial/appeal procedure into the first

stage of a double trial: the first of guilt and the second of innocence. Even so, a person who is innocent but who cannot prove that fact beyond reasonable doubt would not be compensated because in practice the task of proving innocence could be extremely onerous. We note that this option 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.

- 104 *The second option* was a narrower version of the first. Payment of compensation would be confined to *post-appeal claimants* who prove to the Minister of Justice their innocence beyond reasonable doubt. We defined 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 have 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.
- 105 The main advantages of this option, compared to the first, are that it would limit the number of claims by excluding those acquitted at trial or on appeal, and would avoid the risk of double trial. Under this option, however, the innocent person acquitted on or before appeal could recover only if the Minister exercised residual prerogative powers. As with the first option, a person who is innocent but who cannot prove that fact beyond reasonable doubt, or suffers another form of miscarriage, such as being convicted on false evidence, would not be compensated.
- 106 *The third option* was 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 into account the whole of the case, including an appraisal of the likelihood of innocence. Again, the prerogative right to award compensation in cases falling outside the option would remain.
- 107 We noted as an advantage of this option that it allows payment of compensation to a person who is innocent but who cannot prove that fact beyond reasonable doubt, or who has suffered another form of miscarriage (such as being convicted on false evidence). Moreover, the eligibility criteria are simple: only that a person meet our definition of post-appeal claimant, which is itself a strict enough requirement to limit the number of claims. However, this option has the disadvantage of uncertainty as to quantum, because

in all cases 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 other options. The integrity of an acquittal could be damaged if followed by a compensation award abated heavily because of probable guilt. Further, because this option would compensate only post-appeal claimants, those who were innocent and acquitted or discharged on or before appeal would be forced to rely on the prerogative.

- 108 *The fourth option* was to maintain Cabinet's interim criteria (see para 64 of this report).
- 109 The main advantages of this option are that it keeps the number of claims within manageable proportions, and that the absence of binding rules allows the Minister of Justice to adopt a flexible approach which recognises the circumstances of individual cases. On the other hand, 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, and that of doubtful innocence where it is refused. It does not compensate those acquitted or discharged on or before appeal notwithstanding that they may have incurred loss. Finally, it requires claimants to prove not only innocence on the balance of probabilities but also conclusively that a miscarriage of justice has occurred. This indeterminate concept may be regarded as a distraction from the key issues of innocence and the losses suffered by the claimant; miscarriage of justice is therefore better dealt with separately, as by appeal to a higher court or by a civil claim for damages.

### *Response to the four options*

- 110 The submissions on our discussion paper revealed no clear preference for any one of the four options, and several submissions favoured none. Some preferred the breadth of the first option, under which those acquitted at trial would be able to claim compensation if they could satisfy the Minister of Justice of their innocence. These submissions focused on the effects of being charged with serious offences, including stigmatisation, stress and financial losses caused by being remanded in custody or having to prepare a defence. The plight of those charged with sex offences in particular was brought to our attention. Many submissions were to the effect that compensation is required for those acquitted at trial because by that stage, the defendant had already suffered greatly and the fact of acquittal was cold comfort. Others went further and said that our focus should not be on compensating those who are wrongly prosecuted or convicted, but rather on improving the

prosecution process to prevent mistakes from occurring in the first place. The Law Commission's discussion paper *Criminal Prosecution* (NZLC PP28 1997) and the forthcoming report on the topic are more directly concerned with this issue: it lies outside the relatively narrow ambit of this report.

- 111 But other aspects of the first option were less popular; in particular the retention of the Minister of Justice as decision-maker, and the requirement on the claimant to prove innocence beyond reasonable doubt.
- 112 Other submissions disagreed with confining compensation to post-appeal claimants (as in the second, third and fourth options) but thought that the first option was too broad. They suggested that compensation should not be paid to those acquitted at trial, because for them the justice system has not in any sense miscarried. It was also suggested that if the presumption of innocence really means something to the public (as it should), it is only on conviction that the defendant is truly stigmatised. These submissions suggested a middle way between conferring eligibility on all those acquitted at trial, and confining it to those acquitted outside the normal appeal process. Instead, all those convicted and subsequently acquitted on appeal, or pardoned, would be eligible for compensation. Only those who had spent time in prison after conviction would be eligible: those given non-custodial sentences would not be. We have adopted this approach.

### *Reasons for a wider scheme*

- 113 The Cabinet's interim criteria, s 133 of the Criminal Justice Act 1988 (UK), and Article 14(6) of the International Covenant on Civil and Political Rights – on which the interim criteria and s 133 are based – limit compensation to those who have been pardoned or who have had their convictions reversed (or quashed with no order for a retrial) outside the normal appeal process.<sup>29</sup> To repeat, our discussion paper referred to these people as “post-appeal claimants”. Three of the four options advanced in the discussion paper – the second, third and fourth – confined eligibility to post-appeal claimants, with or without further criteria. Only the first option covered those who had had charges against them dropped, or been acquitted at trial or on appeal – but it required them to prove their innocence beyond reasonable doubt to the Minister of Justice.

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<sup>29</sup> That Article 14(6) is limited to these cases is made clear by the reference to the reversal of conviction or pardon taking place following a conviction “by a final decision”.

- 114 Both in England and in Canada it has been argued that compensation schemes should extend beyond post-appeal claimants to those who spend time in custody and are then acquitted at trial or on appeal:

Even if their predicaments are less compelling from a compensatory perspective, they have suffered some of the same stigma and burdens. Those whose wrongful conviction and imprisonment are discovered by extraordinary means are merely further along the continuum toward outrage, as the absence of solid foundations for the finding of guilt are only belatedly discovered. (Kaiser 1989 98–99)

Although for practical reasons we make no general recommendations relating to acquittals at trial we nevertheless think it right to call public attention to the serious hardships and injustices which can be suffered by innocent persons who are remanded in custody for varying periods of time and are subsequently acquitted when they come up for trial. . . . If, therefore, there is to be a statutory scheme for compensation, we would recommend bringing such cases within its scope . . . . (Justice 1982 15–16)

- 115 There are indications in *Hansard* that limiting compensation to post-appeal claimants may not be accepted in New Zealand either. It has been suggested that someone who has a conviction overturned on appeal to the Court of Appeal (or for that matter on appeal from the District Court to the High Court) should have the same entitlement to compensation as someone whose conviction has been overturned after a reference to the Court of Appeal under s 406 of the Crimes Act.<sup>30</sup>

- 116 There is nothing in the International Covenant on Civil and Political Rights to prevent states from providing a more liberal compensation scheme than Article 14(6) requires. Many of the arguments for compensation in paras 27–32 apply equally to post-appeal claimants and those acquitted at trial or on appeal. To the extent that the justification for compensation is simply that the state has unjustifiably deprived a citizen of liberty, there should in principle be no distinction on the basis of when the defendant was released: someone remanded in custody and then acquitted at trial should be able to claim alongside someone who was convicted and

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<sup>30</sup> See, for example, the Hon Phil Goff's discussion (1997 NZPD 5625–5626); and the Rt 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).

imprisoned, unsuccessful on appeal but finally pardoned. The differences between their respective cases, such as the length of confinement, could be reflected in quantum.

- 117 To the extent that the argument for compensation is that rectification of mistakes is necessary to restore confidence in the justice system, this is unlikely to be achieved if mistakes which occur before a conviction is entered or overturned are completely excluded from cover under a compensation scheme.
- 118 A further reason for compensation not to be confined to post-appeal claimants, as at present, is that the defendant may have no control over when the evidence required to prove innocence becomes available. The crucial event may be the acquisition of DNA evidence under a more sophisticated form of testing, or the decision of a witness who can provide the defendant with an alibi to come forward. Either of these events might occur before trial, between the trial and the appeal, or after the appeal. Why should this make any difference to whether the defendant recovers compensation, assuming that in all three cases the defendant has suffered some loss as a result of the criminal process? It would seem incongruous, for example, if the same DNA evidence had the effect of clearing two defendants of sex offences, but one defendant *could* recover compensation because his or her appeal had already failed by the time the evidence emerged, while the other *could not* because his or her appeal was yet to be heard.
- 119 What then are the justifications for confining compensation to post-appeal claimants? Two stand out. First, as noted in para 34, the criminal justice system contains self-correcting mechanisms which mean that rarely does the system as a whole fail as a result of a mistake in the prosecution process or at trial. By far the majority of mistakes are remedied on appeal: this in itself must, for the practical reasons given in paras 94–98, generally be accepted as representing an adequate remedy. Compensation should only be paid in the exceptional case, whereas the quashing of a conviction on appeal represents a normal outcome flowing from the defendant's exercising ordinary rights of appeal.
- 120 A second argument for confining compensation to post-appeal claimants is to limit the number of people covered and hence the cost of the scheme. We noted the number of successful criminal appeals in para 22: it may be argued that the cost of compensating – or even considering applications for compensation by – potentially all successful appellants discharged on appeal (for which no statistics are available) is too great.

121 We appreciate both these arguments but find neither conclusive. First, to suggest that the system has corrected itself where a criminal appeal succeeds is an overstatement which does not meet the pain and indignity the defendant has suffered upon conviction. Secondly, while recognising that cost, and particularly diversion of resources, is a significant factor, the controls we propose are strict. These include limiting eligibility to those who have been remanded in custody or imprisoned following conviction, and imposing on claimants a requirement to prove innocence. Further restrictions on claims would in our view be unwarranted. The government, if concerned about the cost of a compensation scheme, could decide that awards should be capped, or rates fixed for each day of imprisonment (although we do not favour either of these options); while procedural simplicity will keep down the administrative costs of any scheme.

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## 4

# Features of a compensation scheme

- 122 **T**HIS CHAPTER ADDRESSES THE REMAINING ISSUES concerning a compensation scheme:
- Should there be a requirement to prove innocence?
  - 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?
- 123 Our discussion of eligibility criteria in the previous chapter anticipates our conclusions on some of these issues. Nevertheless it is desirable to recall the competing policy options and explain how we have reached our conclusions.

### SHOULD THERE BE A REQUIREMENT TO PROVE INNOCENCE?

- 124 Three of the four options as to the scope of a compensation scheme advanced in *Compensation for Wrongful Conviction and Prosecution* (NZLC PP32 1998), including the interim criteria, contained a requirement to prove innocence. In this respect we have included a requirement to prove innocence in the eligibility criteria under our proposed scheme.
- 125 We acknowledge that there are practical difficulties with requiring a claimant to prove innocence, including that it may often be impossible (or too costly) to do so. An enquiry into innocence might be tantamount to a retrial long after memories are dimmed, if indeed witnesses are still alive and otherwise available. It may very well not be feasible to reconstruct the events. A complainant in a case involving allegations of violence or sexual abuse may reasonably decline to be subjected to the ordeal of giving evidence once again long after the event.



- 126 A requirement to prove innocence may deny compensation to a meritorious claimant who simply cannot discharge this obligation.
- 127 A requirement to prove innocence is, however, necessary to prevent the “guilty” claimant, acquitted on a technicality, from profiting from the crime. It recognises that it is a person’s innocence which provides the justification for compensation in the first place.

## STANDARD OF PROOF

- 128 The current guidelines (see paras 64 and 108–109) limit compensation more narrowly than we propose, confining it to post-appeal claimants. Under those guidelines miscarriage of justice must be established “conclusively”, and innocence on the balance of probabilities. The former echoes the language of Article 14(6) – “that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.”
- 129 If the sole consideration were that of the innocence of the particular claimant we should recommend the familiar civil standard of proof on the balance of probabilities. Viewed from the standpoint of one who is in fact innocent that would be seen as the proper test.
- 130 It is, however, necessary to consider not only those who are innocent but those who are not, and the effect on the practical administration of justice and on public resources if a balance of probabilities test were adopted: the “floodgates” point noted at para 19.
- 131 An important value in any system of administration of justice is efficiency and promptness of result. To achieve it requires clear rules, and an acceptance that refined categories are unattainable. The test of criminal guilt is proof beyond reasonable doubt – a standard accepted despite the escape of some offenders because it achieves a practical result. In our view a similar test is appropriate here for departing from the norm that the court’s adjudication ends the litigation process. We consider that the public interest in finality outweighs the disadvantage that some innocent claimants are left to rely on the Costs in Criminal Cases regime.
- 132 All those affected by the criminal process – witnesses, jurors, police, victims, and their families – suffer from it in various ways. The law cannot achieve a perfect, but only a practical, result. In the present context we prefer a result that protects the efficient operation of the system, even at a cost to some innocent claimants.

## WHO DETERMINES ELIGIBILITY AND QUANTUM?

133 In our discussion paper we outlined 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.<sup>31</sup>

Our discussion paper noted that this option might provide desirable continuity and consistency between the old and new compensation schemes. Officials within the Ministry of Justice are experienced in handling applications for compensation and are likely to be familiar with a claim through advising the Minister on referral to the Court of Appeal or High Court 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. On the other hand, we noted that this option might be perceived as insufficiently open and transparent. It could be said to challenge the separation of powers doctrine whereby decisions on rights are vested in the judiciary; while the possibility that political pressure or public opinion might be brought to bear on individual decisions cannot be completely excluded.

- *The court which acquits the defendant or quashes the 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 for pardons.

Our discussion paper rejected the option of leaving the decision with the court which reconsidered the verdict, as this 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 1961 s 385). Furthermore, in cases referred to the Court of Appeal under

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<sup>31</sup> 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.

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. Neither at trial nor on appeal is the defendant's innocence the matter in issue.

- *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.

We expressed the concern in our discussion paper that 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.<sup>32</sup>

- *An independent tribunal* established to determine whether, and if so how much, compensation should be paid.

An independent tribunal would 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; while courts may be perceived as reluctant to interfere with matters which have apparently been settled by another trial or appeal court. The independence of the tribunal would be enhanced by it being created by statute. Disadvantages of a tribunal would be the cost involved in its administration, and the likely creation of a separate procedure after the conclusion of criminal proceedings, which is largely avoided under the current *ex gratia* scheme.

134 The discussion paper raised the possibility of separating decisions as to eligibility for compensation and quantum. Whether it would be necessary to do so would turn on which of the four options as to the scope of a compensation scheme was adopted. We noted that under the first, second and fourth options, following the Minister's determination of eligibility, quantum could be assessed by an independent tribunal. In the case of the third option, as eligibility would be a matter of record, the tribunal's function would be confined to assessing quantum.

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<sup>32</sup> 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*

- 135 The submissions were almost unanimous in their support for an independent tribunal, while the least favoured option was to keep decision-making power with Cabinet on the advice of the Minister of Justice. A few submissions favoured the courts making a decision as to compensation, despite the difficulties we highlighted in our discussion paper.
- 136 We agree that an independent tribunal is the most appropriate decision-maker. The process by which claims for compensation are determined should be as transparent and objective as possible. The first step towards ensuring this is to enact eligibility criteria which are free from subjective considerations. It is equally important to ensure that all claims are dealt with in the same way and, so far as possible, by the same people, to ensure fairness between claimants. The identity of those assessing quantum, and the basis upon which quantum is assessed, should be known to the public. All these factors weigh in favour of a tribunal.
- 137 A Compensation Tribunal could be established either in the exercise of the prerogative or by statute. Most of the submissions favoured a tribunal appointed by statute. This would enhance its independence and accountability to Parliament, and protect it from the possibility, however remote, of interference from the government of the day. We suggest two options as to composition. The first is that the Tribunal have three members and include at least one retired judge or barrister or solicitor of appropriate experience, and one lay person. A cheaper but still effective alternative would be for the Tribunal to consist of a single member who would be a retired judge or a barrister or solicitor of appropriate experience. Under either option the Tribunal's membership should be appointed by the Minister of Justice. Administrative and secretarial services to the Tribunal could be provided as necessary by the Department for Courts. The Tribunal would be required to provide an annual report to Parliament.

## WHAT LOSSES SHOULD BE COMPENSATED?

- 138 We would limit compensation under the scheme to losses following conviction. Other citizens, who are acquitted at or discharged before trial, will be limited to relief available under the Costs in Criminal Cases Act 1967. For reasons similar to those stated at paras 95–96 we consider losses outside the scope of that Act, including detention prior to conviction, as part of the vicissitudes of life that cannot reasonably give rise to compensation.

- 139 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”.<sup>33</sup>
- 140 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 pecuniary 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,<sup>34</sup> while others impose limits on either category of loss.<sup>35</sup> We do not consider either approach to be fair or necessary to prevent unduly large awards.
- 141 Then there is the question whether there should be an upper limit for total awards of compensation. We think not: the Tribunal should apply the same principles of full and fair compensation that are employed by a judge or civil jury in analogous cases. Because our eligibility criteria are still quite tightly defined, there are unlikely to be so many cases before the Tribunal as to create a need to limit awards in those which are heard. The first few cases before the Tribunal in the 3-year trial period we propose would provide a yardstick against which future awards could be measured.
- 142 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 Wrongly Convicted and*

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<sup>33</sup> *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 Sprott; 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.

<sup>34</sup> For example, Norway and Romania (see Shelbourn 1978 27).

<sup>35</sup> See the limitations in Germany noted in para 78; also note the \$100,000 limit on compensation for non-pecuniary losses under the Canadian guidelines (Kaiser 1989 148).

*Imprisoned Persons.* The statute should expressly state that both pecuniary and non-pecuniary losses are recoverable.

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; and
- (d) Mental or emotional harm as a result of conviction or detention or imprisonment.<sup>36</sup>

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; and
- (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.

- 143 We would also add to this list pecuniary losses suffered and costs incurred by family members. 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 many of the costs of appealing the conviction. These costs can include engaging lawyers and others, such as forensic scientists, to prepare a case which is sufficiently compelling to succeed on appeal, justify referral to the Court of Appeal under s 406 of the Crimes Act, or result in a pardon. The statutory provisions we have drafted (see para 100) ensure that losses which may be compensated are not confined to those incurred by the person who has been wrongly prosecuted or convicted.
- 144 The claimant's family may also have suffered emotional harm, stigmatisation and loss of reputation as a result of the claimant's conviction. However, the response to our discussion paper confirms our preliminary view that such losses are too remote to be covered by a compensation scheme.

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<sup>36</sup> Note that mental or emotional harm is not covered by the Canadian guidelines. 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.

- 145 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. Moreover, if a court has refused an application for costs under that Act, the Tribunal should not then award costs in the absence of new evidence which was not previously before the court. Again in the absence of such evidence, the Tribunal should also have regard to any finding of the court as to the conduct of the investigation and whether the prosecution acted in good faith in bringing and continuing the case.
- 146 The principle that the claimant should not be compensated twice over also dictates that the Tribunal take into account any award under the Accident Rehabilitation and Compensation Insurance Act 1992 arising out of the conduct of police or other prosecuting authorities. This raises the wider question of the relationship between an award made by the Tribunal and any other remedy the claimant may have.
- 147 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)
- 148 We agree that a claimant should be entitled to reject an award by the Tribunal. In practice this is only likely to happen if the claimant feels a more lucrative tort remedy may be available (eg, if there was gross police misconduct for which significant damages, perhaps including exemplary damages which are not covered under our proposed scheme, 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.
- 149 Our only disagreement with the passage quoted in para 147 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 an assessment of compensation is created, the state has already acknowledged that citizens may sometimes be wrongly

convicted or prosecuted, 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 wrongly convicted (or prosecuted, as the case may be). Indeed, if the reason for the conviction was an honest misidentification of the defendant, there may be no fault on the part of the authorities.

- 150 Finally, there is the issue of whether the estate of a qualifying claimant should be able to claim compensation. The preliminary view expressed in our discussion paper was 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 wrongly convicted person. Compensation to that person's family is an exception to this principle in recognition of the circumstances noted in para 143.
- 151 Some submissions expressed the view that an estate should be able to claim pecuniary losses suffered as a result of the deceased being wrongly convicted or prosecuted, but not non-pecuniary losses. The analogy was made with s 3 of the Law Reform Act 1936 which allows compensatory (but not exemplary) damages to be claimed by the estate of a deceased person. Losses incurred by a claimant's family may be no less because the claimant has died. Against this is the impracticability of reopening old cases after the death of the central figure in the claim, and the undermining of finality in the justice system. On balance, claims by an estate should be limited to pecuniary losses only, and should be made within 6 months of the claimant's death. This would both ensure that old cases do not clog up the scheme and discourage an estate from delaying the exercise of its rights.

## RELEVANT FACTORS IN DETERMINING QUANTUM

- 152 In our discussion paper we listed a number of factors a compensation body should take into account in determining the amount of compensation to be paid. We noted that if the third option were to be adopted, the likelihood of innocence would be a factor in determining quantum; whereas under the first, second and fourth options, innocence would be a precondition to eligibility rather than a quantum factor. We also listed a number of factors which, regardless of which option was adopted, the compensation body should take into account:
- the likelihood of the defendant's being guilty of an offence other



than that with which he or she was charged;<sup>37</sup>

- conduct of the defendant leading to the prosecution or conviction (see paras 157–161);
- 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.<sup>38</sup>

153 We also suggested the following factors which have some analogy with the existing law of tort damages:

- 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.

154 These factors met with almost universal approval amongst those who made submissions. The only factor to which objection was taken, was that pertaining to likely guilt of an offence *other* than that with which the defendant was charged. It was suggested that this factor could lead to dangerous speculation; and in any event the Tribunal could consider relevant conduct of the defendant leading to the prosecution or conviction, which is as far as such enquiry should go. We accept this reasoning.

155 We have considered whether the quantum factors should be included in a statute (or in some other form if the scheme is established under the prerogative) as mandatory considerations for the Tribunal to take into account. The alternative is that these factors merely be guidelines published by the Tribunal. Most of the submissions we received preferred mandatory considerations to guidelines. Mandatory considerations would provide clarity to the Tribunal, the claimant and the public. Another advantage of mandatory considerations would be that it would encourage the Tribunal to adopt a consistent approach to fixing awards. A further argument is that it is appropriate for Parliament to debate and finally determine those factors which the Tribunal should take into account in assessing quantum.

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<sup>37</sup> 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.

<sup>38</sup> The 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 Tribunal itself might be assisted by cases under that Act.

156 An argument for guidelines is that they would allow the Tribunal the flexibility to determine cases as it saw fit, and allow it to develop its own approach to assessment of compensation over time. But in our view the Tribunal would still be able to determine cases as it saw fit under mandatory considerations: depending on the case some factors would be more relevant than others. Accordingly, we have included a list of mandatory considerations for the Tribunal to take into account in our statement of the parameters of the scheme.

### *Conduct of the claimant*

157 Both Article 14(6) of the International Covenant on Civil and Political Rights 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 a person who was wrongly convicted or prosecuted could have done more, while still a suspect or defendant, to prevent the misfortune from occurring. Secondly, there is concern that this requirement could be used to punish the naive, the youthful, or the powerless (Kaiser 1989 136).

158 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) engaged incompetent counsel who failed to conduct a proper cross examination of one or more of the prosecution witnesses?

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.

159 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.

160 Nevertheless, where claimants have contributed to their predicament through negligence or intentional acts while a suspect or defendant (as by not co-operating 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.

- 161 We conclude that claimants for compensation should not be disentitled by reason of the fact that being wrongly detained, prosecuted or convicted was wholly or partly attributable to their conduct. This fact should, however, be stated in the statute (or other document setting out the elements of the scheme) as relevant to the Tribunal's assessment of quantum.

## TIME LIMIT AND APPLICATION PROCEDURE

- 162 We suggest a requirement that any application to have compensation assessed be made within 6 months of the claimant's acquittal or pardon, or the quashing of the conviction without an order for retrial. It is desirable that the error implicit in any payment of compensation be vindicated as soon as possible. Also, claimants should be prevented from delaying the exercise of their right to have compensation assessed.
- 163 The application procedure should be kept as simple as possible. The Tribunal 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 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.
- 164 We propose that claimants for compensation should be eligible for legal aid under the Legal Services Act 1991, and that ss 4 and 19 of that Act should be amended accordingly.

## COMPENSATION TRIBUNAL'S POWERS AND PROCEDURES

### *Powers to gather information*

- 165 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 can be appointed to recommend whether compensation should be paid, with that commission having powers under the Commissions of Inquiry Act 1908.

166 If compensation were left as a prerogative matter, the absence of express powers to gather information would presumably continue. However, under a statutory scheme, it would be appropriate for the statute to set out the Tribunal's powers. An obvious model might be the Commissions of Inquiry Act which gives a commission 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)).<sup>39</sup>

167 Similar powers are conferred on the Police Complaints Authority under ss 24–25 of the Police Complaints Authority Act 1988, which may also provide a useful model for legislation if a statutory compensation scheme is ultimately favoured by the government.

### *Hearings and deliberations*

168 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 Tribunal's procedures. In particular, the Tribunal 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.<sup>40</sup> This would reduce the likelihood that a court challenge to the decision on narrow procedural grounds would succeed, although the Tribunal would normally be expected to observe the laws of natural justice.

### *Reasons for decisions*

169 As a general principle of administrative law a tribunal or 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,

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<sup>39</sup> The corollary of giving the 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.

<sup>40</sup> See also the comparable provisions in s 18(3) of the Ombudsmen Act 1975.

although that subsection is subject to s 23(4) which provides that nothing in s 23 “entitles any person to obtain a written statement of advice given to the Sovereign or her representative”.<sup>41</sup>

- 170 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 Tribunal simply to award an amount could leave all concerned wondering whether there was any method to the Tribunal’s deliberations and conclusions. Finally, giving reasons could in the present circumstances be a valuable discipline for the Tribunal and encourage it to develop a consistent approach to determining levels of compensation (see Wade and Forsyth 1994 942).
- 171 The current practice is for decisions in respect of ex gratia compensation to be accompanied by a statement of reasons. The Minister of Justice includes this statement in the letter indicating whether compensation will be paid. In the event that compensation is refused, the grounds for refusal stated in the letter may form the basis of an application for judicial review.
- 172 We consider that candour in the administration of justice requires that the Tribunal give reasons. We accept that providing reasons might encourage unmeritorious applications for judicial review of Tribunal decisions and 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 178). The Tribunal would be expected to demonstrate in its decision that all relevant considerations had been taken into account. Finally, the amount of and factors underlying an award should be made available to the public unless the parties or the Tribunal decides otherwise.

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<sup>41</sup> Section 23(1) states:

- (1) 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.

## *Appeals*

- 173 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 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, and in most cases an appeal, before the case reaches the Tribunal. 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.
- 174 Currently there is no right of appeal against decisions concerning *ex gratia* payments, decisions under s 406 of the Crimes Act 1961, or any other exercises of the prerogative. Our discussion paper expressed the preliminary conclusion that neither should there be a right of appeal from compensation decisions under any of our proposed options. This position was widely supported in the submissions and we confirm this as our final position.

## REVIEW OF COMPENSATION DECISIONS

- 175 A significant issue is whether decisions to decline compensation, or as to quantum, 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 body whose decision has been appealed; review is concerned with the validity of the decision (see Craig 1994 7). Whereas rights of appeal are necessarily conferred by statute, the High Court has an inherent jurisdiction (as well as under the Judicature Amendment Act 1972) to review administrative decisions. This power can be ousted only by specific statutory provisions. The current position in New Zealand is that even an exercise of the prerogative of mercy may be susceptible to review (see para 63). It may be that a decision to refuse to make, or consider making, an *ex gratia* payment on unreasonable grounds could also be reviewed.

### *An ouster clause?*

- 176 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 1990,<sup>42</sup> 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 will respect Parliament's directions.

177 There are certain factors which weigh against reopening compensation decisions (and the court decisions which preceded them), and which warrant consideration of an ouster clause. These factors might also lead the courts to give full effect to an ouster clause, notwithstanding their traditional reluctance to do so. The hearing of a claim for compensation results from the unhappy need to depart from the principle of finality of criminal decisions. A review of the compensation decision could see the court look to the Tribunal's processes and, if it upheld the grounds for review, order the Tribunal to reconsider its award. The Tribunal 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.

178 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, even under our widened eligibility criteria, is still relatively small. 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,

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<sup>42</sup> Section 27(2) states:

(2) 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.

with decisions of the Ombudsmen,<sup>43</sup> and, closely analogous, 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 that only in cases of serious abuse of process, unfairness or irrationality, would a challenge to the compensation decision be upheld.

179 The submissions on our discussion paper were for the most part in favour of compensation decisions being susceptible to review. Some, however, also warned that review in other than the most serious cases should be excluded. We prefer the former view. Decisions of the Tribunal should be subject to review, and the circumstances in which review can be sought should not be limited: the court's discretion provides a safeguard against abuse.

### A SHIFT TO A STATUTORY SCHEME?

180 Do our proposed changes to the way compensation is paid require legislation setting out the eligibility requirements and other elements of the compensation scheme? The arguments in favour of compensation, canvassed in paras 27–32, do not automatically favour one form of compensation scheme over another. Essentially, the choice is among the following:

- Maintaining consideration and payment of compensation within the prerogative;
- A narrow statute specifying only the eligibility criteria;
- A broader statute specifying eligibility criteria, establishing an independent tribunal to determine awards of compensation, and defining its powers and procedures.

181 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.

182 First, a statutory scheme would reduce the scope for compensation claims to be dealt with in a discretionary or arbitrary way. The interim criteria provide greater clarity than previously existed as to who is eligible to receive an *ex gratia* payment, but certainty as

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<sup>43</sup> 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".



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, without good reason, over others.

- 183 Secondly, through a statutory scheme the state recognises the importance of compensating the wrongly convicted and prosecuted. An *ex gratia* payment, 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 error in the prosecution and trial processes, and confers upon a claimant eligibility to have compensation assessed. That eligibility could only be reduced or removed by an Act of Parliament, whereas the ability to apply for *ex gratia* compensation could be effectively rendered meaningless if the executive, in its discretion, decided 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 and the public.
- 184 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.
- 185 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 wrongly convicted (and meet certain other criteria) be compensated “according to law” (see para 69).
- 186 These are powerful arguments. But we must not overstate the advantages of a statutory scheme. While a prerogative scheme is liable to change by executive decision, we have ourselves proposed a 3-year trial period for the proposed scheme.

- 187 If the government were to establish the proposed scheme under the prerogative, we would expect that the scheme be given a statutory foundation at the end of the 3-year trial period if found to be operating effectively.
- 188 Accordingly, we commend to the government the adoption of a scheme based on the provisions set out in para 100 of this report either by statute or on an interim basis under the prerogative.
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APPENDIX

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

A1 **B**ECAUSE NEW ZEALAND IS PARTY to the International Covenant on Civil and Political Rights but has entered a reservation to Article 14(6) (see para 66–71) some discussion is warranted. The article 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.

A3 We have considered whether a requirement to show that there has been a miscarriage of justice might be preferable to a requirement to prove innocence. Definitions of miscarriage of justice vary considerably, which in itself makes the requirement 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 Nothing we have read in the submissions on *Compensation for Wrongful Conviction or Prosecution* (NZLC PP32 has convinced us of

the utility of a miscarriage of justice requirement. Accordingly we confirm our initial view that it is not required as part of a new compensation scheme.

*Shall be compensated according to law*

- A5 We noted in para 69 that the words “according to law” have been interpreted as requiring a statutory compensation scheme. Our proposed scheme would be created by statute, but the words “shall be compensated” are unlikely to be satisfied if the Tribunal retains the ability to make nil awards to unmeritorious claimants. Accordingly, New Zealand might still need to keep its reservation to Article 14(6) in place even if the government were to adopt our proposed scheme.

*Suffered punishment*

- A6 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”.
- A7 Our proposed scheme (see para 100) requires that claimants have been deprived of their liberty, either by being remanded in custody or imprisoned on conviction. Those who were sentenced to a fine or community service would not be eligible. According to the Canadian Task Force Report which preceded the adoption of guidelines in that country (see para 76), such a limitation is contrary to unconditional accession to Article 14(6) (Kaiser 141).
- A8 Our principal concern in this report is with deprivation of liberty. As we have built deprivation of liberty into the eligibility requirements, we do not favour an additional requirement on claimants to show that they have suffered punishment.

*New or newly discovered fact*

- A9 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). It is likely that the requirement of a new or newly discovered fact is based on the assumption that other reasons for error will normally be uncovered on appeal. The requirement is not out of place in a scheme which

is limited to those whose conviction has been overturned outside the normal appeal process. As our proposals cover those who are acquitted on appeal in the normal way, however, the requirement is inappropriate.

*Unless wholly or partly attributable to the claimant*

A10 Article 14(6) excludes compensation if non-disclosure of a new or newly discovered fact is “wholly or partly attributable to the claimant”. For reasons we discuss in paras 157–161 of the main paper, we conclude that a claimant for compensation should not be disentitled by reason of the fact that imprisonment following 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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