

In Confidence

Office of the Minister of Justice

Chair, Cabinet Social Wellbeing Committee

## **Compensation Guidelines for Wrongful Conviction and Imprisonment: Including Home Detention and Military Detention**

### **Proposal**

1. This paper seeks Cabinet's agreement to extend the *Compensation Guidelines for Wrongful Conviction and Imprisonment* ("Compensation Guidelines") to include wrongly convicted persons who are or were sentenced to home detention.

### **Executive Summary**

2. Since December 1998, Cabinet-approved Guidelines have provided that persons who were wrongfully convicted and served the whole or part of a sentence of imprisonment are eligible to apply for compensation. Cabinet accepted the Law Commission's advice to limit the compensation scheme to imprisonment, as the most severe sentence involving the greatest deprivation of liberty.
3. Although home detention has been available as a stand-alone sentence since 2007, the question of including home detention in the compensation scheme has not previously been considered.
4. Home detention is the second most restrictive sentence available to the sentencing courts and is expressly used as an alternative to a short-term sentence of imprisonment. The sentence involves significant deprivation of liberty. Home detainees are at all times subject to the supervision of their probation officers and, if required, electronic monitoring. They cannot leave their residence except for approved purposes. The restrictions are on a par with post-conviction bail or parole with residential detention, which are already covered by the Guidelines where the person has been wrongfully convicted and imprisoned.
5. In my view, the sentence of home detention is sufficiently severe that it should be recognised in the compensation scheme. I recommend that the Compensation Guidelines be extended accordingly.
6. Because home detention is not as severe as imprisonment, adjustments to the compensation rates are required. I propose that the base annual rate for home detention should be fixed at \$75,000, half the annual rate for imprisonment of \$150,000. I propose that the \$75,000 rate also apply to post-conviction bail or parole with residential restrictions. Corresponding proportional adjustments are required to other compensable losses.
7. The compensation scheme also applies to wrongful convictions in the military justice system that result in a sentence of imprisonment. Apart from imprisonment, the next most serious custodial sentence is detention (in this paper referred to as 'military detention'), which is similar in severity to home detention. Accordingly, the

Minister of Defence and I agree that the Guidelines should be extended to military detention, when imposed by the Court Martial.

8. I also propose that extension of the scheme should be backdated to 2007 for home detention (when that sentence was introduced) and to 2009 for military detention (when significant reforms to the military justice system came into force).
9. Including home detention and military detention is likely to result in a very small number of additional, successful claims – about 1 successful claim every 2-3 years for future wrongful convictions and up to an estimated 5 further successful claims for the period 2007-2022.

### **Scope of the Compensation Guidelines**

10. The Compensation Guidelines approved by Cabinet in July 2020 (CAB-20-MIN-0352; SWC-20-MIN-0095) have their origin in the Cabinet Guidelines first adopted by Cabinet in December 1998 (CAB (98) M 46/6C, STR (98) M 39/6).
11. The 1998 Guidelines were in turn based on the Law Commission's 1998 Report *Compensating the Wrongly Convicted*. The Law Commission concluded that the compensation scheme should be limited to cases where the claimant is clearly innocent and their conviction resulted in a term of imprisonment. About imprisonment, the Commission commented:

“As our society places paramount value on individual freedom, the most severe sentence and highest form of condemnation is the deprivation of liberty by imprisonment.”
12. Changes to the scope of the Compensation Guidelines require Cabinet's approval.
13. Although the sentence of home detention was introduced in 2007, Cabinet has given no previous consideration to whether home detention should also be covered by the scheme. The Compensation Guidelines were not reviewed between 2001 and 2020. The 2020 revision focussed on addressing pressing issues with the operation of the 1998 Guidelines but was not intended to change the essential scope of the scheme. The Ministry of Justice advises that, prior to 2021, there had been no applications for compensation in a home detention case.
14. In April 2021, the previous Minister of Justice, Hon Kris Faafoi received an application for compensation from a person who had been sentenced to and served a term of 12 months' home detention. In light of that application, which involved detention for the maximum period of one year, the previous Minister commenced work to examine whether home detention is a sufficiently severe deprivation of liberty that wrongly convicted detainees should be compensated.

### **Home detention**

15. A form of home detention was originally introduced in 1995 and was available to some prisoners as a way of *completing* a short term of imprisonment.
16. In 2007, home detention was established as a stand-alone sentence under the Sentencing Act 2002. It is second (in terms of restrictiveness) to imprisonment in the hierarchy of sentences and orders. Home detention may only be imposed in

cases where the sentencing court would otherwise have imposed a short-term sentence of imprisonment (ie, a sentence of two years or less). The maximum sentence is 12 months, which is served in full.<sup>1</sup> This means that home detention is available for moderately serious offending, but not at the level of seriousness that would justify a long-term sentence of imprisonment (ie, longer than two years).

17. A person sentenced to home detention is subject at all times to the supervision of their probation officer. Standard conditions prohibit the offender from leaving the home detention residence except in specified circumstances, as approved by their probation officer, and they are subject to electronic monitoring by ankle bracelet. They may only engage in employment if approved by the probation officer, may not associate with any persons against the direction of the probation officer and may be required to undertake rehabilitation programmes. The court may impose additional restrictions to manage the risks of further offending.

### **Extending the scheme to home detention**

18. Every wrongful conviction is regrettable and the principal remedy in our system of justice is to have the conviction set aside and removed from the person's record. Monetary compensation is an exceptional response, reserved for those cases where the deprivation of liberty is most significant.

#### *Maintaining the scope of the scheme*

19. The main argument for the status quo is that it would reserve the scheme for the most serious cases and the most serious form of punishment. Including home detention sentences in the scheme would bring in cases that are generally less serious than many of the cases that currently qualify for compensation.
20. I also acknowledge that while the restrictions inherent in home detention are significant, they are not of the same scale and character as going to prison. Further, many sentences will be less than the maximum term of 12 months.

#### *Including home detention*

21. However, I consider that home detention is sufficiently severe to qualify for compensation. I have taken into account that:
  - 21.1. Home detention is expressly used as an alternative to a short-term sentence of imprisonment, ie in cases where the offender would be imprisoned if home detention was not available and would be eligible to apply for compensation;
  - 21.2. The maximum sentence of 12 months is still substantial;
  - 21.3. While the offender is not detained in a State facility, they are otherwise subject to full-time detention and direction by their probation officer, enforceable by 24-hour electronic monitoring. There are strict controls on the offender's movements and activities;

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<sup>1</sup> Home detainees serve the whole of their sentence whereas persons subject to a short-term sentence of imprisonment are released after serving half their sentence. Accordingly, the maximum home detention sentence of 12 months lines up with the 50% release date for the maximum short-term sentence of imprisonment of 2 years.

- 21.4. Wrongly convicted persons can already be compensated under the Guidelines if they suffer comparably restrictive bail and parole conditions as an adjunct to a sentence of imprisonment;
- 21.5. The compensation scheme would still be reserved for cases serious enough to warrant a sentence of detention.

#### *Other jurisdictions*

22. Most jurisdictions with which New Zealand compares itself (UK, Australia, Canada, USA) confine their compensation schemes to imprisonment. However, it is difficult to draw direct comparisons with other jurisdictions because of differences in both their sentencing laws and compensation schemes. The **Appendix** has more information.

#### *Backdating eligibility*

23. I do not consider the changes to the Guidelines should be wholly prospective, ie applying only to home detention sentences imposed after the amended Guidelines come into force.
24. The application of the compensation scheme to home detention was not considered when the sentence was introduced in 2007; nor was it addressed when the Guidelines were reviewed by Cabinet in 2020. Further, the scheme does not currently require applications to be made within a specified period after the qualifying conviction is overturned.
25. In my view, the fair approach is for all wrongly convicted home detainees since 2007 to be treated the same.
26. The pool of eligible applicants (see paragraphs 35-36 and **Appendix**) is small and the potential financial implications (see paragraphs 46-51) are relatively modest – insufficient in my opinion to override fairness arguments.

#### **Military convictions**

27. Since 2001, the compensation scheme has applied to the military justice system as well as the civil system. The same eligibility criteria apply: an applicant must have had their conviction finally set aside and have served the whole or part of a sentence of imprisonment.
28. In the 20 years since, there has been just one application for compensation, which was successful, arising from the military justice system. Nevertheless, the proposals in this paper raise the question of whether any comparable extension of the eligibility criteria for military convictions is warranted.
29. Like the Sentencing Act 2002, the Armed Forces Discipline Act 1971 also has a hierarchy of sentences or punishments. At the apex is imprisonment, which may only be imposed by the Court Martial of New Zealand (“Court Martial”) and, in practice, is usually served in a Department of Corrections prison. The maximum term is life imprisonment. Below imprisonment is dismissal from His Majesty’s Service.

### *The military sentence of detention*

30. The next most serious sentence is military detention (simply called “detention” in the Act). Like imprisonment, military detention is also a sentence involving full-time deprivation of liberty and may be served in a detention quarter or service custody or as a field punishment (if on active service). For serious offending, a sentence of dismissal from His Majesty’s Service may be included with a sentence of military detention.
31. Where military detention is imposed on conviction by the Court Martial, the maximum sentence is 2 years’ detention. Military detention has some of the characteristics of imprisonment but generally allows more opportunity than imprisonment for exercise, work and training outside the place of detention.
32. The Minister of Defence and I agree that home detention and military detention are sufficiently similar that the compensation scheme should cover military detention, where it is imposed on conviction by the Court Martial.
33. Further information about military detention is set out in the **Appendix**.

### *Backdating eligibility*

34. We also favour backdating eligibility in relation to sentences of military detention. The Minister of Defence considers the appropriate eligibility date for military detention should be 2009. That was when significant reforms to the military justice system established the permanent Court Martial of New Zealand and implemented the current summary disciplinary process.

### **Pool of potential applicants and successful claims**

35. If the scheme was extended as proposed, there would be a small increase in eligible applicants and likely an even smaller increase in successful claims. That is largely because only a small proportion of eligible persons actually apply for compensation and only a proportion of those meet the criteria for payment (innocence, interests of justice).
36. For home detention, it is estimated that if the scheme was extended prospectively only, on average there could be one successful claim by a home detainee every 2-3 years. If eligibility is extended back to 2007, it is estimated there could be up to 5 further claims in total. For military detention, the pool of potential eligible applicants since 2009, when the permanent Court Martial of New Zealand was established, is just two. That number is too small to estimate there will be additional successful claims.
37. See the **Appendix** for further information.

### **Adjustments to compensation rates**

38. Adjustments to the compensation rates are required because home detention and military detention do not compare with the harshness and restrictions of imprisonment. The Minister of Defence and I agree that the rates for military detention should, where applicable, be the same as for home detention.

### Home detention and military detention

39. The current rates are based on the deprivation of liberty inherent in imprisonment. There is a flat annual rate of \$150,000 for non-pecuniary losses, multiplied by the number of years or part years the convicted person was detained. The base annual rate is then adjusted, by up to \$100,000 a year, to reflect loss of livelihood.
40. I propose that home detention and military detention be compensated at a flat rate of \$75,000 a year. Setting the base annual rate at 50% of the rate for imprisonment recognises that there are significant differences between the experience of imprisonment in a State facility and being detained in a private home or military facility.

### Restrictive post-conviction bail or parole conditions

41. I also propose that the amount of compensation for periods of post-conviction bail or parole with residential restrictions be set at the same flat rate of \$75,000 a year. The Guidelines would clarify that the essential elements of both are that the applicant has been subject to full-time detention under the direction of a probation officer, enforceable by electronic monitoring.

### Other rates

42. I also propose proportionate 50% adjustments to other features of the calculation model, including:
  - 42.1. The minimum threshold to be compensated for significant pecuniary losses;
  - 42.2. A one-off transitional allowance to help with reintegration into society;
  - 42.3. The adjustment to the total compensation amount to account for any aggravating or mitigating factors.
43. Further detail about the proposed rates is set out in the **Appendix**.

### **Commencement**

44. If Cabinet agrees to the proposals in this paper, Ministry of Justice officials will prepare amendments to the Guidelines and I will authorise the revised Guidelines to be issued.
45. I propose the Guidelines come into effect on the date they are issued. If Cabinet agrees to the inclusion of home detention and military detention being backdated to convictions since 2007 and 2009 respectively, the revised Guidelines should apply to any application made but not completed before they are issued.

### **Financial implications**

#### Effect of proposals on amount of compensation payable

46. The financial implications of the proposed changes are difficult to quantify precisely. This is because it is not possible to make confident estimates of the number of successful claims, and because claims are determined on a case by case basis and reflect each applicant's individual circumstances.

47. In general, the Ministry expects that compensation awards in cases of home detention will be at the lower end of what has previously been awarded in cases of imprisonment following wrongful conviction.
48. Based on the compensation rates proposed in this paper, the Ministry estimates that compensation awards for home detention are likely to be within the range of \$66,250 and \$175,000 (not including significant pecuniary losses). See the table in the **Appendix** for details. As noted above, it is estimated there could be one such award every 2-3 years and up to 5 further awards for the period since 2007.
49. It is not assessed that there would be any additional implications in respect of military convictions.

#### Effect of proposals on costs of assessing claims

50. The Ministry also incurs costs (as would Defence agencies if there was a military claim) in referring claims to a KC or other independent advisor for assessment. Historically these costs have ranged from approximately \$30,000 to \$275,000, depending on the complexity of the assessment. These costs are typically absorbed by the Ministry (and within existing baselines).

#### *Legal aid*

51. Applicants are eligible to apply for a grant of legal aid to assist with their application. Only a very small number of legal aid grants have been made for compensation matters over the last 5 years and the extension of the Guidelines to home detention is unlikely to have any significant impact on legal aid costs.

#### *Appropriation*

52. When the Compensation Guidelines were adopted in 2020, Cabinet agreed that it would 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). I propose that Cabinet continue to determine the funding of compensation payments on a case by case basis because the number of applications that result in a compensation payment will remain relatively low, and experience shows that the amount to be paid cannot be easily predicted given the wide variation of circumstances of each applicant.
53. The Ministry of Justice and the Defence agencies are not specifically funded for any ex gratia compensation payments in this area and therefore a funding decision would be required. Such payments to date have been charged against the between-Budget operating contingency, but Cabinet retains the discretion to require a payment to be funded through baselines.

#### **Legislative Implications**

54. There are no legislative implications.

#### **Impact Analysis**

55. The impact analysis requirements do not apply.

## Human Rights

56. The proposals appear to be consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

## Population Implications

57. The potential pool of persons wrongly convicted and sentenced to home detention or military detention is too small (see paragraphs 35-36 and **Appendix**) to draw meaningful insights about the impact of the proposals on particular populations. I would make the following observations:
- 57.1. Gender – Women are sentenced to home detention at a higher rate compared to men than they are to imprisonment. In theory, that could result in a slightly higher proportion of female applicants from the pool of eligible home detainees than currently apply under the Guidelines.
- 57.2. Māori – The impact of including home detention is likely to be relatively neutral. Compared to non-Māori, Māori are disproportionately sentenced to both imprisonment and home detention, although the disproportionality is a little lower for home detention. Māori are likely to comprise a significant proportion of potential applicants.
- 57.3. Disability – While people in the justice system are more likely to have disabilities and experience mental health issues than in the general population, including home detention in the compensation scheme is not expected to have a direct or differential impact on persons with disabilities.

## Consultation

58. The New Zealand Defence Force, Ministry of Defence, Crown Law Office, New Zealand Police, Treasury, Public Service Commission, Department of Corrections, Te Puni Kōkiri, Ministry for Pacific Peoples and Ministry for Women have been consulted on the paper. The Department of Prime Minister and Cabinet has been informed.

## Publicity and proactive release

59. I propose to publicise the changes to the Compensation Guidelines when the revised Guidelines are published on the Ministry of Justice's website.
60. I also propose to proactively release this paper when the revised Guidelines have been published on the Ministry's website, with any necessary redactions as appropriate under the Official Information Act 1982.

## Recommendations

The Minister of Justice recommends that the Committee:

1. **Note** that, on 27 July 2020, Cabinet agreed to adopt new *Compensation Guidelines for Wrongful Conviction and Imprisonment* (the Compensation Guidelines) governing compensation for persons wrongly convicted and imprisoned [CAB-20-MIN-0352; SWC-20-MIN-0095];



2. **Note** that the Compensation Guidelines also apply to persons who are convicted of an offence under military law;
3. **Note** that eligibility to apply for compensation under the Compensation Guidelines is limited to persons who, having been wrongly convicted of an offence, served all or part of a sentence of imprisonment in respect of that conviction;
4. **Note** that when Guidelines governing compensation for persons wrongly convicted were first adopted in December 1998, Cabinet accepted the Law Commission's recommendation that they be confined to persons who were sentenced to and served a sentence of imprisonment [STR (98) M 39/6];
5. **Note** that the sentence of home detention was subsequently introduced in 2007 and that:
  - 5.1 Home detention is the second most restrictive sentence that the criminal courts can impose, with a maximum term of 12 months;
  - 5.2 The sentence may be imposed as an alternative to a sentence of imprisonment of up to two years;
6. **Note** that in the military justice system, the sentence of detention, when imposed by the Court Martial, has similarities to home detention;
7. **Agree** that the Compensation Guidelines be amended as follows:

#### Eligibility

- 7.1 Eligibility to apply for compensation would be extended to wrongly convicted persons who serve all or part of a sentence of:
  - 7.1.1 home detention, imposed under the Sentencing Act 2002; or
  - 7.1.2 detention, imposed by the Court Martial under the Armed Forces Discipline Act 1971;

#### Compensation

- 7.2 The base annual rate for time spent serving a sentence of home detention or military detention would be \$75,000, that amount incorporating compensation for pecuniary losses below \$25,000;
- 7.3 The annual rate for time spent on restrictive bail or parole conditions after conviction would be \$75,000;
- 7.4 Significant pecuniary losses sustained by home detainees or military detainees exceeding \$25,000 and up to \$250,000 would be compensable;
- 7.5 The transitional allowance for persons who served a sentence of home detention or military detention would be up to \$25,000;
- 7.6 For persons who served a sentence of home detention or military detention, the one-off adjustment, up or down, in appropriate cases to reflect any aggravating or mitigating features in respect of the conviction would be up to \$75,000;

8. **Agree** that the remainder of the Compensation Guidelines would otherwise apply, with any necessary modifications, to persons sentenced to home detention or military detention;
9. **Invite** the Minister of Justice to issue amended Compensation Guidelines that implement the decisions in paragraphs 7 and 8 above;
10. **Agree** that the amendments to the Guidelines come into effect on the date that they are issued by the Minister;
11. **Agree** that the amendments apply:

**EITHER**

11.1 Retrospectively, to:

11.1.1 sentences of home detention imposed on or after 1 October 2007;  
and

11.1.2 sentences of military detention imposed on or after 1 July 2009;

**OR**

11.2 Prospectively only, to sentences of home detention and military detention imposed on or after the date the Guidelines come into effect;

12. **Agree** that Cabinet continue to determine the funding of compensation payments on a case by case basis;
13. **Note** that the Minister of Justice intends, at the time the amended Guidelines are issued, to:
  - 13.1 Publicise the changes to the Compensation Guidelines; and
  - 13.2 Publish this paper and related Cabinet decisions online, subject to consideration of any redactions that would be justified if the information had been requested under the Official Information Act 1982.

Authorised for lodgement

Hon Kiri Allan  
Minister of Justice

## APPENDIX

### Cabinet Paper: Compensation Guidelines for Wrongful Conviction and Imprisonment: Including Home Detention and Military Detention

#### Additional Information

#### Compensation for wrongful conviction in other jurisdictions

1. Although many jurisdictions confine their compensation schemes to imprisonment, it is difficult to draw direct comparisons because of differences in both their sentencing laws and compensation schemes.
2. For instance, under the statutory compensation scheme in the United Kingdom, a person could be eligible for compensation for the time spent on home detention curfew after having served part of a sentence of imprisonment. However, that is similar to the allowance that the Compensation Guidelines already make for restrictive post-imprisonment parole conditions. Home detention curfew is not a standalone sentence.
3. There is little publicly available information about Australia. Though some states have a stand-alone sentence similar to home detention, they do not have legislative compensation schemes, or publicly available compensation guidelines. The Australian Capital Territory's statutory scheme is drafted widely enough to include compensation for "punishment" that is less than imprisonment, but it is unclear whether the scheme has ever been applied to that effect.
4. In Canada, claimants under the *Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* must have been sentenced to imprisonment to be eligible for compensation. In the United States, 33 states have statutory compensation schemes, most of which require the claimant to have been imprisoned.
5. Compensation schemes in some Scandinavian countries appear to be broader in scope and somewhat different in character than those noted above. For example, both Sweden and Norway have schemes that encompass losses (such as arrest and detention) that occur *prior* to trial as well as post-conviction losses.

#### The military sentence of detention

6. The sentence of detention takes two forms:
  - 6.1. It can be imposed on conviction by the Court Martial for a term of up to 2 years. The Court Martial can sentence any non-commissioned member of the Armed Forces, up to and including the rank of Warrant Officer to military detention. The Court Martial can, and often does, sentence offenders to a period of military detention to be followed by dismissal from His Majesty's service;
  - 6.2. It can be imposed summarily by a Disciplinary Officer following a finding of guilt (no conviction is entered). A Disciplinary Officer is only empowered to sentence a member of the Armed Forces of the rank of Able Rate/Private/Aircraftman to military detention. The maximum period of detention is 28 days or, if the offence is committed on active or sea service, 60 days.

7. Military detention is regarded as a "very strict" regime where discipline and motivation are key factors. The detainee remains a member of the Armed Forces. If a sentence of military detention is overturned on appeal, the person's forfeited pay and leave entitlements are repaid to them in full.
8. Military detention imposed by a Disciplinary Officer at summary trial is fundamentally a short sentence aimed at correcting conduct which undermines core military discipline before reintegrating the detainee into the Armed Forces. It is not suitable for inclusion in the compensation scheme.
9. The Court Martial, by comparison, imposes military detention after entering a conviction against the accused, including for serious offending which might otherwise attract a sentence of imprisonment. The sentence is more closely analogous to home detention than detention imposed by a Disciplinary Officer at summary trial.

### **Pool of potential applicants and successful claims**

#### *Home detention*

10. If the scheme was extended to home detention, there would be a small increase in eligible applicants and likely an even smaller increase in successful claims.
11. Based on figures for the last 5-6 years, the current rate of wrongly convicted home detainees is about 5 a year. The total pool of potential eligible applicants between 2007 and 2021 is 54.
12. On past experience of the Guidelines, only a small proportion of eligible persons actually apply for compensation and only a proportion of those meet the criteria for payment (innocence, interests of justice). To illustrate, approximately 325 persons were wrongly convicted and imprisoned between 2007 and 2021. From this potential pool, there were about 30 compensation applications in the period, with just 4 successful.
13. The numbers of wrongly convicted home detainees is too small to make confident estimates of additional successful claims. There would be very few if it followed the success rate for imprisonment cases but may be higher if publicity about eligibility generates more claims, at least initially.
14. The Ministry of Justice estimates that if the scheme was extended prospectively only, on average there could be one successful claim by a home detainee every 2-3 years. If eligibility is extended back to 2007, it is estimated that could add up to 5 further claims in total.

#### *Military detention*

15. For military detention, there would also be a very small increase in eligible applicants and an even smaller increase in successful claims.
16. Based on analysis of Court Martial Appeal Court decisions since 2009 where a member of the Armed Forces was sentenced to detention and subsequently had their conviction overturned, the pool of potential eligible applicants since that date is two.

17. The number of wrongly convicted military detainees is too small to make confident estimates of additional successful claims. They would be rare if it followed the success rate for imprisonment cases and would remain small in absolute terms even if publicity about eligibility generates more interest.

## **Compensation rates**

### *Flat annual rate*

18. A flat rate of \$75,000 a year is proposed for home detention, military detention and time spent on restrictive bail or parole conditions after conviction. This is 50% of the annual rate for imprisonment. While there is scope for variation in sentences and conditions of detention, variable rates are not proposed, for the following reasons:
  - 18.1. The compensation rate for imprisonment is a fixed rate, even though there are variations in individuals' conditions of imprisonment. The choice of a flat rate was a deliberate one in order to make the Guidelines more streamlined, straightforward, and easy to apply;
  - 18.2. It would not be appropriate to have a more complex calculation process for forms of detention that are less serious than imprisonment;
  - 18.3. A fixed rate will help to keep the costs of assessing the quantum of a claim down and avoid situations where the costs of assessing the claim overall are higher than the amount of compensation awarded.
19. Proportionate 50% adjustments to compensation rates for other categories of compensation under the Guidelines are also proposed, as follows.

### *Pecuniary loss threshold*

20. In cases of imprisonment, individual pecuniary losses under the threshold of \$50,000 cannot be claimed separately and are considered to be included within the \$150,000 base annual rate. That is, instead of counting up relatively small pecuniary losses, they are absorbed in the total payment of loss of liberty and not compensated separately. However, where an applicant has suffered a significant loss of property or other significant consequential financial loss in excess of the \$50,000 threshold, the Guidelines provide that the applicant may be compensated between \$50,000 and \$250,000 to reflect that loss.
21. It is proposed to lower the threshold for recovery of individual pecuniary losses in cases of home detention to \$25,000. That is so that home detainees, who on average will receive significantly smaller payments for loss of liberty than prisoners, are not required to absorb a disproportionately large amount of pecuniary loss in that payment. The lower threshold would reduce the possibility of an applicant suffering pecuniary losses that exceed the amount recoverable for loss of liberty – and therefore being out of pocket.

### *Transition allowance*

22. The Guidelines provide for a transition allowance up to a maximum of \$50,000 to assist with the costs of reintegration into society after a period of imprisonment. The maximum amount is intended to provide for an applicant who has been in prison for a long time and needs significant help to reintegrate.

23. The current maximum sentence for home detention is 12 months. It is expected that applicants sentenced to home detention will have fewer reintegration needs than those who have been sentenced to longer terms of imprisonment. It is therefore proposed that the maximum transition allowance for applicants who have been sentenced to home detention be set at \$25,000.

*Adjustment for aggravating and mitigating factors*

24. The Guidelines provide for a discretionary one-off adjustment to an award of compensation where certain aggravating or mitigating factors are present. In cases of imprisonment, the maximum amount by which an award of compensation may be increased or decreased is \$150,000, or the base annual rate. It is proposed that the maximum amount of adjustment for cases of home detention should be \$75,000, so that it remains reasonably proportionate to the base annual rate for home detention.

**Estimated compensation awards for home detention**

<b>Type of loss</b>	<b>12 months</b>	<b>6 months</b>	<b>3 months</b>
<b>Loss of liberty</b> at annual rate of \$75,000	\$75,000	\$37,500	\$18,750
<b>Loss of income</b> at 50% of maximum amount	\$50,000	\$25,000	\$12,500
<b>Transition allowance</b>	\$20,000	\$10,000	\$5,000
<b>Costs</b> of pursuing appeal and compensation application <sup>1</sup>	\$30,000	\$30,000	\$30,000
<b>TOTAL</b>	<b>\$175,000</b>	<b>\$102,500</b>	<b>\$66,250</b>

25. The table does not include any amounts for significant pecuniary losses, as such losses are entirely dependent on individual circumstances and are very difficult to estimate. However, if such losses arise, that could add between \$25,000 and \$250,000 to the amount of compensation in an individual case.

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<sup>1</sup> The same figure for the costs of pursuing an appeal and compensation claim is used for all three examples. These costs depend on the complexity of the legal and factual issues involved, rather than on the length of the sentence.



# Cabinet

## Minute of Decision

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*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.*

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### Compensation Guidelines for Wrongful Conviction and Imprisonment: Including Home Detention and Military Detention

Portfolio                      Justice

On 14 November 2022, following reference from the Cabinet Social Wellbeing Committee (SWC), Cabinet:

- 1        **noted** that in July 2020, SWC agreed to new *Compensation Guidelines for Wrongful Conviction and Imprisonment* (the Compensation Guidelines) governing compensation for persons wrongly convicted and imprisoned [SWC-20-MIN-0095];
- 2        **noted** that the Compensation Guidelines also apply to persons who are convicted of an offence under military law;
- 3        **noted** that eligibility to apply for compensation under the Compensation Guidelines is limited to persons who, having been wrongly convicted of an offence, served all or part of a sentence of imprisonment in respect of that conviction;
- 4        **noted** that when Guidelines governing compensation for persons wrongly convicted were first adopted in December 1998, Cabinet accepted the Law Commission's recommendation that they be confined to persons who were sentenced to and served a sentence of imprisonment [STR (98) M 39/6];
- 5        **noted** that the sentence of home detention was subsequently introduced into law in 2007 and that:
  - 5.1      home detention is the second most restrictive sentence that the criminal courts can impose, with a maximum term of 12 months;
  - 5.2      the sentence may be imposed as an alternative to a sentence of imprisonment of up to two years;
- 6        **noted** that in the military justice system, the sentence of detention, when imposed by the Court Martial, has similarities to home detention;

7 **agreed** that the Compensation Guidelines be amended as follows:

Eligibility

7.1 eligibility to apply for compensation would be extended to wrongly convicted persons who serve all or part of a sentence of:

7.1.1 home detention, imposed under the Sentencing Act 2002; or

7.1.2 detention, imposed by the Court Martial under the Armed Forces Discipline Act 1971;

Compensation

7.2 the base annual rate for time spent serving a sentence of home detention or military detention would be \$75,000, that amount incorporating compensation for pecuniary losses below \$25,000;

7.3 the annual rate for time spent on restrictive bail or parole conditions after conviction would be \$75,000;

7.4 significant pecuniary losses sustained by home detainees or military detainees exceeding \$25,000 and up to \$250,000 would be compensable;

7.5 the transitional allowance for persons who served a sentence of home detention or military detention would be up to \$25,000;

7.6 for persons who served a sentence of home detention or military detention, the one-off adjustment, up or down, in appropriate cases to reflect any aggravating or mitigating features in respect of the conviction would be up to \$75,000;

8 **agreed** that the remainder of the Compensation Guidelines otherwise apply, with any necessary modifications, to persons sentenced to home detention or military detention;

9 **invited** the Minister of Justice (the Minister) to issue amended Compensation Guidelines that implement the decisions in paragraphs 7 and 8 above;

10 **agreed** that the amendments to the Compensation Guidelines come into effect on the date that they are issued by the Minister;

11 **agreed** that the amendments to the Compensation Guidelines will apply retrospectively to:

11.1 sentences of home detention imposed on or after 1 October 2007; and

11.2 sentences of military detention imposed on or after 1 July 2009;

12 **agreed** that Cabinet continue to determine the funding of compensation payments on a case-by-case basis.

Rachel Hayward  
Secretary of the Cabinet

*Secretary's Note: This minute replaces SWC-22-MIN-0202. Cabinet agreed to the recommendation in paragraph 11.*