Dr Donald Stevens QC

SECOND REPORT FOR MINISTER OF JUSTICE ON CLAIM BY TYSON GREGORY REDMAN FOR EX GRATIA COMPENSATION FOR WRONGFUL CONVICTION AND IMPRISONMENT

25 September 2017

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I. THE MANDATE

Introduction

1. In my report, dated 24 February 2017, for the Minister of Justice on the Claim by Tyson Gregory Redman for *Ex Gratia* Compensation for Wrongful Conviction and Imprisonment I concluded that Mr Redman had established his innocence, on the balance of probabilities, of the injuring and wounding charges he was convicted of in 2007.

2. The Minister, the Honourable Amy Adams MP, has now requested me to provide her with advice on an appropriate amount of compensation for Mr Redman, for wrongful conviction and imprisonment. The Minister has asked that compensation be calculated in accordance with the Cabinet guidelines.[1]

Submissions and other material considered

3. I have received and considered submissions[2] from counsel for the claimant, Mr Jeremy Sutton and Mr Brintyn Smith, as well as Crown counsel, Mr Simon Barr.[3] I have been assisted by counsel and record my gratitude to them.

4. I have also received and considered the following material, additional to that listed in the Schedule to my first report:

- Report dated 20 June 2017 from registered clinical psychologist, Sabine Visser.
- Letter dated 6 July 2017 from Perpetual Guardian.
- Letters dated 20 April 2017 and 10 August 2017 on behalf of the Legal Services Commissioner.
- Letter dated 4 July 2014 from Department of Corrections.

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[1] The Cabinet guidelines comprise:
- Cabinet guidelines on Compensation and *ex gratia* payments for persons wrongly convicted and imprisoned in criminal cases.
- Additional guidelines on the quantum of compensation payments.

[2] Dated 7 July 2017 and 27 July 2017.

[3] Dated 16 August 2017.

Amount of compensation sought by claimant

5. The submissions on behalf of the claimant have set out the amount sought by the claimant as compensation for the wrongful conviction and imprisonment, as follows:

a) Loss of liberty: $249,041.10.

b) Other non-pecuniary losses: $131,200.00.

c) Pecuniary losses: $274,496.99.

6. The total amount sought is $654,738.09

7. The claimant seeks a recommendation that compensation for non-pecuniary losses should be adjusted to reflect inflation since the Guidelines came into effect. I record that I am not making such a recommendation, as it would be beyond my remit to do so. The Guidelines do not provide for any adjustment for inflation of calculated losses. Moreover, as the issue of whether such an adjustment should be made in compensation claims was, at the time I was instructed by the Minister, the subject of litigation, the Minister asked me not to include such an adjustment in the calculation of quantum.

Compensation recommendation

8. For reasons that I set out in this report, I recommend payment of the following compensation to Mr Redman:

a) Non-pecuniary compensation for loss of liberty: $245,311.43.

b) Other non-pecuniary losses: $82,000.00.

c) Pecuniary losses: $42,300.00

9. The total compensation recommended is $369,611.43.

10. For reasons elaborated later in the report, I make two further recommendations. First, that the Government meet the cost of counselling and therapy s 9(2)(a) over two years and up to a maximum of $21,700 – to treat the mental and emotional harm caused by the wrongful imprisonment. This is subject to conditions,

explained later in the report.[4] Secondly, that the Government compensate Mr Redman for the amount of his legal aid debt, once the amount of the debt has been finalized.

[4] See paragraphs 126-34 and 145.

II. APPROACH REQUIRED TO ASSESSMENT OF COMPENSATION

11. The Cabinet guidelines define the losses – which can only have arisen during the period following conviction – for which there can be compensation, 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 of interruption of family or other personal relationships; and

d) Mental or emotional harm.

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.

12. 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.

13. The factors referred to in point 3 of the Additional guidelines that influence the assessment of 'general compensation'[5] are:

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.[6]

14. The High Court held in *Akatere v Attorney-General*[7] that a three-step approach is to be taken to the application of the Cabinet guidelines and the Additional guidelines. The process is:

> First, to calculate an appropriate amount for loss of liberty. Under the Additional guidelines, the starting figure for loss of liberty is $100,000. This base figure is then 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.

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[5] Point 4 of Additional guidelines.
[6] Paragraph 4 of Cabinet guidelines.
[7] *Akatere v Attorney-General* [2006] 3 NZLR 705.

> Second, to weigh up the factors set out in [paragraph 4] of the Cabinet guidelines to determine an appropriate amount for the [additional] non-pecuniary losses incurred by a claimant. The factors in paragraph 4 can both aggravate and mitigate the assessment of a claimant's losses. 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.
>
> Third, to calculate pecuniary losses.
>
> The sum of the amounts calculated at each of the three stages represents the total compensation that may be recommended.[8]

15. The three-step process confirmed in *Akatere* reflects the description of the process in 2002 by the then Chief Legal Counsel of the Ministry of Justice[9] and earlier, in 2000, by the then Minister of Justice, the Hon. Phil Goff, MP, in a press release discussing the Additional guidelines promulgated in 2000 to supplement the 1998 guidelines.[10]

16. Both *Akatere* and the then Minister's statement in 2000 make clear that the criteria set out in paragraph 4 of the Cabinet guidelines have application only to the second step of the process.

17. I apply these principles to Mr Redman's claim in the following parts of the report.

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[8] At [52] and [68].
[9] *Akatere*, at [51] and [52].
[10] Hon. Phil Goff, "New Guidelines for compensation payments adopted", 3 September 2000.

III. NON-PECUNIARY LOSS: LOSS OF LIBERTY

18. Compensation under this head is particularly significant. As the Law Commission said in its 1998 report, *Compensating the Wrongly Convicted*[11], "A major value of New Zealand's legal system is the protection of individual liberty, especially from the undue exercise of state power." [12] Our society, the Commission said, "places paramount value on individual freedom".[13]

19. The base figure for loss of liberty is $100,000, which 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.

20. On 30 November 2007 Mr Redman was sentenced in the Auckland District Court to imprisonment for two and a half years, following conviction on the charge of wounding with intent to cause grievous bodily harm; imprisonment for two years on conviction for injuring with intent to cause grievous bodily harm; and imprisonment for six months on each of the six convictions for injuring with reckless disregard for the safety of others. Mr Redman was also sentenced to imprisonment for one month, following conviction for unlawful assembly. All sentences were to be served concurrently.

21. The only conviction to remain extant is that for unlawful assembly.

22. Mr Redman was released from prison, having served the sentence, on 26 May 2010.[14] He served 909 day's imprisonment.[15]

23. The 909 days include the sentence for unlawful assembly. Although that sentence was imprisonment for one month, the actual time served, according to the Department of Corrections, was 13 days.[16] This was a short-term sentence (as defined by section 4 of the Parole Act 2002), in respect of which the release date, in terms of section 86 of the Act, would have been the date on which Mr Redman had served half of the sentence. The difference between the 13 days served and the 15 days that would amount to half of the sentence is accounted for by two days spent on remand.[17] As the conviction and sentence for unlawful assembly were not challenged I deduct the 13 days served on this sentence from the 909

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[11] Report 49, September 1998.
[12] At ix and 8.
[13] At 7.
[14] Letter dated 4 July 2014 from Manager Ministerial Services and Corporate Services, Department of Corrections to Victoria Moss, barrister, Auckland.
[15] Ibid.
[16] Ibid.
[17] Ibid.

days in respect of which compensation is to be assessed. I have done this notwithstanding the conclusion I reach later in the report that it is unlikely Mr Redman would have been sentenced to imprisonment had he been sentenced only on the conviction for unlawful assembly – my conclusion is that in that event a community based sentence would probably have been imposed. [18] Notwithstanding that conclusion, the 13 days served for unlawful assembly cannot be included in the period for which compensation would be appropriate. That is because the sentence of imprisonment for one month remains the sentence imposed upon the conviction for unlawful assembly and cannot, therefore, be said to be a wrongful imprisonment, as a result of a wrongful conviction.

24. At the rate of $100,000 per annum, compensation for imprisonment for 896 days (which does not include the two days on remand) amounts to $245,311.43[19] Payment of this amount for loss of liberty is recommended.

[18] See paragraphs 56-7 of report.

[19] This figure was arrived at using the following equation: $\left(\frac{100000}{365.25}\right) \times 896$

IV. OTHER NON-PECUNIARY LOSSES

25. The guidelines require that the total amount for non-pecuniary losses be fixed by adding to the amount calculated for the period of detention a further sum, to compensate for loss of reputation, loss or interruption of family or other personal relationships and mental or emotional harm. The further sum is to be assessed so as to reflect the factors set out in paragraph 4 of the guidelines. This assessment is the second step of the process.[20]

26. The way this step is to be approached is apparent from the judgment of Keane J in *Akatere*.[21] His Honour described as 'accurate' the description of the second step set out in a letter written by the then Chief Legal Counsel of the Ministry of Justice.[22] That letter 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.
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> 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.[23]

27. I now turn to this assessment, in the context of the paragraph 4 criteria.

The conduct of the claimant leading to prosecution and conviction

28. Two issues arise under this head. First, the implications of the claimant's actions in attending the unlawful assembly. Secondly, whether, and to what extent, Mr Redman (as distinct from his counsel) could be seen as contributing to his convictions, or to the time over which they were extant, by his failure to call

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[20] Described in paragraph 14 above.
[21] *Akatere v Attorney-General* [2006] 3 NZLR 705.
[22] At [68].
[23] At [52].

at the trial and at the first appeal the evidence that ultimately, at the second appeal, saw the convictions quashed. These issues are now considered.

Attendance at the unlawful assembly

29. Mr Redman accepted that he had attended the unlawful assembly (referred to as the "first incident" in my first report).[24] Prior to doing so he had been drinking alcohol over an extended period of time. He was intoxicated.[25] Mr Redman took with him, to the unlawful assembly, a piece of wood, said to be approximately 70 cm in length.[26] The purpose of having that at the assembly was "to use it as a weapon."[27] On arrival at s 9(2)(a) Avenue (where the assembly occurred) Mr Redman's group "stood around yelling and swearing."[28] In the event, nothing was thrown; no weapons were used; and no one was assaulted. The assembly ended – after adults at the party counselled the young men to leave - whereupon they returned to the home of two of them, at s 9(2)(a) Road, from where they had originated.[29]

30. The claimant's intoxicated actions in attending the unlawful assembly, with a weapon, contributed to the mistaken identification that led to his wrongful conviction on the charges relating to the second incident. I concluded in my first report that there was a real risk the identification witness s 9(2)(a) had conflated and confused the first and second incidents, and mistakenly assumed the claimant was at the second incident, because she had seen him demonstrating animus at the unlawful assembly (the first incident).[30] I also concluded the identification evidence of the witness s 18(c)(i) could not be relied upon,[31] for several reasons.[32] Again, in her case it would have been unlikely that she would have purported to identify the claimant as being at the second incident, had he not been at the unlawful assembly. It can be confidently asserted, therefore, that had the claimant not attended the unlawful assembly, and behaved there as he did, he would not have been mistakenly identified as attending the second incident. It follows that his actions in attending the unlawful assembly directly contributed to the subsequent mistaken identification that produced the miscarriage of justice.

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[24] See paragraphs 83, 89, 90 and 91 of first report.
[25] See paragraph 91 of first report.
[26] See paragraph 90 of first report.
[27] Ibid.
[28] ibid.
[29] ibid.
[30] See paragraphs 326 to 332 and 443 of first report.
[31] See paragraphs 353 and 443 of first report.
[32] See paragraphs 334 to 353 of first report.

Failure to call exculpatory evidence at trial and first appeal

31. None of the 'fresh' evidence that was before the Court of Appeal on the second appeal, and that led to the convictions being quashed, was called at the trial or at the first appeal. The issue is how much responsibility for this rests with the claimant, as opposed to his counsel.

32. It should first be noted, however, that while there would be no impediment to the evidence from the eight affiants, who provided affidavits for the royal prerogative application, being used at the first appeal, there would have been an issue about whether evidence from some of the affiants could have been used at the trial. Two of the affiants – s 9(2)(a) and s 9(2)(a) – were themselves defendants at the trial, although s 9(2)(a) pleaded guilt part way through the trial. The others had entered a plea of guilt prior to trial. Obviously, the claimant's trial counsel would not – unless he had applied for and obtained severance – have been able to call s 9(2)(a) as a witness and there is a doubt whether, given the law in force at the time, persons awaiting sentence would have been competent and compellable witnesses.[33]

33. Aside from this, trial counsel made the strategic decision – he told the Ministry of Justice, during the Ministry's consideration of the royal prerogative application – not to call witnesses who might, "under destructive cross-examination", undermine the "solid alibi" he thought Mrs Redman's evidence would provide.[34] He had concluded that Mrs Redman was "a person of good character, and his assessment during the trial that Mrs Redman had given "honest evidence"[35] would seem to have reinforced, at least at that stage, his view of the merits of the strategic decision that had been taken.

34. Trial counsel recalled specifically addressing the issue of whether s 18(c)(i) should be called as a witness for the defence - he was the only one of the eight affiants who faced no charges as a result of the events of the evening, and he would, consequently, have been a competent and compellable witness. Specifically, however, counsel was concerned he could be shaken in cross-examination about the time the claimant had returned home.[36]

35. I concluded in my first report that I could not view s 18(c)(i) as a credible or reliable witness.[37] This conclusion would emphasize the soundness of the

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[33] See discussion of this issue in Advice to Minister of Justice, dated 28 February 2012, on Application [by Tyson Redman] for Exercise of the Royal Prerogative of Mercy, at 179.
[34] Idem, 153-4, 166 178-80.
[35] Idem, 153.
[36] Idem, 152.
[37] See paragraph 213 of first report.

reservations trial counsel had about calling him as a witness. Indeed, the Ministry concluded, on the application for an exercise of the royal prerogative, that it was not satisfied trial counsel erred in the approach he took to this strategic issue.[38]

36. Different considerations applied at the first appeal. According to the solicitor acting for the claimant on the royal prerogative application, the claimant's family had told appeal counsel that trial counsel had not called potential witnesses at the trial. Counsel acting on the appeal apparently advised that:

> ...there was insufficient basis to appeal on grounds of counsel incompetence or fresh evidence. Instead, the best approach was an appeal focused on the Judge's summing up and other "technical points". The Redmans considered that [appeal counsel] was resistant to making further inquiries about the potential witnesses. However, ultimately his advice about the strategy for the appeal was accepted.[39]

37. The outcome of the second appeal demonstrates that the 'fresh evidence' that would have been available at the time of the first appeal could have been expected to have produced a successful outcome to the first appeal, had it been produced on that occasion. However, counsel acting for Mr Redman at that time was unaware of the detail of that evidence,[40] presumably because the inquiries that would have produced it were not made.

38. To what extent could it be said that the claimant should bear some responsibility for failing to instruct his counsel to pursue this line of inquiry for the first appeal? After all, the claimant's parents had raised the issue with counsel and sensed that he was resistant to making the inquiries. Should they have persevered?

39. According to the claimant, he did not at any time have a face-to-face meeting with appellate counsel – his only contact was a phone call and a video link.[41] He seems to have left it to his family to discuss with counsel the conduct of the case.[42] s 9(2)(a) [43]

40. It was evident that the claimant's parents relied heavily – as did the claimant himself – on the advice of counsel. They had not previously had contact

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[38] Advice to Minister of Justice, dated 28 February 2012, on Application [by Tyson Redman] for Exercise of the Royal Prerogative of Mercy, at 179.
[39] Idem, 167.
[40] Idem, 181.
[41] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 41.
[42] Idem, p 71.
[43] Idem pp 42, 71.

with the criminal justice system and did not have an understanding of how it worked. They were told not to worry and to leave it to the lawyer.[44] Thus, they "relied on the advice of counsel in circumstances where they were not equipped to evaluate critically the advice."[45]

41. The claimant and his family placed their entire confidence in the justice system to deliver a just outcome – Mrs Redman was confident her son would be acquitted.[46] The family thought they could leave matters to the lawyers, who, they thought, were best equipped to deal with them. I believe there may also have been a cultural dimension to this: s 9(2)(a)

The approach they took could be said to accord with the traditional values of Pacific Islands culture. Those values have not always easily accommodated adversarial processes, being more comfortable with communal processes, and relying upon persons in leadership roles to initiate and pursue just outcomes. It is more natural in this tradition to defer to those in a leadership position.

42. I do not believe – in the circumstances that applied here – that the claimant should be held responsible, to any extent, for failing to instruct appellate counsel to pursue inquires that would be expected to have produced the evidence that was ultimately before the Court of Appeal, on the second appeal. A contrary approach could be faulted, as a matter of principle, because – in the words of one academic writer – it "could be used to punish the naïve, the youthful, or the powerless".[47] I accept that view. I therefore do not count against the claimant his failure to instruct counsel at the first appeal to pursue these inquiries.

43. I have therefore concluded that Mr Redman himself bears no responsibility for the failure to call at the trial, or the first appeal, the evidence that ultimately saw the convictions quashed.

Whether the prosecution acted in good faith in bringing and continuing the case

44. The claimant suggests the prosecution did not act in good faith in bringing and continuing the case. I do not accept that submission. As the Crown points out the prosecution, at the commencement of the case, had three eye witnesses, who purported to place Mr Redman at the scene of the crime. The claimant was committed for trial, at the conclusion of a depositions hearing, and no application

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[44] Interview of Carol Redman, conducted on 7-8 July 2016, pp 158-60, 247.
[45] This was the essence of a submission by the claimant's solicitor in relation to the royal prerogative application: see Advice to Minister of Justice, dated 28 February 2012, on Application [by Tyson Redman] for Exercise of the Royal Prerogative of Mercy, at 165.
[46] Interview of Carol Redman, conducted on 7-8 July 2016, p 158.
[47] Kaiser, "Wrongful Conviction and Imprisonment: Towards an end to the Compensatory Obstacle Course" (1989) 9 Windsor Yearbook of Access to Justice 96.

was made for a discharge under section 347 of the Crimes Act 1961. There was clearly sufficient evidence at that point for the charges to be put to a jury. The convictions were upheld by the Court of Appeal, on the first appeal.

45. The claimant contends that even when new evidence was provided at the second appeal hearing the Crown continued to suggest that the claimant was guilty and, "instead of accepting the new evidence, the prosecution continued to seek to uphold the convictions."[48] I do not see that this involved an absence of good faith. As the Crown points out, in its submissions, the Court of Appeal, on the second appeal, after hearing from the new witnesses produced by the claimant, was not satisfied that judgment of acquittal should be entered. That was because if there were then to have been a re-trial the jury might well have had a reasonable doubt about whether Mr Redman was at the second incident, but it would still have been, on the evidence, "open to the jury to find Tyson Redman guilty."[49] As a consequence, there would have been in the "ordinary course" an order for a new trial; but as Mr Redman had served his full sentence, such an order was not made, and instead the proceedings were stayed. That provides the answer to the claimant's point.

Whether the investigation was conducted in a reasonable and proper manner

46. Mr Redman argues the investigation was not conducted in a reasonable and proper manner. He says the police did not explore the alibi and, instead, "relied on inherently unreliable identification evidence."[50] The police did, however, explore the alibi: they interviewed and took statements from the claimant's parents, and made recorded observations about the claimant's home, that had a bearing upon the alibi. I believe they were entitled to leave it to the court to determine whether the alibi was accepted.

47. I do not accept that the police reliance on the identification evidence means the investigation can be characterized as unreasonable or improper. There are obvious dangers when the prosecution relies upon identification evidence, because, as the law recognizes, such evidence "carries an inherent risk of unreliability."[51] These dangers are discussed in detail in my first report.[52] I made reference in that discussion to the view expressed by the authors of an article published in the Connecticut Law Review – Richard A Wise et al, "How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case"[53] – that "the

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[48] Submissions of Counsel for Tyson Redman, dated 7 July 2017, at paragraph 23.
[49] *Tyson Gregory Redman v The Queen* [2013] NZCA 672, at [58].
[50] Submissions of Counsel for Tyson Redman, dated 7 July 2017, at paragraphs 24 and 25.
[51] Mahoney et al, *The Evidence Act 2006: Act and Analysis* (3 ed), 503.
[52] At paragraphs 322 to 324.
[53] *Connecticut Law Review*, December 2009, Vol 42, 435.

State needs to minimize the number of criminal cases that it brings where the sole or primary evidence of the defendant's guilt is eyewitness testimony."[54] But, I have to recognize that in New Zealand cases are prosecuted where the evidence of guilt is primarily eyewitness testimony, and that it cannot be said, on that basis alone, that the investigation was conducted in an unreasonable or improper manner. Indeed, the law has in place a mechanism to deal with this situation: it requires the jury to be warned of the "special need for caution" before convicting in reliance wholly or substantially on the correctness of evidence of identification.[55]

48. In the present case, as at the date the prosecution was commenced, the police had what they thought was the evidence of three eyewitnesses to establish the presence of the claimant at the second incident, notwithstanding that they were affected by the consumption of alcohol and drugs. By the time the trial commenced one of these had fallen away,[56] but the police were entitled to take the position that the issue of the reliability of the remaining two was a matter to be determined by the court.

49. As Mr Barr points out, evidence that subsequently emerged calling into question the reliability of the eyewitness evidence was not known to the police, at the time of their inquiry. The police had interviewed s 9(2)(a) , who did not refer to the claimant one way or the other; rather, "His exculpation of the claimant did not emerge until the second Court of Appeal hearing."[57] Likewise, the police had interviewed s 9(2)(a) He also did not refer to the claimant one way or the other. The aspect of his later account that assisted the claimant did not emerge until I interviewed him for the purposes of this inquiry.[58] s 9(2)(a) told the police the claimant was at home during the second incident. But the police were also aware, as Mr Barr points out, that, in addition to the eye witness evidence, s 9(2)(a) had told the police that the claimant was at the second incident. s 9(2)(a) did not retract that part of his statement until his interview for the purposes of this inquiry.

50. I accept the Crown submission that the claimant's assertion that the police investigation was not conducted in a reasonable and proper manner is ill-founded.

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[54] At 550.
[55] See section 126 of the Evidence Act 2006, and also paragraph 322 of the first report.
[56] By virtue of cross-examination at the depositions hearing.
[57] Crown Submissions in Response to Aspects of Submissions made by the Claimant in Respect of Quantum, at 11.3.3.
[58] See paragraph 11.3.4 of Crown submissions.

The seriousness of the offences alleged

51. Wounding with intent to cause grievous bodily harm is a very serious offence, as is injuring with intent to cause such harm. The former carries a maximum sentence of imprisonment for 14 years; while the maximum in the case of the latter is imprisonment for 10 years. The ignominy attendant upon conviction for these offences is substantial. This contrasts with the maximum penalty for unlawful assembly, which is imprisonment for one year.

Severity of the sentence

52. A sentence of imprisonment for two and a half year is not, in the scheme of things, a particularly severe sentence; but, an unworldly 19-year-old with no prior criminal history could be expected to view it as severe. The claimant may well have viewed it as more severe by virtue of his being denied parole; an outcome partly attributable to his refusal to admit guilt – as a result he was classified as a "motivation category prisoner",[59] which prevented him from attending criminogenic programmes (attendance at which would have enhanced parole prospects) – and partly the result of his behaviour in prison. The latter may have been a reaction to the wrongful conviction. s 9(2)(a)

53. The injustice caused to the claimant as a wrongly convicted and imprisoned person was thus compounded by his serving a longer period of imprisonment, as a result of a combination of the consequences of insisting on his innocence, and behavioural issues in prison, as well as a loss of trust in authority; the last two of which can be attributed to the miscarriage of justice. An observer could be excused for contrasting this with the prisoner who is rightly convicted and who feigns remorse, so as to qualify to attend the criminogenic programmes in prison, then to be rewarded with a release on parole.

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[59] Department of Corrections, Parole Assessment Report to the New Zealand Parole Board, dated 30 June 2009. See also report dated 15 April 2009.
[60] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 244-5.
[61] Department of Corrections, Parole Assessment Report to the New Zealand Parole Board, dated 15 April 2009.
[62] Ibid.

54. I consider a wrongly convicted person who has to serve the full sentence, without parole, for the reasons I have described, should see this factor weigh in his favour when the severity of the sentence is assessed.

The nature and extent of the loss resulting from the conviction and sentence

Loss of reputation

55. Although at the time he was sentenced to imprisonment Mr Redman had no prior criminal history and was described by the sentencing judge as "a young man of considerable promise," he was, nonetheless, prepared on the night of the events that led to his imprisonment to attend an unlawful assembly. He remains convicted of attending that assembly. It was of the essence of that charge that Mr Redman, and the others with him, had assembled in such a manner as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that violence would be used against persons or property. Mr Redman's participation in such a group would in itself significantly undermine his reputation as a law-abiding citizen. The issue is how much more his reputation may have been undermined by the wrongful conviction and imprisonment, on the other charges. While Mr Redman damaged his own reputation, by his actions in attending the unlawful assembly, I find that the wrongful conviction on the other charges aggravated the reputational loss, to at least some extent.

56. When considering the extent to which Mr Redman's reputation was harmed by his having served a sentence of imprisonment, I need to inquire what the sentence might have been had Mr Redman only been convicted of unlawful assembly. Had that been the case it is unlikely he would have been sentenced – as a 17-year-old first offender – to imprisonment. This is made clear from the sentence imposed on one of the other young men who attended the unlawful assembly, but who was not convicted of any offence arising from the later incident (the second incident). s 9(2)(a) – who at the time of the offence was also 17 years-of-age – was convicted (on pleas of guilt) of unlawful assembly and possession of an offensive weapon. He was sentenced on each charge to community work for 100 hours.

57. I conclude that Mr Redman was sentenced to imprisonment for one month on the unlawful assembly charge simply because he was imprisoned at the same time on more serious charges, and that had he only been convicted of unlawful assembly he would not have been imprisoned; and would probably have been sentenced to community work.

58. A sentence of imprisonment carries significantly more opprobrium than does a community based sentence, such as community work. Mr Redman's

reputation has thus been harmed by his having served a sentence of imprisonment, which he would not have done but for the wrongful convictions.

59. I therefore conclude that Mr Redman's imprisonment was a contributor to the reputational loss, as were, but to a lesser extent, the wrongful convictions themselves. In assessing reputational harm, this is to be balanced against the extent to which Mr Redman's actions in attending the unlawful assembly were also responsible for damage to his reputation.

Loss or interruption of family or other personal relationships

60. Mr Redman lived with his parents prior to his imprisonment. At the age of 19 he was removed from his family home and the guidance, on a daily basis, of his parents. At a young age, he experienced an interruption of his family relationship. That continued for two and a half years.

61. s 9(2)(a)

62. s 9(2)(a)

63. s 9(2)(a)

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[63] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, pp 5, 8.
[64] Idem, p 9.
[65] Ibid.
[66] Idem, p13.
[67] Idem, p 5.
[68] Idem, p 12.
[69] Idem, p 12.
[70] Idem, p 5.

s 9(2)(a)

64. I should note that international research, to which I will make reference in the next part of this report, into the psychological consequences of wrongful conviction and imprisonment, suggests that the impact on relationships with family and friends, s 9(2)(a) is not uncommon.

65. I accept that the claimant suffered – as a direct result of his imprisonment, and the on-going consequences of it – impairment or loss of family and other personal relationships.

66. s 9(2)(a)

67. While I accept that compensation for wrongful conviction and imprisonment cannot extend to compensating family, who may also have suffered emotional harm, stigmatization and loss of reputation,[78] as a result of the claimant's conviction and imprisonment – the Law Commission concluded in its report *Compensating the Wrongly Convicted*[79] that such losses are too remote to be covered by a compensation scheme – I consider the claimant himself should be compensated for the consequences to him flowing from his awareness of the harm caused, by his predicament, to his family. This would encompass the stress, anxiety and embarrassment that would result from a sense that his situation was

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[71] Ibid.
[72] Interview of Gregory Alfred Redman, conducted on 6 July 2016, p 64.
[73] Idem, p 70.
[74] Breaks in the interview of Mrs Redman had to be taken on three occasions, because Mrs Redman became distressed: pp 158, 228-9, 256 of Interview of Carol Redman, conducted on 7-8 July 2016.
[75] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 13.
[76] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 96.
[77] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 13.
[78] In this respect see the reference in paragraph 194 of my first report to Mrs Redman's standing and integrity.
[79] Report 49, September 1998, at 144.

responsible for the suffering of his family – Mr Redman said they were 'quite hurt', and it was 'pretty hard' for him "seeing them like that".[80] s 9(2)(a)

Mental or emotional harm

68. The claimant's counsel commissioned a report, which has been submitted to me, from a registered clinical psychologist, Sabine Visser – who has 20 years of experience as a clinical psychologist in the area of forensic mental health and who has served as an expert witness in the New Zealand courts. The purpose of the report was to assess, and report on, the impact upon Mr Redman of his wrongful conviction and imprisonment.

69. s 9(2)(a)

70. s 9(2)(a)

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[80] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 147.
[81] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 9.
[82] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, pp 11-2.
[83] Ibid.
[84] Idem, p 9.
[85] Idem, p 8.
[86] At paragraph 120.
[87] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 220.

71. s 9(2)(a)

72. There is minimal empirical research reported in the international literature on the psychological effects of wrongful conviction and imprisonment;
s 9(2)(a)

Adrian Grounds, of the Institute of Criminology, University of Cambridge, published a paper in 2004 in the *Canadian Journal of Criminology and Criminal Justice* – "Psychological Consequences of Wrongful Conviction and Imprisonment"[88] – in which he reported a study of a sample of 18 men referred for systematic psychiatric assessment, after their convictions were quashed on appeal and they were released from long-term imprisonment. The assessments revealed evidence of "substantial psychiatric morbidity. s 9(2)(a)

The author concluded – while acknowledging that the sample was small and not necessarily representative and that caution must be adopted in generalizing from it[91] – that "specific traumatic features of miscarriage of justice and long-term imprisonment both appear to contribute to the post-release psychological problems."[92]

73. s 9(2)(a)

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[88] Adrian Grounds, "Psychological Consequences of Wrongful Conviction and Imprisonment" *Canadian Journal of Criminology and Criminal Justice,* Jan 2004; 46, 2.
[89] s 9(2)(a)
[90] s 9(2)(a).
[91] At p 167.
[92] At pp 165-6.
[93] s 9(2)(a).
[94] s 9(2)(a)

s 9(2)(a)

74. It is the case that most of the subjects of the study the author was writing about had served long terms of imprisonment, markedly longer than the term served by the claimant – but not all had done so, as is indicated by the duration of the wrongful imprisonments, ranging from nine months to 19 years: 10 had served 11 or more years.[96] But, it seems that the trauma experienced by Mr Redman was exacerbated by his youth and by his having been imprisoned during the formative years of his adolescence.

75. s 9(2)(a)

Ms Visser discusses the impact of the claimant being imprisoned during later adolescence. She describes adolescence as "a very important developmental stage."[98] She says that "most adolescents still need guidance from adults to develop their potential for rational decision making."[99] According to the World Health Organization, developments to the pre-frontal cortex region of the brain take place during later adolescence. This is the "area responsible for what are called executive functions: decision-making, organization, impulse control and planning for the future."[100] Ms Visser says most adolescents, "still need guidance from adults to develop their potential for rational decision making."[101] She continues: "Adolescents [sic] cognitive development, in part, lays the ground work for moral reasoning, honesty, and prosocial behaviours. s 9(2)(a)

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95 s 9(2)(a)
96 Idem, p 168.
97 *R v Redman et al*, Notes of Judge C J Field on Sentencing, District Court at Auckland, 30 November 2007, at [56].
98 Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 9.
99 Ibid.
100 World Health Organization, "Maternal, newborn, child and adolescent health: Adolescent development", p 2.
101 Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 9.
102 s 9(2)(a) .
103 s 9(2)(a) .

s 9(2)(a)

76. The World Health Organization recognizes that the characteristics of both the individual and the environment (e.g. an abusive environment) influence the developments occurring in adolescence. It says that the social context in which young people are growing up, together with the biological changes, can influence the appearance of health problems, including mental disorders. It says: "Many of the health-related behaviours that arise during adolescence have implications for both present and future health and development."[105] They may, therefore, have a long-term impact.

77. s 9(2)(a)

[104] Idem, p 10.
[105] World Health Organization, "Maternal, newborn, child and adolescent health: Adolescent development", p 2.
[106]

s 9(2)(a)

PAGES 26 - 28 ARE REMOVED AS THESE PAGES HAVE BEEN WITHHELD IN THEIR ENTIRETY UNDER SECTION 9(2)(a)

79. It might be said, in the claimant's case, that the events of arrest and trial would have been anticipated and expected in relation to his prosecution for the unlawful assembly. But, that involved a different incident and a much less serious charge. He would not have anticipated or expected to be arrested, tried, convicted and imprisoned on the serious charges, in respect of which he was wrongfully convicted and imprisoned.

80. The psychologist's report has described the impact on the claimant of his arrest, trial and incarceration, in the following terms:[144]

> Mr Redman's development was interrupted by his arrest, trial and incarceration. s 9(2)(a)

> Mr Redman was significantly traumatized by his experiences s 9(2)(a)

> Mr Redman was exposed to high levels of stress and unknown as well as high level of anxiety. He was exposed to an environment which did not assist in a positive way in individuation and positive development of self-identity and self-esteem. s 9(2)(a)

s 9(2)(a)

s 9(2)(a)

[144] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, pp 11-3.

s 9(2)(a)

Mr Redman's potential for employment has been seriously impacted as his mental state s 9(2)(a)

s 9(2)(a)

Mr Redman's relationship with his family has been affected. s 9(2)(a)

81. The psychologist's report concludes that the claimant has been impacted by the charges, the trial, and subsequent incarceration. s 9(2)(a)

Ms Visser asserts that Mr Redman "requires significant assistance going forward."

82. I accept that the claimant s 9(2)(a) was "significantly traumatised" as a result of the wrongful conviction and imprisonment. The basis upon which Ms Visser has arrived at this conclusion is supported, it seems to me, by the Adrian Grounds article, to which I have made reference. I accept, as well:

- That Mr Redman's development during the later stage of his adolescence was adversely affected by the prison environment.
- s 9(2)(a) an essential stage of his development occurred in the prison system.
- s 9(2)(a)
- That the prison system is an environment s 9(2)(a) of deprivation, that impedes cognitive development.
- s 9(2)(a)
- That the psychological damage to the claimant may have a long-term impact.

83. It is my conclusion that Mr Redman suffered significant mental and emotional harm, as a result of his wrongful conviction and imprisonment.

Conclusion in relation to other non-pecuniary losses

84. I have concluded that Mr Redman's wrongful conviction and imprisonment caused him significant mental and emotional harm, which may have a long-term impact. I have also concluded that a contributing factor to this outcome was the imprisonment of the claimant at an age where the later stage of his development in adolescence was adversely affected by the prison environment. I have further concluded that the claimant's reputation suffered as a result of conviction and imprisonment on serious charges, but that this factor is tempered by the extent to which the claimant damaged his own reputation by his attendance at the unlawful assembly. There was, as well, loss or interruption of family and other personal relationships.

85. The Additional guidelines on quantum suggest that on average the relevant figure at this stage should "even out around $100,000." Only cases with "truly exceptional circumstances" would attract compensation at this stage that is greater than $100,000. Counsel for the claimant submit that his case is exceptional because of the impact imprisonment had on Mr Redman, particularly

because of his youth. I do not consider this to be a case with "truly exceptional circumstances". In my view the claimant's youth at the time of his imprisonment, and the harm he suffered in the areas currently under consideration, would be adequately reflected by a starting point of $100,000, before weighing the impact of the paragraph 4 criteria that are in play.

86. The first of those is the conduct of the claimant, in attending at the unlawful assembly. I have found[145] that had he not attended that assembly, and behaved there as he did, he would not have been mistakenly identified as attending the second incident. His actions – in drinking over a long period of time, in going to s 9(2)(a) Road (to the first incident) armed with a piece of wood, said to be approximately 70 cm in length, which he had with him "to use…as a weapon," and in behaving at s 9(2)(a) Road in a manner that caused people at the address to fear on reasonable grounds that violence might be used against persons or property (even though, in the event, nothing was thrown, no weapons were used and no one was assaulted: the group just "stood around yelling and swearing, before leaving) – directly contributed to the subsequent mistaken identification of the claimant as being at the second incident. The claimant must accept responsibility for the fact his attendance and actions at the unlawful assembly directly contributed to this outcome.

87. In my view, this factor requires a reduction of 33% from the starting figure.

88. The 33% reduction from the starting figure is attenuated by the considerations I have discussed in relation to the severity of the sentence.[146] I consider they warrant a 10% adjustment in the opposite direction, with a further adjustment, upwards, of 5% to reflect the seriousness of the offences of which the claimant was wrongfully convicted.[147]

89. This produces an over-all reduction of 18% from the starting point. I therefore recommend compensation of $82,000 in respect of the second step of the process, for non-pecuniary losses, other than loss of liberty.

90. Mr Redman claimed, as a non-pecuniary loss, what was described as "an uplift of $31,200.00" to cover the cost of 52 counselling sessions per annum, for three years. This is more appropriately considered as a pecuniary loss, and I will discuss this feature of the claim in the next chapter of the report.

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[145] See paragraph 30, supra.
[146] See paragraphs 52 to 54, supra
[147] see paragraph 51, supra.

V. PECUNIARY LOSSES

91. The claimant seeks compensation of $274,496.99 for what are said to be pecuniary losses, made up, according to the supplementary submissions of his counsel, as follows:

a) Lost past earnings: $100,000.00.
b) Lost future earnings: $100,000.00
c) Legal aid costs: $29,790.74 (including psychologist's report).
d) Legal fees to set-up a trust, and fees associated with administering it for at least five years, viz.:

    i. Initial set-up cost: $2,300.00.
    ii. Fees to administer trust: $42,406.25 (being $8,481.25 per annum, over five years).

92. The claim for this amount as pecuniary losses in the supplementary submissions was intended to replace a claim in the original submissions for $170,525.25. The increase in the amount was the result primarily of the claim for loss of livelihood and loss of future earning ability increasing from $100,000.00 to $200,000.00. As well there was an increase in respect of legal aid costs from $25,819.00 to $29,790.74.

93. The amount of the claim for pecuniary losses was amended after I inquired of the claimant's counsel how their claim for loss of livelihood and loss of future earning had been calculated, and how much was being claimed under each head.

94. I now assess each of the claimed pecuniary losses.

Loss of livelihood

95. This head is designed to cover loss of earnings whilst imprisoned. As the Honourable Rodney Hansen, CNZM, QC, put it in the *Second Report for Minister of Justice on Compensation Claim by Teina Anthony Pora*:

> 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.[148]

[148] At 85. The report makes reference to section 1A(a) of the Social Security Act 1964, in respect of the proposition in the last sentence.

96. The onus is on the claimant to establish what he could have expected to earn during the time of his imprisonment, were he not to have been imprisoned.

97. The claimant's counsel submit that "a degree of pragmatism" is required when assessing loss of livelihood, because of the "high degree of unknown". They say that had he not been imprisoned he *could* (my emphasis) have completed an apprenticeship with his father over a four-year period. If he did so he would likely have worked a 40-hour week, at approximately $15 per hour, rising to $25 had he completed the apprenticeship. Thus, the submission is that had the claimant been in receipt of the average weekly income ($684 gross) he would have earned $88,790.00 over the two and a half years he was imprisoned and had he been in receipt of the median weekly income ($537 gross) he would have earned $69,654.00.

98. The difficulty with the claimant's position in this regard is that, as at the date he was imprisoned, he had not entered into an apprenticeship. According to the psychologist Mr Redman "was supposed to start an apprenticeship before he went to prison."[149] But no evidence has been produced to support this rather vague assertion. I am not told why he had not started the apprenticeship, or what steps had been taken to arrange it. As the Crown points out, no evidence has been proffered as to the availability of this category of employment during the period 2007-2010 (which time included the Global Financial Crisis). No evidence has been provided to establish the likelihood the claimant would secure an apprenticeship, taking into account his academic record, skills, training, work experience, s 9(2)(a) No evidence has been produced about the likely wages available.

99. There was ample time between leaving school, at the age of 17, and the commencement of his trial, when he was 19, for the claimant to have built up substantial work experience in the area of the contemplated apprenticeship, or in any other area. But, he had not built up such work experience. I learnt from the interview with the claimant's father that the claimant did some work for his father – but this was sporadic. His father said he used to "take him in whenever [he] could" and that was on a casual basis.[150] The psychologist says the claimant occasionally worked with his father, but this was inconsistent.[151] She further reports that Mr Redman has had no employment, other than that offered by his

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[149] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 4.
[150] Interview of Gregory Alfred Redman, conducted on 6 July 2016, p 65.
[151] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 4.

father.[152] The claimant has not achieved any formal qualifications, either at school or since.[153]

100. This is not a sound basis upon which I could conclude that Mr Redman would have entered into an apprenticeship and earned the amount his counsel suggest, were it not for his imprisonment.

101. I have not been told what Mr Redman's actual earnings were over the time between leaving school and being imprisoned. There is no basis to think they were other than meagre.

102. In the end, the only conclusion open to me is that had the claimant not been imprisoned his income over that time would have been limited. On the evidence available, any income would probably have derived from sporadic and intermittent work, for his father. Although the exercise is to some extent speculative, I conclude, on the evidence I have, that the work would have averaged out at no more than 16 hours a month. It has simply not been established that he could have been expected to earn the amount his counsel claim, or indeed anything remotely near it.

103. On the basis of lost earnings for 16 hours per month (at $15 per hour) I recommend a payment of $7,200 for lost livelihood over the two and a half years the claimant was imprisoned.

Loss of future earning abilities

104. This head of loss is to compensate for significant impairment in the future earning abilities (or capacity) of a claimant, resulting directly from the person's wrongful conviction and imprisonment. It is designed to compensate for realistic lost opportunities (through study, training or work experience) to improve the claimant's earning potential.[154] It would extend to compensation for impaired ability to work, as a result of psychological damage done by the wrongful imprisonment. The starting point for the calculation of this figure is from the time of release from prison.

105. It is important to note that this head of the guidelines (unlike the earlier head relating to loss of livelihood) is not concerned with an *actual loss* of earnings (my emphasis); but rather with compensation for loss of future earning *abilities*, as a result of the imprisonment. Hence the inquiry must, for this

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[152] Ibid.
[153] Ibid.
[154] See discussion by the Hon. Rodney Hansen of the purpose of this head in the Second Pora Report, at 89.

purpose, focus upon the extent to which the wrongful imprisonment impaired the claimant's *ability* to work after release from prison, rather than the extent to which he actually worked, or did not work. A fundamentally different approach is therefore required when considering loss under this head from that taken when considering loss of livelihood.

106. The gist of the claimant's submission under this head is that the claimant has, as his counsel put it, "highly unfavourable work prospects going forward due to his imprisonment".[155] s 9(2)(a) [156] As an indication of just how 'unfavourable' his work prospects are said to be his counsel estimate his earnings over the period since he was released from prison (in 2010) to be $6,750.00.

107. I have accepted that the claimant suffered s 9(2)(a) as a result of his imprisonment. s 9(2)(a)

108. s 9(2)(a)

[155] Submissions of Counsel for Tyson Redman, dated 27 July 2017, at 25.
[156] Ibid.
[157] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 159, 242.
[158] Idem, p 242.
[159] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 6.
[160] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 244-5.
[161] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 6.
[162] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 244.
[163] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 6.

113. The psychologist has described the situation, in these terms:

> Mr Redman has had no employment independent from that offered by his father.[173] s 9(2)(a)
> Mr Redman does attend work and is paid for this work. However, Mr Redman's attendance at work remains sporadic and is intermittent.
> s 9(2)(a)

174

114. s 9(2)(a)

115. I am prepared to accept s 9(2)(a) impaired the claimant's ability to hold down full-time work, but I am not prepared to accept that it prevented him from working at all. s 9(2)(a)

116. It is reasonable to assume s 9(2)(a) was for a time after the claimant's release from prison likely to depress his earning abilities, but not on its own to prevent him entirely from working. The period over which it would have done so is unclear. A degree of conjecture is required. In my view, it would be reasonable to allow for impairment of earning capacity over a period of three years, but at a reducing rate.

117. The Ministry of Social Development classifies capacity to work into three categories. For the purposes of my assessment I use these categories. They are: Limited Part Time (up to 15 hours per week); Part Time (at least 15 hours per week); and Full Time (30 hours or more per week). I have adopted 35 hours as a full-time week, for this exercise.

118. I consider, it would be reasonable to assume that for the first year, following his release from prison, Mr Redman should have been capable of working 15 hours per week on a part-time basis, when allowance is made s 9(2)(a)

During this time, he could have been expected to have sought professional help s 9(2)(a) . Assuming that his impaired income earing capacity was at this level, he should be compensated for the lost earning ability of 20 hours per week at the rate of the minimum wage, rounded up to $15 per

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[173] He told me at interview though that he had had one job s 9(2)(a) , which was arranged through his 'mates.' (p 158).
[174] Report dated 20 June 2017 of Sabine Visser, registered clinical psychologist, p 4.

hour. That would be $300 per week, or $15,600 for that year. During the second year, Mr Redman should have been capable of working 20 hours per week, on a part time basis, meaning he should be compensated for 15 hours lost earning ability per week. That would be $225 per week, or $11,700 for the year. During the third year, I would have expected the claimant's ability to work to have further improved, enabling him to work 25 hours per week. In respect of that year he should be compensated for 10 hours lost earning ability per week, i.e. $150 per week, or $7,800 over the year.

119. These are gross amounts, but given the essentially arbitrary nature of the assessment that may not be inappropriate. It leads to compensation of $35,100.00 for loss of future earning abilities.

Other consequential financial losses

Setup and administration of trust

120. The claimant seeks compensation for the cost of setting-up a trust, together with the fees associated with administering the trust "for at least five years."[175]

121. The fees associated with setting up the proposed trust are said to be $2,300.00, while the fees for administering it for five years will be, it is said, $8,481.25 per annum, making a total administration cost over five years of $42,406.25. The total sought as compensation in respect of setting-up and administering the proposed trust is $44,706.25.

122. The claimant's counsel have provided a letter from Perpetual Guardian, setting out an estimate of the costs involved in setting-up and administering the proposed trust. The letter provides the foundation for the costs claimed by Mr Redman.

123. Counsel for the claimant appear to suggest that such a trust is necessary to protect the proceeds of any compensation payment, s 9(2)(a)
.[176]

124. The wisdom of setting up such a trust for this purpose could not be in doubt. However, the cost of doing so is a cost that Mr Redman will have to bear himself, so as to protect any compensation payment that he receives. The costs could not, in my view, qualify as "consequential financial losses resulting from…imprisonment," as they would have to do to meet the Cabinet

[175] Submissions of counsel for claimant, dated 7 July 2017, paragraph 41vii.
[176] Submissions of counsel for claimant, dated 27 July 2017, paragraph 4.

guidelines.[177] Pecuniary losses have to be direct consequences of the wrongful conviction and subsequent imprisonment. I do not see that these costs could be said to be financial losses that were a consequence of the imprisonment. Rather, they are the costs that good sense dictates should be incurred by Mr Redman in the future, to protect any compensation payment he might receive. This highlights the prospective nature of such costs: they may or may not be incurred. Moreover, any cost may be for a different amount than that proposed: the Perpetual Guardian letter [178] provides only *estimates* for setting up and administering a trust; and it makes its role in administering the trust (which involves acting as a trustee, providing investment management and tax and accounting services) contingent upon "a final decision on the appropriateness of our involvement" to be made "after meeting with Mr Redman and his family to determine our compatibility and upon agreement as to how the Trust would operate."

125. The claimant's counsel make reference,[179] in support of their submission that the cost of setting-up and administering a trust should qualify as a pecuniary loss, to a recommendation made by the Hon Rodney Hansen, in the Second Pora report. Mr Hansen, however, did no more than recommend that the bulk of compensation be paid to a trust that had been established for the benefit of Mr Pora, his daughter and grandson.[180] He did not decide that the cost of setting up and administering the trust was a pecuniary loss that could be compensated.

Cost of counselling and treatment

126. As I noted earlier in the report[181], Mr Redman has claimed $31,200 to cover the cost of 52 counselling sessions per annum, for three years. This aspect of the claim reflects a recommendation of the clinical psychologist, Ms Visser, in the concluding part of her report:

> Mr Redman requires significant assistance going forward. I recommend that he undertakes weekly sessions s 9(2)(a) for a duration of at least two years. s 9(2)(a)
>
> The cost of a one hour session is $200 per session.

[177] Cabinet guidelines, paragraph 5, pecuniary losses (c).
[178] Dated 6 July 2017.
[179] Submissions of counsel for claimant, dated 27 July 2017, paragraph 5.
[180] *Second Report for Minister of Justice on Compensation Claim by Teina Anthony Pora*, paragraph 5.
[181] Supra, paragraph 90.

127. While the cost of counselling and therapy s 9(2)(a) to remedy the mental and emotional harm caused by the wrongful imprisonment – is a prospective cost, that may or may not be incurred, it is nevertheless (unlike the cost of setting up and administering a trust) a loss – if the cost is incurred – that is a direct consequence of the imprisonment.

128. Accordingly, that cost would qualify as a pecuniary loss, for the purposes of the guidelines. I note that in *Akatere* each of the claimants was offered counselling, with the cost being accepted as a pecuniary loss.

129. s 9(2)(a)

130. My conclusion is that the cost of counselling, therapy s 9(2)(a) should be met as a pecuniary loss, insofar as it is designed to remedy the emotional and mental harm caused by the wrongful imprisonment, s 9(2)(a)

131. The claimant seeks payment of weekly counselling for three years; Ms Visser recommends weekly sessions s 9(2)(a) "for at least two years." I consider, on the material available to me, that the cost of counselling and treatment s 9(2)(a) over two years should be met as a pecuniary loss. I doubt that the sessions would take place every week (given that allowance would have to be made for holiday periods and the like) and thus 48 sessions per year would seem a likely maximum.

132. On this basis, 48 sessions a year (at $200 per session) could be expected to cost $19,200 over two years.

133. Ms Visser thought Mr Redman may require other services s 9(2)(a)

in the future. She did not provide an estimate of the cost of these services, but a cost of up to $2,500 would seem appropriate.

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[182] Supra, paragraphs 108-10.

134. I therefore recommend that the cost of counselling and therapy s 9(2)(a) over two years and up to a maximum of $21,700 – to treat the mental and emotional harm caused by the wrongful imprisonment, s 9(2)(a) - should be met, as a pecuniary loss. This, of course, would be subject to invoices being submitted to the Ministry of Justice and clarification provided of the basis for the counselling, therapy s 9(2)(a)

Legal costs

135. The Cabinet guidelines include[183] as pecuniary losses costs incurred by or on behalf of the claimant in obtaining a pardon or acquittal. On a literal reading this would not extend to costs incurred in pursuing a claim for compensation. However, in practice such costs have been included in compensation recommendations.[184] So that the approach to this issue is consistent, I will approach it on the basis that the Guidelines contemplate this cost as a pecuniary loss.

136. In the present case, the claimant was represented by the Public Defence Service when the application was made for an exercise of the royal prerogative of mercy and when the case was heard by the Court of Appeal, pursuant to the referral to that court by the Governor-General in Council. There has been no claim for compensation in relation to any of the costs associated with that. I assume that the Legal Services Commissioner did not seek to recover from the claimant any of the legal aid cost expended at that stage.

137. The claim for legal costs has been limited to the costs associated with the application for compensation. Counsel who have acted for the claimant in respect of the application for compensation have been assigned on legal aid.

138. It is now the practice of the Legal Services Commissioner, where circumstances allow it, to recover part or all of the costs expended on a legal aid grant – this reflects the modern approach, where legal aid is viewed as a loan. At the conclusion of a case the Commissioner determines what, if any debt, the person granted aid has to the Crown, in relation to the legal aid grant. The amount of the debt, if any, is determined according to a number of criteria.

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[183] Paragraph 5 (d).

[184] see, e.g., *Second Report for Minister of Justice on Compensation Claim by Teina Anthony Pora* by Hon Rodney Hansen, CNZM, QC, where all the legal costs recommended for inclusion as pecuniary losses related to the application for compensation (see paragraphs 92 – 100).

139. The claimant's counsel have assumed that the debt will equal the amount that the Government has expended on the legal aid grant. But, this is not necessarily the case. I have asked them to ascertain from the Legal Services Commissioner the amount of the debt the claimant has to the Commissioner. The most they have been able to tell me is the amount that has been expended hitherto on legal aid. That figure is, as at 16 August 2017, $27,163.85. But, as the letter - on behalf of the Commissioner to Mr Redman's counsel – that communicates this figure also points out, Mr Redman currently has no legal aid debt.[185] The letter notes, however, that the Commissioner may seek to recover "*up to* the total cost of the legal aid services provided". (my emphasis). It is not, therefore, presently known what the precise amount of the legal aid debt will be, should recovery be sought. This precludes me from recommending the payment of a specific amount, in respect of legal costs.

140. This is not a case such as *Akatere*, where one of the issues – where the claimants had sought recovery of their full legal costs – was whether recovery should be of the full cost of counsel's services, based on market rates, or limited to an hourly rate equal to that provided in the Crown Solicitors Regulations. The Queen's Counsel recommended that compensation be limited to the Crown Solicitor's rate. The High Court did not fault this approach.[186]

141. As is notorious, the legal aid hourly rate is markedly less than the Crown Solicitor's rate, let alone market rates. There can therefore be no issue in this case about the hourly rate. Nor could there be an issue about the reasonableness of the number of hours expended by counsel, as this aspect of a legal aid grant is closely scrutinized by a legal aid grants officer.

142. All that is in issue is the amount of the debt that the claimant will have to the Commissioner. It is realistic to expect that there will be a debt, albeit of an amount presently unknown.

143. In my view, this issue can be resolved by my recommending that payment be made of the amount that is, in due course, communicated to the Ministry as the debt the claimant has to the Legal Services Commissioner, in respect of this legal aid grant.

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[185] Letter dated 16 August 2017 on behalf of Legal Aid Commissioner to Mr Jeremy Sutton.
[186] *Akatere v Attorney-General (No.2)*, High Court, Auckland registry, 1 March 2006, CIV 2004-404-6217.

VI. CONCLUSION

144. The compensation I consider is payable to Mr Redman, in terms of the Cabinet Guidelines, is:

Non-pecuniary compensation for loss of liberty	$245,311.43
Other non-pecuniary losses	$ 82,000.00
Pecuniary losses	$ 42,300.00
Total	**$369,611.43**

145. For reasons elaborated in the report, I make two further recommendations. Each relates to an additional pecuniary loss. First, that the Government meet the cost of counselling and therapy s 9(2)(a) over two years and up to a maximum of $21,700 – to treat the mental and emotional harm caused by the wrongful imprisonment, s 9(2)(a) . This would be subject to invoices being submitted to the Ministry of Justice and clarification provided of the basis for the counselling, therapy or treatment.[187] Secondly, that the Government compensate Mr Redman for the amount of his legal aid debt, once the amount of the debt has been finalized.[188]

Donald Stevens QC

[187] Supra, paragraph 126-34.
[188] Supra, paragraph 135-43.