

Criminal Practice Committee

Annual Report

For the year ended 31 December 2014

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About the criminal practice committee

The Criminal Practice Committee (CPC) was established in 1988. It brings together all those professionally involved in the criminal justice system at a senior level to progress matters of importance to the operation of the criminal justice system and to inform the Executive. The Committee has two primary functions:

- to monitor and progress action of issues relevant to the operation of the criminal justice system; and
- to provide a forum for discussion and comment on legislative and policy developments.

Membership

Members of CPC include judges, legal practitioners, registrars and Ministry of Justice policy advisers. It also includes representatives from the New Zealand Law Commission, Law Society, Crown Law and New Zealand Police (see *Appendix 1* for a list of current members).

Justice Young retired from his position as chairperson of the CPC. Justice Lang assumed the role of chairperson in June 2014.

Operational matters considered

In 2014, the Committee monitored and considered a number of operational issues, including:

Criminal rules and expert witnesses in criminal cases`

The Committee discussed issues around the use of experts in criminal cases.

- It is customary in criminal cases that none of the experts involved in the case are shown the Code of Conduct for expert witnesses. The High Court Rules dealing with experts do not apply in criminal cases. It was noted that courts still allow partisan experts, which can be a problem, and that the Crown can attack defence experts on methodology, without asserting a position on theirs.
- Various members agreed to approach the Institute of Judicial Studies, the Criminal Bar Association and the Law Society to suggest that seminars be held on scientific method and the obligations of expert witnesses in criminal trial.
- Members discussed how the Criminal Procedure Rules might be amended to deal with expert witnesses in criminal cases. It was suggested that a sub-committee of the Rules Committee could be established to deal with these matters. This led to the establishment of the Criminal Rules Sub-Committee, chaired by Justice Ronald Young.
- Mr Sainsbury approached the Legal Services Agency to investigate developing a list of approved expert witnesses in order to expedite legal aid grants for such witnesses and minimise trial delays with trials.

Legal Aid Services

- Expert witnesses: The CPC considered the idea of an expert witness list proposal. Legal Aid Services does not pay experts directly but rather through lead providers. Legal Aid Services was concerned that they cannot compile a list of pre-approved experts because each expert must be approved on a case-by-case basis. The issue the list would seek to remedy was the length of time it takes for legal aid applications for experts to be approved. Legal Aid Services was to investigate setting up a process to record the name of experts, the kind of expertise they offer, the rate they charge and other matters. There could be a directory of expert witnesses that a commercial provider would charge people to access. Mr Neil Cooper attended the November 2014 meeting to discuss this issue (see below under Presentations Received by the Committee).
- Review of fixed fees: Legal Aid Services was looking to conduct a review of fixed fees in 2014. One of the matters it would examine would be whether the new CPA regime creates the risk of any identifiable fee-driven consequences such as encouraging the election of trial by jury.
- Criminal appeals: The Court of Appeal has noted that the decision to decline legal aid in some circumstances creates false economies. Criminal appellants who lose legal aid after an interim grant often persist with their appeals. In many cases the appellants are in custody and seek an adjournment of their appeals because they are not prepared for the allocated fixture. The commitment of valuable judicial and registry resources to these appeals far outweighs the cost of the fixed fee (\$1700) that counsel would have received had legal aid been granted.

Questioning of young persons/nominated persons

The CPC considered while a young person has a choice between a nominated person and a lawyer, he or she usually chooses a nominated person, even in cases of very serious crime. There is no training for nominated persons. The Children's Commissioner reviewed a number of video interviews of young persons. Some police officers have adopted a "tick-box" approach to ascertaining whether the younger person had received legal advice. It also appeared that there was no legal funding for free legal advice for young persons. The police standard form did not make it clear to young persons that they could choose both a lawyer and an advocate.

In-Court Media Guidelines:

The CPC considered that the CPC drafted guidelines in 2012. The guidelines were to be reviewed three years after their introduction. The applicability of the rules was to be re-examined in light of the subsequent production of guidelines by the police and Crown Law. The issue was raised that it would be harder to change rules than practice notes.

Criminal Procedure Rules

The Criminal Rules Sub-Committee was to look at consolidating practice notes into criminal rules where possible. That was to include rules relating to sentencing and interpreters. The CMM and TCM forms were being reviewed in consultation with the profession. The Sub-Committee was also looking at guidelines instead of practice notes wherever possible.

Protocol cases

Protocol cases have changed the composition of the High Court's work. The High Court is now hearing more sexual cases. These have increased from 19 per cent of the workload to 27 per cent. These include areas targeted by the protocol, including cases involving multiple defendants, "stranger rapes" and serious sexual offending over a lengthy period of time accompanied by physical violence. Drug cases have increased from 17 per cent to 25 per cent. The High Court generally retains cases with more than 10 defendants.

- *Protocol decisions.* Protocol cases cause scheduling problems because they come to the High Court at irregular times. Protocol decisions should be made at or shortly after case review hearing in the District Court. This is usually about two months after arrest. Sometimes it may take six or seven months before the decision is made to hear the case in the High Court. When a protocol case comes to the High Court it is immediately allocated a trial review hearing at which it is allocated a trial date. Usually it is not possible to allocate a date sooner than nine months away. This leads to a significant disparity between the delay before trial in category 4 cases and that relating to cases retained under protocol.
- *The Protocol Review Committee.* The Protocol Review Committee (Lang J, Brewer J and Judge Davidson) would review legislation enacted during the last 12 months and make recommendations to the Chief High Court Judge and Chief District Court Judge regarding new offences that should be considered for inclusion in the protocol.
- *Sentence indications.* Justice Winkelmann and Judge Doogue issued a public statement that in protocol cases sentence indications would be given in the court of trial as determined under the protocol. They were working with the Ministry to ensure that processes were in place to allow this to happen smoothly.

Jury trials in the District Court

- The jury trial workload in the District Court was at the lowest it had been since 2007. However, there has been a marked increase in new jury trial business in Manukau, Rotorua, Napier and Nelson District Courts. Otherwise there was a 21 per cent decrease in the number of new jury trials nationally. Peaks could be explained by large police drug operations and were monthly aberrations.

- At the same time, the length of the average trial had expanded from two days to between three and five days. Lengthy evidential interviews being played and counsel not getting to the point contributed to this problem. Another significant contributor to the increase in length of trials was the number of trials that required interpreters who must interpret consecutively.

Case review hearings

Case review have been of little utility in category 4 cases. At first call in the High Court a trial date is allocated and issues such as name suppression and fitness to plead are dealt with. A case review hearing six or seven weeks later serves little purpose as counsel are unable to indicate whether pre-trial issues will require determination because briefs of evidence will not yet have been served.

- When both parties agree that the case review hearing will serve little purpose, the Judge who presides at first call may exercise his or her discretion under s 58(1) of the Criminal Procedure Act 2011 to waive the requirement for a case review hearing.
- Case review hearings are important events in the District Court because they have replaced status hearings. Case review hearings in the District Court dispose of 73 per cent of cases

Criminal Appeals in the Court of Appeal

Justice Wild informed the CPC that fewer criminal appeals are now coming to the Court of Appeal. Instead of dealing with around 320 appeals per year, the figure was around 250 between October 2013 and October 2014. The Court of Appeal is now processing appeals faster than the criminal bar can prepare them.

High Court criminal statistics from 2014

The CPC was provided with a copy of statistics for High Court criminal cases. The number of High Court criminal trials has reduced by about 25 per cent nationwide. Despite a reduction in the number of trials, the total number of hearing days has not reduced proportionately. On a major trial, where there are expert witnesses and forensics involved, it is unrealistic to schedule the trial earlier than 10 to 11 months from arrest. The High Court aims to have most trials concluded within one year of arrest.

- The average length of trial has increased from 10 days to 13 days.
- Pre-CPA trials made up 38 per cent of the High Court's work
- CPA trials made up 62 per cent of the workload.
- Category 4 cases made up 42 per cent of trials.
- Protocol cases make up 58 per cent of trials.
- Guilty pleas dispose of 48.6 of cases. Sentencing indications have likely contributed to this phenomenon.

Briefing on Law Commission projects

The Committee was briefed on the work of the Law Commission including:

- The review of the Crown Proceedings Act 1950 is still ongoing.
- The review of burial and cremation law will probably result in a draft bill.
- The review of pecuniary penalties has been published.
- The review of the Judicature Act produced the Judicature Modernisation Bill.
- The review of contempt of court is underway. The Law Commission took the unusual step of asking for a contempt bill to be drafted at an early stage simply as a discussion document. The Law Commission aimed to consult with the judiciary before Christmas 2014.

Raising matters for consideration by the CPC

The CPC was asked to consider how matters should find their way on to the agenda of the CPC. Matters may come from CPC members proactively looking for issues, as well as issues referred from judicial common rooms and from the profession. Members were to actively seek and gather information from the networks they represent so that the issues can be raised with the CPC.

Legislation and policy development

In addition to considering operational issues of concern, the Committee discusses policy and legislative developments. In 2014, the Committee discussed the following:

- **Criminal Procedure Act 2011**
- **Criminal Procedure Amendment Bill:** the Committee discussed potential problems with the procedure to be followed where Category 1,2 and 3 charges accompany Category 4 charges. However the Bill had already been through the Select Committee stage when the Committee considered it.
- **Criminal Procedure (Mentally Impaired Persons) Act 2003:** the Committee was informed that reform of this Act is not a Ministerial priority. Reform of the CP(MIP) Act has formally been on the work programme for several years now. The Minister ranked reform of the CP(MIP) Act as the 15th priority out of 16 legislative projects.
- **Judicature Modernisation Bill**
- **Jury Rules 1990:** There was a proposal to amend the Jury Rules to allow for the use of single panels for the District and High Courts, remove the requirement for a registrar's signature on a summoning form, enable electronic pre-balloting and mandate the collection of jurors' electronic contact details. The Law Society supported all the proposals with the caveat that when using pre-balloting, there must be a sufficient surplus of jurors balloted to account for no-shows on the day.

- **Public Safety (Public Protection Orders) Bill:** This Bill was to have its second and third readings before the election. The Bill allowed for civil orders to be made detaining an offender that has served his or her sentence in a secure residence on prison grounds. The Bill received royal assent on 11 December 2014 as the Public Safety (Public Protection Orders) Act 2014.
- **Sentencing Act:** When s 24A of the Sentencing Act 2002 comes into force it will be compulsory to adjourn a case for an assessment of whether restorative justice is appropriate. Current guidance from the Ministry of Justice is internally inconsistent and unclear.
- **Victims of Crime Reform Bill:** By mid-2014 the Bill had passed. It made adjourning sentencing compulsory in order to investigate whether restorative justice is appropriate if restorative justice processes are available and have not yet been undertaken. The Ministry was to examine the implications of what that will mean in practice. There were also amendments that broadened the scope of content allowed in victim impact statements.
- **Victims' Rights Amendment Act 2014:** Amendments to s 22 of the Victims' Rights Act 2002 mean that victims now have a right to read out their victim impact statements at sentencing. Judges retain discretion not to allow statements to be read in the interests of time, and it is important that the police communicate this possibility to victims in order to moderate their expectations.

Presentations received by the committee

The Committee received the following presentations in 2014:

- **Youth Court:** Judge Becroft, Principal Youth Court Judge, attended and raised the following issues of concern to the Youth Court: (1) what information should be provided to parents of young people when the young person is about to be questioned by police; and (2) who should the "nominated person" be when police interview young people and what role should the nominated person have and what training should he or she receive.
- **Legal Aid Services:** Mr Neil Cooper, Manager of Operations Support and Improvement for Legal Aid Services attended the November 2014 meeting to speak about funding for expert witnesses. It was noted at the meeting that counsel are concerned about the length of time and amount of paperwork required to receive funding for expert witnesses to be approved.
 - Mr Cooper said that a grants officer must decide each application afresh, so there could be no pre-approval. Legal Aid Services planned to redraft the application form so that less detail is necessary and make the process faster and simpler. Legal Aid Services was reluctant to compile a list of expert witnesses that have previously been approved because Legal Aid Services did not have the expertise to compile a list that provides accurate information about expertise.

- Legal Aid Services is undertaking a review of fixed fees. Consultation workshops and interviews have been conducted to identify problems. The way in which tasks were grouped for payment, procedures and sums payable were all under review. Total expenditure was forecast to increase. The new fees will be decided in March 2015 and introduced in July 2015. Mr Cooper will report back to the CPC on the new fees after they are announced.

APPENDIX – MEMBERSHIP AND ATTENDANCE

The members of the Criminal Practice Committee during 2014 were:

Rt Hon Dame Sian Elias, Chief Justice of New Zealand

Hon Justice Wild, Judge of the Court of Appeal

Hon Justice Winkelmann, Chief High Court Judge

Hon Justice Ronald Young, Judge of the High Court (Chair)

Hon Justice Lang, Judge of the High Court (Chair)

Judge Doogue, Chief District Court Judge

Judge Barry, Judge of the Wellington District Court

Hon Sir Grant Hammond, President of New Zealand Law Commission

Mrs J Ablett-Kerr QC, New Zealand Law Society, Wellington

Mr R Lithgow QC, New Zealand Law Society, Wellington

Mr N Sainsbury, Criminal Bar Association, Wellington

Mr A Perkins, Crown Solicitor, Auckland

Mr B Horsley, Crown Law Office, Wellington

Superintendent C Tweedie, National Manager, Police Prosecution Service, New Zealand Police

Superintendent M Johnson, New Zealand Police

Mr D Fagan, Department of Corrections

Ms M Laracy, Acting Director, Public Defence Service, Wellington

Ms S Turner, General Manager, Courts and Justice Services Policy

Mr J Richardson, Case Flow Manager, District Courts and Special Jurisdictions, Ministry of Justice

Ms M Anderson, Ministry of Justice

Mr B Trott, General Manager, Performance and Improvement, Ministry of Justice

Non-member attendees included:

Judge Boshier (as alternative to Sir G Hammond)

Judge Becroft, Principal Youth Court Judge

Mr K McCarron, Judicial Administrator to the Chief Justice

Ms D Iversen, Judicial Administrator to the Chief High Court Judge

Inspector B Erasmuson (as alternative to Superintendent C Tweedie)

Inspector J Walker, New Zealand Police

Ms M McCreadie, Ministry of Justice

Ms H Lilley (as alternative to Mr G Astle), Ministry of Justice

Senior Sergeant G Clark, New Zealand Police

Mr W Fraser, Ministry of Justice

Mr G Cowle, Ministry of Justice

Mr N Cooper, Legal Aid Services

Mr M Dodd (Clerk), Judges' Clerk of the High Court

Ms H Bennett (Clerk), Judges' Clerk of the High Court

Secretarial services were provided by:

Ms S Turner (Secretary), Ministry of Justice