

**COMPENSATION FOR A WRONGLY CONVICTED AND IMPRISONED INDIVIDUAL****Proposal**

1. Cabinet is asked to agree in principle to compensate **Section (9) (2) (a)** for being wrongfully convicted and imprisoned.
2. If Cabinet agrees, I will report back to Cabinet with a proposed compensation package.

**Executive summary**

3. Mr **Section (9) (2) (a)** has applied for compensation for wrongful conviction and imprisonment in respect of two convictions in 2013 for driving whilst disqualified contrary to the Land Transport Act 1998. The first conviction relates to alleged offending on 13 March 2013 and the second conviction relates to alleged offending on 14 March 2013
4. As a result of these convictions, together with sentencing for other offending, the District Court sentenced Mr **Section (9) (2) (a)** to a total of 16 months' imprisonment. He was also disqualified from driving. The period of imprisonment relating to the 2013 convictions of driving whilst disqualified was 14 months' imprisonment, of which Mr **Section (9) (2) (a)** served about 7 months.
5. On 5 February 2016, the Police applied for a rehearing of the 2013 convictions. The basis for the application was that it had come to the Police's attention that Mr **Section (9) (2) (a)** had been wrongly convicted in 2013 due to an error on his criminal history. This was because, in 2007, a sentence of disqualification from driving of six months had been incorrectly recorded by the Court registry as six years. This "inputting error" meant that Mr **Section (9) (2) (a)** was not actually disqualified from driving in March 2013. The District Court granted the application for a rehearing and by consent, the guilty pleas were vacated and the charges withdrawn.
6. As a result of the District Court's decision, Mr **Section (9) (2) (a)** is eligible to apply for compensation under the 2020 Compensation Guidelines for Wrongful Conviction and Imprisonment ('the 2020 Guidelines').
7. Under the 2020 Guidelines, the Minister of Justice is responsible for considering compensation claims and advising Cabinet on them. Cabinet must agree to any payment of compensation.
8. A person who is eligible to apply under the Guidelines may be compensated only if Cabinet is satisfied on the advice of the Minister of Justice that:
  - 8.1. the applicant is innocent on the balance of probabilities of the offence(s) in respect of which the application was made;

- 8.2. compensation is in the interests of justice, having regard to the purposes of the compensation scheme and taking into account:
- 8.2.1. The conduct of the applicant leading to the prosecution and conviction; and
- 8.2.2. All other relevant circumstances; and
- 8.3. the applicant has suffered losses that are compensable under the Guidelines.
9. Section 9(2)(h) the District Court's decision has established Mr Section 9(2)(a) innocence of the charges of driving whilst disqualified. Therefore, Mr Section 9(2)(a) has met the first criterion of innocence.
10. The question for Cabinet to decide is whether it is in the interests of justice for Mr Section 9(2)(a) to be compensated, and if so, in respect of which convictions.
11. I propose that Mr Section 9(2)(a) be compensated for the 13 March 2013 conviction because:
- 11.1. The District Court decision established that he was innocent of the charge for which he was convicted, and therefore, the purpose of vindicating innocent defendants is satisfied.
- 11.2. It is unclear if Mr Section 9(2)(a) thought he was still disqualified on 13 March and I am prepared to give him the benefit of the doubt.
- 11.3. Compensation would recognise that the conviction occurred because of a mistake on the part of the court registry, which flowed onto the records held by NZTA and Police. This acknowledgement may enhance public confidence in the justice system.
12. I propose that compensation for the 14 March 2013 conviction be declined. On that date, Mr Section 9(2)(a) deliberately drove whilst believing he was disqualified, and as such, his conduct leading to the prosecution and conviction is sufficiently blameworthy to disqualify him from receiving compensation for that conviction. I consider that to compensate him in these circumstances would tend to undermine confidence in the compensation scheme.
13. I also considered whether compensation should be declined for both convictions because Mr Section 9(2)(a) had been earlier notified by the Court that he needed to obtain a new licence at the end of the disqualification period, he had failed to do so, and he was, nevertheless, committing the offence of driving without a licence. I do not consider that compensation should be declined completely. Driving without a licence is a comparatively minor offence and, if he had been prosecuted, could have only resulted in a fine – Mr Section 9(2)(a) could not have been imprisoned for that conduct. In my view, it is more appropriate to deal with that blameworthy conduct as an aggravating factor when assessing quantum, which will likely result in a reduced award.
14. In conclusion, I seek agreement in principle to compensate Mr Section 9(2)(a) under the Guidelines for the conviction for offending on 13 March 2013 only, which would be a compensable period of imprisonment of five months. If Cabinet agrees, I will seek submissions from Mr Section 9(2)(a) on matters relevant to determining an appropriate compensation payment and return to Cabinet with a recommended compensation offer.

## Background

### 2007/2008 offending

15. On 24 December 2007, Mr [Section (9) (2) (a)] appeared in the District Court for sentencing on several charges. On a charge of failing to stop when being followed by a motor vehicle flashing blue and red lights, the Court convicted and sentenced Mr [Section (9) (2) (a)] to disqualification from holding or obtaining a driver's licence for 6 months, which commenced on the date of sentencing, that being 24 December 2007.
16. The period of disqualification that Mr [Section (9) (2) (a)] was sentenced to on 24 December 2007 appears to have been incorrectly recorded in the Court's case management system by registry staff as 6 years not 6 months (i.e. until 24 December 2013). This error would then have been replicated in Police and NZTA records. When combined with sentencing on other charges on 24 December 2007, Mr [Section (9) (2) (a)] was disqualified from holding or obtaining a driver's licence for a total period of two years, which meant that the overall disqualification period ended on 24 December 2009.
17. Following sentencing, the Court issued Mr [Section (9) (2) (a)] with a notice of disqualification stating that after the disqualification ended he would need to apply for a new licence before he could drive lawfully again.
18. On 15 October 2008, Mr [Section (9) (2) (a)] was convicted and sentenced by the District Court in respect of various offences, including driving while disqualified. These were committed within the correct disqualification period (before 24 December 2009). The maximum disqualification period imposed in respect the offences was 2 years from 24 December 2009, i.e. until 24 December 2011. Again, the Court issued Mr [Section (9) (2) (a)] with a notice of disqualification explaining that after the disqualification ended he would need to apply for a new licence before he could drive again.

### 2013 offending

19. On 13 March 2013, Mr [Section (9) (2) (a)] was driving in [Section (9) (2) (a)] and was stopped at a police checkpoint on his way home from work. Mr [Section (9) (2) (a)] was charged with driving whilst disqualified (third or subsequent offence).
20. On 14 March 2013, Mr [Section (9) (2) (a)] was driving in [Section (9) (2) (a)]. He was pursued by police after failing to stop, who were using flashing lights. During this pursuit, Mr [Section (9) (2) (a)] drove at high speeds, through multiple red lights, heavily accelerated, crossed the centre line, weaved to make sure that the police could not get past at high speed, and aimed his car at approaching patrol cars, and only stopped because his car's engine failed. When his engine failed, he ran from Police but was apprehended shortly after. He said that he ran from Police because he was disqualified and did not want to go to prison. Mr [Section (9) (2) (a)] was charged with driving whilst disqualified (third or subsequent offence), reckless driving, failing to stop when followed by red/blue flashing lights, and possession of a drug utensil.
21. Mr [Section (9) (2) (a)] pleaded guilty to all charges relating to the events on 13 and 14 March 2013. At sentencing, the Court and the parties proceeded on the mistaken basis that [Section (9) (2) (a)] was disqualified from driving until 23 December 2013, i.e. that he was disqualified at the time of the offending on 13 and 14 March 2013. The total imprisonment sentence imposed on 12 June 2013 by the Court was 1 year 4 months (concurrent).

22. Following further offending, Mr [Section 9(2)(a)] appeared for sentencing on 5 February 2016 related to 7 charges. Prior to dealing with these offences, Police filed an application for rehearing in respect of Mr [Section 9(2)(a)] sentencing on 12 June 2013. We understand this was because the error in the disqualification period was brought to the attention of Police by Mr [Section 9(2)(a)] lawyer at the time. The sentencing Judge sought to “regularise” matters flowing from both the sentencing on 12 June 2013 and subsequently. The rehearing was granted and, by consent, the guilty pleas in respect of the 2013 driving whilst disqualified charges were vacated and the charges withdrawn.

### Application for compensation

23. In August 2019, Mr [Section 9(2)(a)] applied for compensation for wrongful conviction and imprisonment for the two convictions of driving whilst disqualified on 13 and 14 March 2013.
24. In his application, his lawyer said that Mr [Section 9(2)(a)] did not think he was disqualified from driving on 13 March 2013 and his arrest and charge came as somewhat of a surprise to him. This triggered memories about his past, which caused “a relapse and panicked offending the next day”.
25. However, Mr [Section 9(2)(a)] lawyer at the time of the 2013 proceedings said that although he could not recall the June 2013 sentencing, the court record stated six years disqualification and he said that Mr [Section 9(2)(a)] also thought he was still disqualified. The summary of facts relating to the March 2013 charges also states that Mr [Section 9(2)(a)] said he was disqualified when stopped by Police on 13 March. Mr [Section 9(2)(a)] also pleaded guilty to the charges.
26. In explanation, Mr [Section 9(2)(a)] said that the reason he did not contest the disqualified driving charges on 13 and 14 March 2013 was “because at the time I didn’t understand what had happened. I didn’t want to deny the offending and have that go against me at sentencing”. In his compensation application, Mr [Section 9(2)(a)] said that he believed his disqualification period had ended in December 2011.

### **Comment**

#### 2020 Guidelines

27. There is no legal right to compensation for wrongful conviction and imprisonment in New Zealand. However, the Government in its discretion may decide to compensate a person who has been wrongly convicted and imprisoned by making an *ex gratia* payment.
28. On 27 July 2020, Cabinet agreed to adopt new guidelines concerning compensation for persons wrongly convicted and imprisoned in criminal cases. The *Compensation Guidelines for Wrongful Conviction and Imprisonment* (‘the 2020 Guidelines’) came into force on 19 August 2020. The Guidelines are attached as an Appendix to this paper.
29. In order to be eligible to apply for compensation under the Guidelines, a person must have been wrongly convicted of an offence, have served all or part of a sentence of imprisonment in relation to that conviction, and be alive at the time of the application.
30. A person who is eligible to apply under the 2020 Guidelines may be compensated only if Cabinet is satisfied on the Minister of Justice’s advice that:

- 30.1. the applicant is innocent on the balance of probabilities of the offence(s) in respect of which the application was made;
  - 30.2. compensation is in the interests of justice, having regard to the purposes of the compensation scheme and taking into account:
    - 30.2.1. The conduct of the applicant leading to the prosecution and conviction; and
    - 30.2.2. All other relevant circumstances; and
  - 30.3. the applicant has suffered losses that are compensable under the Guidelines.
31. The purposes of the compensation scheme are to:
- 31.1. vindicate innocent defendants;
  - 31.2. provide reasonable compensation for losses arising from wrongful conviction and consequent loss of liberty; and
  - 31.3. enhance public confidence in the justice system.

#### Eligibility

32. Mr <sup>Section (9) (2) (a)</sup> meets the requirement of having served all or part of a sentence of imprisonment. Mr <sup>Section (9) (2) (a)</sup> convictions for driving whilst disqualified on 13 and 14 March 2013 were overturned at a rehearing in the District Court. The purpose of the application for a rehearing was to enable the driving whilst disqualified charges to be disposed of without need for a retrial. As no retrial or further hearing was ordered, he is eligible to apply under the Guidelines pursuant to paragraph 14(b) of the Guidelines.

#### Innocence

33. An applicant is innocent on the balance of probabilities if it is “more likely than not” that they are innocent. The onus of establishing innocence to this standard is on the applicant.
34. In this case, Police acknowledged that Mr <sup>Section (9) (2) (a)</sup> was not disqualified in March 2013, and the charges were withdrawn. As the existence of the disqualification order is a necessary element of the offence with which Mr <sup>Section (9) (2) (a)</sup> was charged, the 2016 rehearing in the District Court has effectively established his innocence.
35. Therefore, I am satisfied that Mr <sup>Section (9) (2) (a)</sup> has established on the balance of probabilities that he was innocent of the two charges of driving whilst disqualified (3<sup>rd</sup> or subsequent) contrary to sections 32(1)(a) and 32(4) of the Land Transport Act 1998.

#### Interests of justice

36. Any decision to compensate must also be consistent with the stated purposes of the compensation scheme, namely to make good losses incurred when a person has been wrongly deprived of liberty, vindicate innocent defendants and enhance public confidence in the justice system.

37. This requirement is captured in paragraph 17(b) of the 2020 Guidelines, which states that compensation must be in the interests of justice, having regard to the purposes of the Guidelines and taking into account:
- 37.1. The conduct of the applicant leading to the prosecution and conviction; and
  - 37.2. All other relevant circumstances.
38. There are two ways of dealing with blameworthy conduct by an applicant for compensation. The compensation application may be declined if payment would not be in the interests of justice. Alternatively, if Cabinet decides that compensation should be paid, the applicant's blameworthy conduct may be taken into account as an aggravating factor that reduces the amount of compensation payable by up to \$150,000 (paragraph 43 of the Guidelines). It is a matter for Cabinet's judgement, in a particular case, which approach is more consistent with the interests of justice.
39. Critical to this assessment are the relative blameworthiness of the person's conduct and the extent to which it contributed to their conviction. Is the applicant's conduct, although not amounting to the offence they were wrongly convicted of, nonetheless sufficiently criminal or blameworthy to disqualify them from receiving compensation at all? For instance, in decisions made under the previous Guidelines, it was judged that payment of compensation would not be in the interests of justice where:
- 39.1. the person's conduct constituted an offence of equal seriousness to the offences on which the person was convicted, or was at least offending of sufficient seriousness;
  - 39.2. the person intended to commit an offence, although their conduct was not actually criminal;
  - 39.3. the person contributed to their conviction, for example by pleading guilty.
40. Put another way, a claimant who has established their innocence may still have their claim rejected if, taking into account all the circumstances, compensation would be clearly contrary to the interests of justice. The conduct of the claimant is central to this assessment.

Mr <sup>Section (9) (2) (a)</sup> conduct

41. Mr <sup>Section (9) (2) (a)</sup> is innocent of the offences of driving whilst disqualified in March 2013; however, there is still a question whether compensation would be in the interests of justice because:
- 41.1. On 13 March 2013, it is unclear if Mr <sup>Section (9) (2) (a)</sup> believed he was still disqualified. He had also not obtained a new licence but drove anyway. This was unlawful and his decision to drive contributed to him being wrongly convicted of driving while disqualified;
  - 41.2. In addition, on 14 March 2013, having been stopped and charged with driving whilst disqualified the day before, Mr <sup>Section (9) (2) (a)</sup> clearly believed he was still disqualified but decided to drive anyway, driving in Christchurch after having attended a party. His decision to drive whilst believing he was disqualified was aggravated by his behaviour when signalled to stop by Police, as noted in paragraph 20.

42. In considering the interests of justice, it is important to assess whether payment of compensation would strengthen or undermine confidence in the justice system and compensation scheme.
43. The application could be determined in three ways – it could be declined in full; Cabinet could agree to compensate Mr [Section 9(2)(a)] only for the wrongful conviction relating to the events on 13 March 2013 (a compensable period of five months imprisonment); or Cabinet could agree to compensate Mr [Section 9(2)(a)] for the wrongful convictions for both 13 and 14 March 2013 (a compensable period of six months and 16 days imprisonment).
44. I propose that Mr [Section 9(2)(a)] be compensated for only the conviction relating to events on the 13 March 2013. This is because:
- 44.1. The District Court decision established that he was innocent of the charge for which he was convicted, and therefore, the purpose of vindicating innocent defendants is satisfied.
- 44.2. It is unclear if Mr [Section 9(2)(a)] thought he was still disqualified on 13 March and I am prepared to give him the benefit of the doubt.
- 44.3. Compensation would recognise that the conviction occurred because of a mistake on the part of the court registry, which flowed onto the records held by NZTA and Police. This acknowledgement may enhance public confidence in the justice system.
45. I do not consider that the fact that Mr [Section 9(2)(a)] drove without a licence (which is an offence that carries a maximum sentence of a fine only) should preclude compensation entirely. Rather, in my view, it is more appropriate to treat that lesser blameworthy conduct as an aggravating factor and consider it when assessing an appropriate amount of compensation, likely leading to a reduced award.
46. Although similar considerations apply to the conviction for events on 14 March 2013, there is one marked difference. Mr [Section 9(2)(a)] made a deliberate decision to drive again shortly after being charged with driving whilst disqualified. He believed he was disqualified, and as such, he intended to commit an offence although his conduct was not actually criminal. Furthermore, when directed by Police to stop, knowing he was disqualified and not wanting to be caught, he chose to flee at high speed, driving dangerously and ran from Police when his engine failed. I consider that Mr [Section 9(2)(a)] conduct leading to the prosecution and conviction for driving whilst disqualified on 14 March is sufficiently blameworthy to disqualify him from receiving compensation for that conviction. To compensate him would tend to undermine confidence in the compensation scheme.
47. On balance, I consider that granting compensation in respect of the 13 March offending, but not the 14 March offending, would strike an appropriate balance in terms of the purpose of enhancing public confidence in the justice system.

#### **Next steps – determining quantum of compensation and offer to applicants**

48. Subject to Cabinet's agreement in principle to compensate Mr [Section 9(2)(a)], the next step will be to determine an appropriate amount of compensation and, if Cabinet approves, make a formal offer to him. Compensation may also include a public statement of the claimant's

innocence and in appropriate cases a public apology by the Crown. Any compensation payment will be calculated in accordance with the 2020 Guidelines.<sup>1</sup>

49. In respect of the conviction relating to 13 March only, the compensable period of imprisonment is five months (which is half of the sentence of imprisonment of 12 months that he received for that offending minus the one month's imprisonment that he would have been lawfully detained in relation to the other convictions).
50. I propose to seek submissions from Mr Section 9(2)(b) on matters relevant to compensation. Usual practice is to also invite the Crown Law Office to make submissions in response. I will then report to Cabinet with a recommended compensation package before making a formal offer to Mr Section 9(2)(b).

### Consultation

51. 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

52. After considering any submissions from Mr Section 9(2)(b) 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.

### Human rights

53. Compensation would be consistent with the New Zealand Bill of Rights Act 1990 and Human Rights Act 1993.

### Legislative implications

54. There are no legislative implications.

### Regulatory impact analysis

55. Not required.

### Publicity

56. There has not been any media interest in Mr Section 9(2)(b) case to date. Any Government decision on compensation is likely to attract 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 Mr Section 9(2)(b).

### Recommendations

57. The Minister of Justice recommends that Cabinet:
1. **note** that, in June 2013, Mr Section 9(2)(b) was convicted and sentenced to imprisonment on two charges of driving whilst disqualified on 13 and 14 March 2013;

---

<sup>1</sup> See paragraphs 29 to 30 of the 2020 Guidelines for types of compensation, and paragraphs 31 to 43 for how compensation is assessed.



2. **note** that following a sentencing in 2007, a period of disqualification from driving of six months was incorrectly recorded by the Court as six years. This “inputting error” meant that Mr <sup>Section (9) (2) (a)</sup> was not disqualified from driving in March 2013 when the incidents that gave rise to the charges occurred;
3. **note** that, in February 2016, the District Court granted an application for a rehearing and vacated Mr <sup>Section (9) (2) (a)</sup> guilty pleas in respect of the two convictions for driving whilst disqualified on 13 and 14 March 2013;
4. **note** that Mr <sup>Section (9) (2) (a)</sup> is eligible to apply for compensation for wrongful conviction and imprisonment under the 2020 Guidelines;
5. **note** that <sup>Section 9(2)(h)</sup> <sup>Section (9) (2) (a)</sup> Mr <sup>Section (9) (2) (a)</sup> has established his innocence of the two 2013 driving whilst disqualified charges;
6. **note** that the Minister of Justice considers that it would be in the interests of justice to compensate Mr <sup>Section (9) (2) (a)</sup> for the offending on 13 March 2013 only;
7. **agree in principle** to compensate Mr <sup>Section (9) (2) (a)</sup> for wrongful conviction and imprisonment under the Guidelines in respect of his conviction for driving whilst disqualified on 13 March 2013;
8. **invite** the Minister of Justice to seek submissions from Mr <sup>Section (9) (2) (a)</sup> on matters relevant to determining the appropriate compensation payment; and
9. **invite** the Minister of Justice to report back to Cabinet with a proposed compensation package.

Authorised for lodgement

Hon Kris Faafoi  
Minister of Justice

Memorandum for Cabinet

## COMPENSATION FOR A WRONGLY CONVICTED AND IMPRISONED INDIVIDUAL

### Proposal

1. Cabinet is asked to agree to compensate **Section (9) (2) (a)** for his wrongful convictions and imprisonment.

### Executive summary

2. On 6 September 2021, Cabinet agreed in principle to compensate **Section (9) (2) (a)** for wrongful conviction and imprisonment under the 2020 Compensation Guidelines for Wrongful Conviction and Imprisonment ('the 2020 Guidelines') in respect of his two convictions for driving whilst disqualified on 13 and 14 March 2013. Cabinet invited the Minister of Justice to seek submissions from the applicant on matters relevant to determining an appropriate compensation payment and return to Cabinet with a proposed compensation package (CAB-21-MIN-0341).
3. I now seek agreement to the following compensation package for **Mr Section (9) (2) (a)**:
  - 3.1. An *ex gratia* payment of **\$108,037.44** representing **Mr Section (9) (2) (a)** non-pecuniary and pecuniary losses in respect of his wrongful convictions and imprisonment; and
  - 3.2. A statement of innocence and apology made privately to **Mr Section (9) (2) (a)** by the Minister of Justice on behalf of the Crown.

### Background

#### *Application for compensation*

4. On 29 August 2019, **Mr Section (9) (2) (a)** applied for compensation for wrongful conviction and imprisonment in respect of two convictions in June 2013 for driving whilst disqualified contrary to the Land Transport Act 1998. The first conviction related to alleged offending on 13 March 2013 and the second conviction related to alleged offending on 14 March 2013.
5. As a result of these convictions, together with sentencing for other offending, the District Court sentenced **Mr Section (9) (2) (a)** to a total of 16 months' imprisonment. He was also disqualified from driving. The period of imprisonment relating to the 2013 convictions of driving whilst disqualified was 14 months' imprisonment, of which **Mr Section (9) (2) (a)** served about 7 and a half months. For one of these months, he was lawfully detained on another charge.
6. In 2016, having identified an error in **Mr Section (9) (2) (a)** criminal history report, Police applied for a rehearing of the 2013 convictions. The error had occurred in 2007 when the District Court registry had incorrectly recorded in the Court's electronic case management system a six month sentence of disqualification from driving as six years. This error flowed onto the records of Police and the NZTA. Because of the inputting error, the prosecution of **Mr Section (9) (2) (a)** proceeded on the basis that he was disqualified when he drove in March 2013. **Mr Section (9) (2) (a)** pleaded guilty.

7. In fact, he was not actually disqualified from driving at that time. The District Court granted the application for a rehearing and by consent, the guilty pleas were vacated and the charges withdrawn.
8. As a result of the District Court's decision, Mr <sup>Section (9) (2) (a)</sup> is an eligible applicant under the 2020 Guidelines.
9. Under the 2020 Guidelines, the Minister of Justice is responsible for considering compensation claims and advising Cabinet on them. Cabinet must agree to any payment of compensation.
10. A person who is eligible to apply under the Guidelines may be compensated only if Cabinet is satisfied on the advice of the Minister of Justice that:
  - 10.1. the applicant is innocent on the balance of probabilities of the offence(s) in respect of which the application was made;
  - 10.2. compensation is in the interests of justice, having regard to the purposes of the compensation scheme and taking into account:
    - 10.2.1. The conduct of the applicant leading to the prosecution and conviction; and
    - 10.2.2. All other relevant circumstances; and
  - 10.3. the applicant has suffered losses that are compensable under the Guidelines.

*Cabinet's in principle decision*

11. The District Court's 2016 decision established Mr <sup>Section (9) (2) (a)</sup> innocence on the charges of driving whilst disqualified on 13 and 14 March 2013. When the former Minister of Justice, Hon Kris Faafoi, reported to Cabinet on 6 September 2021, he asked Cabinet to consider whether or not compensation would be in the interests of justice, having regard to Mr <sup>Section (9) (2) (a)</sup> conduct:
  - 11.1. On 13 March 2013, it was unclear if Mr <sup>Section (9) (2) (a)</sup> believed he was still disqualified. He had also not obtained a new licence but drove anyway. This was unlawful and his decision to drive contributed to him being wrongly convicted of driving whilst disqualified;
  - 11.2. In addition, on 14 March 2013, having been stopped and charged with driving whilst disqualified the day before, Mr <sup>Section (9) (2) (a)</sup> clearly believed he was still disqualified but decided to drive anyway. His decision to drive whilst believing he was disqualified was aggravated by his behaviour when signalled to stop by Police.
12. Having considered these matters, Cabinet agreed in principle to compensate Mr <sup>Section (9) (2) (a)</sup> for wrongful conviction and imprisonment in respect of the two convictions for driving whilst disqualified on 13 and 14 March 2013. Cabinet invited the Minister of Justice to seek submissions from the applicant on matters relevant to determining an appropriate compensation payment and return to Cabinet with a proposed compensation package.

## Submissions

13. Following Cabinet's in principle decision, submissions were sought and received from Mr <sup>Section (9) (2) (a)</sup> and the Crown Law Office about calculation of compensation. Counsel for Mr <sup>Section (9) (2) (a)</sup> provided submissions and supporting documentation about Mr <sup>Section (9) (2) (a)</sup> pecuniary losses and the assessment of aggravating and mitigating features. The Crown's submissions addressed the assessment of aggravating and mitigating features.

### How is compensation calculated?

*What can be included in a compensation package?*

14. Compensation is to be calculated in accordance with the 2020 Guidelines (**attached** as Appendix A). This is the first time that Cabinet has made a decision on payment of compensation under the 2020 Guidelines.
15. The purposes of the compensation scheme are to make good losses incurred when a person has been wrongly deprived of liberty, vindicate innocent defendants and enhance public confidence in the justice system.

*What losses may be compensated*

16. Losses are compensable:<sup>1</sup>
  - 16.1. To the extent that they are attributable to the applicant's wrongful conviction and imprisonment.
  - 16.2. To the extent they have been incurred by or on behalf of the applicant;
  - 16.3. In respect of the period following conviction only; and
  - 16.4. As assessed in accordance with paragraphs 29 and 31-43 of the Guidelines.

*What monetary compensation may include*

17. Where a person qualifies for compensation under the Guidelines, their compensation award will comprise a mix of annualised compensation and additional payments for specific losses. This is outlined in the Step by Step guide on page 8 of the Guidelines.
18. Annualised compensation covers:
  - 18.1. Non-pecuniary losses and minor pecuniary losses while imprisoned for a wrongful conviction at an annual rate of \$150,000;
  - 18.2. Loss of livelihood while in prison following conviction, up to \$100,000 a year;
  - 18.3. Where applicable, non-pecuniary losses while on bail or parole following conviction at an annual rate of up to \$75,000 a year.

---

<sup>1</sup> 2020 Guidelines, paragraph 30.

19. There may be additional payments, where relevant:
  - 19.1. A transitional allowance of up to \$50,000 to aid reintegration to society and return to work;
  - 19.2. Recovery of legal and other professional fees incurred in challenging the wrongful conviction and pursuing a compensation application;
  - 19.3. An amount to compensate for significant pecuniary losses between \$50,000 and \$250,000.
20. The total amount of the annualised compensation and any additional payments can then be adjusted – upwards or downwards by up to \$150,000 – to reflect any aggravating or mitigating features relating to the person’s prosecution or conviction.

### **Proposed compensation package**

21. Applying the above calculation model to Mr [Section (9) (2) (a)] claim, I recommend that Mr [Section (9) (2) (a)] be paid compensation totalling **\$108,037.44**. The calculations are explained below and summarised in the table that follows.

#### *Annualised compensation*

#### Compensable period of imprisonment

22. Mr [Section (9) (2) (a)] spent a total of six months and 16 days in prison solely because of the two convictions for driving whilst disqualified (see paragraph 5 above).

#### Annual rate

23. The Guidelines provide for a monetary amount of up to \$250,000 for each year (or part year) of imprisonment (the adjusted annual rate).
  - 23.1. The first element is the **base annual rate** of \$150,000 which provides compensation for non-pecuniary losses, being loss of liberty; loss of reputation, loss or interruption of family or other personal relationships; loss or interruption of school or study opportunities; mental or emotional harm; and pecuniary losses under \$50,000.<sup>2</sup> The base annual rate of \$150,000 is a flat rate – it does not involve an individualised assessment of losses covered by the rate.
  - 23.2. The second element is a sum to reflect **annual loss of livelihood**, where applicable, taking into account any income tax payable and any benefits received by the applicant while imprisoned. It therefore covers loss of net income and is an annualised amount based on the expected earnings, or earnings-related, income over the compensable period. Loss of livelihood is capped at \$100,000 per year.<sup>3</sup>

#### Loss of livelihood

24. Prior to his imprisonment in June 2013, Mr [Section (9) (2) (a)] was employed at [redacted] [Section (9) (2) (a)] as a [Section (9) (2) (a)].

---

<sup>2</sup> 2020 Guidelines, paragraph 32.

<sup>3</sup> 2020 Guidelines, paragraphs 31-34.

25. Mr <sup>Section (9) (2) (a)</sup> provided evidence of his net earnings (gross pay minus tax minus child support payments) for the 12-month period leading up to his imprisonment. His earnings amounted to **\$43,661.42**, which is the appropriate basis for assessing his loss of income while imprisoned.

#### Calculation of adjusted annual rate

26. The base annual rate of **\$150,000** plus annual loss of livelihood of **\$43,661.42** amounts to an adjusted annual rate of **\$193,661.42**.
27. The next step is to multiply the adjusted annual rate by the compensable period of six months and 16 days. This results in annualised compensation to Mr <sup>Section (9) (2) (a)</sup> of **\$104,899.94**. I recommend that he be compensated accordingly.

#### Time on bail or parole

28. Mr <sup>Section (9) (2) (a)</sup> did not spend any time on bail or parole during the period following the conviction and when he was treated as wrongfully convicted. Therefore, he does not have any losses under this category.

#### *Other pecuniary losses*

#### Significant loss of property or other significant financial loss

29. Significant financial losses, such as the loss of an inheritance or an investment opportunity, may be compensable under the category of significant loss of property or significant other consequential financial loss.<sup>4</sup> This category is not intended to compensate for aggregated minor pecuniary losses. This is because the base annual rate of \$150,000 already provides compensation for pecuniary losses under \$50,000.
30. Mr <sup>Section (9) (2) (a)</sup> has not identified any significant losses over \$50,000.

#### Legal costs

31. The reasonable costs of challenging the wrongful conviction and pursuing the compensation application can include legal costs and the costs of engaging other professionals.<sup>5</sup> This category provides for reasonable rather than actual costs. The Crown Solicitor rates are used as a guide to what are reasonable legal costs although some adjustment may be reasonable depending on the circumstances.<sup>6</sup>
32. Mr <sup>Section (9) (2) (a)</sup> does not seek to claim for the legal costs incurred for the rehearing in 2016 which corrected his criminal history.
33. He claims **\$10,637.50** for the legal costs of pursuing the compensation application. His lawyer's hourly rate is comparable with the Crown Solicitor rates and the number of hours claimed is reasonable. I recommend that this claim be accepted.

---

<sup>4</sup> 2020 Guidelines, paragraph 36.

<sup>5</sup> 2020 Guidelines, paragraph 37.

<sup>6</sup> 2020 Guidelines, paragraph 38.

### Transitional allowance

34. A transitional allowance may be made to cover some of the costs of reintegration into society, such as counselling, vocational counselling or retraining, education or health costs for a transitional period. The allowance is also intended to provide a catch-up period to compensate for loss of future earning capacity.<sup>7</sup>
35. Mr Section 9(2)(a) has not sought a transitional allowance.

### *Aggravating and mitigating features*

36. After adding the amounts from the previous calculations, the total amount of compensation may be adjusted by up to \$150,000 to reflect specific aggravating or mitigating features:<sup>8</sup>
- 36.1. It may be increased by up to \$150,000 to reflect misconduct or negligence in conducting the investigation that led to the applicant's prosecution or conviction or to reflect bad faith by the prosecution in bringing or continuing the prosecution.<sup>9</sup>
- 36.2. It may be decreased by up to \$150,000 to reflect "blameworthy conduct by the applicant contributing wholly or in part to the prosecution or conviction".<sup>10</sup>
37. The **adjusted total** is the amount of compensation that may be payable under the Guidelines.

### Aggravating features

38. I do not consider that there was any misconduct or negligence in conducting the investigation that led to the applicant's prosecution or conviction or any bad faith by the prosecution in bringing or continuing the prosecution. At the time of conviction, it was not appreciated by legal counsel or the court that the six year disqualification period was incorrect. I do not consider that there is any basis to increase the compensation payable.

### Mitigating features

39. I consider that the following conduct by Mr Section 9(2)(a) should be viewed as contributing in part to his convictions:
- 39.1. That Mr Section 9(2)(a) drove on both 13 and 14 March 2013 without having obtained a new licence. However, this is a far less serious offence than driving whilst disqualified and if he had been prosecuted, and convicted, of this charge, it could not have resulted in imprisonment.
- 39.2. His overall behaviour on 14 March 2013. Having been directed by Police to stop, believing he was disqualified and not wanting to be caught, he chose to flee at high speed, driving dangerously and running from Police when his engine failed. However, Mr Section 9(2)(b) was convicted of other charges relating to his driving on

---

<sup>7</sup> 2020 Guidelines, paragraph 39.

<sup>8</sup> 2020 Guidelines, paragraph 41.

<sup>9</sup> 2020 Guidelines, paragraph 42.

<sup>10</sup> 2020 Guidelines, paragraph 43.

14 March 2013 and served a separate sentence of imprisonment. Care should therefore be taken not to give too much weight to this factor.

40. I recommend that there should be some downwards adjustment to recognise the blameworthy conduct of Mr [Section (9) (2) (a)] which contributed in part to the convictions for driving whilst disqualified. However, it should also be acknowledged that an inputting error by the court registry, which flowed onto the records held by NZTA and Police, meant that Mr [Section (9) (2) (a)] was erroneously treated as a disqualified driver. This was the primary cause of Mr [Section (9) (2) (a)] convictions.
41. There is a balance to be struck. A downwards adjustment should be a meaningful recognition of blameworthiness but where the compensable period of imprisonment is relatively short, as in Mr [Section (9) (2) (a)] case, the adjustment should not be disproportionate to the provisional total amount of compensation.
42. The maximum deduction that can be made is \$150,000. In the circumstances, I recommend that a reduction of 5% of that figure, \$7,500, would appropriately recognise the mitigating features and would not be unduly disproportionate to the overall amount.

Summary of recommended compensation payment

43. Applying the Step by Step guide on page 8 of the Guidelines, the recommended compensation for Mr [Section (9) (2) (a)] is **\$108,037.44**.

Step	Calculation element	Amount	Assessment
A	Annual rate for period of imprisonment following conviction	\$150,000	\$150,000.00
B	Annual loss of livelihood during time in prison	\$0-\$100,000	\$43,661.42
C	Add A and B (adjusted annual rate)	\$150,000-\$250,000	\$193,661.42
D	C x years and part years of imprisonment ( <b>6.5 months</b> )	Subtotal D	<b>\$104,899.94</b>
E	Annual rate for time on bail or parole following conviction	\$0-\$75,000	N/A
F	E x years or part years on bail or parole	Subtotal F	N/A
G	Transition allowance, up to \$50,000	Subtotal G	N/A
H	Reasonable costs in challenging conviction and seeking compensation	Subtotal H	<b>\$10,637.50</b>
I	Significant pecuniary losses between \$50,000-\$250,000	Subtotal I	N/A
J	Add D, F, G, H and I	Provisional total J	<b>\$115,537.44</b>



Step	Calculation element	Amount	Assessment
K	Adjustment for aggravating and mitigating features	Between +\$150,000 and -\$150,000	- \$7,500.00
L	Combine J and K	<b>Final total</b>	<b>\$108,037.44</b>

### *Other features of the compensation package*

#### Statement of innocence and apology

44. Compensation under the Guidelines may include a public statement of the applicant's innocence<sup>11</sup> and where appropriate, a public apology.<sup>12</sup> The apology recognises the impact on the claimant of the wrongful conviction and imprisonment but is not an acceptance of fault on the side of the Crown.
45. Mr Section 9(2)(a) does not seek a public statement of innocence or public apology. His preference is for a private apology. He has advised that he "just wants to get on with his life and doesn't want any publicity or attention".
46. Accordingly, I do not consider that a public apology is necessary. I recommend that a letter addressed and sent privately to Mr Section 9(2)(a) would be appropriate. The letter would acknowledge that Mr Section 9(2)(a) is innocent of the two offences for driving while disqualified for which he was convicted in 2013. It would apologise for the fact of the wrongful conviction and imprisonment, and advise Mr Section 9(2)(a) of the quantum of the ex gratia payment. It would also acknowledge his request that the matter remain private and note that I do not intend to make any public statement about this compensation payment.

#### Agreement to forgo proceedings

47. As with all previous compensation payments under the Guidelines, the recommended ex gratia payment would be subject to Mr Section 9(2)(a) agreeing to forego any 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 Section 9(2)(a)**

48. If Cabinet agrees with the recommended ex gratia compensation package, I will offer the compensation package to Mr Section 9(2)(a) on behalf of the Crown. That offer will enclose a deed of release for Mr Section 9(2)(a) to sign.

#### **Consultation**

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

<sup>11</sup> 2020 Guidelines, paragraph 29(h).

<sup>12</sup> 2020 Guidelines, paragraph 29(i).

## Financial implications

50. When the Compensation Guidelines were adopted in 2020, Cabinet agreed that it would continue to decide on a case by case basis to appropriate funds for each compensation payment to a non-departmental "Other Expense" appropriation (SWC-20-MIN-0095).
51. As part of the process leading up to Budget 2022, the Government established the Justice Cluster. The Cluster made operating funding decisions for a multi-year period rather than on an annual basis. The expectation of moving to multi-year funding is that Cluster agencies will only seek additional funding over the multi-year period in specific named exceptions that have been approved by Minister of Finance.
52. *Ex gratia* or compensation payments have not previously been agreed as an exception. The exceptions initially submitted and approved included where there is significant uncertainty with costs and the Cluster has limited options to manage those costs. *Ex gratia* or compensation payments are costs with significant uncertainty and should be considered an exemption to the Justice Cluster multi-year funding process.
53. 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 of **\$108,037.44** will be a charge against the between-Budget contingency.

## Human rights

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

## Legislative implications

55. There are no legislative implications.

## Regulatory impact analysis

56. A regulatory impact analysis is not required.

## Publicity

57. In accordance with Mr Section (9) (2) (a) wishes to not have any publicity or attention, I do not intend to make a public statement about this matter.

## Proactive release

58. I propose that this Cabinet paper and the earlier Cabinet paper seeking Cabinet's agreement in principle to compensate Mr Section (9) (2) (a) be proactively released, subject to any redactions as appropriate under the Official Information Act 1982. I propose that Mr Section (9) (2) (a) name and identifying details be redacted in order to maintain his wish for privacy.

## Recommendations

59. The Minister of Justice recommends that Cabinet:

1. **note** that on 6 September 2021, Cabinet:
  - 1.1. agreed in principle to compensate Mr [Section (9) (2) (a)] for wrongful conviction and imprisonment under the 2020 Guidelines in respect of two convictions for driving whilst disqualified on 13 and 14 March 2013.
  - 1.2. invited the Minister of Justice to seek submissions from Mr [Section (9) (2) (a)] on matters relevant to determining an appropriate compensation payment; and
  - 1.3. invited the Minister of Justice to report back to Cabinet with a proposed compensation package (CAB-21-MIN-0341);
2. **agree** that the following compensation package be offered to Mr [Section (9) (2) (a)]:
  - 2.1. an *ex gratia* payment of **\$108,037.44** representing Mr [Section (9) (2) (a)] non-pecuniary and pecuniary losses in respect of his wrongful convictions and imprisonment;
  - 2.2. a statement of innocence and apology made privately to Mr [Section (9) (2) (a)] by the Minister of Justice on behalf of the Crown;
3. **approve** the following change to appropriation to provide for the *ex gratia* payment to Mr [Section (9) (2) (a)] for wrongful conviction and imprisonment, with a corresponding impact on the operating balance and net debt:

Vote Justice Minister of Justice	\$m – increase/(decrease)				
	2021/22	2022/23	2023/24	2024/25	2025/26 & Outyears
<i>Non-Departmental Other Expense:</i> Compensation for Wrongly Convicted Individuals	-	\$0.109	-	-	-

4. **agree** that the expenses incurred under recommendation 3 above are an exception to the Justice cluster multi-year funding process;
5. **agree** that the proposed change to appropriations for 2022/23 above be included in the 2022/23 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
6. **agree** that the expenses incurred under recommendation 3 above be a charge against the between-Budget operating contingency, established as part of Budget 2022;
7. **authorise** the Minister of Justice to offer the compensation package under recommendation 2 above to Mr [Section (9) (2) (a)].

8. **note** that if Mr Section 9(2)(a) accepts the offer, he will be required to forego any further legal action against the Crown in respect of matters relating to his 2013 convictions for driving whilst disqualified.

Authorised for lodgement:

Hon Kiri Allan  
**Minister of Justice**

Proactive Release



# Cabinet

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Compensation for a Wrongly Convicted and Imprisoned Individual

Portfolio Justice

On 6 September 2021, Cabinet:

- 1 **noted** that in June 2013, **Section 9(2)(a)** was convicted and sentenced to imprisonment on two charges of driving whilst disqualified on 13 and 14 March 2013;
- 2 **noted** that:
  - 2.1 following a sentencing in 2007, a period of disqualification from driving of six months was incorrectly recorded by the Court as six years;
  - 2.2 this “inputting error” meant that Mr **Section 9(2)(a)** was not disqualified from driving in March 2013 when the incidents that gave rise to the charges occurred;
- 3 **noted** that, in February 2016, the District Court granted an application for a rehearing and vacated Mr **Section 9(2)(a)** guilty pleas in respect of the two convictions for driving whilst disqualified on 13 and 14 March 2013;
- 4 **noted** that Mr **Section 9(2)(a)** is eligible to apply for compensation for wrongful conviction and imprisonment under the 2020 Compensation Guidelines for Wrongful Conviction and Imprisonment (the 2020 Guidelines);
- 5 **noted** that **Section 9(2)(h)** Mr **Section 9(2)(a)** has established his innocence of the two 2013 driving whilst disqualified charges;
- 6 **agreed in principle** to compensate Mr **Section 9(2)(a)** for wrongful conviction and imprisonment under the 2020 Guidelines in respect of the two convictions for driving whilst disqualified on 13 and 14 March 2013;
- 7 **invited** the Minister of Justice to seek submissions from Mr **Section 9(2)(a)** on matters relevant to determining the appropriate compensation payment;
- 8 **invited** the Minister of Justice to report back to Cabinet with a proposed compensation package.

Michael Webster  
Secretary of the Cabinet



# Cabinet

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Compensation for a Wrongly Convicted and Imprisoned Individual

Portfolio Justice

On 8 August 2022, Cabinet:

- 1 **noted** that on 6 September 2021, Cabinet:
  - 1.1 agreed in principle to compensate Mr [redacted] for wrongful conviction and imprisonment under the Compensation Guidelines for Wrongful Conviction and Imprisonment (2020 Guidelines) in respect of two convictions for driving whilst disqualified on 13 and 14 March 2013;
  - 1.2 invited the Minister of Justice to seek submissions from Mr [redacted] on matters relevant to determining an appropriate compensation payment;
  - 1.3 invited the Minister of Justice to report back to Cabinet with a proposed compensation package;

[CAB-21-MIN-0341]
- 2 **agreed** that the following compensation package be offered to Mr [redacted]:
  - 2.1 an ex gratia payment of \$108,037.44 representing Mr [redacted]'s non-pecuniary and pecuniary losses in respect of his wrongful convictions and imprisonment;
  - 2.2 a statement of innocence and apology made privately to Mr [redacted] by the Minister of Justice on behalf of the Crown;
- 3 **approved** the following change to appropriation to provide for the ex gratia payment to Mr [redacted] for wrongful conviction and imprisonment, with a corresponding impact on the operating balance and net debt:

	\$m – increase/(decrease)				
Vote Justice Minister of Justice	2021/22	2022/23	2023/24	2024/25	2025/26 & Outyears
<i>Non-Departmental Other Expense:</i>					
Compensation for Wrongly Convicted Individuals	-	\$0.109	-	-	-

- 4 **agreed** that the expenses incurred under paragraph 3 above are an exception to the Justice cluster multi-year funding process;
- 5 **agreed** that the change to appropriations for 2022/23 above be included in the 2022/23 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
- 6 **agreed** that the expenses incurred under paragraph 3 above be a charge against the between-Budget operating contingency, established as part of Budget 2022;
- 7 **authorised** the Minister of Justice to offer the compensation package under paragraph 2 above to Mr Section (9)(2)(a);
- 8 **noted** that if Mr Section (9)(2)(a) accepts the offer, he will be required to forego any further legal action against the Crown in respect of matters relating to his 2013 convictions for driving whilst disqualified.

Rachel Hayward  
Acting Secretary of the Cabinet