SECOND REPORT FOR MINISTER OF JUSTICE

ON COMPENSATION CLAIM BY TEINA ANTHONY PORA

BY

HON RODNEY HANSEN CNZM QC

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(1) INTRODUCTION

1. In my report to the Minister of 23 March 2016, I concluded that Teina Pora had established on the balance of probabilities that he is innocent of the charges of murder, sexual violation and aggravated burglary of which he was convicted and for which he has served a sentence of imprisonment. The Minister has now asked that, in accordance with the Cabinet Guidelines[1] (the Guidelines), I provide advice on an appropriate amount of compensation for Mr Pora. The Minister has stipulated that the amount should be calculated according to the Guidelines.[2]

2. For the purpose of this report I have considered written submissions (supplemented by affidavit evidence and supporting documents) on behalf of Mr Pora and submissions in response on behalf of the Crown. Mr Pora took the opportunity to file submissions in reply. I have been greatly assisted by this material and record my gratitude for the assistance of counsel responsible, Mr Jonathan Krebs and Ms Ingrid Squire for Mr Pora and Dr Mathew Downs for the Crown.

3. Under the Guidelines compensation is payable for losses in two categories – non-pecuniary and pecuniary. Both are payable in respect only of the period following conviction.[3] For the reasons set out in the balance of my report, I recommend payment of:

   (a) Non-pecuniary compensation for loss of liberty in the sum of $1,961,895 and $225,000 for other non-pecuniary losses, a total of $2,186,895. For reasons I elaborate later in this report,[4] I recommend that consideration be given to increasing the amount of compensation paid to Mr Pora for non-pecuniary losses to take into account inflation since the Guidelines came into effect.

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[1] *Cabinet Criteria for Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases (*Ministry of Justice, 1998*)*.
[2] Letter 5 April 2016.
[3] Cabinet Guidelines at para 5.
[4] At paras 16-18.

(b) Pecuniary compensation of $334,054.42 comprising:

(i)	Loss of livelihood		$100,000.00
(ii)	Loss of future earning abilities		$100,000.00
(iii)	Costs incurred on behalf of Mr Pora		$134,054.42
		Total:	$334,054.42

4. The total amount of compensation recommended in accordance with the Guidelines is, accordingly, $2,520,949.42. This would be increased by any additional sum Cabinet agreed should be paid as compensation for non-pecuniary losses to take account of inflation.

5. It is proposed that the compensation, excluding a sum to be specified, be paid to a trust that has been established for the benefit of Mr Pora, his daughter and grandson. A copy of the trust deed has been made available. It is recommended that the bulk of compensation be paid to the trust on the basis proposed.

(2) APPROACH TO DETERMINING COMPENSATION

6. The Guidelines require a three step approach to the assessment of compensation. This was made explicit in Additional Guidelines issued in 2001[5] and elucidated in a media statement issued by the Minister of Justice on their release.[6]

7. The Guidelines require that, in recommending an appropriate amount of compensation, the Queen's Counsel reporting take into account the following factors:[7]

   (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.

8. Losses recoverable are then specified as follows:[8]

   5. Losses are in respect only of the period following conviction and are defined as follows:

      Non-pecuniary losses

      (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.

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[5] *Additional Guidelines on quantum of future compensation.*
[6] Minister of Justice, the Hon Phil Goff "New Guidelines for Compensation Payments Adopted" (press release, 3 September 2000).
[7] Cabinet Guidelines at para 4.
[8] Cabinet Guidelines at para 5.

Pecuniary losses

(a) loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;

(b) loss of future earning abilities;

(c) loss of property or other consequential financial losses resulting from detention or imprisonment; and

(d) costs incurred by or on behalf of the person in obtaining a pardon or acquittal."

9. The Additional Guidelines then stipulate:

1. The calculation of compensation payments under the Cabinet criteria should be firmly in line with the approach taken by New Zealand courts in false imprisonment cases.

2. The starting figure for calculating non-pecuniary losses should be set at $100,000 and that this base figure is to be multiplied on a pro rata basis by the number of years spent in custody so that awards for non-pecuniary losses are proportional to the period of detention.

3. The figure obtained under the calculations referred to above should be then added to the figure representing the amount assessed for the presence/absence of the factors outlined in the Cabinet guidelines.

4. Only those cases with truly exceptional circumstances would attract general compensation that is greater than $100,000, and that on average the relevant figure should even out around $100,000;

5. A claimant's pecuniary losses should be calculated separately, and the resulting figure should then be added to the amount assessed for non-pecuniary loss, the sum of which represents the total compensation payable to a claimant.

10. The three step process that emerges from the Guidelines was confirmed by Keane J in *Akatere v Attorney General*:[9]

> **First**, to calculate an appropriate amount for loss of liberty. Under the Additional Guidelines, the starting figure for loss of liberty is $100,000. The base figure is then to be multiplied on a pro rata basis by the number of years spent in custody so that an amount for loss of liberty is arrived at that is proportional to the period of detention.
>
> **Second**, to weigh up the factors set out in para 4 of the Guidelines to determine an appropriate amount for additional non-pecuniary losses. While there is a degree of discretion in this stage, para 4 of the Additional Guidelines provides that truly exceptional circumstances would be required to attract general compensation greater than $100,000.
>
> **Third**, to calculate pecuniary losses.
>
> The sum of the amounts calculated at each of the three stages represents the total compensation payable.

[9] *Akatere v Attorney General* [2006] 3 NZLR 705 at [52].

(3) NON-PECUNIARY LOSS FOR LOSS OF LIBERTY

11. Mr Pora has sought compensation on the basis of his suffering a loss of liberty for an aggregate period of 21.11 years. The Crown submits that the operative period for the purpose of the guidelines is somewhat less – between 19 years, 10 months and 13 days and 20 years, 8 months and 18 days.

12. Mr Pora was arrested on 18 March 1993. He was convicted on 15 June 1994. Following his successful appeal he was, in December 1999, granted bail on strict conditions.[10] He was convicted again on 6 April 2000 following his retrial. It is not known precisely when he was returned to custody but it is likely to have been at the commencement of the retrial. Mr Pora was released on parole on 28 April 2014. His convictions were quashed on 3 March 2015.

13. Mr Pora's claim for loss of liberty (based on 21.11 years) is on the basis that he should be compensated from his arrest on 18 March 1993 to when he was released on parole. However, I accept the Crown's submission that the Guidelines do not permit compensation for loss of liberty for any period preceding conviction. Both non-pecuniary and pecuniary losses are recoverable only in respect of the period following conviction.[11]

14. Nor do the Guidelines contemplate compensation for time spent on bail or on parole. Only time spent in custody is counted.[12] The Crown has however generously conceded that the time spent by Mr Pora on bail should be disregarded and suggested that the time spent on parole should be compensated at 40% of the applicable rate (of $100,000 per annum).

15. These concessions appeal as fair and reasonable but the Guidelines simply do not provide for compensation on that basis. However, there is room to recognise restrictions on liberty when considering non-pecuniary losses under the second step. I will give further consideration to the issue at that stage.

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[10] Pre-sentence report, 3 May 2000.
[11] Guidelines at para 5.
[12] Additional Guidelines at para 2 and see *Akatere*, above n 10, at [66].

16. Precise dates for the time Mr Pora was on bail are not available. On the information available to me, it appears to have been close to 3 months. On that basis, the time he spent in custody between conviction on 15 June 1994 and his release on 28 April 2014 was no less than 19 years, 7 months and 13 days. At the rate of $100,000 per annum, compensation under this head is $1,961,895.

17. Mr Pora has sought an adjustment to compensation for loss of liberty by reference to the consumer price index. The rationale for this is said to be that it seems unlikely that Cabinet intended those who have suffered a miscarriage of justice in the years following the issue of the Guidelines to receive an ever-diminishing amount as time progressed.

18. The Guidelines make no provision for inflation adjustments to the sums specified. As I am asked to give advice in accordance with the Guidelines, there is no room to propose an adjustment to recognise the progressive decline in real terms in the level of compensation payable since the Additional Guidelines were introduced. It must be recognised nevertheless that, in real terms, claimants will be compensated on a different basis depending on when their claim is settled. Later claimants will be disadvantaged. The rate at which claimants in Mr Pora's position will be compensated, will decline the longer they remain in prison. That appears to be anomalous and unjust.

19. If it is intended that levels of compensation should be maintained in real terms at the levels payable when the Guidelines were introduced and that claimants should, in substance, be treated equally, consideration should be given to adjusting compensation payable to Mr Pora for loss of liberty to reflect the decline in the value of money.

(4) OTHER NON-PECUNIARY LOSSES

20. The Guidelines require that the total amount for non-pecuniary losses be fixed by adding to the amount calculated by reference to the period of detention a further sum to take account of the presence and/or absence of the factors outlined in para 4 of the guidelines. This is the second step in the process identified above.[13]

21. The way in which this part of the exercise is to be undertaken was set out in the judgment of Keane J in *Akatere v Attorney General*,[14] adopting as correct the approach summarised in a letter by the Chief Legal Counsel of the Ministry of Justice to the Queen's Counsel in that case, which read in part:

> "The second stage is to weigh up the factors set out in the 1998 Cabinet criteria to determine an appropriate amount for the non-pecuniary losses incurred by a claimant. There is a limited degree of discretion in this stage, but Cabinet has agreed that only those cases with truly exceptional circumstances would attract an award under this stage that is greater than $100,000. On average, the relevant figure under this stage should even out at around $100,000.
>
> Where there are aggravating features present such as Police misconduct or the fabrication of evidence by the prosecution, then this would indicate that the case falls at the higher end of the range. Quantum for non-pecuniary losses should be adjusted upwards from $100,000. Alternatively, where there are mitigating factors such as the conduct of the accused that may have contributed to the wrongful conviction, then this would suggest that the case is at the lower end of the continuum of cases envisaged by Cabinet. Accordingly, quantum for non-pecuniary loss should be adjusted downwards from $100,000."

22. Mr Pora has sought an uplift of $150,000 per annum for the 21.11 years he relies on as the term of his detention, a total of $3,287,500. This approach is not, however, what the Guidelines envisage. They stipulate that the total amount payable under the second step will "on average even out around $100,000".[15] Only in "truly exceptional circumstances" would the figure be greater. There is no provision for this figure to be multiplied on a per annum basis to reflect time spent in custody.

23. To recapitulate, the factors requiring consideration under this head are:

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[13] At para 10 above.
[14] *Akatere* , above n 10, at [52].
[15] Additional Guidelines at para 4.

(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.[16]

24. The last three are not controversial and it is convenient to deal with them first.

The seriousness of the offence alleged

25. The offence of murder is among the gravest crimes. The sentence of life imprisonment reflects that. When associated with the rape of the victim, itself a very seriousness crime, and the aggravated burglary of her house, the offending must be regarded as heinous and susceptible to the highest levels of opprobrium.

Severity of the sentence

26. A life sentence is the most severe punishment the law allows, ameliorated only by the right to seek parole (with no assurance it will be granted) after a finite period, in Mr Pora's case, 13 years. It is ironic that one of the reasons he was repeatedly denied parole was his refusal to acknowledge that he had committed the crimes for which he had been sentenced.

The nature and extent of loss

27. The emotional and psychological injuries suffered by Mr Pora as a result of his convictions and punishment are incalculable.

s 9(2)(a), s 9(2)(ba)

[16] Cabinet Guidelines at para 4.

s 9(2)(a), s 9(2)(ba)

s 9(2)(a), s 9(2)(ba)

28. The effect of imprisonment was exacerbated by Mr Pora's youth and his vulnerability. Doctor Valerie McGinn, the neuropsychologist who, with Doctor Craig Immelman, identified that Mr Pora suffered from Fetal Alcohol Syndrome Disorder (FASD), has provided a report for the purpose of the compensation application. She says that long periods of imprisonment are recognised as crushing for young people. The imprisonment of a young disabled man who knew that he was innocent but was powerless to do anything about it must, she says, have been the most crushing set of circumstances possible. She points out that Mr Pora was imprisoned at an age when his character was forming and he had his life ahead of him. She confirms that he suffered many years of low mood and despair in prison and was vulnerable and exploited because of his disability.

29. A further dimension to Mr Pora's loss is the effect of imprisonment on his personal relationships. In particular, it denied him any meaningful contact with his daughter from when she was two.

30. The consequences of imprisonment for over half of Mr Pora's life, which, as Dr McGinn says, included the formative years of his youth, are, of course, ongoing. He has been required to confront the challenges of adjusting to life in the outside world. It is clear that this has not been easy, albeit that his re-integration into society has been greatly assisted by a committed support network.

31. In assessing injury, it is appropriate to have regard to reputational damage. For more than 20 years Mr Pora suffered the opprobrium of guilt for serious crimes he did not commit. Against that, it is customary and appropriate to have regard to other matters that bear on standing and character, including previous convictions for unrelated offending.

32. Prior to his incarceration, Mr Pora had accumulated a number of convictions. Most were for relatively minor offending. Even two convictions for robbery attracted only modest penalties. He had served one, brief, custodial sentence. The Crown accepts that any discount to take account of earlier offending should be modest, suggesting a discount of 5% from the starting figure. Mr Pora argues for a nominal allowance, if any.

33. As earlier noted, the remaining three factors required to be considered are controversial. Mr Pora disputes the Crown's contention that his conduct is relevant to an assessment of compensation. The Crown contests Mr Pora's claim that the prosecution against him was not brought in good faith and that the investigation was not conducted in a reasonable and proper manner.

Mr Pora's conduct

34. In my first report, I briefly summarised as follows the circumstances in which Mr Pora agreed to the video interview in the course of which he confessed to his involvement in the murder and rape of Ms Burdett:

> "On 18 March 1993, Teina Pora was arrested for failing to appear on outstanding charges including one of unlawfully taking a motor vehicle. He was interviewed by Detective Sergeant Mark Williams. In the course of the interview Mr Pora asked Detective Sergeant Williams if the Police had caught the person responsible for the Susan Burdett murder. He disclosed that he had some knowledge in relation to the crime. Detective Williams told him of a $20,000 reward the Police were offering for information leading to the conviction of the offender. Mr Pora was shown the reward notice and Detective Williams explained what was meant by the term "indemnity from prosecution". He was then formally cautioned and his rights under the Bill of Rights explained to him. He agreed to be interviewed on video camera."

35. I concluded that, motivated by the prospect of a reward and believing that he was not in serious jeopardy, Mr Pora set out to convince the Police that he was present when Ms Burdett was raped and murdered.[18] There has been nothing advanced by either side for the purpose of assessing compensation which would cause me to depart from that view. Indeed, it is fundamentally the version of events that Mr Pora himself put

[18] Rodney Hansen QC *First report for Minister of Justice on Compensation Claim by Teina Anthony Pora* at paras 102, 148 and 300 [First Report].

forward at the pre-trial hearing before the first trial[19] and for the purpose of his compensation application.[20]

36. There is a suggestion in Mr Pora's most recent affidavit that he was put under some degree of pressure to confess. That cannot stand against his evidence at the pre-trial hearing that he was treated well by the interviewing officers[21] and the Privy Council's finding that none of the Police officers exerted pressure on Mr Pora and were "fastidiously correct" in their treatment of him.[22]

37. While Mr Pora's confession was voluntary, it is nevertheless contended on behalf of Mr Pora that he should not be held responsible for implicating himself under Police interrogation. Doctor McGinn asserts in a letter tendered in support of his application that:[23]

> "Some may argue that Mr Pora should be held in some way responsible for implicating himself under police interrogation. I am not in agreement. He was a 17 year old young person with a disability who was functioning at a much lower developmental age of 8 to 10 years. He was obviously confused and not comprehending much of what was said. Young people with FASD are gullible and easily led and tend to acquiesce to authority figures. Inducements were offered and guarantees of immunity made which Mr Pora would only have been able to take literally. In my opinion, he was trying to give the police officers what was expected and they continued to lead him in what to say. Mr Pora has been shown to be markedly suggestible because of his FASD. On watching the recorded interviews it was, in my opinion, inevitable that a young person with FASD would not know what was happening or be able to extract himself from such a situation of gradual and benevolent manipulation. Even individuals without FASD are known to make false confessions under such a set of circumstances."

38. The Crown's position is that the issue is not why, as a matter of psychology, Mr Pora embarked on the course he chose but whether, objectively, he should bear some responsibility for what occurred.

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[19] Notes of evidence at 64-68.
[20] Affidavits sworn in 2011, found in Pora Common Bundle, 1771 at [32] and in written submissions 31 July 2015 [8] and [163(a)].
[21] Notes of evidence at 68.
[22] *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [57].
[23] Letter of Doctor McGinn dated 28 April 2016 at page 2.

39. I take the view that the two issues cannot be separated. The question of whether Mr Pora should bear some of the responsibility and, if so, how much, cannot be divorced from a consideration of the nature and level of his psychological dysfunction.

40. All the indications are that Mr Pora made a deliberate decision to represent that he was present when Ms Burdett was raped and murdered and that he did so because it offered the prospect of receiving the reward. To that extent he brought the consequences which followed on himself. But his conduct must be assessed by reference to the significant impairment to his executive functioning associated with FASD. Dr McGinn says that in some respects Mr Pora was thinking and acting like a child of 8-10 years of age. He had no capacity for abstract thought. His capacity to self-monitor and appreciate how his actions may be perceived, were seriously affected. As a result he would tend to say and do what seemed to be to his advantage without realising that he was doing so.[24]

41. Judged in the light of his significant cognitive deficiencies, I consider that, for the purpose of assessing compensation, the allowance required for Mr Pora's incriminating conduct should be significantly reduced.

Whether the prosecution acted in good faith

42. For Mr Pora, it is said that the Police lacked good faith in bringing and continuing the prosecution when Mr Pora's confession was "fundamentally flawed". As further evidence of bad faith there is reference to the evidence that emerged of Malcolm Rewa's involvement in the offending against Ms Burdett and the claimed failure of the Police then, and following Mr Pora's successful appeal in 1999, to re-evaluate the case against him.

43. The question of whether the **prosecution** (emphasis added) acted in good faith in bringing and continuing the case is to be distinguished from the question[25] whether the investigation was conducted in a reasonable and proper manner. The former concerns

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[24] Doctor Valerie McGinn *Neuropsychological assessment of Teina Pora* (12 May 2014) at 18.
[25] Raised by para 4(c) of the Guidelines.

the decision to bring the prosecution in the first place and the subsequent conduct of the prosecution. The latter addresses the quite distinct question of the manner in which the Police investigation was carried out. Many of the matters relied on by Mr Pora as evidence of bad faith are in substance criticisms of the Police investigation and will be considered under that head.

44. Ultimate responsibility for the conduct of public prosecutions does not reside in the Police. It lies with the Solicitor-General.[26] The prosecution of serious crimes is undertaken by a Crown Prosecutor, ordinarily a Crown solicitor or counsel employed in the Crown Solicitor's practice. In Mr Pora's case, the Crown Solicitor at Auckland was directly responsible for the conduct of the prosecution. Senior counsel from the independent bar[27] was briefed to lead the Crown case in both the first trial and the retrial. He was assisted by senior counsel from the Crown Solicitor's practice. The Solicitor-General assumed direct responsibility for the appeal to the Privy Council.

45. It is a principle of long standing, now enshrined in the Prosecution Guidelines,[28] that prosecutions ought to be initiated or continued only where the prosecutor is satisfied that, in relation to an identifiable person, there is credible evidence which the prosecution can adduce before a Court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who was prosecuted has committed a criminal offence.[29]

46. The further evidence painstakingly assembled for the purpose of Mr Pora's appeal to the Privy Council and his application for compensation has helped to show that the evidence relied on was not credible. Hindsight tells us the prosecution should not have been brought and continued. It does not, however, follow that the prosecution did not act in good faith. Successive judicial evaluations of the evidence vindicated the decision to prosecute and to continue the prosecution.

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[26] The Solicitor-General's longstanding responsibility to maintain general oversight of public prosecutions is now codified in s185 of the Criminal Procedure Act 2011.
[27] Mr Paul Davison QC now the Honourable Justice Paul Davison.
[28] *Solicitor-General's Prosecution Guidelines* (Crown Law, 1 July 2013) at para 5.1.
[29] At para 5.3.

47. Mr Pora's confession to involvement in the crimes against Ms Burdett was voluntary. There was no suggestion that he was subjected to improper pressure. His pre-trial challenge to the admissibility of the confessional evidence failed. The decision of the Judge at first instance was upheld in the Court of Appeal.[30]

48. On the basis of the information then available, the decision to prosecute was plainly made in accordance with principle. The confession survived thorough judicial scrutiny. A jury found Mr Pora guilty. The decision to prosecute was thereby vindicated.

49. Mr Pora's retrial in 2000 was endorsed by the Court of Appeal. In allowing his appeal against convictions in 1999 and ordering a retrial, the Court said:[31]

> "We are in no doubt that the case should be reconsidered by another jury."

50. An appeal by Mr Pora against his conviction following retrial was unsuccessful. The Court rejected arguments that there had been errors on the part of the trial judge that might have resulted in a miscarriage of justice. It was no part of the case on appeal that the evidence could not support a conviction. The Court acknowledged that the force of Mr Pora's confession was somewhat weakened by evidence suggesting that some parts were untrue. However, it pointed to other evidence implicating him, notably that of his cousin Martha McLaughlin and of his association with Malcolm Rewa.[32]

51. As the Crown has forcefully submitted, it was not until the evidence of Doctor McGinn and Dr Immelman became available[33] that a risk of a miscarriage of justice was identified. For the first time there was an explanation as to why Mr Pora's confessions may have been false. The evidence enabled Mr Pora's confessions to be seen in an entirely new light. Until then what he had said had been potentially reliable and accepted as such by two juries and in a succession of appeals. In the circumstances the suggestion that the prosecution was not entitled to rely on it and that it acted in bad faith in doing so cannot be supported.

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[30] *R v Pora* (1994) 11 CRNZ 544 (CA).
[31] *R v Pora* CA447/98, 18 October 1999 at [24].
[32] *R v Pora* CA225/00, 12 October 2000 at [28]–[29].
[33] After leave to appeal to the Privy Council had been granted.

Whether the investigation was conducted in a reasonable and proper manner

52. The deficiencies in the Police investigation relied on by Mr Pora, including issues of Police conduct raised in support of the claim that the prosecution was not brought and continued in good faith, may conveniently be categorised as follows:

    (a) The failure of the Police to objectively re-evaluate the case when evidence implicating Malcolm Rewa emerged;

    (b) Police reliance on witnesses of questionable credibility;

    (c) The payment of rewards;

    (d) Loss of records;

    (e) Flawed identification processes;

    (f) The failure to disclose evidence;

    (g) The evidence of David Henwood;

    (h) Resistance to requests for disclosure.

(a) <u>Failure to re-evaluate the case</u>

53. It is submitted that the Police failed to objectively re-evaluate the case against Mr Pora when evidence of Malcolm Rewa's involvement emerged and again when Mr Pora successfully appealed in 1999. I am told that a number of Police officers associated with the investigation were of the view that Malcolm Rewa had acted alone.[34] It appears, however, that those with direct responsibility for the carriage of the investigation were unreceptive to that view. Detective Sergeant Williams' thinking is revealed by an entry in his notebook which read:

[34] Including Detective Sergeant David Henwood – see First Report at paras 272-275.

"Who should we see to show an association between Hama [Malcolm Rewa] and Teina."

54. There seems to have been no thought given to a wholesale review of the evidence. Instead the investigating team focussed on uncovering evidence of a link between Malcolm Rewa and Teina Pora. Evidence that did not fit with the theory (such as Detective Sergeant Henwood's analysis) was set to one side. The evidence of witnesses of questionable credibility was promoted.

(b) Witnesses of questionable credibility

55. Those witnesses included Mr Pora's aunt, Terry McLaughlin, his cousin Martha McLaughlin and convicted criminal and prison inmate s 9(2)(a) s 18(c)(ii) My reasons for questioning their credibility and the reliability of their evidence are set out at length in my first report.

56. Terry McLaughlin and other members of Mr Pora's extended family were found to have provided false information at an early stage of the investigation in order to "have [Mr Pora] put away".[35] Yet Terry McLaughlin and her husband, Maurice, were engaged by the Police to obtain further admissions from Mr Pora in the course of the interviews in March 1993 and, with Martha, provided potentially damning evidence of Mr Pora's connection with the crime scene and his association with Malcolm Rewa. All the indications are that this evidence was received uncritically and without due regard for the unconcealed antagonism of family members toward Mr Pora.[36]

57. The evidence of family members, particularly Martha McLaughlin, added significantly to the case against Mr Pora when he was retried.[37] Martha McLaughlin's evidence linking Mr Pora with earrings allegedly taken from the crime scene was particularly potent. Yet the way in which the evidence emerged and came to be advanced at Mr Pora's retrial raises numerous questions about its reliability.[38] One particularly unfortunate aspect of

[35] First Report at para 29.
[36] First Report at para 220.
[37] *R v Pora* CA 225/00, 12 October 2000 at [28]-[29].
[38] First Report at paras 207-223.

the role of the Police in this was the failure of Detective Sergeant Williams to record conversations with Martha McLaughlin and Teina Pora's sister, Lobelia, on the subject.[39]

(c) Payment of rewards

58. The payment of rewards to key witnesses is identified as one of the deficiencies in the Police investigation. The prospect of a reward was, of course, Mr Pora's primary motivation for making a false confession. Other witnesses who received rewards were Terry McLaughlin and s 9(2)(a) .[40] s 9(2)(a) s 18(c)(ii) received a small loan from Detective Sergeant Williams personally. It is not known whether other witnesses received payments as Police records no longer exist.

59. The offer of a reward in conjunction with possible immunity from prosecution is an accepted stratagem in a proper case. Although it led directly to Mr Pora's false confession, it cannot on that account be said to have been improper. The investigation had stalled; the offer of a reward had the potential to unlock relevant information. It was clearly a legitimate tactic.

60. There is nothing to indicate that the reward payments actually made departed from established protocols.[41] I am assured that payments were made after the witness gave evidence and were approved by senior officers. However the wisdom of paying Terry McLaughlin is open to question. She was the leading figure in the initial (unsuccessful) attempt by family members to incriminate Mr Pora.

61. I cannot exclude the possibility that the payment to Terry McLaughlin played a part in her daughter, Martha, later coming forward to provide highly incriminating evidence against Mr Pora. Although she denies receiving or being induced by the prospect of a reward, it remains a mystery why she should break her silence after four years[42] to become a key Crown witness in the second trial.

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[39] First Report at para 218.
[40] First Report at para 39 and 258.
[41] I exclude the personal loan made by Detective Williams to s 9(2)(a) s 18(c)(ii)
[42] To emerge from obscurity as I put it in my first report at para 225.

62. No firm conclusions can be reached as to whether there were undisclosed payments to Crown witnesses. Most records of rewards have been lost. The payment to Terry McLaughlin was confirmed only after evidence of the payment was found in the file of Mr Pora's defence counsel.

(d) Loss of records

63. Documents pertaining to rewards were among a number of records that had been lost or disposed of. In that category also are notes presumed to have been made of discussions with Martha McLaughlin and Lobelia Pora regarding the leaf earrings.

64. I accept that some loss of records is inevitable in an investigation that spanned 8 years and considering the time passed between the retrial and request for further disclosure. It is unfortunate that the losses include documents that would have contributed significantly to an understanding of some of the more puzzling aspects of the investigation.

(e) Flawed identification process

65. Deficiencies in the identification processes adopted by the Police for the purpose of establishing links between Teina Pora and Malcolm Rewa were highlighted in my first report.[43] Mr Pora also complains about the way in which photographs were used when Police interviewed him in 1994. No record of this was kept.

66. It is true, as the Crown says, that the shortcomings identified did not lead to exclusion of the evidence. But that does not dispose of the point that the deficient procedure adopted by the Police in each case led to mistaken evidence of identification which was an important part of the Crown case.

[43] First Report at paras 234-236, 241-246.

(f) Failure to disclose evidence

67. In the course of disclosure for the purpose of the Privy Council appeal, the defence discovered that the Police had not disclosed information that may have assisted Mr Pora's defence. This included:

- DNA tests which ultimately linked Malcolm Rewa's semen and other crime scene samples.
- Communications intercepted in 1998 as part of the ongoing enquiry into Ms Burdett's rape and murder.
- Photo identification processes involving associates of Malcom Rewa which unsuccessfully sought to link him and Mr Pora.
- Brief of evidence of former Detective Sergeant Henwood as it related to Malcolm Rewa's erectile dysfunction and the positioning of victims of his offending.

(g) Mr Henwood's evidence

68. David Bruce Henwood (formerly a Detective Sergeant) was involved in the arrest and prosecution of Malcolm Rewa.[44] Based on his knowledge of the crimes known to have been committed by Rewa and having particular regard to his sexual dysfunction, Mr Henwood came to the view that Rewa acted alone. Mr Pora is critical that Mr Henwood's view was not shared by the decisionmakers in the Police or, it seems, by the Crown.

69. As the Crown points out in its submissions, the Privy Council did not accede to Mr Henwood's view either. However, the Privy Council's refusal to receive Mr Henwood's evidence (and that of Professor Owens) involved a much more stringent test. Mr Henwood's colleagues (and the Crown) were obliged to have regard to the evidence that informed his view. Had they done so as part of a full re-evaluation of the

[44] See First Report at paras 272-275.

case against Mr Pora, it is possible that events could have taken a different course. It does not follow, however, that their failure to embrace Mr Henwood's theory was unreasonable or improper.

(h) Resistance to disclosure requests

70. Mr Pora complains that the Police unjustifiably resisted and delayed providing information sought by his advisers for the purpose of reviewing his convictions in pursuing a remedy. It is said that the approach of the Police to the release of information had the effect of prolonging his time in custody. Three categories of evidence are identified:

(a) Evidence of Malcolm Rewa's other victims, scene reports and the like;

(b) Payment of rewards to witnesses;

(c) Scientific evidence including issues surrounding potentially destructive testing.

71. I have been provided with a detailed chronology of the way in which the requests for information were advanced and managed by the Police. It is unnecessary to go through each step. It is sufficient to note that the initial request was made in March 2010. Agreement to the disclosure of the information did not occur until February 2012 and then only as a result of High Court proceedings seeking an injunction.

72. The Crown acknowledges that information about reward payments should have been released more promptly but otherwise defends the Police actions as professional and reasonable. I do not agree with that assessment. I acknowledge that care was required with the release of information about the Rewa enquiry in order to ensure that the privacy of victims was protected. I accept there were genuinely held differences of opinion over the involvement of the defence in further scientific testing. But the defence position was ultimately vindicated. The delay was unjustifiable and contributed to the time it took to dispose of Mr Pora's appeal.

Conclusion as to conduct of investigation

73. The shortcomings in the Police response to requests for information is arguably of peripheral importance as clearly this part of the Guidelines requires focus on the investigation which led to the wrongful convictions. The major concern in that respect is with the apparent lack of professional detachment when Malcolm Rewa's involvement came to light. There appears to have been an unwillingness to re-examine the Police theory of the case. Associated with that was a failure to critically examine the evidence of witnesses whose evidence supported that theory but whose credibility was demonstrably suspect. There were also concerning departures from best practice in such matters as identification, disclosure and record-keeping.

Quantification of compensation

74. Mr Pora has sought compensation totalling $3,616.250.00 for non-pecuniary losses other than the loss of liberty and having regard to the presence or absence of the matters identified in para 4 of the Guidelines, the second step identified in *Akatere.* Described as "an uplift", the losses are computed as $165,000 per annum for the period of 21.11 years relied on as the qualifying time in custody. The $165,000 per annum is said to be referable to Police misconduct in relation to the investigation and prosecution, when information was being sought between 2009 and 2015 and for unspecified misconduct over the whole period of incarceration.

75. As the earlier discussion makes clear, the approach taken on Mr Pora's behalf is not the way in which non-pecuniary losses of this nature are to be computed. There is provision for a lump sum payment, on average $100,000, greater in exceptional circumstances. There is no provision for it to be multiplied on a per annum basis to reflect time spent in custody.

76. As the Crown acknowledges, there can be no doubt that the circumstances of Mr Pora's case are truly exceptional. The lengthy term of imprisonment and Mr Pora's youth and vulnerability are by themselves sufficient to put his claim in the truly exceptional category. He suffered grievous mental and emotional harm. Family relationships were lost or destroyed and were more or less non-existent for much of his incarceration;

important relationships, particularly with his daughter, had to be built from scratch. As earlier noted, harm of this nature continued when Mr Pora was on bail (on highly restrictive conditions) and on parole.

77. I suggested earlier[45] that there is room under the second step to recognise the time spent on bail and on parole which do not qualify as loss of liberty for the purpose of the first step. This would not permit compensation at the levels suggested by the Crown under the first step,[46] as it is not loss of liberty (at the prescribed rate) which is being compensated but the incremental loss under the applicable further heads of non-pecuniary loss, notably loss or interruption to relationships and mental or emotional harm.

78. In my view, Mr Pora's losses are of such a magnitude that it is reasonable to fix a starting point of $225,000 before weighing the factors remaining for consideration – his conduct and the conduct of the Police.[47]

79. I have found fault with the way in which the Police conducted the investigation. That is not to suggest that the Police should bear responsibility for the wrongful convictions. The Police investigation is one element only of the factual matrix in which Mr Pora was found guilty of crimes he did not commit. His confession was another. The conduct of the prosecution and Mr Pora's defence were others. An analysis of why the normal safeguards failed on this occasion would be far-reaching and quite beyond the scope of this report.

80. The Crown submits that the case miscarried because Mr Pora confessed and that compensation under this head should be discounted by 33% on that account, with a further 5% discount to reflect his earlier convictions. Against that, it is clearly arguable that greater rigour and objectivity on the part of the investigating officers could well have exposed the falsity of the confession at an earlier stage. It could also have led to

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[45] Above at para 14-15.
[46] $25,000 for the three months spent on bail and approximately $35,000 for the time spent on parole (10 months and 5 days at 40% of the applicable rate).
[47] Sub paragraphs (d)-(f) of para 4 of the Guidelines are encompassed by the various heads of non-pecuniary loss.

the exclusion from the Crown case at the re-trial, of evidence which has been shown to be of no worth.

81. In the end I find these two opposing factors tend to balance one another out. Mr Pora began the process and allowed it to continue. But he was young and significantly disabled and his disastrous error of judgment (if it can be called that) was compounded by shortcomings in policing then and afterwards that in my view are deserving of no less weight. In all the circumstances compensation of slightly more than twice a notional average, without deduction, seems commensurate to the quite exceptional suffering that Mr Pora has endured.

82. The sum of $225,000 reflects the stipulation in the Guidelines that on average awards under this head would even out at $100,000. If, as I have suggested, that figure is adjusted for inflation, there should be a corresponding adjustment to the amount recommended. In line with the suggested approach to compensation for loss of liberty,[48] I recommend adjusting the figure of $225,000 to reflect the decline in the value of money.

[48] At para 19 above.

(5) PECUNIARY LOSSES

83. Mr Pora seeks to recover pecuniary losses comprising:

    (a) Loss of earnings during his time in custody - $966,500 before tax;

    (b) Loss of future earnings - $200,000;

    (c) Legal and other costs incurred - $134,054.42.

Loss of earnings

84. Loss of earnings over the assessed period (of 21.11 years) have been calculated on behalf of Mr Pora as the midpoint between the aggregated unemployment benefit over the period of $406,866.00 and the wages of a building labourer totalling $1,376,156.00, both adjusted to present values. Mr Pora was unemployed when he was incarcerated and worked as a builder's labourer when released on parole.

85. The wording of the Guidelines makes it clear that losses under this head are for the sum the claimant could have expected to earn were he not incarcerated, adjusted for income tax and benefits received while in custody. This is a net sum. I accept the Crown's submission that "earnings" contemplates earnings derived from paid employment. Earnings could not have encompassed a benefit which is paid only as the need arises.[49]

86. At the time of his conviction and his prior incarceration, Mr Pora had no qualifications. His personal history discourages any notion that he had any immediate prospects of obtaining employment. That is not to say, however, that had Mr Pora not been wrongfully convicted, he could not in time have acquired skills, established a pattern of employment and achieved economic gains. As Dr McGinn said in her report:

> Due to being in prison from such a young age, Mr Pora did not get the opportunity to find and build on his talents. I know that he is musical and plays guitar and has sporting prowess. He likes to construct and is hard working. There is no doubt that Mr Pora too

[49] Section 1A(a) of the Social Security Act 1964.

> has talents to develop but at his age now this is far more difficult. The critical age for best learning and skill development has passed.
>
> In my opinion it would be wrong to assume Mr Pora would not have succeeded in his life due to having FASD. Disabled people have the right to live a normal life and be suitably supported so that they can succeed.

87. It is reasonable to acknowledge the possibility that, had he not been falsely imprisoned, Mr Pora may have acquired the skills and work habits required for him to become gainfully employed. Having regard to the high level of uncertainty, however, I consider that any allowance under this head must be modest. In my view, the maximum sum suggested by the Crown of $100,000 provides a reasonable recognition of what Mr Pora could reasonably claim to have lost after making the adjustments required by the Guidelines.

Loss of future earning abilities

88. An amount of $200,000 is claimed under this head on the basis that Mr Pora's incarceration will have affected his ability to earn over the next 25 years (until his retirement) to the extent of "perhaps 20% of his total potential future earnings".

89. This head of loss is intended to compensate for the adverse effect incarceration had on the claimant's ability to earn on his or her release. This may arise because imprisonment has denied a claimant the ability to enhance his or her earning capacity (by study, training or work experience) or to resume employment at the level of remuneration previously received.

90. As Mr Pora had no record of employment and no imminent prospects of acquiring skills or qualification when he was incarcerated, any attempt to quantify the impact of his imprisonment on future earning capacity is also highly conjectural. Regardless, it is inevitable, as Dr McGinn says, that 20 years of imprisonment will have had long term effects on Mr Pora's ability to earn, if only because it denied him the opportunity to acquire skills and work experience. In my view it is reasonable to assume that those effects are likely to depress his earning capacity over the 25 years to retirement, albeit at a diminishing rate. Quantifying the amount, discounting it for uncertainty and attributing to it a present value suggests that an allowance of a further $100,000 under

this head would be reasonable. The essentially arbitrary nature of that assessment is acknowledged.

91. What it leads to however is compensation of $200,000 in total for economic loss. While that sum could be criticised as too generous (or too niggardly) it seems to me to fairly reflect Mr Pora's highly unfavourable work prospects at the outset while recognising that the long period he spent in custody will have severely constrained his ability to achieve financial independence.

Costs incurred on behalf of Mr Pora

92. Mr Pora seeks to recover:

Legal costs	$106,691.61
Private investigator	$21,562.50
Actuary	$970.31
Doctor Valerie McGinn	$4,830.00
TOTAL:	$134,054.42

Legal Costs

93. Legal costs comprise:

Jonathan Kreb, barrister	$57,330.50
Gifford Devine, solicitors	$49,358.11

94. Mr Kreb's costs are for time engaged since 3 March 2015 at an hourly rate of $350.00. Gifford Devine's costs cover time spent by Ms Ingrid Squire since 10 April 2015.[50] Except for some early attendances by Mr Kreb, all costs relate to the application for compensation.

[50] The bill refers to 2014 but that is assumed to be an error.

95. The Crown takes issue with the hourly rate charged. There is reliance on *Akatere v Attorney General*[51] where the claimant sought to recover legal costs based on $350 per hour for senior counsel and $250 per hour for junior counsel. The High Court upheld the view of the reporting Queen's Counsel that the appropriate rate for senior counsel was the corresponding rate pursuant to the Crown Solicitor's Regulations 1994 (then $177 per hour, now $240 per hour).

96. In the High Court, Keane J upheld the approach taken in the report. He said:[52]

> [19] For 'compensation' to be 'appropriate' may well call, I consider, for a balance to be struck between market and Crown rates. Each has a place in the equation. The rates set in the High Court Rules seem to me to represent a fair mid-point. But that does not necessarily mean that to opt for one, as opposed to the other, as Ms McDonald QC did by opting for the Crown Solicitor's rate, is wholly unreasonable. Though the difference between the two rates is large, a choice either way can be made intelligibly. The question is where the accent is to be placed, on the need to make good, or the need to reconcile that with the most prudent use of public money. A choice either way may seem highly undesirable from the opposed perspective but that is another matter. I see no basis for sustaining this aspect of the claimant's application either.

97. It will be noted that, while upholding the approach taken by Ms McDonald QC, the Judge acknowledged that full reimbursement was reasonably available. That is the approach I favour in this case. The work was carried out by two senior practitioners. The rates charged are reasonable having regard to those prevailing in the profession. The costs claimed are part only of the qualifying legal costs incurred in pursuing a remedy on behalf of Mr Pora. Time spent earlier was paid at legal aid rates or was undertaken on a pro bono basis. I consider it reasonable for this part of counsels' brief, which is essentially civil in nature, to be fully remunerated. The alternative requires the practitioners to further subsidise Mr Pora's quest for justice. That is difficult to justify, particularly when no issue is taken with full reimbursement of expert adviser's costs.

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[51] *Akatere v Attorney-General (No 2)* HC Auckland, CIV 2004-404-6217, 1 March 2006, a later judgment of Keane J in the same matter – see above n 10.
[52] At [19].

Private Investigator

98. Mr Timothy McKinnell, a former policeman, has, as I understand it, taken a leading role in Mr Pora's case. The support he has provided to counsel will have resulted in cost savings overall. The time he has expended (150 hours) and his hourly rate ($125) seem reasonable.

Actuary

99. I have not found the actuary's report of any real assistance but I accept it was reasonable to engage him. His costs are modest.

Doctor McGinn

100. Doctor McGinn has provided valuable input at both stages of this application. Her time (21 hours) and hourly rate ($200) are reasonable.

Conclusion

101. I conclude that pecuniary losses reasonably payable under the available heads of loss are:

(a)	Loss of livelihood		$100,000.00
(b)	Loss of future earning abilities		$100,000.00
(c)	Costs incurred on behalf of Mr Pora		$134,054.42
		Total:	$334,054.42

(6) CONCLUSION

102. The compensation which I consider is payable to Mr Pora in accordance with the Guidelines is:

Non-pecuniary compensation for loss of liberty	$1,961,895.00
Other non-pecuniary losses	$225,000.00
Pecuniary losses	$334,054.42
TOTAL:	$2,520,949.42

103. For the reasons set out earlier in this report,[53] I recommend that consideration be given to adjusting non-pecuniary losses for inflation.

31 May 2016
Rodney Hansen CNZM QC
Shortland Chambers
Auckland

[53] At paras 17-19 and 82.