

Hon Andrew Little

Minister of Justice

Minister for Courts

Minister for Treaty of Waitangi Negotiations

Minister Responsible for the NZSIS

Minister Responsible for the GCSB

Minister Responsible for Pike River Re-entry



Felix Lee

By email: fyi-request-6819-b74918aa@requests.fyi.org.nz

Dear Felix Lee

OIA request – Teina Pora compensation inflation adjustment

Thank you for your email of 9 November 2017 requesting, under the Official Information Act 1982, a copy of the advice I received regarding adjusting Teina Pora's compensation for inflation.

The decision to inflation adjust was made by Cabinet on my recommendation. I have therefore included documents relating to Cabinet's consideration within the scope of your request.

The relevant documents are listed in the Appendix to this letter. Information has been withheld from those documents:

- under section 9(2)(a) (cell phone numbers) to protect personal privacy;
- under section 9(2)(f)(iv) to protect the confidentiality of advice from officials to me. This advice relates to matters that I will be making decisions on in the future;
- under section 9(2)(g)(i) to maintain the effective conduct of public affairs through free and frank expression of opinions, in this case mine; and
- under section 9(2)(h) to maintain legal professional privilege.

I am satisfied that there are no countervailing public interest considerations in favour of release that outweigh the reasons for withholding this information.

You have the right, under section 28(3) of the Official Information Act, to ask the Ombudsman to investigate and review my decision to withhold information.

Yours sincerely



Hon Andrew Little
Minister of Justice

Appendix

No.	Date	Title	Document Type	Comments
1	27/10/17	Teina Pora Compensation Claim	Briefing	Some information withheld under sections 9(2)(a), 9(2)(f)(iv), 9(2)(h), and 9(2)(g)(i).
2	6/11/17	Pora Inflation Adjustment	Aide memoire	Some information withheld under section 9(2)(f)(iv).
3	6/11/17	Teina Anthony Pora's Application for Compensation for Wrongful Conviction and Imprisonment: Inflation Adjustment	Cabinet paper	Some information withheld under sections 9(2)(f)(iv) and 9(2)(h).
4	6/11/17	Teina Pora Inflation Adjustment	Cabinet minute	Some information withheld under section 9(2)(f)(iv).

1



Hon Andrew Little
Minister of Justice

TEINA PORA COMPENSATION CLAIM

Date:	27 October 2017	File Number:	CON 35-46
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Action Sought	Timeframe
<p>Note the content of this report, which discusses:</p> <ul style="list-style-type: none"> the High Court decision in <i>Pora v Attorney-General</i> [2017] NZHC 2081, s9(2)(h) what will be required to implement the High Court's decision; s9(2)(f)(iv) & 9(2)(h) <p>Read the report together with the associated briefing on compensation for wrongful conviction and imprisonment.</p> <p>Note that officials are available to meet to discuss this area with you.</p> <p>Decide whether to withdraw the appeal in <i>Pora v Attorney-General</i>.</p>	Before 4 December 2017

Contacts for telephone discussion (if required)

Name	Position	Telephone		1 st Contact
Jeff Orr	Chief Legal Counsel, Office of Legal Counsel	(04) 494 9775	s9(2)(a)	✓
Dagny Baltakmens	Principal Solicitor	(04) 496 3358		
Jeremy Hammington	Special Counsel	(04) 494 9839		

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events	<input type="checkbox"/> Referred to: _____
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister	

Minister's office comments

RELEASED UNDER THE OFFICIAL INFORMATION ACT

27 October 2017

Hon Andrew Little
Minister of Justice

TEINA PORA COMPENSATION CLAIM

Purpose

1. This paper:

- provides an overview of the High Court's decision in *Pora v Attorney-General* [2017] NZHC 2081 [REDACTED] s9(2)(h) [REDACTED];
- provides detailed information about how to inflation adjust Mr Pora's compensation;
- [REDACTED]
- [REDACTED] s9(2)(f)(iv) & s9(2)(h) [REDACTED]

Background to Teina Pora's application for judicial review

2. Teina Pora's convictions for murder, sexual violation, and aggravated burglary were quashed by the Privy Council in March 2015. Mr Pora made a claim for compensation for wrongful conviction and imprisonment under the Cabinet Guidelines governing such claims. These comprise:

- Cabinet Criteria for Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases (1998); and
- Additional Guidelines of Quantum of Future Compensation (2000).

3. In 2016, after following the process set out in the Cabinet Guidelines, Hon Rodney Hansen QC recommended that Mr Pora be paid compensation in the amount of \$2,520,949.42. That sum included:

- \$1,961,895 for non-pecuniary loss, specifically loss of liberty;
- \$225,000 for other non-pecuniary losses (loss of reputation, loss or interruption of family and other personal relationships, mental and emotional harm);
- \$334,054.42 for pecuniary losses (loss of livelihood and future earnings potential, costs incurred in challenging his convictions and bringing the application for compensation).

4. Mr Hansen QC also recommended that Cabinet consider adjusting part of the total amount (those parts awarded for loss of liberty and other non-pecuniary losses) to reflect the effects of inflation since 2000.

The Additional Guidelines

5. The issue of inflation adjustment arises in relation to the application of the Additional Guidelines, which set out the method for calculating non-pecuniary losses. The Additional Guidelines were developed in 2000 and were adopted in order to standardise the level of future awards by using a simpler, less subjective method of calculation than had been used in the first compensation award under the 1998 Guidelines. Broadly, under the Additional Guidelines there is a two-stage approach to calculating non-pecuniary losses. Stage 1 is the calculation for loss of liberty and involves multiplying a figure of \$100,000 by the number of years a claimant has been in prison. Stage 2 provides compensation for other non-pecuniary losses and is assessed as a "one-off" figure, starting at \$100,000 and adjusted up or down to reflect the aggravating or mitigating factors listed in the Guidelines. Unlike the stage 1 figure, the stage 2 figure is not proportional to the length of time spent in prison.
6. On the advice of the Minister of Justice, Cabinet did consider inflation adjusting the amounts assessed by Mr Hansen for non-pecuniary losses, but decided not to do so.
7. The reasons for Cabinet's decision not to adjust for inflation were as follows:¹
- The Cabinet Guidelines do not provide for payments to be adjusted for inflation;
 - The absence of inflation-adjusting in the Cabinet Guidelines is not unusual – a number of fees, charges, and payments in the Crown system do not automatically provide for inflation-adjusting, and instead the rates are updated when appropriate;
 - Cabinet needed to be mindful of the eight other people who had already been compensated under the Cabinet Guidelines and whose payments were not adjusted for inflation;
 - Cabinet was comfortable that \$100,000 per year for the time of incarceration was still an appropriate amount to compensate for loss of liberty;
 - The annual rate of \$100,000 per year of incarceration "still sits very well" when compared internationally;
 - Mr Pora was also to receive an additional sum of compensation for pecuniary losses that was "assessed in real terms" by Mr Hansen, and a further amount of compensation at Mr Hansen's discretion, also assessed "in real dollar values", to pick up other non-pecuniary losses.
8. Mr Pora accepted payment of the amount approved by Cabinet but with the agreement of the Minister of Justice reserved the right to bring judicial review proceedings in respect of the decision not to make an adjustment for inflation. Mr Pora then filed an application for judicial review, which was heard by Justice Ellis in the High Court in July 2017.

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

What was at issue in the judicial review proceeding?

9.

s9(2)(h)

Ellis J's decision

10. In August 2017 Ellis J upheld the application for review. Ellis J held that the Ministry of Justice's advice to the Minister, and the Minister's subsequent advice to Cabinet, proceeded on the basis of an error of law. The error of law identified by Ellis J was that the advice did not recognise that the Guidelines (correctly interpreted) "permit the quantum of compensation payable to an applicant for ... non-pecuniary losses ... to be adjusted for inflation, where it is in the interests of justice to do so."² Ellis J said that as a result Cabinet had not yet had the opportunity to consider the critical issue, which was whether it wished to treat Mr Pora consistently with those other claimants who had received compensation under the Guidelines at earlier points in time.
11. More specifically, in relation to the issue of inflation adjustment, Ellis J said:
- the interests of justice ordinarily require consistency of treatment;
 - consistency would normally suggest inflation adjustment where not to do so would result in the applicant being treated differently in real terms from other applicants;
 - the evidence suggested that Mr Pora had been treated differently in real terms from others and also that an inflation adjustment would not result in Mr Pora being treated better than other applicants;
 - however, that did not mean that the Guidelines *require* inflation adjustment by way of some "nice mechanical exercise upon their every application".
12. Ellis J was also critical of Cabinet's stated reasons for deciding not to depart from the Guidelines in Mr Pora's case. In her view, Cabinet's reasons (as articulated by the Minister of Justice) were largely irrelevant and did not engage with what the Judge saw as a fundamental requirement for consistency.

² *Pora v Attorney-General* [2017] NZHC 2081 at [141].

Outcome

13. The remedy granted by the Judge was a declaration that the Guidelines "permit the quantum of compensation payable to an applicant for non-pecuniary losses to be adjusted for inflation where it is in the interests of justice to do so". The Judge then invited the Minister of Justice to consider whether, in the circumstances of Mr Pora's case, the interests of justice require the benchmarks in the Guidelines to be inflation adjusted. The Judge saw no impediment to the Minister taking the matter back to Cabinet should inflation adjustment be seen as the proper outcome.

Appeal

14. On 25 September 2017, the Attorney-General filed a notice of appeal against Ellis J's decision.

15.

s9(2)(h)

16.

Resolving Mr Pora's compensation claim

17. You have indicated that you intend to withdraw the appeal and make an inflation adjustment to Mr Pora's compensation payment in accordance with Ellis J's decision. Accordingly, the remainder of this paper discusses issues to be addressed in applying the judgment to Mr Pora's claim

s9(2)(h)

Applying Ellis J's judgment

18. The essential elements of Ellis J's judgment are that Cabinet should:
- 18.1. Consider inflation adjusting non-pecuniary losses,
 - 18.2. where the interests of justice require it,
 - 18.3. to ensure that Mr Pora is not treated differently in "real terms" from previous claimants.

19.

s9(2)(h)

What does inflation adjustment mean in this context?

20.

s9(2)(h)

21. In 2000, Cabinet set the amount of compensation for loss of liberty at \$100,000 per year. The base amount of \$100,000 is multiplied by the number of years of imprisonment so that the overall amount is proportionate to the length of time spent in prison. This is the stage 1 amount referred to in paragraph 5 above. It is the length of time in prison, rather than the actual years, that is central to the calculation. *When* a claimant was imprisoned – for example between 1995 and 2005, or between 1975 and 1985 – is not relevant.

22. As noted above, the stage 2 amount is not multiplied by the number of years spent in prison, but is a one-off amount intended to compensate for other non-pecuniary losses. However, the \$100,000 benchmark is also relevant here. Although the QC assessing the claim has discretion to adjust the amount to reflect aggravating and mitigating factors, the Additional Guidelines say that "on average the relevant figure should, even out around \$100,000."

s9(2)(g)(i)

23. In his report on the quantum of Mr Pora's compensation, Mr Hansen recommended that Cabinet consider inflation adjusting the amounts assessed for non-pecuniary losses. He described the proposed adjustment in the following terms:

... an adjustment to recognise the progressive decline in real terms in the level of compensation payable since the Additional Guidelines were introduced ...

If it is intended that levels of compensation should be *maintained in real terms at the levels payable when the Guidelines were introduced* and that claimants should, in substance, be treated equally, consideration should be given to

adjusting compensation payable to Mr Pora for loss of liberty to reflect the decline in the value of money.³

(emphasis added)

24. Ellis J characterised the proposed adjustment in similar terms at [67] of the judgment

... Mr Hansen explicitly recommended that the amounts for non-pecuniary losses at stages one and two be adjusted for inflation to recognise the effect of the passage of time on the real dollar value of the \$100,000 benchmark.

25. Accordingly, the adjustment described by both Mr Hansen and Ellis J is one that will reflect the decline in the value of a sum of money (the compensation amount as assessed under the Additional Guidelines) since 2000 (when the benchmarks were set) to the present day.

How should the inflation adjustment be calculated?

26. Treasury officials have advised that the appropriate way to make the adjustment described by Mr Hansen and Ellis J is as follows:

$(\$100,000 \times \text{number of years in prison}) \times (\text{change in the CPI between 2000 and the present})^4$

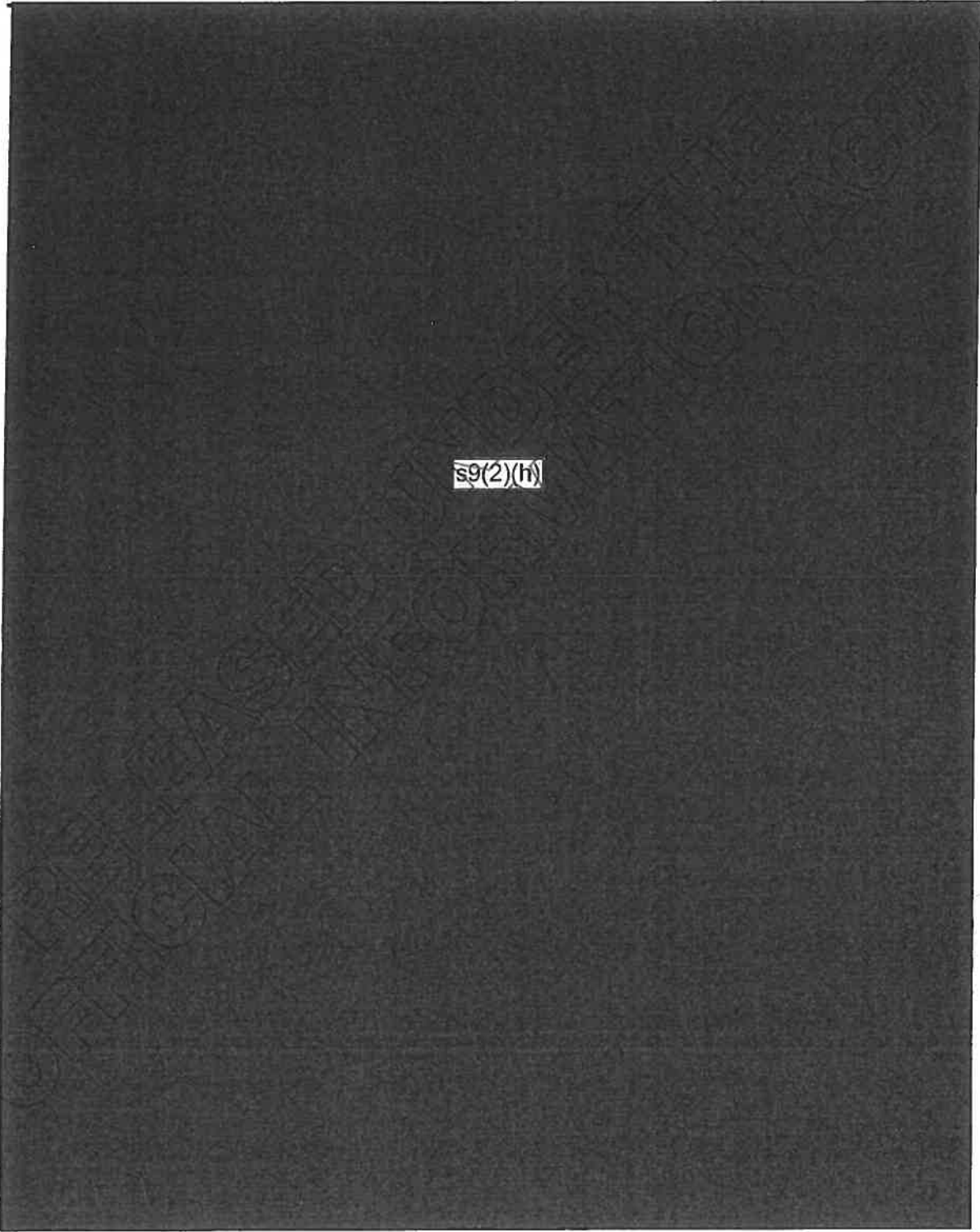
27. CPI is the best measure of the effects of inflation where the intention is to reflect the difference in purchasing power of the compensation payment between 2000 and the present.

28. Treasury has provided us with two sets of figures for CPI. The first set is the aggregate CPI based on a standard bundle of goods and services. The second set excludes tobacco and alcohol from the bundle. Treasury advises that the CPI excluding alcohol and tobacco is the index used to adjust benefits. This is because alcohol and tobacco are taxed at a high rate, which has a slight distorting effect on the CPI. In our view, it is open to you to adopt either figure.

s9(2)(h)

³ Rodney Hansen *Second Report for the Minister of Justice on Compensation Claim by Teina Anthony Pora* (31 May 2016) at [18] and [19].

⁴ Expressed in terms of the stage 1 amount. The method is the same for the stage 2 amount, where the lump sum is multiplied by the relevant CPI figure.



§9(2)(h)



Summary on inflation adjustment

36. In summary, we consider that adopting Ellis J's decision means that:

- the annual rate for the stage 1 calculation (loss of liberty) is now \$100,000 adjusted using the CPI to the date of payment. This is currently approximately \$144,000 and will increase as time goes on;

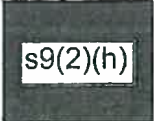


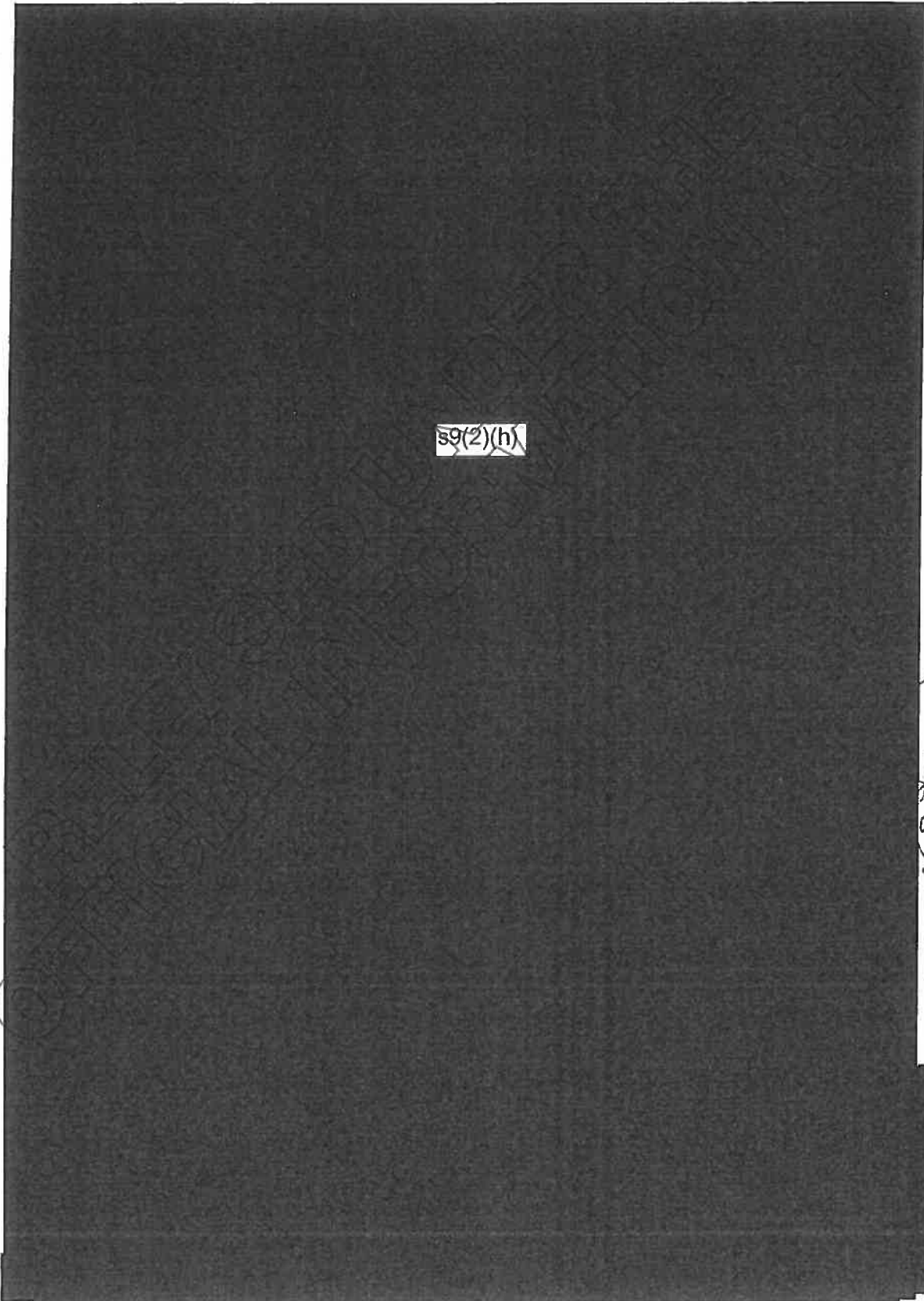
What does this mean for Mr Pora?

37. The effect of an inflation adjustment on the amount of compensation paid to Mr Pora is set out in the table below. We have used the calculation model and CPI figures provided by Treasury. These are provisional calculations only, and will need to be checked and confirmed by an actuary before we provide final advice.

	Unadjusted amount	Adjusted amount CPI from June qtr 2000 to June qtr 2017	Adjusted amount CPI less alcohol and tobacco from June qtr 2000 to June qtr 2017	
Stage 1	\$1,961,895	\$2,834,467.42	\$2,761,288.74	s9(2)(h)
Stage 2	\$225,000	\$325,071	\$316,678.50	
Total	\$2,186,895	\$3,159,538.42 Total increase of \$972,643.42	\$3,077,967.23 Total increase of \$891,072.23	

+ CBT





b9(2)(h)



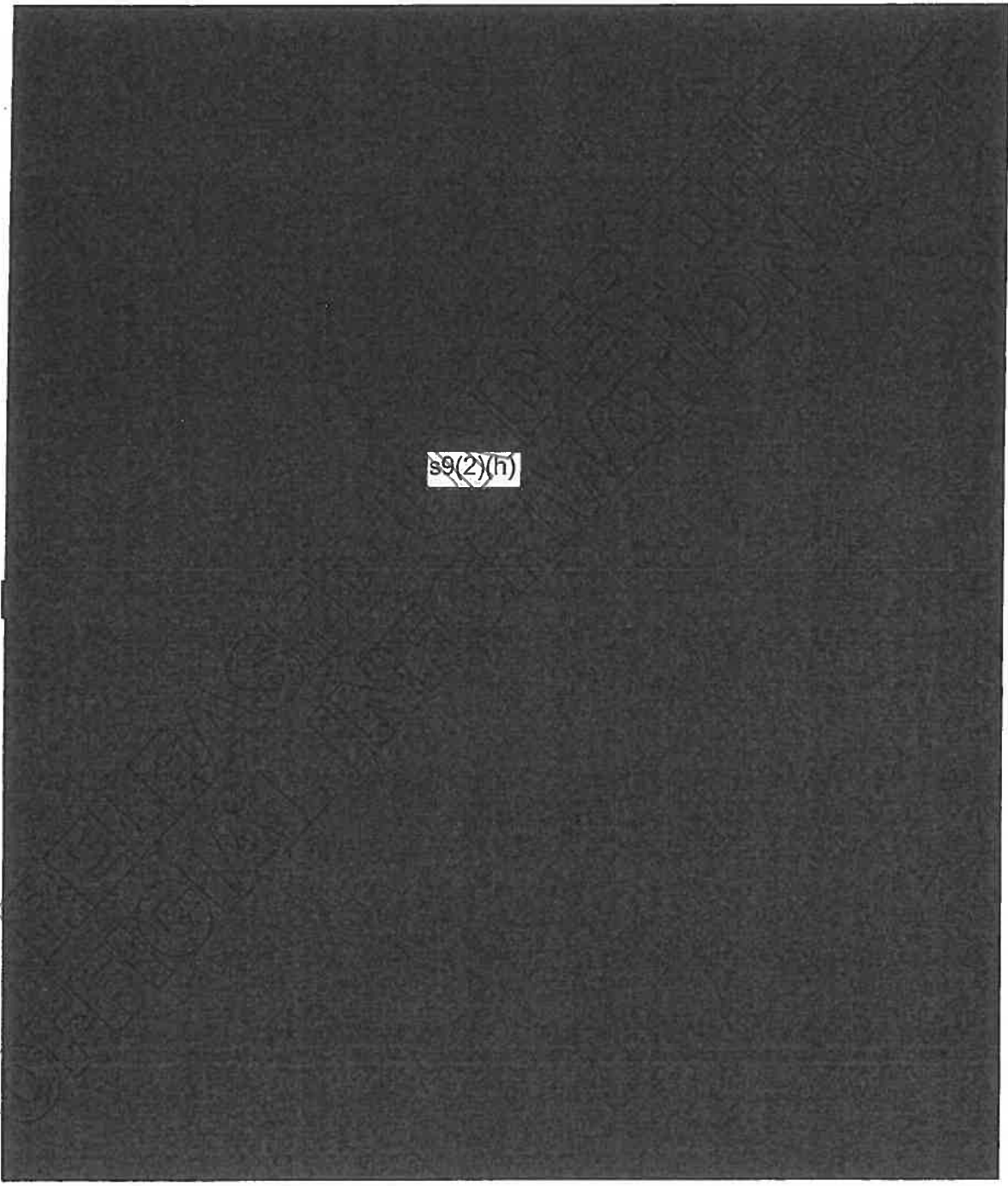
s9(2)(h)

Withdrawing the appeal

Timing – when does a decision need to be made?

46. Under the Court of Appeal rules, the next step is for the Crown to file the case on appeal and apply for a hearing date by 24 December. Crown Law have advised that a decision to withdraw should be made by 4 December to avoid any unnecessary work in preparing the case on appeal. However, the appeal can be withdrawn as soon as a formal decision to do so is made.
47. On withdrawal of the appeal, the Crown may be liable for costs, depending on what steps the respondent has taken up to that point.

s9(2)(h)



s9(2)(h)



55.

s9(2)(h)

Next steps

56. The first step is to decide whether to withdraw the appeal. This decision must be made by 4 December 2017, but ideally as soon as possible.

57. Following your decision to withdraw the appeal:

- The Ministry will communicate that decision to Crown Law;
- Crown Law will seek the Attorney-General's approval to withdraw the appeal and file the necessary papers;
- The Ministry will provide you with final advice on how to inflation adjust the award for Mr Pora;
- That advice would be based on the provisional calculations set out at paragraph 37;
- The Ministry will prepare a Cabinet paper on Mr Pora's inflation adjustment;

s9(2)(h) & 9(2)(f)(iv)

Recommendations

58. I recommend that you:

1. Note the contents of this report, which: ✓

1.1. provides an overview of the High Court's decision in *Pora v Attorney-General* [2017] NZHC 2081

s9(2)(h)

1.2. provides detailed information about how to inflation adjust Mr Pora's compensation;

1.3.

1.4.

s9(2)(h) and 9(2)(f)(iv)

2. Read this report in conjunction with the associated briefing on compensation for wrongful conviction and imprisonment; ✓

3. Note that officials are available to meet to discuss this area with you; ✓

+ question of costs

4. Decide to withdraw the appeal in *Pora v Attorney-General*; YES/NO

In which case -


4.1. Direct the Ministry to provide advice on inflation adjustment for Mr Pora; YES/NO

4.2. Direct the Ministry to prepare a Cabinet paper on further payments to Mr Pora; YES/NO

4.3. [Redacted] s9(2)(f)(iv) [Redacted]


Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

APPROVED SEEN NOT AGREED


Hon Andrew Little
Minister of Justice
Date 29, 10, 17

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AIDE MEMOIRE FOR CABINET MEETING (06/11/17)

PORA INFLATION ADJUSTMENT

Proposal

1. Cabinet is asked to agree to withdraw the appeal against the High Court's decision *in Pora v Attorney-General* and pay an additional amount of \$988,099 in compensation to Teina Anthony Pora for his wrongful conviction and imprisonment to reflect the effect of inflation.

Background

2. Mr Pora was convicted in 1994, and again in 2000, of murder, sexual violation and aggravated burglary in relation to the death of Susan Burdett in 1992. In March 2015, the Privy Council quashed his convictions without order of retrial. He applied for compensation for wrongful conviction and imprisonment in April 2015. In 2016, after following the calculation process set out in the Cabinet Guidelines, Mr Hansen recommended that Mr Pora be paid compensation in the amount of \$2,520,949.42.
3. Mr Hansen also recommended that Cabinet consider inflation-adjusting Mr Pora's compensation for non-pecuniary losses (\$2,186,895) to reflect the effects of inflation since 2000, when the benchmark amounts in the Additional Guidelines were set. Cabinet decided not to make an inflation adjustment.
4. In August 2017 the High Court upheld an application for judicial review of Cabinet's decision not to inflation adjust. The High Court made a declaration that the Cabinet Guidelines "permit the quantum of compensation payable to an applicant for non-pecuniary losses to be adjusted for inflation where it is in the interests of justice to do so", and invited the Minister of Justice to consider whether, in the circumstances of Mr Pora's case, the calculation of non-pecuniary losses should be inflation adjusted.
5. I have reviewed the matter in line with the High Court's decision and consider that in the unique circumstances of Mr Pora's case, the interests of justice favour inflation adjustment of his compensation for non-pecuniary losses. In particular I note:
 - Mr Pora was wrongly imprisoned for almost 20 years, which is the longest term of imprisonment for any claimant under the Cabinet Guidelines;
 - The inflationary impact, since 2000, on the amount of compensation paid to Mr Pora in respect of his non-pecuniary losses is significant;
 - Mr Pora's compensation for non-pecuniary losses, proportionate to years in prison, was substantially lower, in real terms, than the amounts paid to previous claimants.

Proposed inflation adjustment

6. I propose that Mr Pora's compensation for non-pecuniary losses should be inflation adjusted as follows, to reflect Mr Hansen's recommendation:

The amount of compensation awarded by Mr Hansen for non-pecuniary losses (in total \$2,186,895) should be multiplied by the change in the CPI index for All Groups over the relevant period;

 - The starting point for adjustment should be July 2000 when the benchmarks in the Additional Guidelines were set;
 - The end point should be the nearest complete quarter year to the time of payment.
7. Expert advice from an actuary has confirmed that the additional amount required to inflation adjust from July 2000 to the September quarter of 2017 is \$988,099. This brings Mr Pora's total compensation for non-pecuniary losses to \$3,174,994, and the total amount of compensation including pecuniary losses to \$3,509,048.42.

Why was this method of calculation used?

- 8. In line with the recommendation by Mr Hansen, the aim of the adjustment was to maintain the purchasing power of the amount awarded for non-pecuniary losses at the same level as when the benchmark amounts under the Additional Guidelines were set in 2000. The Consumer Price Index is the best measure of the change in purchasing power over time.
- 9. Compensation for non-pecuniary losses (loss of liberty, loss of reputation, loss or interruption of family or other personal relationships, mental and emotional harm) does not represent lost income, lost earnings, or loss of opportunities. Those matters are dealt with as pecuniary losses and were the subject of a separate assessment by Mr Hansen, amounting to (\$334,054.42). When adjusting for inflation, compensation for non-pecuniary losses should be dealt with as a lump sum and not considered as representing income over time. This approach is supported by Treasury.

Only the amount for non-pecuniary losses has been adjusted

- 10. Mr Hansen's recommendation was that the amount assessed for non-pecuniary losses (\$2,186,895) should be adjusted. The balance of the original compensation award (\$334,054.42) was for pecuniary losses. It was assessed in actual dollar terms and not by reference to calculation figures set in 2000.

Costs

- 11. When the appeal is withdrawn, outstanding court costs will be payable to Mr Pora. [REDACTED]
[REDACTED]
[REDACTED] s 9(2)(h) & 9(2)(f)(iv) [REDACTED]
[REDACTED]
[REDACTED]

Future claims for compensation for wrongful conviction and imprisonment

- 13. Until the Cabinet Guidelines are amended, Cabinet will need to assess whether the interests of justice require an inflation adjustment for any future successful claimants. [REDACTED] s9(2)(f)(iv) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] s 9(2)(f)(iv) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] s9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]

Next steps

- 16. If Cabinet agrees with the proposed inflation adjustment, the Minister of Justice will offer the inflation adjustment to Mr Pora. The payment would be subject to Mr Pora agreeing to forego any further legal action against the Crown in respect of matters relating to his convictions. When Mr Pora accepts the offer, there will be a public announcement. Crown Law will then withdraw the appeal and seek to settle the issue of costs promptly with Mr Pora's counsel.
- 17. The Minister of Justice's office will coordinate publicity following Mr Pora's acceptance of any offer.

SENSITIVE

Office of the Minister of Justice

Memorandum for Cabinet

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

Proposal

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

Executive summary

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

Background

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

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

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

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

Resolving Mr Pora's claim

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

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

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

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

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

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

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

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

24. The total inflation adjusted amount is:

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

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

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

Costs

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

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

s9(2)(h)

29. [REDACTED]

[REDACTED]

30.

[REDACTED]

Agreement to forego further proceedings

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

Offer to Mr Pora

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

Future claims for compensation for wrongful conviction and imprisonment

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

[REDACTED]

34.

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

[REDACTED]

35.

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

Consultation

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

Financial implications

37. When establishing the Cabinet Guidelines, Cabinet agreed that it would decide on a case by case basis to appropriate funds for each compensation payment [STR (98) M 39/6].
38. The Ministry of Justice is not funded for any ex gratia or compensation payments and is unable to make any cost reductions to absorb this payment. The payment will be a charge against the general contingency.

Human rights

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

Legislative implications

40. There are no legislative implications.

Regulatory impact analysis

41. A regulatory impact analysis is not required.

Publicity

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

Recommendations

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

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

11. **agree** that:

- 11.1. the appeal against the High Court's decision of 28 August 2017 be withdrawn;
- 11.2. an ex gratia payment of \$988,099 be made to Mr Pora to represent the adjustment for inflation of his compensation for non-pecuniary losses;

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

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

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

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

- 14. **agree** that the proposed changes to appropriations for 2017/18 above be included in the 2017/18 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
- 15. **agree** that the expenses incurred under recommendation 13 above be a charge against the between-Budget operating contingency, established as part of Budget 2017;
- 16. **note** that the between-Budget operating contingency is built into the operating allowance line in the Fiscal Plan;
- 17. **authorise** the Minister of Justice to offer the above amount to Mr Pora;
- 18. **note** that if Mr Pora accepts the inflation adjusted offer, he will be required to forego any further legal action against the Crown in respect of matters relating to his convictions, imprisonment, claim for compensation for wrongful conviction and imprisonment, and all related proceedings;

19. **note** that, on the withdrawal of the appeal:

19.1. court costs will be payable to Mr Pora in relation to the judicial review proceeding and the Crown's appeal;

19.2. the Crown Law Office will seek to settle promptly the quantum of costs payable to Mr Pora;

20. **note** that my office will coordinate publicity following Cabinet's decision and the acceptance of the offer to Mr Pora;

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

Hon Andrew Little
Minister of Justice

Date signed:

RELEASED UNDER THE
OFFICIAL INFORMATION ACT



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.

Teina Pora Inflation Adjustment

Portfolio Justice

On 6 November 2017, Cabinet:

- 1 **noted** that in June 2016 the previous government:
 - 1.1 considered an application for compensation for wrongful conviction and imprisonment from Mr Teina Pora, in light of advice provided to the Minister of Justice by Hon Rodney Hansen QC CNZM on an appropriate amount of compensation for Mr Pora;
 - 1.2 noted that on 31 May 2016, Mr Hansen recommended that:
 - 1.2.1 Mr Pora be paid total compensation of \$2,520,949.42;
 - 1.2.2 Cabinet consider adjusting for inflation the amount of compensation he assessed for Mr Pora's non-pecuniary losses;
 - 1.3 agreed, in light of Mr Hansen's advice, that Mr Pora be compensated for his wrongful conviction and imprisonment;
 - 1.4 agreed not to adjust for inflation the compensation for non-pecuniary losses payable to Mr Pora;
 - 1.5 agreed that an ex gratia payment of \$2,520,949.42 be made to Mr Pora for his wrongful conviction and imprisonment;

[CAB-16-MIN-0276]
- 2 **noted** that Mr Pora accepted the offer of compensation referred to in paragraph 1.5 above but, with the agreement of the Minister of Justice, reserved the right to apply for judicial review of the decision not to adjust for inflation, in accordance with the Consumer Price Index, the compensation for non-pecuniary losses;
- 3 **noted** that, on 3 November 2016, Mr Pora applied for judicial review of that decision, and the application was heard in the High Court by Justice Ellis on 3 July 2017;

- 4 **noted** that in her judgment of 28 August 2017, Justice Ellis:
- 4.1 made a declaration that the Cabinet Guidelines on compensation for wrongful conviction and imprisonment permit the quantum of compensation payable to an applicant for his or her non-pecuniary losses to be adjusted for inflation, where it is in the interests of justice to do so;
- 4.2 invited the Minister of Justice to consider whether, in the circumstances of Mr Pora's case, the interests of justice require the benchmarks in the Guidelines for the calculation of non-pecuniary losses to be inflation adjusted;
- 5 **noted** that:
- 5.1 in September 2017, the previous government agreed to file an appeal against the High Court's decision in order to preserve the options available to an incoming government in responding to the case [CAB-17-MIN-0478];
- 5.2 a notice of appeal was filed in the Court of Appeal on 25 September;
- 6 **agreed** that, in the unique circumstances of Mr Pora's case, in particular the length of time Mr Pora spent in prison and the effect of inflation on his award of compensation, it is in the interests of justice that Mr Pora's compensation for non-pecuniary losses be adjusted for inflation;
- 7 **noted** that Mr Pora's total compensation payment included the amount of \$2,186,895.00 for non-pecuniary losses;
- 8 **noted** that the Ministry of Justice has received actuarial advice that this amount, if adjusted for inflation based on the change in the Consumers Price Index (All Groups) between July 2000, when the benchmarks in the Guidelines were adopted, and the quarter year ending in 30 September 2017, would result in an additional sum of \$988,099;
- 9 **agreed** that:
- 9.1 the appeal against the High Court's decision of 28 August 2017 be withdrawn;
- 9.2 an ex gratia payment of \$988,099 be made to Mr Pora to represent the adjustment for inflation of his compensation for non-pecuniary losses;
- 10 **agreed** to re-establish the following appropriation:

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

11 approved the following change to appropriation to provide for an inflation adjustment to the ex gratia payment made to Mr Pora for wrongful conviction and imprisonment, with a corresponding impact on the operating balance:

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

12 agreed that the proposed change to appropriation for 2017/18 above be included in the 2017/18 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;

13 agreed that the expenses incurred under paragraph 11 above be a charge against the between-Budget operating contingency, established as part of Budget 2017;

14 noted that the between-Budget operating contingency is built into the operating allowance line in the Fiscal Plan;

15 authorised the Minister of Justice to offer an ex gratia payment of \$988,099 to Mr Pora;

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

17 noted that, on the withdrawal of the appeal:

17.1 court costs will be payable to Mr Pora in relation to the judicial review proceeding and the Crown's appeal;

17.2 the Crown Law Office will seek to settle promptly the quantum of costs payable to Mr Pora;

18 noted that the office of the Minister of Justice will coordinate publicity following Cabinet's decision and the acceptance of the offer to Mr Pora;

19 s9(2)(f)(iv)

Michael Webster
Secretary of the Cabinet

Hard-copy distribution:
Prime Minister
Deputy Prime Minister
Minister of Justice