

Memorandum for Cabinet

TEINA ANTHONY PORA'S APPLICATION FOR COMPENSATION FOR WRONGFUL CONVICTION AND IMPRISONMENT: INFLATION ADJUSTMENT

Proposal

1. Cabinet is asked to agree to withdraw the appeal against the High Court's decision in *Pora v Attorney-General* [2017] NZHC 2081 and pay an additional amount of compensation to Teina Anthony Pora for his wrongful conviction and imprisonment, to reflect the effect of inflation.

Executive summary

2. Mr Pora was convicted in 1994 of murder, sexual violation and aggravated burglary in relation to the death of Susan Burdett in 1992. In March 2015, the Privy Council quashed Mr Pora's convictions without order of retrial.
3. Mr Pora applied for compensation for wrongful conviction and imprisonment in April 2015. In 2016, after following the calculation process set out in the Cabinet Guidelines, Hon Rodney Hansen QC recommended that Mr Pora be paid compensation in the amount of \$2,520,949.42.
4. Mr Hansen QC also recommended that Cabinet consider adjusting part of the total amount (those parts awarded for loss of liberty and other non-pecuniary losses) to reflect the effects of inflation since 2000, when the Additional Guidelines were issued. Cabinet decided not to adjust the amount awarded for inflation.
5. In July 2017 the High Court heard a judicial review application in respect of Cabinet's decision not to inflation adjust. The High Court upheld Mr Pora's application for review. Justice Ellis granted a declaration that the Guidelines "permit the quantum of compensation payable to an applicant for non-pecuniary losses to be adjusted for inflation where it is in the interests of justice to do so" and invited the Minister of Justice to reconsider the matter.
6. In September 2017 the Attorney-General filed a notice of appeal against the High Court's decision to preserve options for an incoming government.
7. Having reviewed the matter, in line with the High Court's decision, I consider that Mr Pora should be paid an inflation adjustment. I now seek agreement to:
 - 7.1. Withdraw the appeal against the High Court's decision;
 - 7.2. Make an additional payment to Mr Pora of \$988,099.

Background

8. Teina Pora's convictions for murder, sexual violation, and aggravated burglary were quashed by the Privy Council in March 2015. Mr Pora made a claim for compensation for wrongful conviction and imprisonment under the Cabinet Guidelines governing such claims. These comprise:
 - 8.1. Cabinet Criteria for Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases (1998); and
 - 8.2. Additional Guidelines of Quantum of Future Compensation (2000).
9. Broadly, under the Additional Guidelines there is a two-stage approach to calculating non-pecuniary losses. Stage 1 is the calculation for loss of liberty and involves multiplying a figure of \$100,000 by the number of years a claimant has been in prison. Stage 2 provides compensation for other non-pecuniary losses and is assessed as a "one-off" figure, starting at \$100,000 and adjusted up or down to reflect the aggravating or mitigating factors listed in the Guidelines. These amounts have not been amended since they were introduced in 2000.
10. In 2016, after following the calculation process set out in the Cabinet Guidelines, Hon Rodney Hansen QC recommended that Mr Pora be paid compensation in the amount of \$2,520,949.42. That sum included:
 - 10.1. \$1,961,895 for non-pecuniary loss, specifically loss of liberty;
 - 10.2. \$225,000 for other non-pecuniary losses (loss of reputation, loss or interruption of family and other personal relationships, mental and emotional harm);
 - 10.3. \$334,054.42 for pecuniary losses (loss of livelihood and future earnings potential, costs incurred in challenging his convictions and bringing the application for compensation).
11. Mr Hansen QC also recommended that Cabinet consider adjusting the amounts calculated for loss of liberty and other non-pecuniary losses to reflect the effects of inflation since 2000. Mr Hansen described the proposed adjustment as one to "recognise the decline in real terms in the level of compensation payable since the Additional Guidelines were introduced".
12. On the advice of the Minister of Justice, on 13 June 2016 Cabinet did consider inflation adjusting the amounts assessed by Mr Hansen for non-pecuniary losses, but decided not to do so.
13. The reasons for Cabinet's decision not to adjust for inflation were as follows:¹
 - 13.1. The Cabinet Guidelines do not provide for payments to be adjusted for inflation;

¹ As recorded in the transcript of Hon Amy Adams' appearance at the Justice and Electoral Select Committee on 16 June 2016.

- 13.2. The absence of inflation-adjusting in the Cabinet Guidelines is not unusual - a number of fees, charges, and payments in the Crown system do not automatically provide for inflation-adjusting, and instead the rates are updated when appropriate;
 - 13.3. Cabinet needed to be mindful of the eight other people compensated under the Cabinet Guidelines whose payments were not adjusted for inflation;
 - 13.4. Cabinet was “comfortable that \$100,000 per year for the time of incarceration was still an appropriate amount” to compensate for loss of liberty;
 - 13.5. The annual rate of \$100,000 per year of incarceration “still sits very well” when compared internationally; and
 - 13.6. Mr Pora was also to receive additional sums of compensation for his other non-pecuniary losses and his pecuniary losses which were assessed “in real dollar values” at Mr Hansen’s discretion.
14. Mr Pora accepted payment of the amount approved by Cabinet but with the agreement of the Minister of Justice reserved the right to bring judicial review proceedings in respect of the decision not to make an adjustment for inflation. Mr Pora then filed an application for judicial review, which was heard by Justice Ellis in the High Court in July 2017.
 15. In August 2017 Justice Ellis upheld the application for review. In relation to the issue of inflation adjustment, Justice Ellis said that:
 - 15.1. the Guidelines permit inflation adjusting of compensation for non-pecuniary losses if the interests of justice dictate;
 - 15.2. the interests of justice ordinarily require those in like positions to be consistently treated;
 - 15.3. consistency would normally suggest that compensation for non-pecuniary loss should be inflation adjusted where not to do so would result in the applicant being treated differently in real terms from other applicants;
 - 15.4. the evidence suggested that Mr Pora had been treated substantially worse in real terms than other applicants and also that an inflation adjustment would not result in Mr Pora being treated substantially better than earlier claimants under the Guidelines.
 16. The remedy granted by the Judge was a declaration that the Guidelines “permit the quantum of compensation payable to an applicant for non-pecuniary losses to be adjusted for inflation where it is in the interests of justice to do so”. The Judge then invited the Minister of Justice to consider whether, in the circumstances of Mr Pora’s case, the interests of justice require the benchmarks in the Guidelines to be inflation adjusted. The Judge saw no impediment to the Minister taking the matter back to Cabinet should inflation adjustment be seen as the proper outcome.
 17. On 25 September 2017, the Attorney-General filed a notice of appeal against Ellis J’s decision. [REDACTED]

18. The notice of appeal stated that the grounds of appeal were that:
 - 18.1. The High Court erred in determining that Cabinet's decision not to adjust Mr Pora's compensation for non-pecuniary losses for inflation proceeded on the basis of an error of law, in that the Cabinet Guidelines implicitly stipulated for "consistency" as between applicants and "permitted" compensation to be adjusted for inflation;
 - 18.2. The High Court erred in not instead assessing the claim as a challenge to the substance of Cabinet's decision not to depart from the Cabinet Guidelines in order to adjust Mr Pora's compensation for inflation, on the basis of unreasonableness. Were the case characterised in this way, Cabinet's decision was not justiciable and, in any event, was not unreasonable.

Resolving Mr Pora's claim

19. I have read the decision of the High Court in *Pora v Attorney-General* and I have considered the circumstances of Mr Pora's claim for compensation for wrongful conviction and imprisonment. In particular, I have considered the facts that:
 - 19.1. The High Court found that the circumstances of Mr Pora's case were qualitatively and quantitatively different from other previous claims;
 - 19.2. Mr Pora was wrongly imprisoned for almost 20 years;
 - 19.3. This is the longest term of imprisonment for any claimant under the Cabinet Guidelines;
 - 19.4. The impact of inflation on the amount of compensation paid to Mr Pora in respect of non-pecuniary losses is significant;
 - 19.5. Mr Pora's compensation for non-pecuniary losses, proportionate to years in prison, is substantially lower, in real terms, than the amounts paid to previous claimants;
 - 19.6. The High Court observed that the impact of inflation on Mr Pora's case is "particularly acute" compared with the effect on awards made to other claimants.
20. Having reviewed the matter in line with the High Court's decision, I consider that, in the unique circumstances of Mr Pora's case, the interests of justice favour inflation adjustment of his compensation for non-pecuniary losses. I recommend that he be compensated accordingly.
21. I therefore ask Cabinet to agree to withdraw the appeal against the High Court's decision.

22. Further, I propose that the amount of compensation paid to Mr Pora for non-pecuniary losses should be inflation adjusted on the following basis, to reflect Mr Hansen's recommendation:

22.1. The amount of compensation awarded by Mr Hansen for non-pecuniary losses should be multiplied by the change in the relevant inflation index;

22.2. The relevant index is the Consumer Price Index (All Groups CPI / index SE9A), which reflects the change in purchasing power over any specified period;

22.3. The starting point for inflation adjustment should be July 2000, when the \$100,000 benchmarks in the Additional Guidelines were set;

22.4. The end point should be the nearest complete quarter year to the time of payment.

23. The Ministry of Justice has received expert advice from an actuary to the effect that Mr Pora's compensation for non-pecuniary losses of \$2,186,895 should be adjusted in the following manner:

$$\text{Total adjusted amount} = \text{Unadjusted amount} \times \frac{\text{Current index value}}{\text{Index value at benchmark date}}$$

24. The total inflation adjusted amount is:

$$\begin{aligned} \$2,186,895 \times \frac{1232}{848.585691} &= \$3,174,994 \end{aligned}$$

25. The additional payment required to allow for inflation is \$988,099, being the difference between the adjusted amount (\$3,174,994) and the unadjusted amount (\$2,186,895).

26. I therefore ask Cabinet to agree to pay Mr Pora an additional amount of \$988,099 to reflect an adjustment for inflation.

Costs

27. On the withdrawal of the appeal, outstanding court costs will be payable to Mr Pora.

28. The High Court held that Mr Pora was entitled to costs for the judicial review. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] s9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

29. [REDACTED]
[REDACTED]

[REDACTED]

30. [REDACTED]

Agreement to forego further proceedings

31. The recommended inflation adjustment would be subject to Mr Pora agreeing to forego any further legal action against the Crown in respect of matters relating to his convictions, imprisonment, claim for compensation for wrongful conviction and imprisonment, and all related proceedings.

Offer to Mr Pora

32. If Cabinet agrees with the recommended inflation adjustment, I will offer that amount to Mr Pora on behalf of the Crown. That offer will enclose a deed of release for Mr Pora to sign.

Future claims for compensation for wrongful conviction and imprisonment

33. I note that until such time as the Cabinet Guidelines are amended, Cabinet will need to assess, when determining an appropriate amount of compensation for any future successful claimant under the Guidelines, whether the interests of justice require the amounts calculated for non-pecuniary losses to be inflation adjusted.

[REDACTED]

34. [REDACTED] s9(2)(f)(iv) [REDACTED]

[REDACTED]

35. [REDACTED] s9(2)(h) [REDACTED]

Consultation

36. The Treasury and the Crown Law Office have been consulted on this paper. The Department of Prime Minister and Cabinet has been informed.

Financial implications

37. 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].
38. The Ministry of Justice is not funded for any ex gratia or compensation payments and is unable to make any cost reductions to absorb this payment. The payment will be a charge against the general contingency.

Human rights

39. The proposed compensation package is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative implications

40. There are no legislative implications.

Regulatory impact analysis

41. A regulatory impact analysis is not required.

Publicity

42. My office will co-ordinate publicity following Cabinet's decision and the acceptance of the offer to Mr Pora.

Recommendations

43. The Minister of Justice recommends that Cabinet:
 1. **note** that on 13 June 2016 Cabinet considered Teina Pora's application for compensation for wrongful conviction and imprisonment, in light of advice provided to the Minister of Justice by Hon Rodney Hansen QC CNZM on an appropriate amount of compensation for Mr Pora;
 2. **note** that Cabinet:
 - 2.1. **noted** that, on 31 May 2016, Mr Hansen recommended that Mr Pora be paid total compensation of \$2,520,949.42;
 - 2.2. **noted** that Mr Hansen also recommended that Cabinet consider adjusting for inflation the amount of compensation he assessed for Mr Pora's non-pecuniary losses;
 - 2.3. **agreed**, in light of Mr Hansen's advice, that Mr Pora be compensated for his wrongful conviction and imprisonment;

- 2.4. **agreed** not to adjust for inflation the compensation for non-pecuniary losses payable to Mr Pora;
 - 2.5. **agreed** that an ex gratia payment of \$2,520,949.42 be made to Mr Pora for his wrongful conviction and imprisonment;
3. **note** that Mr Pora accepted the offer of compensation but, with the agreement of the Minister of Justice, reserved the right to apply for judicial review of the decision not to adjust for inflation, in accordance with the Consumer Price Index, the compensation for non-pecuniary losses;
4. **note** that Mr Pora applied for judicial review of that decision on 3 November 2016 and that the application was heard in the High Court by Justice Ellis on 3 July 2017;
5. **note** that in her judgment of 28 August 2017, Justice Ellis:
 - 5.1. **made** a declaration that the Cabinet Guidelines on compensation for wrongful conviction and imprisonment permit the quantum of compensation payable to an applicant for his or her non-pecuniary losses to be adjusted for inflation, where it is in the interests of justice to do so; and
 - 5.2. **invited** the Minister of Justice to consider whether, in the circumstances of Mr Pora's case, the interests of justice require the benchmarks in the Guidelines for the calculation of non-pecuniary losses to be inflation adjusted;
6. **note** that on 25 September 2017, Cabinet:
 - 6.1. **agreed** to file an appeal against the High Court's decision in order to preserve the options available to an incoming government in responding to the case;
7. **note** that a notice of appeal was filed in the Court of Appeal on the same day;
8. **agree** that, in the unique circumstances of Mr Pora's case, in particular the length of time Mr Pora spent in prison and the effect of inflation on his award of compensation, it is in the interests of justice that Mr Pora's compensation for non-pecuniary losses be adjusted for inflation;
9. **note** that Mr Pora's total compensation payment included the amount of \$2,186,895.00 for non-pecuniary losses;
10. **note** that the Ministry of Justice has received actuarial advice that this amount, if adjusted for inflation based on the change in the Consumers Price Index (All Groups) between July 2000, when the benchmarks in the Guidelines were adopted, and the quarter year ending in 30 September 2017, would result in an additional sum of \$988,099.

11. **agree** that:

11.1. the appeal against the High Court's decision of 28 August 2017 be withdrawn;

11.2. an ex gratia payment of \$988,099 be made to Mr Pora to represent the adjustment for inflation of his compensation for non-pecuniary losses;

12. **agree** to re-establish the following appropriation:

Vote	Appropriation Minister	Title	Type	Scope
Justice	Minister of Justice	Compensation for Wrongly Convicted Individuals	Non-Departmental Other Expense	This appropriation is limited to compensation or ex-gratia payments for persons wrongly convicted and imprisoned

13. **approve** the following changes to appropriations to provide for an inflation adjustment to the ex gratia payment made to Mr Pora for wrongful conviction and imprisonment, with a corresponding impact on the operating balance:

Vote Justice Minister of Justice	\$m – increase/(decrease)				
	2017/18	2018/19	2019/20	2020/21	2021/22 & Outyears
<i>Non-Departmental Other Expense:</i> Compensation for Wrongly Convicted Individuals	0.989	-	-	-	-

14. **agree** that the proposed changes to appropriations for 2017/18 above be included in the 2017/18 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;

15. **agree** that the expenses incurred under recommendation 13 above be a charge against the between-Budget operating contingency, established as part of Budget 2017;

16. **note** that the between-Budget operating contingency is built into the operating allowance line in the Fiscal Plan;

17. **authorise** the Minister of Justice to offer the above amount to Mr Pora;

18. **note** that if Mr Pora accepts the inflation adjusted offer, he will be required to forego any further legal action against the Crown in respect of matters relating to his convictions, imprisonment, claim for compensation for wrongful conviction and imprisonment, and all related proceedings;

19. **note** that, on the withdrawal of the appeal:
 - 19.1. court costs will be payable to Mr Pora in relation to the judicial review proceeding and the Crown's appeal;
 - 19.2. the Crown Law Office will seek to settle promptly the quantum of costs payable to Mr Pora;
20. **note** that my office will coordinate publicity following Cabinet's decision and the acceptance of the offer to Mr Pora;
21. s9(2)(f)(iv)

Hon Andrew Little
Minister of Justice

Date signed: