



Cabinet

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Minute of Decision

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Compensation for Two Persons Wrongly Convicted and Imprisoned for Arson

Portfolio: Justice

On 15 February 2010, Cabinet:

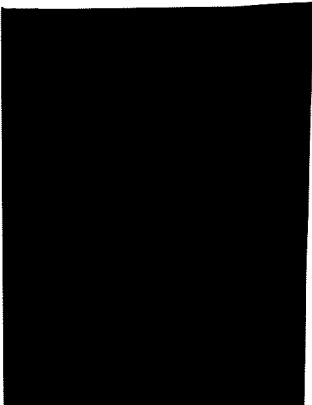
- 1 **noted** that Mr Johnston and Mr Knight were convicted and sentenced to imprisonment for arson in 2004;
- 2 **noted** that in 2005 the Court of Appeal quashed their convictions and ordered new trials;
- 3 **noted** that Mr Johnston was retried and found not guilty, and Mr Knight was discharged [REDACTED] prior to his retrial;
- 4 **noted** that Mr Johnston and Mr Knight are not eligible under the Cabinet guidelines governing compensation of wrongful conviction and imprisonment because the Court of Appeal ordered new trials [STR (98) M 39/6];
- 5 **noted** that:
 - 5.1 the Prime Minister, the Deputy Prime Minister and Minister of Justice have received confidential briefings on this case;
 - 5.2 there is substantial evidence supporting the innocence of Mr Johnston and Mr Knight;
 - 5.3 it is not in the public interest for that evidence to be made publicly available;
- 6 **noted** that available evidence clearly establishes that Mr Johnston and Mr Knight are, at a minimum, innocent on the balance of probabilities of the arson;
- 7 **noted** that the Minister of Justice is satisfied the case involves extraordinary circumstances such that it is in the interests of justice for compensation to be paid;
- 8 **agreed** in principle to compensate Mr Johnston and Mr Knight for wrongful conviction and imprisonment under the Crown's residual discretion to award compensation outside of the Cabinet guidelines in extraordinary circumstances where it is in the interests of justice [STR (98) M 39/6];

- 9 **invited** that Minister of Justice to seek submissions from Mr Johnston and Mr Knight on matters relevant to determining an appropriate compensation payment;
- 10 **invited** the Minister of Justice to report back to Cabinet with a proposed compensation package.



Secretary of the Cabinet

Reference: CAB (10) 37



Compensation for two persons wrongly convicted and imprisoned for arson

Proposal

1. Cabinet is asked to agree in principle to compensate Phillip Johnston and Jaden Knight for being wrongly convicted and imprisoned.

Executive summary

2. Phillip Johnston and Jaden Knight applied for compensation for wrongful conviction and imprisonment in relation to their convictions for arson in September 2004. The applicants served approximately nine and a half months of their sentences of imprisonment before their convictions were quashed by the Court of Appeal.
3. Mr Johnston was retried and found not guilty. Mr Knight was discharged [REDACTED] prior to his retrial.
4. The applicants fall outside Cabinet guidelines established to govern compensation for wrongful conviction and imprisonment because the Court of Appeal, when quashing their convictions, ordered new trials. This means their claim for compensation must be dealt with under the Crown's residual discretion to consider claims outside the Cabinet guidelines. The residual discretion can be exercised in extraordinary circumstances where it is in the interests of justice to do so.
5. In 2007 the New Zealand Police formally apologised to the applicants, stating that Police had ascertained that the applicants had not committed the arson. The apology followed the receipt of new evidence [REDACTED].
6. I am satisfied that the case qualifies for the exercise of the Crown's residual discretion to award compensation outside the Cabinet guidelines. At a minimum, the evidence now available clearly establishes the applicants' innocence on the balance of probabilities. When combined with other unusual features present, I consider the applicants' case involves extraordinary circumstances such that it is in the interests of justice that compensation be paid.
7. I seek in principle agreement to compensate Mr Johnston and Mr Knight. I propose to then seek submissions from the applicants on matters relevant to determining an appropriate compensation payment and to return to Cabinet with a recommended compensation offer.

Background

8. On 12 November 2003, an arsonist set fire to the Manawatu Hotel in Foxton. Mr Johnston and Mr Knight were jointly charged and tried for the arson. The applicants were found guilty of arson on 15 September 2004. They were sentenced to six years imprisonment.

9. On 28 June 2005, the Court of Appeal quashed the applicants' convictions and ordered new trials on the basis that the trial Judge's summing up lacked adequate direction to the jury. The applicants served approximately nine and a half months of their sentence of imprisonment before their convictions were quashed by the Court of Appeal.
10. Mr Johnston was retried and found not guilty in August 2006. Mr Knight's retrial did not go ahead – he was discharged in February 2007 after the Police received new evidence in late 2006 [REDACTED]
11. On 13 March 2007, Superintendent Mark Lammas, then the District Commander for the Central Police District, met with the applicants. Superintendent Lammas provided the applicants with a letter that tendered an apology to the applicants, stating that it had been "ascertained by Police that the offence for which you were charged, convicted and incarcerated had not been committed by you".
12. On the basis of Superintendent Lammas' letter, the applicants applied for compensation for wrongful conviction and imprisonment.
13. At the time of the arson, Mr Johnston was 28 years old. [REDACTED]. Mr Knight was 27 years old and employed as a mobile security guard for Chubb Security in Lower Hutt. Both applicants consistently denied being involved in the arson and had no previous criminal convictions.

Assessment under Cabinet guidelines for compensating persons wrongly convicted and imprisoned

14. Compensation payments are made on an ex gratia basis. This means there is no legal obligation to make the payments: the payments are at Cabinet's discretion.
15. Cabinet guidelines govern compensation payments for wrongful conviction and imprisonment (CAB (98) M46/6C and POL Min (01) 34/5). Under the guidelines, people may apply for compensation if they have served all or part of a sentence of imprisonment and either had their convictions quashed on appeal without a retrial being ordered or received a free pardon. Compensation payments are only made to applicants who can prove on the balance of probabilities they were innocent of the crime for which they were convicted.
16. The applicants are not eligible under the Cabinet guidelines because, when quashing the applicants' convictions, the Court of Appeal ordered new trials.

Assessment under the Crown's residual discretion to compensate outside of the Cabinet guidelines in extraordinary circumstances

The Crown's residual discretion

17. The Crown has a residual discretion to consider claims that fall outside the Cabinet guidelines. I have considered the applicants' claims under this residual discretion.

18. In 1998 Cabinet decided that the residual discretion can be exercised “in extraordinary circumstances where it is in the interests of justice” to do so (STR (98) M 39/6). Cabinet did not determine what matters would constitute extraordinary circumstances. In general terms, the residual discretion should not be exercised in a way that would undermine the normal process for compensation in the Cabinet guidelines. Innocence on the balance of probabilities is a minimum requirement, consistent with the Cabinet guidelines. But the bar is set higher for claims that fall outside the Cabinet guidelines – something more is required that demonstrates that the circumstances are extraordinary. To qualify as extraordinary, the circumstances must include some feature which takes the case outside the ordinary run of cases in which appeals have been allowed.

Applicants’ case justifies the exercise of the Crown’s residual discretion

19. The Crown’s case at trial against the applicants relied on circumstantial evidence. The Crown alleged that Mr Johnston was the arsonist and that Mr Knight was a party to the offence by intentionally assisting Mr Johnston in the arson. There was no forensic evidence implicating the applicants, no real motive, and no eye witnesses to identify Mr Johnston as the arsonist. The Crown’s evidence included expert analysis of footage from the Manawatu Hotel security camera that showed the arsonist. The footage was of poor quality, and the expert analysis only of limited value in identifying Mr Johnston as the arsonist.
20. The new evidence received by the Police in late 2006 is central to determining whether there are extraordinary circumstances in the applicants’ case such that it is in the interests of justice that they be compensated. [REDACTED]
21. The Police have disclosed the new evidence to myself and selected Ministry of Justice officials under an agreed protocol that places strict limits on release of the information. The Prime Minister and Deputy Prime Minister have also been briefed on the evidence.
22. The new evidence indicates that the applicants had no involvement in the arson. The New Zealand Police are satisfied that the evidence is reliable.
23. When considering the available evidence as a whole, the new evidence in combination with other evidence clearly establishes the applicants’ innocence on the balance of probabilities. Indeed the evidence comes close to establishing their innocence to the higher standard of beyond reasonable doubt.
24. The Deputy Solicitor-General has also considered the new evidence and advised that the evidence now available establishes the applicants’ innocence on the balance of probabilities.
25. The applicants’ case contains several additional unusual features, including that:
- both the Police and the Crown have resiled from the position that the applicants were responsible for the arson; and
 - the Police have formally apologised to the applicants and continue to stand by the apology.

Conclusion

26. I have carefully considered the new evidence and been briefed by Police on their inquiries into it. I am satisfied that Mr Johnston and Mr Knight's case qualifies for the exercise of the Crown's residual discretion to award compensation outside the Cabinet guidelines. At a minimum, the evidence now available clearly establishes the applicants' innocence on the balance of probabilities. When combined with other unusual features present, I consider the applicants' case involves extraordinary circumstances such that it is in the interests of justice that compensation be paid.
27. I seek agreement in principle to compensate Mr Johnston and Mr Knight for being wrongly convicted and imprisoned.

Next steps – determining quantum of compensation and offer to applicants

28. Subject to Cabinet's agreement in principle to compensate the applicants, the next step will be to determine an appropriate amount of compensation and make a formal offer to the applicants. Compensation may also include a public statement of the claimant's innocence and in appropriate cases a public apology by the Crown. I propose to seek submissions from the applicants on matters relevant to compensation. I will then report to Cabinet with a recommended compensation package before making a formal offer to the applicants.
29. Under the Cabinet guidelines, a successful applicant may be compensated for the following types of losses arising from their wrongful conviction and imprisonment:
 - non-pecuniary losses (loss of liberty, loss of reputation, loss or interruption of family or other personal relationships, and mental or emotional harm); and
 - pecuniary losses (loss of livelihood, loss of future earnings, loss of property or other consequential financial losses, and costs in obtaining a pardon or acquittal).
30. While the applicants' case falls outside of the Cabinet guidelines, the calculation of any compensation payment should be consistent with the Cabinet guidelines and past payments for compensation.

Consultation

31. The New Zealand Police, Crown Law Office, and Treasury have been consulted on this paper. The Department of the Prime Minister and Cabinet has been informed.

Financial implications

32. When establishing the Cabinet guidelines, Cabinet agreed that it would decide on a case by case basis to appropriate funds for each compensation payment (STR (98) M 39/6 (Other Expenses to be Incurred by the Crown: Compensation for Wrongly Convicted Individuals)).
33. After considering any submissions from the applicants on factors relevant to compensation quantum, I will report back to Cabinet with a proposed compensation package and seek agreement to the required financial appropriation.

34. The most recent payment under the Cabinet guidelines was in 2006 when three young women wrongly convicted and imprisoned for aggravated robbery received between \$162,000 and \$176,000 each. The women had served approximately seven months in prison.

Human rights

35. A decision to compensate the applicants would be consistent with the New Zealand Bill of Rights Act 1990 and Human Rights Act 1993.

Legislative implications

36. There are no legislative implications.

Regulatory impact analysis

37. Not required.

Publicity

38. There has been some media interest in the applicants' case to date. Any Government decision on compensation is likely to attract considerable public interest. I do not intend to publicly announce the in principle decision sought in this paper. I propose instead to make a media statement if Cabinet subsequently approves a compensation package to offer the applicants.

Recommendations

39. The Minister of Justice recommends that Cabinet:
1. **note** that Mr Johnston and Mr Knight were convicted and sentenced to imprisonment for arson in 2004;
 2. **note** that in 2005 the Court of Appeal quashed their convictions and ordered new trials;
 3. **note** that Mr Johnston was retried and found not guilty, and Mr Knight was discharged [REDACTED] prior to his retrial;
 4. **note** that Mr Johnston and Mr Knight are not eligible under the Cabinet guidelines governing compensation for wrongful conviction and imprisonment because the Court of Appeal ordered new trials;
 5. **note** that available evidence clearly establishes that Mr Johnston and Mr Knight are, at a minimum, innocent on the balance of probabilities of the arson;
 6. **note** that the Minister of Justice is satisfied the case involves extraordinary circumstances such that it is in the interests of justice for compensation to be paid;
 7. **agree in principle** to compensate Mr Johnston and Mr Knight for wrongful conviction and imprisonment under the Crown's residual discretion to award compensation outside of the Cabinet guidelines in extraordinary circumstances where it is in the interests of justice;

8. **invite** the Minister of Justice to seek submissions from Mr Johnston and Mr Knight on matters relevant to determining an appropriate compensation payment; and
9. **invite** the Minister of Justice to report back to Cabinet with a proposed compensation package.



Hon Simon Power
Minister of Justice

Date signed:

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