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A REPORT BY JUSTICE

Compensation for Wrongful Imprisonment

CHAIRMAN OF COMMITTEE
CHARLES WEGG-PROSSER

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Jacqueline Levine was Secretary of the Committee for its earlier meetings, but had to resign through ill health. Mrs Carol Harlow was obliged to resign owing to pressure of other work.

This report has been endorsed and approved for publication by the Council of JUSTICE.

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INTRODUCTION

1 One of the conditions of an ordered democratic society is that every citizen should submit himself to the laws of the land in which he lives and to the jurisdiction of those who are authorized to administer and enforce them. Thus, in England and Wales, if he is suspected of having committed a criminal offence, he may be arrested and detained in a police station, charged, brought in front of a magistrate and, if the offence is serious, tried in the Crown Court. If he is found guilty and has exhausted any right of appeal he may exercise then he has to accept the penalty and the consequences which flow from it be they imprisonment, or fine, or loss of reputation, property and livelihood.

2 All those who participate in the administration of criminal law at various levels, including juries, are acting on behalf of society as a whole. As they are human, it is inevitable that mistakes will be made. There are inherent dangers of error and injustice in the accusatorial system of trial and the problem which this committee has been asked to consider is the extent to which the state should accept responsibility for the consequences of such errors and injustices.

3 This country has been slow to provide a remedy in damages in the field of administrative law, but if there is an area in which an effective remedy should be provided it is where the operation of the criminal law has resulted in unjustified loss of liberty.

4 This void in our provision of remedies appears even more remarkable when we consider that the injury suffered through errors in the administration of the criminal law can be far more serious than one suffered by maladministration on the part of a civil authority since it may include:–

(a) loss of liberty and the harshness and indignities of prison life;

(b) loss of livelihood and property;

(c) break-up of the family and loss of children;

(d) loss of reputation.

Any period of imprisonment, however short, can bring about all these consequences.

5 It has further to be noted with regret that, so far as we have been able to ascertain, the United Kingdom is the only member country of the Council of Europe with no statutory scheme for compensating those who unjustly suffer loss through the malfunctioning of the criminal law. This is despite the fact that Article (6) of the U N International Covenant on Civil and Political Rights, which entered into force on 23 March 1976 and was ratified by the United Kingdom on 27 May 1976, establishes the following right:–

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Furthermore, the United Kingdom was the last member country of the Council of Europe to adopt a scheme for rehabilitation of offenders, after a campaign led by JUSTICE, and is still the only such country which has no statutory provision for the independent investigation and remedying of prisoners' grievances.

6. The original terms of reference given to our committee were 'compensation for wrongful imprisonment arising out of a miscarriage of justice', but it soon became apparent that these were too restrictive, and that there are other situations in which a citizen can suffer serious injustice at the hands of the criminal law with very little prospect of obtaining compensation. The reason for this is that there is no statutory right to compensation. The only available source is an *ex gratia* payment by the Home Office in cases where:–

(a) a free pardon has been granted under the Royal prerogative;

(b) the Court of Appeal has quashed a conviction on a reference from the Home Office;

and in a few other exceptional circumstances.

7 This inadequate provision does not cover cases in which;–

(a) a conviction carrying a sentence of imprisonment is quashed on appeal from a Crown Court or a magistrates' court;

(b) a person is committed in custody for trial and the jury finds him not guilty, or he is discharged by the judge, or the prosecution offers no evidence;

(c) a person is detained or remanded in custody and is discharged or acquitted when he appears in the magistrates' court;

(d) a person is detained for questioning and released without being charged.

Although an aggrieved person can bring civil action for wrongful arrest or malicious prosecution such actions are fraught with technical difficulties and are rare in practice.

8 A statutory scheme to cover all these situations might not be regarded as practicable. We have, therefore, not attempted to formulate recommendations in respect of (c) and (d) above, taking the view that these could be the subject of study by another committee.

9 In a special section of our report we have summarized the statutory provisions for compensation in other countries. In drawing attention to them we think it fair to point out that their problems are simpler than ours, particularly if factual innocence or unjustified prosecution is to be taken as the criterion for awarding compensation. Inquisitorial systems with independent public prosecutors mean that fewer unjustified charges are brought and the facts of a case are more fully explored than in our accusatorial system where there is no independent scrutiny and appraisal of evidence before a case comes to trial. Furthermore, an acquittal at trial or the quashing of a conviction on appeal does not necessarily betoken innocence, or indicate the extent to which a person may have contributed to his misfortune.

EXISTING PROVISIONS

10 As we have indicated in the introduction to this report, there is no statutory provision for the payment of compensation even in the clearest cases of wrongful imprisonment and even if they have been brought about by negligence or malpractice on the part of the prosecution. The Home Office does, however, make *ex gratia* payments without question in those cases where the Home Secretary has granted a free pardon under the Royal prerogative or the Court of Appeal has quashed a conviction following a reference by the Home Secretary.

11 The justification for this would appear to be that in such cases factual innocence is presumed to have been established. The Home Secretary is in a difficult position constitutionally, since questions of guilt or innocence are supposed to be decided by the Courts and not by the executive. The Home Secretary therefore will not grant a free pardon unless the petitioner can produce unassailable proof of innocence which overcomes all the evidence on which he was convicted including, perhaps, a disputed admission. A plea of guilty, even if made under improper pressure, can provide an insuperable barrier to a pardon although in such cases the Court of Appeal can treat the plea of guilty as a nullity and order a retrial. If the Home Secretary is in doubt about the probative value of new evidence he will refer it to the Court of Appeal to resolve any doubt. He is more likely to adopt this course when an appeal has already been dismissed. The Home Secretary does not want to appear to overrule the Court of Appeal – as would have been the impression created in the Luton murder case had he granted Cooper and McMahon a free pardon after three unsuccessful references to the Court of Appeal.

12 C.H. Rolph's book, *The Queen's Pardon*, cites a number of the better known cases. The most famous of these is that of Adolf Beck who, in 1905, was a victim of mistaken identity. Beck served seven years in prison before, after sixteen unsuccessful attempts to get his case re-opened, the identity of the real criminal was discovered. Beck was awarded an *ex gratia* payment of £4,000.

13 Other cases cited by C.H. Rolph include:–

(a) In 1928, Oscar Slater, who had been imprisoned for eighteen and a half years for a murder he did not commit, was awarded £6,000 'compassionate allowance'.

(b) In 1955, Emery, Thompson and Powers, who had been wrongly imprisoned for two years for assaulting a police officer, were awarded sums between £300 and £400.

(c) In 1965, the three Cross brothers, who had spent eight months in prison for robbery, were awarded sums between £800 and £1,000. They had been identified by a woman who said that she recognised them in a dimly lit street from a second floor window. A watch they were alleged to have stolen was later found in the possession of another gang.

(d) In 1974, Laszlo Virag, who had been wrongly identified and imprisoned for five years, was awarded £17,500.

(e) In 1977, Patrick Meehan was pardoned by the Secretary of State for Scotland after serving six years for a murder committed by another man, whose confession was disclosed only after his death. Meehan, whose case was the subject of a book by Ludovic Kennedy, was awarded only £7,500, presumably because of his 'way of life'.

14 We would also mention four recent cases in which JUSTICE was actively involved in securing the quashing of the convictions:–

(a) In 1974, Luke Dougherty was found guilty of stealing some curtains from the British Home Stores in Sunderland, having been identified in highly unsatisfactory circumstances by two shop assistants. At the time of the theft he was on a coach outing to Whitley Bay with 24 other persons, but only two of these witnesses were called at his trial. The Court of Appeal condoned some serious

irregularities in the identification procedures and, with the consent of Dougherty's counsel, said it could not take notice of twelve witness statements which JUSTICE had sent to the Registrar. Fifteen affidavits were later prepared and sent to the Home Secretary who, after a police investigation, referred the case back to the Court of Appeal. The conviction was duly quashed and Dougherty, who had served eight months before being released on bail, was awarded £2,000.

(b) In 1977, Tom Naughton served three years of a ten year sentence for armed robbery. His alibi that he had been arranging to buy a car at a garage many miles away was disbelieved. A mechanic, who had left the garage shortly afterwards, was eventually traced and recognised Naughton and his friend who had called at the garage with him. The Court of Appeal quashed the conviction on a reference by the Home Secretary and Naughton was awarded £10,000.

(c) Donald Benjamin was convicted in 1976 of raping a young woman whom he found baby-sitting in the flat of his girl friend, and sentenced to 12 years imprisonment. His defence was that she had willingly consented and that she had accused him of rape only because she was frightened of what her boy friend, who had convictions for violence, might do to her. She had confessed this to two friends who were sisters and who offered to give evidence. The younger sister, however, was threatened by the boy friend and refused to say anything when she went into the witness box. JUSTICE obtained statements from her and her mother. The Home Office ordered a police investigation which resulted in the case being referred to the Court of Appeal, which ordered a re-trial at which Benjamin was acquitted. He was awarded £9,000 compensation.

(d) Albert Taylor was released in 1979 after serving 5 years of a life sentence for the murder of his fiancée's younger sister. A police investigation brought to light some further important medical evidence and a strengthening of Taylor's alibi. This had partly depended on his assertion that about the time of the murder he had been at Peterborough Station and had heard the station clock click on the half-hour. The prosecution had produced evidence to show that it did not click, but the Chief Superintendent who conducted the investigation discovered that a fault in the mechanism had developed between the time of the murder and the trial.

A recommendation by the Chief Superintendent that the new evidence warranted a review of the conviction came to light only as the result of an enquiry by Taylor's welfare officer. This enabled his solicitors and JUSTICE to co-operate in the drafting of a petition to the Home Secretary, who referred the case back to the Court of Appeal. Taylor's conviction was quashed and he was awarded £21,000.

(e) More recently, John Preece, who had been convicted of murder on the subsequently discredited evidence of the Home Office forensic scientist, Dr Clift, has been awarded £70,000.

15 It appears from the above that, when one of the two conditions stated in paragraph 6 above is satisfied, the decision to grant compensation is automatic. The amount to be paid used to be decided by the Official Referee but more recently has been decided by the Chairman of the Criminal Injuries Compensation Board. The procedure for determining the amount of compensation payable is set out in Appendix C.

16 The 'exceptional circumstances', other than those described above, in which the Home Secretary may agree to pay compensation have never been publicly disclosed and lie entirely within his discretion. We can only assume that they include convictions quashed on appeal in which it can be shown that the applicant has suffered wrongful imprisonment through some gross irregularity or malpractice on the part of the prosecution. We shall discuss in a later chapter the general problem of convictions quashed on appeal, but we should like to cite two cases in which JUSTICE has

been involved and which disclose a serious and inexplicable inconsistency of policy.

17 In July, 1976, Roy Binns was found guilty of setting fire to a hospital Portakabin and sentenced to 19 months imprisonment. The evidence against him was a statement by a co-accused and an alleged admission which he hotly disputed. An unidentified finger-print had been found at the scene of the crime and this was not disclosed to the defence. Binns lodged a complaint and an investigation by a Chief Superintendent of Police resulted in a confession by the co-accused that he had given false evidence, the identification of the finger-print as that of a man called Alexandre and his subsequent confession to the crime. There could have been no clearer proof of Binns' innocence, and in December 1976 he was visited by the Chief Superintendent and told that he would be released in the New Year.

The Chief Superintendent reported to the Chief Constable recommending a free pardon and, because the investigation was prompted by a complaint and involved Alexandre, the Chief Constable sent the papers to the Director of Public Prosecutions as well as to the Home Office, where 'an official at junior management level' (as the Parliamentary Commissioner later established) accepted the advice of a legal assistant in the office of the Director of Public Prosecutions to take no action. Binns' solicitors were informed of this in May 1977. Binns was released on parole shortly afterwards. His solicitors applied for leave to appeal out of time on the basis of the Chief Superintendent's findings and the Court of Appeal quashed the conviction with the full agreement of the prosecution. His solicitors applied for compensation and were informed, in a brief letter, that the law made no provision for payment of compensation to persons whose convictions were quashed on appeal and that Binns' case did not justify an *ex gratia* payment.

Strong representations were later made to the Minister of State by Binns' M P with the backing of JUSTICE and, somewhat exceptionally, by the prosecuting solicitor in the case, but to no avail. The Minister would not even agree to consider paying compensation for the period between the Chief Superintendent's recommendation reaching the Home Office and Binns' release.

18 The case of James Stevens followed the same pattern but was treated in a very different way. Stevens was convicted of robbery with violence in March 1976 and sentenced to 5 years imprisonment. He had been taken in for questioning and then released on bail. Two weeks later he was arrested and charged on the strength of an oral admission and unsigned written statement he was alleged to have made before his release on bail. Three men had taken part in the robbery and the two victims both said that two of the robbers had called the third man (allegedly Stevens) by a name which he never used. The victims were at no time asked to identify him.

Stevens likewise complained to the police about the alleged admission, and the investigation resulted in a Chief Superintendent reporting to the Home Office, via the Chief Constable, his firm opinion that Stevens was innocent. Stevens was made aware of this. His solicitor applied for a free pardon or a reference to the Court of Appeal but, despite representations by his M P , the Home Office said it could not act on an opinion, even of a senior police officer. JUSTICE was consulted and advised and assisted with an application for leave to appeal out of time. The prosecution was less helpful than it had been in the case of Binns. It refused to disclose the statements taken in the course of the investigation and opposed the appeal, but Stevens' solicitors obtained permission to interview the two victims, who both stated categorically that he was not one of the robbers. In May 1977, the Court allowed the appeal, virtually without argument, on the main ground that, if Stevens' alleged admission to a robbery with violence had been genuine, he would not have been freed on police bail, and that the trial judge had failed to put this point to the jury. He had then served over three years of his sentence.

The Home Office agreed to pay him compensation without argument, but the arbitrator reduced the amount asked for to £8,500 on the ground that Stevens had been out of work at the time of his arrest. In the light of this case it is very difficult indeed to understand or justify the refusal of compensation in the case of Binns.

19 A similar inconsistency was shown in the treatment of Tony Burke whose conviction for murder was quashed in

1980 in the course of an ordinary appeal. Burke was a part-time club bouncer who was charged with murder after trying to prevent a guest from being beaten up. Witnesses who had not been called at the trial testified that he had been trying to break up the fight. He had spent 18 months in custody and was offered £7,000.

20 As an alternative to granting a pardon or referring a case to the Court of Appeal the Home Secretary, through the Parole Board, may release a prisoner before he has served his full sentence because he accepts that there were serious doubts as to his guilt. This is an obscure area of his jurisdiction, because such releases are rarely publicized. The most recent known cases are those of George Davies, and of Michael McMahon and David Cooper, whose convictions for the murder of a Luton sub-postmaster had been upheld by the Court of Appeal on four occasions. There is no doubt that these releases were brought about by public pressure of various kinds and it is reasonable to infer that there are many other prisoners about whose guilt there are substantial doubts but who have had to serve their sentences because no voices were raised on their behalf. In the absence of public pressure Home Office officials appear to be reluctant to interfere with convictions and the Home Office will never admit that they might have been obtained by police malpractice.

21 To the best of our knowledge no compensation is payable or has been paid in cases of premature release and this can be a source of real injustice. In a case in which JUSTICE was involved in its early days, four Pakistanis were convicted of the murder of a fellow countryman in an inter-family affray. He was knocked to the ground and killed by a blow to the head from a man who took the next plane to India and was never charged. The four convicted men had all been taking part in or watching the fight but two of them, who spoke no English, maintained that they had taken no part in it, and strongly protested their innocence. At the request of the Governor of Wormwood Scrubs, the Secretary of JUSTICE, with the help of a Pakistani barrister who spoke Urdu, undertook a long investigation and it was eventually discovered that the evidence of a vital witness had been mistranslated.

22 There are two Urdu words which sound the same, but have different meanings. One is 'to stand by' and the other is 'to strike'. Both at the magistrates' court and the trial the witness had said that when the victim was on the ground the two men were standing by, but at the trial this was interpreted as 'they struck him'. The Minister of State was pressed to recommend a free pardon. He refused to do so, but eventually agreed to sanction early releases. By this time the two men had been wrongfully imprisoned for seven years through no fault of their own, but they were not given a penny compensation.

23 In October 1978, Tracy Hercules was convicted of malicious wounding occasioning grievous bodily harm and sentenced to life imprisonment. He maintained that the wounding, which had caused the victim permanent injury, had been inflicted by another coloured man who had run off and had not been traced. There were serious irregularities in the evidence of identification and JUSTICE organised an appeal. The Court upheld the conviction but reduced the sentence to seven years. Information as to the identity and possible whereabouts of the real culprit was later obtained through an enquiry agent and passed to the police. Some months later Hercules was suddenly released on parole after he had served less than half of his sentence. No explanation was given and there was no basis for claiming compensation.

24 The clearest statement of the position taken by the Home Office in cases where the Home Secretary has not intervened is set out in a letter from the Minister of State dated 17 March 1978:—

> The law makes no provision for... payments to persons acquitted in the ordinary process of law, whether at trial or an appeal. If someone thinks he has grounds for compensation his legal remedy is to pursue the matter in the civil courts, by way of a claim for damages. In exceptional circumstances, however, the Home Secretary may authorise an *ex gratia* payment from public funds, but this will not normally be done unless the circumstances are compelling and there has been default by a public authority.

25 Here again there is no guidance as to what circumstances

the Home Secretary would regard as compelling or what he would regard as a default by a public authority. The adjudication is made by a Home Office official. No reasons are given for a refusal. There is no case law to guide the applicant's legal advisers. A claim for damages in civil courts is fraught with obstacles and difficulties without access to all the documents and records available to the Home Office.

26 The general position we have described, which covers only Home Office cases, is unsatisfactory in every respect:–

(a) If the prisoner petitions the Home Secretary claiming that he was wrongly convicted and a police investigation is ordered, it is a matter of chance or influence at what level the claim will be decided. In the case of Roy Binns, it was decided at junior management level that no action should be taken on the Chief Superintendent's recommendation. On the other hand, representations by an M P or by JUSTICE normally receive the personal attention of the Minister of State.

(b) Much depends on the zeal and objectivity of the investigating officer and the recommendation he makes.

(c) When the Home Office has been satisfied that there may have been a miscarriage of justice and that some action is called for, then further hazards await the petitioner in that either he may be granted a pardon, or his case may be referred to the Court of Appeal with no certainty that his conviction will be quashed, or he may be released before he has served his full sentence without compensation and, what is worse, without any indication of whether he is judged innocent or guilty.

27 Although it is not strictly a concern of this Committee we think it relevant to point out that, in its report *Home Office Reviews of Criminal Convictions*, JUSTICE recommended that petitions for free pardons based on new evidence should not be assessed by Home Office officials but by a member of a panel of experienced criminal lawyers with power to direct the investigation and make recommendations.

CONVICTIONS QUASHED ON APPEAL

28 As we have already indicated, the problem of compensation in cases other than those in which innocence has been established is a difficult one. The accusatorial system does not set out to establish innocence but to prove to the satisfaction of a properly directed jury that the defendant has committed the crime of which he had been accused. The primary role of the Court of Appeal is to determine whether the jury was properly directed as to the law and fairly directed as to the facts. Appeals can be based and allowed on material irregularities or points of law or misdirections of fact, or on a mixture of these ingredients.

29 The Court has a general power to quash a conviction on the grounds that in all circumstances the verdict of the jury was unsafe or unsatisfactory and a further power to quash a conviction after hearing new evidence and coming to the conclusion that, if the jury had heard it, it would have reached a different verdict.

30. All this means that it is very difficult to deduce from a judgment of the Court of Appeal whether a successful appellant is factually guilty or innocent of the crime of which he was convicted, or who was to blame if he was wrongly convicted. Judges sitting in that Court are prone to mute their criticisms of their fellow judges. More important, they are reluctant to comment on police malpractice even if it is one of the reasons for allowing the appeal.

31 It would therefore be unfair to base awards of compensation solely on the published judgment of the Court of Appeal. The quashing of a conviction on a material irregularity, or a misdirection in law too serious to justify invoking the proviso, would require the payment of compensation to a man who was clearly guilty. On the other hand the quashing of a conviction on a point of law could conceal the deliberate framing of an innocent man.

32 Foreign jurisdictions which grant compensation to persons whose convictions are quashed on appeal operate the

inquisitorial system which is concerned to ensure that all the facts of an offence and the part played by the accused are all brought before the Court. In effect, these jurisdictions require proof of innocence before payment of compensation, a not uncommon formula being: 'provided no suspicion remains'.

33 It would clearly be impracticable to ask the Court of Appeal to provide two judgments – one for public consumption and one for a factual assessment of guilt or innocence and the extent to which the appellant was the author of his own misfortune. We therefore think that the latter task should be entrusted to a specially appointed tribunal. It should be open to any successful appellant to apply to the tribunal for compensation to be determined and assessed in accordance with the guidelines set out in paragraph 46 in this report.

34 A difficulty we foresee is that in many successful appeals to the Court of Appeal the appellant is represented by counsel only. The trial solicitor, who probably knows most about the facts of the case and the totality of evidence available, may well have fallen out of the picture and it will be necessary for him, or another solicitor of the appellant's choice, to be given legal aid for the purpose of presenting a claim for compensation, and if necessary to pursue an appeal against the decision of the single member of the proposed tribunal.

ACQUITTALS AT TRIAL

35 Although for practical reasons we make no general recommendations relating to acquittals at trial we nevertheless think it right to call public attention to the serious hardships and injustices which can be suffered by innocent persons who are remanded in custody for varying periods of time and are subsequently acquitted when they come up for trial.

36 Such acquittals can arise from a number of different causes including the following:–

(i) the prosecution may offer no evidence because new evidence pointing to the accused's innocence has come to light or the available evidence has been re-examined and considered too weak to justify a trial;

(ii) the prosecution may decide not to proceed because one of its vital witnesses is no longer available;

(iii) the trial judge may of his own volition, or on a submission by the defence, direct the jury to acquit on the grounds of insufficient evidence;

(iv) the judge may stop the trial and direct the jury to acquit because one or more of the prosecution witnesses have been clearly shown to be giving false evidence;

(v) for a variety of reasons the jury may find the accused not guilty.

37 Frequently in respect of (i) (iii) and (iv) above, the accused person has suffered wrongful imprisonment through some error, or default, or excess of zeal on the part of authority. Unless, therefore, he has brought suspicion on himself by his own conduct he should be entitled to a statutory remedy; for during the period of his remand in custody he may well have lost his job, his home and his family. In theory he can bring a civil action for wrongful arrest and detention but this is a difficult and usually unrewarding exercise and the action will be vigorously contested by

authority. If, therefore, there is to be a statutory scheme for compensation, we would recommend bringing such cases within its scope, as is the case in West Germany, Sweden, Holland and other jurisdictions. This might bring about the exercise of greater care in the framing and pressing of charges.

38 We would like to be able to recommend that acquittals by a jury should automatically be brought within the scope of any scheme, but because of the nature of our trial system we regard the obstacles as formidable. An acquittal by a jury does not necessarily betoken innocence or indicate that the prosecution should not have been brought. A jury may be prejudiced or influenced by considerations other than the evidence produced or not fully informed of all the facts of the case.

39 Any tribunal would thus be presented with an enormous task if it had to assess compensation in the thousands of acquittals after remand in custody which occur every year. To overcome this difficulty we suggest that in meritorious cases the trial judge should be able to certify, on application by counsel, that a successful defendant should have a claim for compensation considered by the compensation tribunal, and that, if the judge declines or no application is made at the trial, the tribunal should be able to consider an application supported by counsel's written opinion.

40 We are fully aware that our proposals relating to convictions quashed on appeal and to acquittals at trial will entail a formal recognition of the potential difference between a verdict of not guilty and factual innocence, corresponding to the Scottish verdicts of not guilty and not proven. At present anyone who is acquitted at a trial or has his conviction quashed by the Court of Appeal is entitled to claim for all purposes that his innocence has been established. Anyone who publicly suggests that he was lucky to escape conviction may lay himself open to an action for defamation. Our proposals may therefore cause concern on the grounds that they will undermine respect for the verdict of a jury.

41 Our answer to this is threefold. First, trial judges already have the power to cast doubts on the justice of an acquittal by a refusal to award costs or an order to make a contribution to legal aid costs. Secondly, we propose that all applications for compensation should be dealt with in private and the adjudications published anonymously unless the applicants desire otherwise. Thirdly, to be credible and acceptable any scheme of awarding compensation must be based on the factual realities of a situation rather than on legal fictions.

CHAPTER 4

OUR PROPOSALS

42 For reasons which will have become apparent, we recomend that it should no longer rest with the Home Secretary to decide who is or who is not entitled to receive compensation. To summarize them briefly:–

(a) the making of the decisions and the considerations which prompt them are shrouded in secrecy:

(b) the reports on which they are based are not made available to the claimant or his legal adviser;

(c) they may involve an assessment of the extent to which the prosecution or the police or the administration of the court is responsible for the wrong conviction and it is neither right nor fair that this should be entrusted to the Minister who is so heavily involved in the administration of criminal justice and the conduct of the police.

43 We also take the view that the question of eligibility for compensation should not be decided by the appellate courts as they are concerned with narrower issues than those which may be relevant to the issue of compensation.

44 We therefore recommend that all claims for compensation should be made to and decided by an independent tribunal whose nature and powers we describe in succeeding paragraphs. A claimant who has been granted a free pardon, or whose conviction has been quashed by the Court of Appeal on a reference by the Home Secretary, should have an automatic entitlement, as in effect he does at present. An ordinary appellant whose conviction is quashed by the Court of Appeal should have an unrestricted right to apply for compensation, and a person acquitted at trial a conditional right as suggested in paragraph 39 above.

45 We further think that a convicted prisoner who has had part of his sentence remitted by the Home Secretary on the grounds of serious doubts about the rightness of his conviction, or who, with the consent of the Home Secretary, is given early parole for the same reason, should be entitled to apply for compensation, and that the tribunal should have the power to call for all the papers in the case. It can be

fairly argued that, if the new evidence or the result of a police investigation is capable of raising doubts which induce the Home Secretary to use his executive powers, a jury in possession of the new material might not have convicted in the first place.

IMPRISONMENT COMPENSATION BOARD

46 We propose that the tribunal should be called the Imprisonment Compensation Board and function on lines similar to those of the Criminal Injuries Compensation Board. It should draw up and publish guidelines setting out the circumstances on which compensation may be withheld or reduced and the heads under which it may be claimed. The guidelines we suggest below are in the main those in use by the C I C B. They are not intended as a code, as it is clearly desirable that the Board should be flexible in its approach to individual cases:–

(a) After the Board has accepted a claim as falling within its jurisdiction and being worthy of consideration it may refuse or reduce compensation if it considers that:–

(i) a conviction has been quashed on grounds that the Board regard as being a mere technicality;

(ii) it would be inappropriate in view of the imprisoned person's conduct in respect of the matters which led to the criminal proceedings;

(iii) the applicant has failed to give reasonable assistance to the Board in its efforts to assess compensation.

(b) In respect of paragraphs a (i) and a (ii) above the Board will normally only consider evidence which was advanced at the trial or at the hearing of the appeal, except that it may consider and take into account matters which have come to light in the course of a subsequent investigation.

(c) Where the applicant's claim is accepted as coming within the provision of the scheme the Board will grant compensation for:–

(i) expense reasonably incurred in securing the quashing of the imprisoned person's conviction;

(ii) loss of earnings by the imprisoned person or any dependant person where such loss is a direct consequence of the imprisonment;

(iii) any other expenses or loss which are reasonably incurred upon imprisonment either by the imprisoned person or any dependant person;

(iv) pain suffering and loss of reputation suffered by the imprisoned person or by the imprisoned person's dependants.

The Board will reduce any award by the amount of any other compensation or damages already received by the claimant.

(d) Compensation will not be paid if the assessment is less than £250.

(e) A person compensated by the Board will be required to undertake that any damages, settlement or compensation he may subsequently receive in respect of his wrongful imprisonment will be repaid to the Board up to the amount awarded by the Board.

ADMINISTRATION

47 (a) The Compensation Scheme will be administered by the Imprisonment Compensation Board, assisted by appropriate staff. Appointments to the Board will be made by the Lord Chancellor and in Scotland by the Lord President of the Court of Session. The Chairman and members of the Board, who will be legally qualified, will be appointed to serve for five years in the first instance, and their appointments will be renewable for such periods as the Secretary of State considers appropriate.

(b) The Board will be financially supported through a grant-in-aid out of which payments for compensation awarded in accordance with the principles set out below will be made. Their net expenditure will fall on the votes of the Home Office and the Scottish Home and Health Department.

(c) The Board will be entirely responsible for deciding what compensation should be paid in individual cases and its decisions will not be subject to ministerial review or appeal save to the High Court by way of judicial review. The general working of the scheme will, however, be kept under the review by the Government and the Board will submit annually to the Home Secretary and the Secretary of State for Scotland a full report on the operation of the Scheme together with its accounts. The report and accounts will be open to debate in Parliament.

PROCEDURE FOR DETERMINING APPLICATION

48 (a) The initial decision of the amount of any compensation awarded will be taken by one member of the Board. Where an award is made the applicant will be given a breakdown of the assessment of compensation except where the Board consider this inappropriate. Where an award is refused or reduced reasons for the decision will be given. If the applicant is not satisfied with the decision he will be entitled to a hearing before three members of the Board other than the member who made the initial decision.

(b) Procedure at hearings will be informal and hearings will generally be in private. The Board will have discretion to permit observers, such as representatives of the press, radio and television, to attend hearings provided that written undertakings are given that the anonymity of the applicant and other parties will not in any way be infringed without the consent of all parties to the proceedings. The Board will have power to publish information about its decisions in individual cases: this power will be limited only by the need to preserve the anonymity of applicants and other parties.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1 There are no statutory provisions in the United Kingdom for the payment of compensation to persons who have been wrongfully imprisoned, such as are required under Article 14(6) of the U N International Covenant on Civil and Political Rights or are in force in other member countries of the Council of Europe (paragraph 5).

2 It is neither right nor appropriate that decisions to grant compensation should rest with the Home Secretary if only because he is so heavily involved in the administration of criminal justice and the conduct of the police (paragraph 42).

3 In the light of the above we recommend that all claims for compensation should be determined, in respect of both eligibility and quantum, by an independent tribunal to be called the Imprisonment Compensation Board. The Board would be similarly constituted and operate on broadly the same principles as the Criminal Injuries Compensation Board (paragraph 46).

4 Persons who have been granted a free pardon under the prerogative of mercy or whose convictions have been quashed by the Court of Appeal on a reference by the Home Secretary would have an automatic entitlement to compensation as they effectively have under existing provisions for *ex gratia* payments (paragraph 44).

5 Persons whose convictions have been quashed on appeal should be automatically entitled to apply for compensation, but the Board would be entitled to refuse or reduce compensation if it considered that the conviction had been quashed on a mere technicality, or that it would be inappropriate in view of the claimant's conduct in respect of the matters which led to the criminal proceedings (paragraph 46 (i)).

6 In respect of the above, the Board would be entitled to take into account matters which had come to light in the course of a subsequent investigation. (paragraph 46(2).

7 Persons committed for trial in custody and subsequently found not guilty or discharged for any of the reasons indicated in paragraph 36 should be entitled to apply for compensation if the trial judge grants a certificate or if counsel provides a written opinion in support of the application (paragraph 39).

8 A convicted person who has had part of his sentence remitted by the Home Secretary because of serious doubts about the rightness of his conviction should be entitled to apply to the Board for compensation and the Board should have power to call for all the papers in the case (paragraph 45).

9 In assessing quantum, the Board should award compensation under the headings in paragraph 46(3).

10 Legal aid should be available to claimants for the presentation of claims and for appeals against refusals by a single member of the Board (paragraph 34).

APPENDIX A

SCHEMES FOR COMPENSATION IN OTHER COUNTRIES

Many jurisdictions operate schemes to compensate people who have suffered as a result of the faulty functioning of the system of criminal justice. These schemes differ widely as to the scope of compensation available and in the way in which such compensation is assessed.

Some jurisdictions award compensation only for imprisonment following an erroneous conviction. These include Italy, Portugal, Spain, Mexico, Brazil, California, North Dakota, Wisconsin and the United States in its federal jurisdiction. Other jurisdictions go further and also compensate for detention in custody pending final disposal of the case. These include Sweden, Norway, Denmark, Austria, France, West Germany, Holland, Belgium, Hungary and some of the Swiss Cantons. The detailed provisions of some of the schemes operating are set out below:

WEST GERMANY

As a result of federal legislation which came into force on 8 March, 1971, compensation is available from the State Treasury in three situations in which an individual may have been inappropriately dealt with by the system of criminal justice –

(a) Where a person has received a sentence which is subsequently quashed or reduced on appeal.

(b) Where a person has suffered damage by being detained in custody pending trial or being kept in custody as a result of some other prosecution measure, and he is acquitted or the proceedings against him are discontinued.

(c) Where the pre-trial criminal process is discontinued at the discretion of the Court or the State Attorney's Office.

In each of these three situations the accused person has a right to compensation but only insofar as it is equitable for him to receive it in the circumstances of the case. Compensation is denied where the accused person has by some action of his own caused the prosecution either deliberately or through gross neglect. Compensation may also be refused if the accused has kept silent about mitigating circumstances or has made a confession which has subsequently proved to be false, or if the proceedings were discontinued because of the accused's unfitness to plead or because of some technicality.

Compensation is available for both pecuniary and non-pecuniary loss and is assessed by the court of trial either at the conclusion of the proceedings or at some later date; there is no limit to the amount of compensation that can be awarded. Any person who is maintained by the accused person also has a claim for compensation. There is a full right of appeal from the decision on compensation.

In 1974, the last year for which figures are available to us, 1300 people received compensation and the total paid out was 2½ million deutschmarks (about £0.6m). German lawyers who have been in touch with members of JUSTICE have expressed the opinion that their legislation is clear in its provisions and satisfactory in its operation.

SWEDEN

In Sweden, as a result of a law that came into operation on 1 July, 1974, a person who has been detained in custody pending trial can claim compensation from the government if:

(a) he has been found not guilty at his trial; or

(b) the charges against him are withdrawn at the trial; or

(c) the preliminary investigations are concluded without legal proceedings being instituted.

A person who has served a prison sentence is also entitled to compensation from the government if his conviction is quashed on appeal without a new trial being ordered or if a reduced sentence is imposed.

A person has no right to compensation if he has caused the situation which led to his being taken into custody, or if he has destroyed evidence, or in some other way made investigation of the crime he is accused of committing more difficult.

Compensation covers both pecuniary loss and non-pecuniary loss and there is no limit to the amount of compensation that can be paid. Any amount of compensation that a claimant has the right to claim from some other source is deducted from the amount of compensation otherwise payable. If the claim exceeds 100,000 kroner (about £10,000), then compensation is decided by the government instead of the Attorney General.

In 1975 approximately 160 people were acquitted after being detained in custody, and a further 72 had their convictions quashed on appeal. Of these 232 persons, 55 received awards of compensation totalling 120,243 kroner (about £12,024) – up to June 1980 the Attorney General had received 580 petitions requesting compensation. The number of petitions rose each year, except 1977, when the same number was received as in the previous year. The number of cases rose from 11 cases in 1974, to 117 cases in 1979 and in the first five months of 1980 there were 105 cases. The total amount of compensation paid

out up to the end of 1979 was 1,300,000 Swedish kroner (about £130,000).

Under the Swedish legislation, compensation may be paid for expenses, loss of earnings from employment, interference with business activities, or the suffering caused. Compensation payments will cover losses caused by loss of liberty which can be verified by the person concerned. Relatively small sums are paid for compensation for suffering. The 'tariff' operating in mid-1980 seems to have been about 1,600 kroner (about £160) for each month's loss of liberty. It is considered that if the loss of liberty has led to great publicity or arisen from charges of gross or outrageous crime, the rate of compensation will be greater. On the other hand, an 'old lag' might get less than the usual rate of compensation.

It should be noted that payment is only made for loss of liberty and does not compensate a person for being mistakenly suspected of a crime nor is compensation payable for mental or physical illness arising from circumstances of this kind.

FRANCE

By a law passed in 1970 compensation may be awarded to persons detained in custody pending trial and to those recognised as innocent after being convicted. In the case of detention pending trial the person charged does not have to prove his innocence. The accused person may indeed have escaped conviction by being given the benefit of the doubt. However he must show that detention in custody has resulted in 'obviously abnormal damage of particular severity'. This qualification greatly restricts the number of people to whom compensation is paid; for example in 1973 54,000 people were detained in custody pending trial, and of these 1,037 were acquitted. However only about four acquitted persons per year receive compensation.

If compensation is granted it is not limited to financial loss but covers all non-pecuniary loss suffered by the accused as well. There is no limit on the amount of compensation that can be awarded. The average sum awarded is about 56,000 francs (about £560) per person. In respect of persons who claim to have been wrongfully convicted the conditions are so restrictive that out of approximately sixty applications a year, only one or two are successful.

Compensation for detention pending trial is assessed by a special commission of three judges, whereas compensation for a wrongful conviction is awarded by a court other than the one which tried the convicted person. The court dealing with compensation must be of equal status to the trial court.

Compensation may be claimed not only by the person who has been

wrongly convicted, but also by his spouse, relatives or descendants. If the applicant so requests, the decree declaring his innocence will be displayed in the place where he lived, and advertised in newspapers chosen by the court. Legal aid is available to pursue a claim for compensation.

HOLLAND

Compensation can be granted to persons detained in custody who are ultimately acquitted, and for persons whose sentence is annulled after it has been fully or partly served. Compensation is available where a case is disposed of without any punishment having been imposed.

Compensation is available for both pecuniary and non-pecuniary loss and there is no limit to the amount of compensation that can be awarded. Compensation is available for arrest by the police as well as for actual detention in custody. An application for compensation must be made within three months of the close of the case. The applicant has a right to be heard and to have legal representation. So far as possible, the court dealing with the claim for compensation will have the same composition as the trial court. There is a full right of appeal against all decisions on compensation.

Compensation is awarded where the court is of the opinion that, taking all the circumstances into account, it is fair and reasonable to make an award. The applicant is not required to prove his innocence, but he will not automatically get compensation in every case covered by the criteria set out above.

A claim for compensation may be made by the dependants of the person innocently detained as an alternative to a claim by the person directly concerned. If the claimant dies after having submitted an application or lodged an appeal, compensation is paid to his heirs.

COUNTRIES OUTSIDE EUROPE

The countries mentioned above all follow the inquisitorial system. The difference in procedures in the accusatorial system makes it more difficult for Commonwealth countries to overcome the problem of compensation for wrongful imprisonment. Nevertheless the problem is being studied and the information we have received from Australia is of some interest, though as yet no satisfactory statutory scheme has been devised.

SOUTH AUSTRALIA

The Criminal Law and Penal Methods Reform Committee of South Australia has recommended that compensation should be paid to persons who are acquitted after having been detained in custody

pending trial. The Committee recommends that compensation should be assessed by the judge after acquittal if he considers that on the balance of probabilities the defendant is innocent and has suffered loss amounting to hardships. Information is not yet available as to whether this aspect will be implemented.

WESTERN AUSTRALIA

The Law Reform Commission of Western Australia embarked some two years ago on a long-term study of the problem, and collated a great deal of information about provisions in other countries. It very generously made this information available to us and we have drawn on it extensively in this chapter of our report. The Commission then circulated a discussion document to leaders of opinion in the legal profession, the churches, the police and the social services, and it has very helpfully sent us copies of some of the replies it received: these are summarized in Appendix 3. Unfortunately, the Commission's study had to be adjourned in favour of other more pressing matters, and it is not likely to report for some while. We have, however, been told that it is likely to recommend that compensation should be granted only in cases where there are substantial indications of innocence.

OTHER AUSTRALIAN STATES

There are no formal compensation provisions in other Australian States, and *ex gratia* payments were rare in the twenty years prior to 1970. No *ex gratia* payments were made in Tasmania or it is believed in Victoria, Queensland or Western Australia. In New South Wales, there has only been the case of McDermott, who in the 1940's served some years of a life sentence for murder until a Royal Commission found the evidence against him to be unsatisfactory. He was released and given an *ex gratia* payment of £1,000.

SUMMARY OF RESPONSES TO WESTERN AUSTRALIA LAW REFORM COMMISSIONS QUESTIONNAIRE, *COMPENSATION FOR PERSONS DETAINED IN CUSTODY.*

In November 1976 the Western Australian Law Reform Commission published a working paper, concerning *Compensation for persons detained in custody who are ultimately acquitted or pardoned.* A questionnaire was sent to a number of interested individuals, institutions and pressure groups, including lawyers, the police, the probation service, the church and the Social Action Lobby. The system of justice in Western Australia is akin to our own in being based on common law and the adversarial system. Their responses to certain questions have been summarised by this Committee and are set out below:—

(a) All were in favour of a scheme for compensation being implemented whether persons were ultimately acquitted at trial or on appeal or by way of pardon. A typical comment was:— For the balance to be maintained between rights of individuals and society's expectation of having the law enforced effectively, an effective system of compensation must exist.

(b) The majority favoured compensation under specified heads of damage, but the representative of the probation service thought full tort damages should be given.

(c) The majority felt other benefits (such as unemployment benefits) should be taken into account when calculating the quantum of the award; but the Social Action Lobby did not feel even this should be brought into the reckoning.

(d) A majority were against any limit to the amount of any award, but a solicitor and one of the police responses were in favour of some maximum limit.

(e) A majority were in favour of allowing categories of persons in addition to the acquitted claimant, to claim. One of the police to respond disagreed. A typical comment was:— It is essential that those financially dependant should be able to claim. It would be unwise to deny the right to claim for situations may arise where it is equitable and in accordance with natural justice that they should be able to do so. Similarly a majority felt representatives of a deceased claimant should be able to claim on behalf of the estate.

(f) A majority were against claimants being required to establish their innocence. The police and the solicitor thought this

should be a precondition. A typical comment was:– Such a person should not be placed in the position of re-establishing his innocence in order to obtain compensation as this leads to multiplicity of trials and may lead to (seemingly) inconsistent results. To grant compensation is not to imply malicious prosecution (for which there is a remedy in tort).

(g) A majority were in favour of some bars to compensation (but not one of the police responding) such as where a claimant had contributed to his own misfortune; but in general these should not be absolute bars but a factor in assessing compensation.

(h) On the tribunal to decide the claim, the responses were evenly split between an independent tribunal, the trial judge, and other judges or courts.

(i) In general it was felt that an improvement in the procedures for granting bail would alleviate the problems of compensation for pre-trial detentions.

HOME OFFICE LETTER TO CLAIMANTS

EXPLANATORY NOTE
EX GRATIA *PAYMENTS TO PERSONS WRONGLY CONVICTED OR CHARGED:*
PROCEDURE FOR ASSESSING THE AMOUNT OF THE PAYMENT

1 A decision to make an *ex gratia* payment from public funds does not imply any admission of legal liability; it is not, indeed, based on considerations of liability for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages.

2 Subject to Treasury approval, the amount of the payment to be made is at the direction of the Home Secretary, but it is his practice before deciding this to seek the advice of an independent assessor experienced in the assessment of damages. An interim payment may be made in the meantime.

3 The independent assessment is made on the basis of written submissions setting out the relevant facts. When the claimant or his solicitor is first informed that an *ex gratia* payment will be offered in due course, he is invited to submit any information or representations which he would like the assessor to take into account in advising on the amount to be paid. Meanwhile, a memorandum is prepared by the Home Office. This will include a full statement of the facts of the case, and any available information on the claimant's circumstances and antecedents, and may call attention to any special features in the case which might be considered relevant to the amount to be paid; any comments or representations received from, or on behalf of, the claimant will be incorporated in, or annexed to, this memorandum. A copy of the completed memorandum will then be sent to the claimant or his solicitor for any further comments he may wish to make. These will be submitted, with the memorandum, for the opinion of the assessor. The assessor may wish to interview the claimant or his solicitor to assist him in preparing his assessment and will be prepared to interview them if they wish. As stated in paragraph 2 above, the final decision as to the amount to be paid is a matter entirely for the Home Secretary.

4 In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the conviction and/or loss of liberty, and any or all the

following factors may thus be relevant according to circumstances:–

Pecuniary loss
Loss of earnings as a result of the charge or conviction.
Loss of future earning capacity.
Legal costs incurred.
Additional expense incurred in consequence of detention, including expenses incurred by the family.

Non-pecuniary loss
Damage to character or reputation.
Hardship, including mental suffering, injury to feelings and inconvenience.

The assessment will not take account of any injury a claimant may have suffered which does not arise from the conviction (eg as a result of an assault by a member of the public at the scene of the crime or by a fellow prisoner in prison) or of loss of earnings arising from such injury. If claims in respect of such injuries are contemplated, or have already been made to other awarding bodies (such as the courts or the Criminal Injuries Compensation Board), details should be given and included in the memorandum referred to in paragraph 3.

When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation. In submitting his observations a solicitor should state, as well as any other expenses incurred by the claimant, what his own costs are, to enable them to be included in the assessment.

5 In considering the circumstances leading to the wrongful conviction or charge the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed to by the accused person's own conduct. The amount offered will accordingly take account of this factor, but will not include any element analogous to exemplary or punitive damages.

6 Since the payment to be offered is entirely *ex gratia*, and at his discretion, the Home Secretary is not bound to accept the assessor's recommendation, but it is normal for him to do so. The claimant is equally not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstances of his prosecution or conviction, or his detention in either or both of these connections.

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