

SENSITIVE

Office of the Associate Minister of Justice

Cabinet Domestic Policy Committee

Compensation for a wrongly convicted and imprisoned individual

Proposal

1. Cabinet is asked to agree in principle to compensate Aaron Lance Farmer for being wrongly convicted and imprisoned.

Executive summary

2. Aaron Lance Farmer applied for compensation for wrongful conviction and imprisonment in relation to his conviction for rape in April 2005. Mr Farmer served approximately 2 years and 3 months of his sentence of imprisonment before the Court of Appeal quashed his conviction in June 2007 and ordered a retrial.
3. The Crown Solicitor decided not to proceed with the retrial and Mr Farmer was discharged in April 2008. The decision was based on new DNA evidence and the complainant's unwillingness to give evidence at the retrial.
4. Mr Farmer's application falls outside Cabinet guidelines established to govern compensation for wrongful conviction and imprisonment because the Court of Appeal, when quashing his conviction, ordered a retrial. This means Mr Farmer's 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. Hon Robert Fisher QC has provided advice on Mr Farmer's application for compensation. Mr Fisher found that the evidence available, including the new DNA evidence, established Mr Farmer's innocence beyond reasonable doubt.
6. I seek agreement in principle to compensate Mr Farmer under the Crown's residual discretion to award compensation outside the Cabinet guidelines. I propose to then seek submissions from Mr Farmer on matters relevant to determining an appropriate compensation payment and to return to Cabinet with a recommended compensation offer.

Background

7. In the early hours of 1 September 2003, a woman was raped in central Christchurch. She later identified Mr Farmer as the offender from a Police photo montage of eight men. Mr Farmer was charged with the rape and tried before a jury at the Christchurch District Court between 30 March and 1 April 2005.



8. The complainant underwent a medical examination a few hours after the rape. Traces of semen were found on vaginal swabs from the complainant and her underwear. The DNA in these samples matched that of the complainant's boyfriend. No additional male DNA was detected on the swabs. A trace amount of male DNA was also found in scrapings from the complainant's fingernails. Both the complainant's boyfriend and Mr Farmer were excluded as possible donors of the fingernail samples.
9. Mr Farmer was found guilty, and on 18 May 2005 was sentenced to 8 years imprisonment.
10. On 8 June 2007, the Court of Appeal quashed Mr Farmer's conviction and ordered a retrial. The basis for the Court of Appeal's decision was that Mr Farmer's trial counsel had failed to contact a potential witness ([REDACTED]) whose evidence provided a partial alibi for Mr Farmer.
11. Mr Farmer's retrial never went ahead. In preparing for the retrial, the Crown undertook further testing of the DNA samples using a new method of DNA profiling not available at the time of Mr Farmer's first trial in 2005. The new tests found trace amounts of additional DNA on the complainant's vaginal swabs from an unknown male. Mr Farmer was excluded as the donor of this additional male DNA. The new tests also confirmed that Mr Farmer was not the donor of the trace amount of male DNA found in scrapings from the complainant's fingernails. In addition, the complainant was unwilling to give evidence at a retrial. On 22 April 2008, the Crown Solicitor advised that the Crown would not call evidence against Mr Farmer. Mr Farmer was discharged under section 347 of the Crimes Act 1961.
12. Mr Farmer served 2 years and 3 months in prison following his conviction for rape.
13. At the time of the rape, Mr Farmer was 33 years old, [REDACTED]
[REDACTED]

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. Mr Farmer is not eligible under the Cabinet guidelines because, when quashing his conviction, the Court of Appeal ordered a retrial.

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 Mr Farmer's claim 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. An example of such circumstances include where an applicant can establish his or her unequivocal innocence (i.e. innocence proved to the higher standard of beyond reasonable doubt).
19. Successful claims under the Crown's residual discretion are rare. 


Advice from Hon Robert Fisher QC on Mr Farmer's innocence beyond reasonable doubt

20. The Hon Robert Fisher QC has provided advice on Mr Farmer's application. Mr Fisher concluded that the evidence available, including the new DNA evidence, established Mr Farmer's innocence of the rape beyond reasonable doubt.
21. The Crown case against Mr Farmer at trial had relied largely on the accuracy of the complainant's identification of him as the offender, and the coincidence that Mr Farmer was in central Christchurch at the time of the rape and shared several features with those of the rapist. Mr Fisher considered that the evidence positively supporting the Crown's case (and Mr Farmer's guilt) was "remarkably thin".
22. In contrast, Mr Fisher believed there was a strong case for concluding that Mr Farmer was innocent of the rape. Mr Fisher pointed to a number of significant inconsistencies between the complainant's description of the offender, her account of the rape and Mr Farmer's appearance on the night in question. Mr Fisher also pointed to strong alibi evidence for Mr Farmer, which he believed was "a powerful argument in favour of innocence". He found that the evidence indicated the rape occurred between 2.00am and 2.40am and that Mr Farmer did not have the opportunity to commit the rape during this period.

23. Against that background, Mr Fisher considered that the new DNA evidence confirmed Mr Farmer's innocence. On 10 January 2008, the complainant confirmed to Police that she did not have sexual contact with anyone other than her boyfriend and the rapist during the relevant period. Mr Fisher found that the trace amounts of unknown male DNA on the complainant's vaginal swabs and fingernail scrapings must therefore be that of the rapist. Mr Fisher pointed to the results of the new DNA tests, which exclude Mr Farmer as the donor of the trace amounts of the male DNA.
24. In coming to his conclusions, Mr Fisher sought and received submissions from Mr Farmer's lawyer and the Crown Law Office. In its submission to Mr Fisher, the Crown Law Office expressed its view that Mr Farmer could establish his innocence to the higher standard of beyond reasonable doubt and that extraordinary circumstances existed. The Crown Law Office referred to the fact that Mr Farmer can be excluded as the rapist by the new DNA evidence. In its view, the alibi evidence and limitations in the complainant's identification evidence also supported Mr Farmer's innocence.

Conclusion

25. I am satisfied that Mr Farmer's case qualifies for the exercise of the Crown's residual discretion to award compensation outside the Cabinet guidelines on the basis that he has established his innocence beyond reasonable doubt.
26. I seek agreement in principle to compensate Mr Farmer for being wrongly convicted and imprisoned.

Next steps – determining quantum of compensation and offer to Mr Farmer

27. Subject to Cabinet's agreement in principle to compensate Mr Farmer, the next step will be to determine an appropriate amount of compensation and make a formal offer to Mr Farmer. Compensation may also include a public statement of a claimant's innocence and in appropriate cases a public apology by the Crown. I propose to seek submissions from Mr Farmer on matters relevant to compensation. I will then report to Cabinet with a recommended compensation package before making a formal offer to Mr Farmer.
28. 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).
29. While Mr Farmer's 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

30. 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

31. 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).
32. After considering any submissions from Mr Farmer 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. At this point I will seek funding from the Budget 2010 between budget spending contingency. As part of the baseline alignment process I have looked at options for further cost reductions but consider that the impact of these actions would require a reduction in frontline staff numbers that would be detrimental to service delivery and the Ministry's ability to sustainably deliver on Government priorities. In addition, the uncertain nature of compensation payments in quantum and timing mean that it is difficult to determine the level of savings necessary to provide sufficient appropriation for compensation payments.
33. 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. Mr Farmer served a considerably longer period in prison (2 years 3 months). Any compensation payment in his case is likely to be correspondingly larger.

Human rights

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

Legislative implications

35. There are no legislative implications.

Regulatory impact analysis

36. Not required.

Publicity

37. There has been some media interest in Mr Farmer's 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 Farmer.

Recommendations

38. The Associate Minister of Justice recommends that Cabinet:

1. **note** that Mr Farmer was convicted and sentenced to imprisonment for rape in 2005;
2. **note** that in 2007 the Court of Appeal quashed his conviction and ordered a retrial;
3. **note** that Mr Farmer was discharged without conviction prior to his retrial;
4. **note** that Mr Farmer is not eligible under the Cabinet guidelines governing compensation for wrongful conviction and imprisonment because the Court of Appeal ordered a retrial;
5. **note** that Hon Robert Fisher QC has assessed Mr Farmer's case and concluded that Mr Farmer has established his innocence of the rape beyond reasonable doubt;
6. **agree in principle** to compensate Mr Farmer 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;
7. **invite** the Minister of Justice to seek submissions from Mr Farmer on matters relevant to determining an appropriate compensation payment; and
8. **invite** the Minister of Justice to report back to Cabinet with a proposed compensation package;
9. **note** that the Ministry of Justice is unable to make cost reductions to absorb the compensation payment.


Hon Nathan Guy
Associate Minister of Justice

Date signed:

27/4/10