

Criminal Practice Committee

Two-year Report

From 15 March 2019 to 19 March 2021

Contents

About the Criminal Practice Committee	3
Membership	3
Operational matters	3
Resourcing, cases and backlogs	3
Christchurch Mosque Shooter prosecution arrangements.....	4
COVID-19 response.....	4
Pressure on counsel.....	5
Communications and AVL to prisons.....	5
Increases in remand population.....	5
Waikeria Prison riot fire incident.....	6
Victim impact statements.....	6
EM Bail and s 27 reports	6
Hāpaitia/Hui Paneke presentation	6
Late guilty pleas	6
Legislation updates	7
Law Commission	7
Appendix one – Membership as of 19 March 2021	8

About the Criminal Practice Committee

This is a report of the Criminal Practice Committee (CPC), chaired by the Hon Justice Lang. It covers the period from 15 March 2019 to 19 March 2021.

The CPC was established in 1988. It brings together 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 the CPC include judges, legal practitioners, registrars and Ministry of Justice operational and policy advisers. It also includes representatives from the New Zealand Law Commission, the New Zealand Law Society, Crown Law Office, Department of Corrections, and New Zealand Police (see *Appendix 1* for a list of current members).

Operational matters

Resourcing, cases and backlogs

The Committee discussed the effect of court resourcing shortages (namely jury courtrooms, cells, staffing and judicial capacity) on the ability to clear case backlogs in the courts. It was also noted there is also a lack of adequate resourcing in outside agencies including the probation service and report writers.

The backlog was also caused by an increase in the number of cases, the seriousness and complexity of cases, increases in appeals, elections of jury trials, and late guilty pleas. Pre-trial appeals are being filed very close to the trial date, meaning that the trials are often adjourned and there is a flow-on effect in terms of overall delay in disposing of cases. There was also an increase in disposal rates, but not enough to offset this.

The Committee noted the need resolve cases earlier and questioned whether the Criminal Procedure Act 2011 had achieved its aim of front-loading cases and making case review hearings meaningful and observed this can depend on counsel and that other legislation such as the three strikes law was forcing defendants to reserve their position. It was noted that some defendants will always put off election and pleading, some stay in holding patterns to reserve their positions, and there may be a perception a jury trial will get a better outcome. Defendants on three strikes have no incentive to plead guilty. Legal aid rates might encourage not pleading guilty so early.

The Committee said the way forward could be prompt dates for trial which can inform what happens. It was noted that jury trials often get a sooner date and so may be seen as more desirable.

Some suggested that judges should be more involved in case administration, should be the judicial officer for the entirety of each case (a docket system for judicial ownership of files), and should be involved earlier in the process. It was also suggested that when cases settle, the judicial officer who is freed up could deal with bail hearings.

The Committee discussed that case management, quality of disclosure and communication between participants can be difficult and could be improved to resolve cases faster. It was noted that difficulties can be caused by the file moving between prosecutors and that defence counsel find it difficult to engage with prosecutors early enough for resolution. Another difficulty can be obtaining instructions before case management memoranda are due.

It was suggested the Court of Appeal might screen cases more closely and decline to grant leave for pre-trial appeals involving issues that were either non-determinative or could be dealt with if necessary following conviction. The Committee was advised the Court of Appeal had discussed this issue and there was ongoing attention being given to it.

Prosecutor ownership of files also incentivised earlier disclosure to defence counsel. The Police were looking to move towards the Crown model of ownership of files.

Chief District Court Judge Taumaunu observed that he was seeking to interlink relevant court committees to assist in District Court administration.

Twelve additional judicial positions were announced in the first half of 2019 and the recruitment of 20 new District Court Judges was underway in the second half.

Christchurch Mosque Shooter prosecution arrangements

The Committee discussed that the Tarrant prosecution was expected to take a significant amount of time, could require three courtrooms to accommodate observers and media, and that additional security would be required. Arrangements were being made across the justice sector and courts to re-deploy resources to other areas. Corrections advised they were making detailed arrangements for the trial. Christchurch Judges were to be sent to Auckland during the trial to enable additional resources to be applied to reducing the number of outstanding Judge-alone trials. This would have also caused a delay to around 20 trials in Christchurch. Mr Tarrant pleaded guilty before trial, and so the trial and many of the special arrangements were not necessary.

COVID-19 response

The Committee discussed that the criminal justice sector had handled the lockdown period well, with a cooperative approach between participants that was hoped to continue. There was a discussion of leveraging the gains from lockdown into practice and the cross-sector engagement in this.

Serious crime had not risen as expected, court backlogs were not as bad as they could have been and courts were set to return to jury trials soon after, defence counsel access to imprisoned clients remained similar, and the prison remand population was unusually reduced. All cases had fixture dates but some were a considerable distance in the future. Judge-alone trials carried on during lockdown, with high resolution and low adjournment rates.

Post the COVID shutdown, some protocol cases were retained for hearing in the High Court to address the backlog. This occurred in the Hamilton High Court where trials that would normally be held in the District Court, were directed to be heard in the High Court.

There was discussion of the work being undertaken by the Criminal Trials Committee and the Criminal Process Working Group in the District Court following COVID. The Working group built on closer links with the profession forged during COVID and its focus is on case resolution, pragmatism, case-management, and making every appearance meaningful. The Improvement Programme workstreams provided recommendations to steering groups about best practice and sector improvements, with wide consultation being important in each area. There will be staggered implementation in specific courts due to the different levels of complexity and resources required for each workstream area. This work will start in the District Court, but the High Court also intends to involve the profession in a review of High Court trial processes, with a particular focus on the length of trials.

Pressure on counsel

Case scheduling demands put pressure on practitioners, with many being required to accept back-to-back fixtures. It was noted that the pressure was due more to tight scheduling than COVID.

Members of the bench met with practitioners in Auckland and Manukau and had frank discussions with practitioners about issues such as stress, wellbeing, and access to clients and Corrections issues.

An example was judges suggesting to counsel that they reassign the case to another lawyer if they cannot make callovers, yet this caused stress to counsel who may need the work. Senior practitioners firmly pushed back on this and judges were made aware of this issue.

Communications and AVL to prisons

The Committee discussed the difficulties of defence counsel contacting prisoners or prosecution counsel sending documents to self-represented prisoners, with correspondence taking some time, email attachments being unable to be printed out, and telephone calls sometimes being awkward.

The use of AVL for counsel discussions with clients became more prevalent following the COVID lockdown. However, there were inconsistent approaches to AVL among regional Corrections facilities, which was difficult for defence counsel to anticipate.

The Committee noted it would be useful to have a representative from Corrections on the Committee to speak to these issues and Rachel Leota and Andrew Milne subsequently attended as Corrections' representatives on the Committee.

In 2019 and early 2020, concerns that AVL was becoming the default was causing issues for first appearances and resolution of related matters such as difficulties in standing down and getting instructions.

Increases in remand population

The Committee discussed the issue of the growing remand population. The Committee noted the seriousness of the issue and observed that remand prisoners are unable to complete certain rehabilitation courses which, once they are sentenced, can result in a delay in the ability to eventually apply for parole. Some remand prisoners were being sentenced to time served, which ultimately means they are released without having had any rehabilitation or treatment (due to the restrictions of being on remand). A related issue is that such prisoners are automatically classified as high security and this affects how they are accommodated and where.

Waikeria Prison riot fire incident

The Committee discussed the damage to Waikeria prison after the incident in January 2021. Around 284 high security beds were destroyed, requiring the dispersal of prisoners, primarily to Springhill, Mt Eden and then Hawke's Bay if required. This affected court appearances by prisoners.

Victim impact statements

The Committee discussed the issue of victim impact statements going beyond what it permitted. The Crown has responsibility for overseeing this. Editing these statements can be a very sensitive issue and that victims may refuse to change their statements or will just say what they want in court, and so counsel will often just acknowledge to the court that the statement contains inadmissible content.

It was suggested that the victim impact statement form could be amended to set out what is permitted and it could be required that the advisor confirm they have told the victim about this. The Police are reviewing the material they provide for victim impact statements and the Crown Law representative said she would write to the Crown solicitors about this. It was also suggested victim impact statements could be part of the Criminal Process Improvement Programme workstreams.

EM Bail and s 27 reports

There was a discussion of Bail Support Services and specialised addresses for taking people on EM bail and potential accreditation/list of preferred addresses and education around these places for judges and counsel. A lot of cases are being adjourned because suitable EM bail addresses cannot be found.

The Committee discussed s 27 reports and that it is more useful to encourage the authors and people to come to court to speak rather than just give a report. It was noted that there will always be a s 27 report on appeal if there wasn't one prepared for sentencing.

Hāpaitia/Hui Paneke presentation

Phil Reed and Sheridan Smith from Hāpaitia (a cross-sector initiative set up to help guide the transformation of the criminal justice system) gave a presentation to the Committee in March 2020 on the reform of the criminal justice system. This included identifying issues via public engagement processes and providing many reports which addressed the issues and comprehensive strategy for institutional change.

The Committee discussed issues such as how reform initiatives appear to tail off around election periods. They also require systemic coordination and interparty cooperation.

Late guilty pleas

In March 2020, the General Manager Sector from the Ministry of Justice provided statistics showing that later guilty pleas are causing more court events, meaning that cases are taking longer to be resolved. This has a significant impact on the workload of the courts, delays to resolution of cases,

costs, increase in the remand population and the fact that almost 20% of prison sentences are now ‘time served’.

Legislation updates

The Committee discussed the progress of the Crimes Amendment Bill, the Criminal Justice Reform Programme, the Criminal Cases Review Commission Bill, potential review of mental health legislation, the new offence of strangulation (which was having its desired effect), the Family Violence Act 2018, the amendments to the Oranga Tamariki Act 1989, Administration of Justice (Reform of Contempt of Court) Bill, the Sexual Violence Amendment Bill, and the Terrorism and Suppression (Control Orders) Amendment Bill.

Law Commission

The Law Commission provided updates on its work on the reviews of the Evidence Act 2006, Use of DNA in Criminal Investigations, succession law, and adults with impaired decision-making. In March 2020, the Committee was advised that Amokura Kawharu had been appointed President of the Law Commission and Ms Kawharu attended the meetings subsequently.

Appendix one – Membership as of 19 March 2021

	Hon Justice Winkelmann, Chief Justice
	Hon Justice Gilbert, Court of Appeal
	Hon Justice Thomas, Chief High Court Judge
Chair	Hon Justice Lang, High Court
	His Honour Judge Heemi Taumaunu, Chief District Court Judge
	His Honour Judge Crosbie, District Court
	Amokura Kawharu, President of the Law Commission
	Madeleine Laracy, Deputy Solicitor-General, Crown Law
	Rachel Leota, National Commissioner, Department of Corrections
	Andrew Milne, Deputy National Commissioner, Department of Corrections
	Janine Bonifant, NZLS representative
	Nicholas Chisnall, NZLS representative
	David Johnstone, Meredith Connell
	Brett Crowley, Criminal Bar Association
	Superintendent Gary Allcock, Police Prosecution Service
	John Richardson, Court Manager, Auckland High Court
	Richard Williams, District Courts Management representative
	Campbell Savage, Public Defence Service, Ministry of Justice
	Brendan Gage, General Manager of Criminal Justice Policy Group
Observer	Debbie Iversen, Judicial Administrator to Chief High Court Judge
Secretary	Matthew Page, Judge's Clerk, Wellington High Court