

SENSITIVE

Office of the Minister of Justice

Memorandum for Cabinet

DAVID CULLEN BAIN'S APPLICATION FOR COMPENSATION FOR WRONGFUL CONVICTION AND IMPRISONMENT: NEXT STEPS

Proposal

1. This paper seeks Cabinet's decision on next steps for progressing Mr David Cullen Bain's claim for compensation for wrongful conviction and imprisonment.

Executive summary

2. Mr Bain wrote to the then Minister of Justice, Hon Simon Power, in March 2010 to notify his claim for compensation for wrongful conviction and imprisonment following the quashing of his convictions by the Privy Council and his acquittal at retrial.
3. There is no legal obligation to make payments for wrongful conviction and imprisonment. It is a matter solely for Cabinet's discretion.
4. As Mr Bain's application falls outside the Cabinet guidelines governing compensation claims for wrongful conviction and imprisonment, he must prove two things. First, that he is innocent on the balance of probabilities and secondly, that there are extraordinary circumstances such that it is in the interests of justice for the claim to be considered.
5. The then Minister of Justice, Hon Simon Power, appointed Hon Justice Ian Binnie QC in November 2011 to give advice on the claim. His report was completed in August 2012 and recommended that compensation be paid due to his findings that Mr Bain was innocent on the balance of probabilities and that there were extraordinary circumstances in the case.
6. As a result of her concerns about the quality and robustness of the report, the succeeding Minister of Justice, Hon Judith Collins, commissioned a peer review by Hon Dr Robert Fisher QC. Dr Fisher advised that errors in Justice Binnie's report meant it would be unsafe to rely on it as a basis for making a recommendation on Mr Bain's claim to Cabinet.
7. Mr Bain's counsel filed a judicial review proceeding in January 2013 alleging a breach of natural justice in the consideration of Justice Binnie's report. At Mr Bain's request, in February 2013 Cabinet placed Mr Bain's application for compensation on hold pending the determination of the judicial review proceeding.

WITHHELD UNDER s9(g)(i)

WITHHELD UNDER s9(2)(ba)

and

WITHHELD UNDER s 18(c)

11. In order to progress consideration of Mr Bain's claim on a principled, robust basis, I recommend that Cabinet agree that the advice of both Justice Binnie and Dr Fisher be set aside, and that I appoint a new inquirer to conduct a fresh inquiry into Mr Bain's claim.
12. If Cabinet agrees, the next steps are for me to identify a suitable inquirer and prepare instructions for the inquiry. I will report back to Cabinet before these are finalised.

Background

Background to compensation claim

13. Mr Bain was convicted in May 1995 of murdering five members of his family in Dunedin and was sentenced to life imprisonment. An appeal by Mr Bain to the Court of Appeal was dismissed in late 1995, and the Privy Council refused leave to appeal that decision in April 1996. A joint investigation by Police Complaints Authority and the Police in 1997 found that criticisms of the Police investigation into the case were not justified. In 2003, following an application by Mr Bain for the Royal prerogative of mercy based on new evidence, the Governor-General referred Mr Bain's case for further appeal before the Court of Appeal. The Court of Appeal dismissed that appeal. However, Mr Bain successfully appealed to the Privy Council which, in 2007, quashed his convictions on the grounds of a substantial miscarriage of justice and ordered a retrial. Mr Bain was released on bail in May 2007, having spent just under 12 years in jail since his convictions.

14. At the retrial in June 2009 the second jury found Mr Bain not guilty of the murders.
15. In March 2010, Mr Bain's lawyers wrote to the then Minister of Justice, Hon Simon Power, to notify his claim for compensation for wrongful conviction and imprisonment.

Compensation framework

16. Compensation for wrongful conviction and imprisonment in New Zealand is made on an ex gratia basis. This means that there is no legal obligation to make the payments. Rather, payments are made at Cabinet's discretion under either Cabinet guidelines or a residual discretion for claims falling outside guidelines.

Cabinet guidelines

17. Cabinet guidelines governing compensation payments for wrongful conviction and imprisonment were established in 1998 (CAB (98) M48/6C and POL Min (01) 34/5). Mr Bain's claim falls outside the Cabinet guidelines because, when quashing his convictions, the Privy Council ordered a retrial.

"Extraordinary circumstances" discretion

18. When the Cabinet guidelines were adopted in 1998, Cabinet reserved discretion to consider claims that fall outside the Guidelines "in extraordinary circumstances ... on their individual merits, where this is in the interests of justice." (STR (98) M 39/6).
19. The question in cases such as Mr Bain's is therefore whether there are extraordinary circumstances, such that it is in the interests of justice for the claim to be considered. Cabinet did not determine what matters would constitute "extraordinary circumstances" when it reserved the discretion to make payments that fall outside the guidelines. While claims of extraordinary circumstances have to be considered on their merits on a case-by-case basis, as does the assessment of the interests of justice, a consistent practice and set of principles has evolved.
20. Innocence on the balance of probabilities is a minimum requirement, consistent with the Cabinet guidelines for eligible claimants. But the bar is set higher for claims that fall outside the guidelines – there must be something that also demonstrates that the circumstances are extraordinary. To qualify as "extraordinary circumstances", a case must include some feature which takes the claimant's case outside of the ordinary run of cases where a conviction has been quashed.

Steps taken on Mr Bain's claim

21. In November 2011, the then Minister of Justice, Hon Simon Power, appointed retired Canadian judge Hon Justice Ian Binnie QC to provide advice on Mr Bain's claim.
22. Justice Binnie was specifically asked to advise on:
 - 22.1. whether Mr Bain was innocent on the balance of probabilities and, if so, whether he was also innocent beyond reasonable doubt; and

- 22.2. any factors particular to Mr Bain's case that he considered relevant to the Executive's assessment of "extraordinary circumstances".
23. On 31 August 2012 Justice Binnie provided his report in which he concluded that Mr Bain was innocent on the balance of probabilities and that numerous serious errors in the Police investigation meant that there were "extraordinary circumstances".
24. The then Minister, Hon Judith Collins had concerns about aspects of the report. After seeking advice from the Solicitor-General and an Assistant Commissioner of Police the then Minister, Hon Judith Collins, decided to seek a peer review of Justice Binnie's report. Hon Judith Collins commissioned Hon Dr Robert Fisher QC to conduct the peer review. Dr Fisher advised that:
- 24.1. Justice Binnie's approach to the assessment of innocence on the balance of probabilities was fundamentally flawed;
- 24.2. Justice Binnie exceeded the terms of his instructions regarding the extraordinary circumstances discretion, and made errors of principle in his assessment; and
- 24.3. Justice Binnie's report gave rise to issues of natural justice in that it criticised various individuals without giving them the opportunity to comment.

Judicial review proceeding

25. On 30 January 2013 Mr Bain's solicitors filed a judicial review proceeding. Mr Bain alleged in general terms that the then Minister, Hon Judith Collins, breached natural justice in several respects, including by excluding Mr Bain from the steps following receipt of Justice Binnie's report. Mr Bain also alleged that the peer review process conducted by Dr Fisher was invalid.
26. Mr Bain's compensation claim was put on hold by Cabinet in February 2013 (CAB Min (13) 2/6), at Mr Bain's request, pending the completion of the judicial review proceeding.
27. An interlocutory application by the Crown to strike out some of Mr Bain's evidence in the judicial review proceeding was set to be heard on 9 February 2015. The substantive hearing was to follow in later months.

WITHHELD UNDER s9(g)(i)

WITHHELD UNDER s9(2)(ba) and WITHHELD UNDER s 18(c)

WITHHELD UNDER s9(2)(ba)

and

WITHHELD UNDER s 18(c)

Proposal for new inquiry

32. Mr Bain's claim for compensation cannot be resolved on the basis of current advice. First, I am satisfied that Cabinet cannot rely on Justice Binnie's report given Dr Fisher's advice. Second, Dr Fisher's advice did not constitute a full inquiry into Mr Bain's claim, but rather a peer review of Justice Binnie's report. As matters stand, a new inquiry is required to assess all the evidence in order to address the question of innocence and any factors relevant to Cabinet's assessment of "extraordinary circumstances".
33. I therefore propose that Cabinet agrees to set aside the advice of both Justice Binnie and Dr Fisher and that I appoint a new inquirer to conduct a fresh inquiry into Mr Bain's claim.
34. This approach involves moving beyond both the advice that the Crown considers unreliable and the advice and steps that Mr Bain considers objectionable. This is a compromise for both parties, but is both constructive and even-handed. It would enable Mr Bain's claim to be progressed on a principled basis, with a proper and robust process directed at obtaining sound, reasoned advice on which I can rely in advising Cabinet.

WITHHELD UNDER s 9(2)(h)

36. It is important to note that Cabinet is the decision-maker on compensation. In cases such as Mr Bain's an inquirer is asked to provide advice on any factors they consider relevant to Cabinet's assessment of "extraordinary circumstances", rather than their conclusion on whether that threshold is met. The inquirer provides advice to the Minister but does not decide on whether compensation should be paid.

Next steps

37. If Cabinet agrees, I will work with officials to identify a new inquirer to consider Mr Bain's compensation claim and report to me.
38. The inquirer should be engaged to consider and advise on the merits of the claim, broadly consistent with the instructions that were given in 2011 to Justice Binnie. I will also consider whether any additional instructions could address difficulties that arose with Justice Binnie's report.
39. I will report back to Cabinet before the appointee and their instructions are finalised.

Consultation

40. The Crown Law Office was consulted on the judicial review proceeding and settlement. The Crown Law Office and Police were not otherwise consulted on the issues in this paper given their role in Mr Bain's claim. No other Departments were consulted as no relevant issues arise for them.

Financial implications

WITHHELD UNDER s9(2)(ba) and WITHHELD UNDER s 18(c)

WITHHELD UNDER s 9(2)(j)

Human rights

43. A decision to set aside the advice of Justice Binnie and Dr Fisher and to appoint a new inquirer is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative implications

44. Not applicable.

Regulatory impact analysis

45. Not applicable.

Publicity

46. There has been considerable media interest in Mr Bain's case. Cabinet's decision on next steps is likely to attract significant media and public interest.
47. If Cabinet agrees to the recommendations in this paper, I will issue a press statement announcing the next steps to be taken in the consideration of Mr Bain's claim.

Recommendations

48. The Minister of Justice recommends that Cabinet:
 1. **note** that David Bain wrote to the then Minister of Justice, Hon Simon Power, in March 2010 to notify his claim for compensation for wrongful conviction and imprisonment following the quashing of his convictions by the Privy Council and his acquittal at retrial;
 2. **note** that:
 - 2.1. Mr Bain is not eligible under the Cabinet guidelines governing compensation for wrongful conviction and imprisonment because the Privy Council ordered a retrial; and
 - 2.2. instead, his claim falls under the discretion to consider claims that fall outside the guidelines "in extraordinary circumstances ... on their individual merits, where it is in the interests of justice";
 3. **note** that in November 2011, Hon Simon Power instructed Hon Justice Binnie QC, a retired judge of the Supreme Court of Canada, to provide advice on Mr Bain's compensation claim;
 4. **note** that on 31 August 2012, Hon Justice Binnie QC provided a report recommending that Mr Bain be compensated on the basis that he is innocent on the balance of probabilities and that serious errors in the Police investigation constitute extraordinary circumstances;
 5. **note** that the then Minister of Justice, Hon Judith Collins, had serious concerns about the quality and robustness of Hon Justice Binnie QC's report and, following receipt of advice from the Solicitor General, commissioned Hon Dr Robert Fisher QC to peer review Hon Justice Binnie QC's report;
 6. **note** that on 30 January 2013, Mr Bain's solicitors lodged a judicial review proceeding in the High Court alleging breach of natural justice following receipt of Hon Justice Binnie QC's report;
 7. **note** that on 4 February 2013 Cabinet agreed that Mr Bain's application for compensation be put on hold pending the determination of the judicial review proceeding lodged in the High Court by Mr Bain;

WITHHELD UNDER s9(2)(b) and WITHHELD UNDER s 18(c)

WITHHELD UNDER s9(2)(ba)

and

WITHHELD UNDER s 18(c)

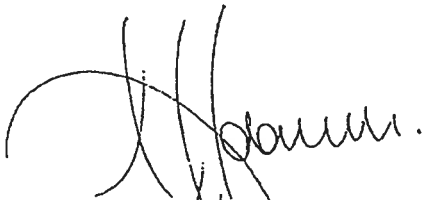
11. **agree that:**

- 11.1. the advice of both Hon Justice Ian Binnie QC and Hon Dr Robert Fisher QC on Mr Bain's claim be set aside; and
- 11.2. I appoint a new inquirer to conduct a fresh inquiry into Mr Bain's compensation claim and report to me;

12. **note that:**

- 12.1. the new inquirer should be asked to advise on the merits of Mr Bain's claim, broadly consistent with the instructions that were given in 2011 to Hon Justice Ian Binnie QC;
- 12.2. Hon Dr Robert Fisher QC will not be engaged to provide advice in relation to the claim.

13. **note that I will report back to Cabinet before the appointee and their instructions are finalised**



Hon Amy Adams
Minister of Justice

Date signed:

29/1/2015