

**REPORT OF THE CRIMINAL PRACTICE COMMITTEE
FOR THE YEAR ENDED 31 DECEMBER 2009**

The Committee met five times during 2009.

MEMBERSHIP

At the end of 2009 the members of the Criminal Practice Committee were:

Rt Hon Dame Sian Elias, Chief Justice of New Zealand

Hon Justice Robertson, Judge of the Court of Appeal

Hon Justice Randerson, Chief Judge of the High Court

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

His Honour Judge Johnson, Chief District Court Judge

His Honour Judge J Walker, Judge of the Wellington District Court

Mrs Judith Ablett-Kerr QC, New Zealand Law Society, Dunedin

Mr Robert Lithgow QC, New Zealand Law Society, Wellington

Mr Peter Winter, Criminal Bar Association, Auckland

Mr Brendan Horsley, Crown Law Office, Wellington

Dr Warren Young, New Zealand Law Commission

Acting Superintendent Craig Tweedie, Acting National Manager, Police Prosecution Service,
Ministry of Justice

Mr Rajesh Chhana, General Manager, Crime Prevention and Criminal Justice, Ministry of
Justice

Mr Graeme Astle, National Operations Manager, Higher Courts, Ministry of Justice

Mr Aaron Perkins, Crown Solicitor, Auckland

Ms Karyn McLean, Manager, Criminal/Youth Jurisdiction, District Courts, Ministry of Justice

Mr Ryhn Visser, (Observer) New Zealand Law Society.

Non-member attendees included:

Inspector Rielly, Police Prosecution Service, New Zealand Police

Mr K McCarron, Judicial Administrator to the Chief Justice

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

Ms V Sim, New Zealand Law Commission

Mr M Luey and Ms S Howan, Ministry of Justice.

Secretarial services were provided by Ms A Wilson and Ms D Livas from the Ministry of Justice.

Hon Justice Robertson and Hon Justice Randerson have now retired from the Committee. Justice Randerson has joined the bench of the Court of Appeal, and Justice Winkelmann, who has been appointed Chief High Court Judge, will be attending the Committee in 2010.

CRIMINAL PROCEDURE (SIMPLIFICATION) PROJECT

Representative Charges

The Committee considered the Ministry of Justice paper "Representative Charges: Options and Issues" (Oct 2008), and the various options presented. It was generally considered that representative charges in appropriate cases would shorten trials by shifting the decision on the totality of the offending from the jury to the Judge. The Law Commission agreed to further develop the option of codifying the New Zealand position providing for broader use in cases involving a continuing course of conduct resulting in a large number of charges.

Audio Links and Audio Visual Links in Proceedings

The Committee considered the Ministry of Justice paper "Audio Links and Audio Visual Links in Proceedings" (Nov 2008). There was agreement that AVL is generally suitable for pre-trial administrative (non-adjudicative) matters. The Committee also discussed the Courts (Remote Participation) Bill and its provisions for using AVL in criminal procedural matters.

Avoiding Retrials Following the Discharge of Jurors

The Committee considered the Ministry of Justice paper "Options for Avoiding Retrials Following the Discharge of Jurors after Trial Commencement" (Nov 08). The Committee considered whether in cases of juror loss a jury of no less than 10 should be permitted, and how majority

verdicts would fit with such a jury. The majority of members considered that majority verdicts were acceptable for juries of 11 or 12 but not for juries of 10.

Identification of the Issues in Dispute

The Committee considered the Ministry of Justice discussion document (May 09) concerning identification of the issues in dispute between prosecution and defence. Concern was expressed by members from the criminal bar as to the effect that such identification would have on the ability of the defence to put the prosecution to proof.

Compliance with Criminal Procedure Obligation

The Committee considered the Ministry of Justice discussion document, and the possibility of providing incentives for compliance with obligations and penalties or fines for non-compliance. The general view was expressed that punitive payments would not be a good way to encourage compliance.

Sending Appellant Back to District Court for Sentencing

The Committee noted that the lack of statutory authority for the High Court to refer cases back to the District Court for re-sentencing after a successful appeal against sentence. The issue is to be considered within the scope of the Simplification project.

Availability of Jury Trials

The Committee discussed the Ministry of Justice paper on this matter, and the possibility of removing the ability of the prosecution to choose whether to proceed summarily or indictably. The Committee also discussed the possibility of increasing the threshold for entitlement to a jury trial.

Criminal Procedure Case Progression Model

The Committee considered a proposed new process and the implications to the current committal process, with members to forward concerns to the Law Commission and Ministry of Justice.

The Committee also discussed proposals for changes to middlebanding, ss 357-360 of the Crimes Act, and proceeding in the absence of the defendant.

MEDIA GUIDELINES

The Committee provided comment to the Police and defence counsel on their respective draft media guidelines. The guidelines were presented to the Committee in 2008 and members' feedback has been incorporated into the final versions.

CRIMINAL PROCEDURE (MENTALLY IMPAIRED PERSONS) ACT 2003, s 38

The Committee discussed the concern of psychiatrists regarding the clash between client confidentiality and their obligations when providing a fitness to stand trial report. The desirability of amending the Evidence Act to make information obtained during these examinations privileged was discussed. Consultation with the psychiatric profession revealed significant support for this. The Ministry of Justice advised that this matter could be dealt with in a proposed Evidence Amendment Bill which is also to address concerns raised with s 35 of the Evidence Act and video record evidence.

SENTENCING INDICATIONS

The Committee discussed whether it would be desirable to put in place rules or legislation for sentencing indications, a matter also considered by the Criminal Procedure (Simplification) Project. The matter was referred to the Rules Committee for consideration. It is now included in the Criminal Procedure Simplification Project.

MAJORITY VERDICT COURT RITUAL

The Committee discussed a pre-formatted form given to juries asking whether they have reached a majority verdict, a unanimous verdict, or no verdict, and used for communication between the jury and the Judge and to avoid problems in taking the verdict. The judiciary agreed to continue to review the form and forward any feedback to the Ministry of Justice.

MEASURES TO REDUCE THE LENGTH OF CRIMINAL TRIALS

The Committee discussed and organised the preparation of a seminar to be held for the criminal bar to consider measures to reduce the length of trials. The seminars will be held in 2010 in Auckland, Wellington, Hamilton and Christchurch.

REPEAL OF THE PARTIAL DEFENCE OF PROVOCATION

The Committee considered the effect of the repeal on sentencing. The ability of section 102 of the Sentencing Act 2002 to deal with murders involving provocation, the role of disputed fact hearings, and the need for a guideline sentencing judgment from the Court of Appeal were discussed.

CHANGES TO RULES RELATING TO SEXUAL ASSAULT TRIALS

The Committee discussed proposals for law reform in sexual assault trials. The matter has been referred to the Law Commission.

COMMITTAL PROCEEDINGS

The Committee discussed the new parts 5 and 5A of the Summary Proceedings Act 1957. The Ministry informed that it was ensuring robust collection of data on the new procedures, and circulated the current data to the Committee. Crown Law and Police informed that they were working on best practice for the provision of formal written statements under the new provisions. No problems were identified regarding the new procedures governing majority verdicts.

LEGISLATION

The Committee was updated on the progress of relevant proposed legislation. The Committee considered a number of bills, including the Criminal Procedure Bill and the Search and Surveillance Bill. The Committee discussed the Criminal Investigations (Bodily Samples) Amendment Bill and potential Bill of Rights concerns with the proposed amendments.

The Committee also discussed the Evidence Act 2006 and referred issues with the Act to the Law Commission and Ministry of Justice.