IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 18/2025**

BETWEEN	**EDMOND TE RAUPO APANUI**
	Appellant
AND	**COMMISSIONER OF POLICE**
	Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL AGAINST A COSTS AWARD

14 October 2025

Te Tari Ture o te Karauna
Crown Law

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:
M F Laracy / Z R Johnston / O A Jessop Boivin
Madeleine.laracy@crownlaw.govt.nz / Zannah.Johnston@crownlaw.govt.nz / Olivia.Boivin@crownlaw.govt.nz

COUNSEL FOR THE RESPONDENT CERTIFIES THAT, TO THE BEST OF THEIR KNOWLEDGE,
THESE SUBMISSIONS CONTAIN NO SUPPRESSED INFORMATION AND ARE SUITABLE FOR PUBLICATION

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SUMMARY

1. Costs orders under s 364 of the Criminal Procedure Act 2011 (**CPA**) are designed as a punitive measure to discourage procedural non-compliance.[1] There is no dispute that an order was justified in this case to mark delayed disclosure of relevant material by Police. The difference between the parties is how to assess the quantum; this turns on exactly what the order can relate to. The statutory test is that the quantum "must be no more than is just and reasonable in light of the costs incurred by the court, victims, witnesses, and any other person".

2. The Solicitor-General brought the first appeal to clarify the approach to costs orders under s 364. The appellant contends the quantum should be calculated on a daily rate to reflect the time he spent in custody following the non-disclosure. In contrast, the respondent says that while the extent of the impact on the defendant is a relevant consideration, the focus of the order is to mark the procedural failure and deter such conduct in the future.

3. Section 364's goal is squarely focussed on procedural efficiency. Its function is to provide a summary tool to minimise unnecessary procedural delay by promoting compliance with procedural requirements and, when such delay is caused, denouncing it. In serving that objective it also recognises the right to be tried without undue delay, and the right to a fair trial. However, a s 364 costs order is conceptually and procedurally different from a *Baigent* claim. The two cannot be conflated.[2]

4. Mr Apanui initially received a costs order designed to compensate him, on the basis of a daily rate, for each day he spent in prison after the date the Court found Police should have recorded and disclosed information to him. A Crown appeal was successful: the Court of Appeal agreed it was an error of principle for the Judge to set the award by reference to the amount of time Mr Apanui spent in custody, rather than by assessing the amount

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1 CPA, s 364 (**[[App authorities at 3]]**), attached at **Appendix A**.

2 See Respondent's memorandum dated 14 October 2025.

appropriate to penalise the police failure. In doing so, the Judge had failed to have regard to the principal purpose of the provision, and this led to a quantum that was disproportionate to the seriousness of the procedural failure.

5. This Court has granted Mr Apanui leave for a second appeal.[3] Leave was granted on the question of whether the Court of Appeal was correct to allow the appeal.

BACKGROUND

6. Mr Apanui was charged with arson endangering life after a house fire in 2020. The charge was dismissed at the end of 2022, before the trial was scheduled to commence. The Crown offered no evidence after disclosure came to light which impacted the credibility of the Crown's key witness.

7. A chronology of key events is attached as **Appendix B**.

Massey fire

8. On 23 November 2020, Police investigated a fire at an address in Massey, Auckland ("Massey fire"). Mr Apanui was living there at the time with Patrick Sylva and a third man. Fire investigators determined the fire began from a pile of clothes and other items in the living room which were deliberately lit with an incendiary substance.[4] Mr Apanui went next door to a neighbour's house not long before the fire was noticed, and, a bit later, a man was seen to run out of Mr Apanui's house, wearing only a towel.

9. The next day, Mr Apanui was arrested and charged with arson endangering life under s 267(1)(a) Crimes Act 1961.[5] The case against Mr Apanui was based on his opportunity and presence at the relevant time, and the statement of his flatmate, Mr Sylva, which included detail relevant to motive.[6] Mr Sylva told Police Mr Apanui had been aggressive to him just

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3 *Apanui v Police* [2025] NZSC 84 **[[01 SC Casebook at 6]]**. The pathway for a second appeal against a costs order is under s 276 Criminal Procedure Act 2011 (**CPA**).

4 Fire Investigation Report – 15 Redwood Drive, Massey at 22 **[[01 SC Casebook at 60]].**

5 Crown Charge Notice, **[[02 CA Casebook at 8]**]. The maximum sentence is 14 years' imprisonment.

6 See: Summary of Facts, **[[02 CA Casebook at 10]];** Formal Statement of Lyall Wanakore dated 13 December 2020 **[[Resp authorities Tab 16]]**; Electronically Recorded Interview of Edmond Apanui dated

before the fire incident and they argued. Mr Sylva went and had a bath. He then smelt fire and got out of the bath and went into the lounge where he discovered the fire. Mr Sylva ran out of the extensively damaged house.

10. Mr Apanui admitted to the Police that he had an altercation with Mr Sylva but denied lighting the fire. He said he left the house due to threats made to him by Mr Sylva.

11. On 23 November 2020, Police took swabs of Messrs Apanui and Sylva's hands to test for the presence of accelerants.[7] Mr Apanui's swab was tested on 29 June 2021 and no trace of accelerants were found.[8] This meant either that ignitable liquids were not present on the swabs or they had subsequently evaporated from the swabs prior to their analysis due to the delay in testing and the way they were stored.[9] Mr Sylva's swab was not tested as, like Mr Apanui's swabs, there was a strong possibility that these swabs would not have produced any conclusive results.[10]

12. Mr Apanui pleaded not guilty on 21 December 2020.[11] He also faced other charges (two charges of male assaults female "Police charges") from events that occurred on 12 September 2020.[12]

13. Mr Apanui raised issues of fitness to stand trial and insanity. He was found fit to stand trial in August 2021 on the arson charge and the Police charges. He was found not guilty by reason of insanity on the Police charges in October 2021. A June 2022 trial date for the arson charge was vacated for insanity to be explored, but ultimately the expert evidence did not support

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23 November 2020 **[[Resp authorities Tab 17]].**

7 Statement of Detective Constable Dhillon dated 14 May 2023 at [6] **[[03 CA Ad Mat at 26]]**.

8 Statement of Detective Constable Dhillon dated 14 May 2023 at [10] **[[03 CA Ad Mat at 27]]**; Statement of Sally Coulson dated 9 July 2021 **[[Resp authorities Tab 18]].**

9 Statement of Detective Constable Dhillon dated 14 May 2023 at [10] **[[03 CA Ad Mat at 27]]**.

10 Statement of Detective Constable Dhillon dated 14 May 2023 at [11] **[[03 CA Ad Mat at 27]].**

11 The Crown assumed responsibility for the prosecution on 19 January 2021, see **[[02 CA Casebook at 9]].**

12 These charges remained the responsibility of the Police Prosecution Service.

an insanity defence on the arson charge.[13] Mr Apanui sought a sentence indication, which was to be heard on 16 December 2022.[14]

14. During this time, the Police Officer in Charge (Detective Constable Ranjinder Dhillon) had no contact with Mr Sylva; it did not occur to him to check his details on NIA.[15]

Henderson fire

15. On 16 February 2022 Police investigated another fire in West Auckland, this time in Henderson ("Henderson fire"). Mr Sylva was a resident at the address of the Henderson fire. Mr Sylva was originally the suspect, but never charged. The fire incident report concluded the cause of the fire as "undetermined".[16] The Police investigation file was closed with no further action on 19 May 2022.

16. The officer investigating the Henderson fire – Detective Derek Elima – recalled having a "passing conversation" on 16 February 2022, (the same day as the outbreak of the Henderson fire) with Detective Constable Dhillon.[17] Detective Elima says he mentioned to Detective Constable Dhillon that Mr Sylva, the witness in the suspected arson at the Massey address, was a suspect in the fire at the Henderson address.[18]

17. Detective Constable Dhillon had no recollection of the conversation,[19] and neither officer made a note of it.

18. Mr Sylva's presence at the house of both fires was drawn to the attention of Detective Constable Dhillon in October 2022 during a "casual conversation" with Detective Sergeant Mead.[20] The Crown prosecutor was

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13 On 21 September 2022, Judge Ryan determined the Court was unable to find the respondent not guilty by reason of insanity.

14 The sentence indication did not proceed as new disclosure resulted in the Crown offering no evidence, as explained further below.

15 Statement of Detective Constable Dhillon dated 14 May 2023 at [17] **[[03 CA Ad Mat at 28]].**

16 Fire Incident Report – 11 Abel Tasman Avenue, Henderson at 7. The report writer wrote "I could not rule out a deliberately lit fire, likewise I could not rule out an accidental fire." **[[01 SC Casebook at 70]].**

17 Statement of Detective Elima dated 8 May 2023 at [26]-[30], **[[03 CA Ad Mat at 20]].**

18 Statement of Detective Elima dated 8 May 2023 at [28] **[[03 CA Ad Mat at 20]].**

19 Statement of Detective Constable Dhillon dated 14 May 2023 at [25] **[[03 CA Ad Mat at 29]].**

20 Statement of Detective Constable Dhillon dated 14 May 2023 at [20] **[[03 CA Ad Mat at 28]].**

informed of this connection on 10 November 2022.[21] By 22 November 2022 the investigation file for the Henderson fire was disclosed to Mr Apanui's counsel.

19. The Crown then reviewed the Henderson file and reconsidered the test for prosecution. The decision was made by the Crown to offer no evidence, and the charge was dismissed under s 147 of the CPA on 28 November 2022. The Crown's submissions on the Costs application, at 2.10-2.11 address the decision to withdraw the charges.[22]

District Court costs decision

20. Mr Apanui sought costs under s 364 of the CPA. No application has been advanced under the Costs in Criminal Cases Act 1967 (**CCCA**).

21. While there were initially three components[23] to his application, only one remains relevant to this appeal. Mr Apanui sought $75,000 as "compensation" for the time he spent in custody between 16 February 2022 (the day of the Henderson fire) to 28 November 2022 (when the charge was dismissed).[24] He referenced the Cabinet Guidelines for Wrongful Conviction and Detention, which he did not meet the criteria for, but he submitted they set a benchmark to assess the appropriate quantum.

22. For Police, the Crown accepted that the delayed disclosure of Mr Sylva's subsequent possible involvement in a second fire was a significant procedural failure without reasonable excuse.[25] While Detective Constable Dhillon did not recall the connection being drawn to his attention by

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21 Statement of Detective Constable Dhillon dated 14 May 2023 at [22] **[[03 CA Ad Mat at 28]].**

22 Respondent's submissions on costs application **[[02 CA Casebook at 42]].**

23 Mr Apanui originally submitted that $10,000 should be paid to the Ministry of Justice as a punitive response to the failure to make timely disclosure (following consultation with the Ministry this was not pursued, see *Apanui v Police* [2023] NZDC 24918 at [19], **[[02 CA Casebook at 65]]**). He also sought $5,640 for legal costs to counsel in preparing the costs application. These costs were ordered by Judge Winter (*Apanui v Police* [2023] NZDC 24918 at [39](b), **[[02 CA Casebook at 75]]**), but overturned by the Court of Appeal (*Police v Apanui* [2024] NZCA 307 at [51], **[[01 SC Casebook at 21]]**). This claim is no longer pursued by Mr Apanui. In any event, it appears these costs were not in fact accrued by him while Mr Duff generated an invoice for his work on the costs application (see **[[03 CA Ad Mat at 41]]**), in the Court of Appeal Mr Duff confirmed he acted for Mr Apanui on a pro bono basis for the costs application and on appeal (see *Police v Apanui* [2024] NZCA 307 at [54] and fn 30, **[[01 SC Casebook at 21 and 22]]**).

24 Application for costs order, **[[02 CA Casebook at 12]].**

25 The Crown's submissions in the District Court **[[02 CA Casebook from 37]].**

Detective Elima in February 2022, the prosecutor accepted the conversation had occurred. There was nothing to suggest the failure to record and disclose was anything other than inadvertent; Detective Constable Dhillon was not challenged on his account that he had no memory of the conversation with Detective Elima.[26] There was therefore no indication of bad faith; rather the failure can be characterised as a failure to compute the possible significance of the link between the two events: an *arson* case in which Mr Sylva was a *witness*, and a *fire* in which he was initially a *suspect*.

23. The Crown invited the Court to make a modest costs award. Considering the punitive, rather than compensatory, focus of the CPA costs scheme and compared with similar cases, an award in the vicinity of $15,000 was appropriate.

24. Ultimately, Judge Winter awarded $28,600 based on $100 per day for the period between when the relevant disclosure should have been made and Mr Apanui's charge was dismissed (286 days).[27]

Court of Appeal decision

25. The Crown appealed Judge Winter's decision to the Court of Appeal on the basis an award calculated by reference to the time an applicant spent in pre-trial detention was outside any compensatory scope of s 364 and the costs order was excessive.

26. The Court held the Judge made an error of principle when setting the award by reference to the amount of time Mr Apanui had remained in custody after the disclosure should have been made.[28] In doing so, the Judge set the award according to the effect of the police procedural failure which in effect set the award "principally, if not wholly, by reference to its

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26 See Statement of Detective Constable Dhillon dated 14 May 2023 at [25], **[[03 Ad Mats at 29]].** There was no cross-examination at the costs hearing.

27 The order was also made for the Police to pay the legal costs of Mr Apanui making the costs application: at [39]. As has been outlined above, this order was overturned by the Court of Appeal and no appeal is pursued from that finding.

28 *Police v Apanui* [2024] NZCA 307 at [45], **[[01 SC Casebook at 19]].**

compensatory effect and not by reference to its penal purpose."[29] The Court held that this resulted in a quantum that was "disproportionate to the seriousness of the procedural failures."[30]

27. The Court observed the consequences of the procedural failure can relevantly be taken into account, but the procedural failure in this case was nothing like the "serious and serial failures present in *Bublitz* and *Lyttle*."[31] The Court considered a costs award of over $34,000 was excessive, even by reference to the CPA's punitive purpose.[32] Accordingly, the Court allowed the appeal and substituted a costs award of $15,000.

28. In the Court of Appeal neither the topic of compensation for breach of rights, nor the concept of "arbitrary detention" was raised. The appellant resisted the appeal on the basis that he should be compensated under s 364 for "wrongful imprisonment" as a result of Police's significant procedural error.

THE APPEAL

Arbitrary detention claim

29. As outlined in the memorandum accompanying these submissions, the respondent does not address the assertion that Mr Apanui was subject to "arbitrary detention", nor that he could in the context of a s 364 claim receive *Baigent* damages for a s 22 New Zealand Bill of Rights Act 1990 (**BORA**) breach without pleading it.

30. Mr Apanui sought leave to bring a further appeal to this Court, contending the Court of Appeal "erroneously considered that the costs order could not have included the compensatory approach taken by the District Court",[33] and inviting this Court to examine the dual purpose of CPA costs.[34] This

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29 *Police v Apanui* [2024] NZCA 307 at [45], **[[01 SC Casebook at 19]].**

30 *Police v Apanui* [2024] NZCA 307 at [46], **[[01 SC Casebook at 19]].**

31 *Police v Apanui* [2024] NZCA 307 at [47], **[[01 SC Casebook at 20]].**

32 The Court further held the Judge erred in including the amount of Mr Apanui's costs of preparing the costs application in the quantum of the order: at [51]. The Court also noted Mr Duff prepared the application on a pro bono basis (see fn 30).

33 Leave submissions dated 21 March 2025 at 4.3.

34 Leave submissions dated 21 March 2025 at 4.5.

was the issue on which the Court of Appeal's reasoning turns, and was the basis on which leave was granted.

31. The Court of Appeal's comment at paragraph [47] that Mr Apanui's continued detention was a "consequence" of a procedural failure must be viewed in light of the way the case was then argued. This was not a finding of *arbitrary* detention, nor was there any consideration of the extent to which Police actions caused the detention. Given the punitive focus of s 364, the Crown took a pragmatic (rather than technical) approach to this point.

The primary purpose of CPA costs is punitive

32. The Crown position on CPA costs awards remains as it has been throughout this proceeding:

    32.1 The primary purpose of the order is punitive – it is a sanction for procedural non-compliance.

    32.2 The level of the award involves an assessment of what is "just and reasonable" and the impact on other participants in the justice system, and on the court system itself, is relevant to the extent of the need to denounce and deter a procedural failure. Where, as here, the procedural failure contributed to a person spending longer in custody than should otherwise have been the case, this is relevant to the court's assessment of what is "just and reasonable". However, time spent in custody is not the yardstick against which costs orders are calculated, and the District Court erred in setting the quantum against a daily recovery rate for time spent in custody. The focus should be on the extent and nature of the failure itself, not all the downstream consequences.

    32.3 In this case the appropriate level of CPA costs award was in the vicinity of $15,000. That sum adequately reflects the culpability inherent in the Police failure, but also appropriately includes an

element to reflect that this failure contributed to loss of liberty for a time.

32.4 There are a variety of potential remedies for a successful defendant. A successful defendant may seek the reimbursement of costs incurred under the CCCA.[35] In that context, inadequacies in the Police investigation are relevant.[36] Other remedies, including public law damages, may also be available.[37]

33. This interpretation of the legislation is supported by: the text of the legislation, its legislative history, the established approach in existing case law, a BORA interpretation, and the place of CPA costs within a wider context.

The text of section 364 CPA[38]

34. A costs order can be made under s 364 of the CPA following a "significant" "procedural failure" and when "there is no reasonable excuse for that failure".[39] Procedural failure is defined prescriptively as non-compliance with the CPA, its rules or regulations, or with the Criminal Disclosure Act 2008 (**CDA**) or its regulations.[40] A significant procedural failure is one that causes avoidable delays in the administration of criminal justice.[41]

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35 Note, Mr Apanui was legally aided. He has no legal aid debt as a result of this case: **[[03 CA Add Mat at 40]],** letter from Legal Services Commissioner, dated 7 February 2023.

36 CCCA, s 5(d). In *R v Lyttle* [2022] NZCA 52 in relation to the *R v Singh* appeal*,* the Court of Appeal held the failures of police to properly investigation the complainant's allegations were significant and could not be justified, and an award of costs above scale were required to recognise the magnitude of the errors of those responsible for the decision to continue with the prosecution against Mr Singh (at [213] – [215], **[[App authorities at 632 – 633]])**.

37 In *Attorney-General v Morrison* [2025] NZCA 240 the Court of Appeal held (at [92], **[[App authorities at 218]]**):

> … the awards made to the respondents under the CPA and under the CCCA, while significant, served different purposes to an award of public law damages. As we have explained, the awards under the CPA were to sanction or punish the FMA for its failure to comply with the CDA. On the other hand, the awards under the CCCA were primarily designed to compensate the respondents for the costs they incurred in successfully defending the charges. The primary role of public law damages is however to vindicate the breaches of the respondents' rights, and in this case, their right to a fair trial.

38 CPA, s 364 attached at Appendix A and **[[App authorities at 3]].**

39 CPA, s 364(2).

40 CPA, s 364(1).

41 *Lyttle (CA),* **[[App authorities at 577]]** at [11].

35. Once the jurisdiction for an order is made out, the court can make an order for a sum which "must be no more than is just and reasonable in light of the costs incurred by the court, witnesses, victims and any other person."[42] This wording indicates a strong focus on the system-impacts of the procedural failure. This test plainly affords the court a "a wide discretion"[43] when determining quantum, and the impact of the failure is relevant. Where a failure has led to significant costs being incurred by other parties, a larger award may be appropriate, and vice versa.[44] For example, the extent of any wasted court time resulting from a procedural failing will be relevant. Likewise, the contribution to a defendant's custodial status is a relevant consideration.

36. Close analysis of the text of the legislation shows the provision is a summary tool to minimise unnecessary procedural delay by seeking to reinforce procedural requirements (and denounce failures to comply), rather than a process designed to compensate:

    36.1 The focus in the CPA is on the person making the payment (the Court may order a person to "pay a sum"). That person is the person responsible for the significant procedural failure. This illustrates the punitive purpose. By contrast, where a successful defendant is to be compensated for legal costs the CCCA states "he be paid such a sum…".[45]

    36.2 The default position is that, absent an order under s 364(8), CPA costs are to be paid to the court. This is "further evidence that compensation is not the focus on the s 364 jurisdiction".[46]

    36.3 The focus of the phrase "just and reasonable" is the impact of the procedural failure on the wider justice system ("in light of the costs incurred by the court, victims, witnesses, and any other

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42 CPA, s 364(3).

43 *Lyttle (CA),* **[[App authorities at 577]]** at [10].

44 *Bublitz (CA),* **[[App authorities at 234]]** at [40].

45 CCCA, s 5.

46 *Bublitz (CA),* **[[App authorities at 235]]** at [42].

person"). The court's assessment of likely expenditure and lost time and resource is at the heart of the order. This contrasts with an order under s 5 of the CCCA where the sum is connected to the costs incurred by the defendant in properly carrying out their defence.[47] The CCCA is plainly compensatory in nature, and compensates an identified range of legal expenses. Costs incurred by the defendant are not specifically mentioned in the CPA (but encapsulated by the catch-all "any other person" and "any person" in ss 364(3) and 364(8)). If Parliament had intended s 364 to be primarily (or even largely) compensatory, it would have specifically referred to defendants and their costs.[48]

36.4 The limited statutory procedure – requiring only natural justice – suggests s 364 is itself meant to be procedurally efficient. This does not favour complex fact-finding and liability processes. An order under s 364 may be made at any time during the criminal process following a summary process. Unlike other costs regimes (i.e. the CCCA) an application need not wait until the charge is determined, nor must the applicant be the "successful" party. An order can be made during the pre-trial stage to encourage compliance. There are limited procedural rules. There are rules as to who may seek an order (the defendant, the defendant's lawyer, the prosecutor, or the court may make an order by its own motion[49]), and who must be heard (the person against whom the order is to be made must have a reasonable opportunity to be heard[50]).

36.5 Section 364(8) enables the court to order that some or all of a costs order be paid to any person connected with the prosecution. This reflects a recommendation from the Departmental Report

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47 CCCA, s 2 "costs".

48 The Court of Appeal in *Bublitz (CA)* said at [41] **([[App authorities at 235]]**) that the absence of the prosecutor and defendant being expressly named in s 364(3) is "telling of the purpose of the provision".

49 CPA s 364(4), **[[App authorities at 3]].**

50 CPA s 364(5).

which said the Bill should be amended to permit costs to be paid to anyone who had incurred loss.[51] This reveals a compensatory element to the provision, but it is not intended to provide full reimbursement of costs.[52] Critically, this compensatory element is referable to the costs arising from the particular procedural failure, as distinct from full reimbursement for other losses or vindication of a downstream rights breach.

36.6 Section 364(9) shows the CPA jurisdiction was not intended to overlap with the compensatory jurisdiction of the CCCA.

Legislative history of the CPA

37. The legislative history demonstrates that s 364 was intended as part of a "carrots and sticks" approach to promoting efficiency and compliance with the CPA:

37.1 In the report that was the genesis of the CPA the Law Commission[53] recommended a sanction scheme to "change the culture of non-compliance"[54] so as to address the delays and wasted resources which "adversely affect the ability to do justice."[55] The Law Commission observed both defence and prosecution conduct as contributing to these issues.[56] Sanctions were considered "an important part" of the reform package,[57] including costs orders on prosecution and defence counsel, and defendants. Costs orders against prosecutors were designed to "promote accountability by making performance failure explicit and public".[58] The Report also referenced the question whether

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51 Ministry of Justice *Departmental Report for the Justice and Electoral Committee: Criminal Procedure (Reform and Modernisation) Bill* (16 May 2011) at [229] – [230] **[[Resp authorities at 214]].**

52 *Bublitz (CA),* **[[App authorities at 232]]** at [32].

53 Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, 2005) **[[App authorities at 813]], [[Resp authorities at Tab 2]].**

54 Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, 2005), Chapter 11 **[[Resp authorities at 42]].**

55 At xi, **[[Resp authorities at 12]].**

56 At [9] – [15] **[[Resp authorities at 32 - 34]].**

57 At [380] **[[Resp authorities at 47]].**

58 At [400] **[[Resp authorities at 48]].**

those found guilty should benefit financially from a failure of the criminal justice system. This was an issue "likely to be a matter for some debate, and regarded like a last resort, if appropriate at all."[59]

37.2 Likewise, the Departmental Report to the Select Committee on the Criminal Procedure Reform and Modernisation Bill[60] described the costs orders under (what would become) the CPA as "a sanction".[61]

37.3 The Explanatory Note to the Criminal Procedure (Reform and Modernisation) Bill said s 364[62] "provides a new power for courts to make costs orders against a defendant, the defendant's lawyer, or a prosecutor for failing to comply with a requirement imposed by or under the Bill or rules or regulations made under it, or the Criminal Disclosure Act 2008."

Established approach of the Court of Appeal

38. Prior to the Court of Appeal decision in *Apanui,* the Court of Appeal had relatively recently considered the nature and purpose of s 364 CPA costs orders in *Bublitz*[63] and *Lyttle.*[64] Both cases affirmed the "penal" purpose of costs orders under the CPA. The Court recognised that s 364 CPA costs orders may contain "an element of compensation",[65] but this was an "incidental effect rather than the primary purpose of the provision".[66] Compensation has been described as taking a "backseat" in s 364

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59 At fn 219 **[[Resp authorities at 48]].** In *Bublitz (CA),* **[[App authorities at 232 at [32]]],** this Court said "[l]ittle weight was given to the possibility that [the costs award] could result in any compensation to the defendant. Certainly, it was not the primary purpose of the order proposed by the Law Commission."

60 The Criminal Procedure Reform and Modernisation Bill was born out of the Law Commission report. This Bill was split up after the Select Committee Stage and part of it became what is now the CPA.

61 Ministry of Justice *Departmental Report for the Justice and Electoral Committee: Criminal Procedure (Reform and Modernisation) Bill* (16 May 2011) at [225] **[[Resp authorities at 214]].**

62 At that time, it was clause 361.

63 *Bublitz (CA)* **[[App authorities at 221]].**

64 *Lyttle (CA)* **[[App authorities at 573]].**

65 *Lyttle (CA),* **[[App authorities at 578]]** at [14(c)]: there "may be an element of compensation associated with an order made under s 364(2).".

66 *Bublitz (CA),* **[[App authorities at 230]]** at [28].

applications,[67] and the Court of Appeal has emphasised that "[t]he two costs regimes serve wholly different purposes and should not be conflated".[68] These principles should be upheld by this Court.

39. In *Bublitz,* the Court of Appeal explained that "the primary purpose of s 364 is penal, for non-compliance, rather than compensatory", and that the weight to be given to the various factors when determining quantum will "depend upon the various circumstances of the case assessed against the purpose of incentivising compliance with the parties' procedural obligations."[69]

40. In *Lyttle*, the Court of Appeal determined costs appeals in relation to three different cases (Mr Lyttle, Mr S and Mr Singh). The Court referred to the purposes of s 364 costs orders to denounce failures to comply with procedural obligations, hold defaulting parties accountable, and to deter similar breaches in future.[70] Again, the Court noted there "may also be an element of compensation associated with an order made under s 364(2)".[71]

41. As to the criteria for determining the appropriate level of a costs award, in addition to the statutory criteria, in *Lyttle*, the Court also identified other factors that may influence the amount of an award made under s 364(2):[72]

    (i) the nature and frequency of the procedural failure;

    (ii) if there was a failure to disclose evidence, the nature of the evidence that was not disclosed;

    (iii) the nature of the charges faced by the defendant;

    (iv) the seniority of those responsible for the procedural failures; and

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67 *Morrison v FMA,* at [60] **[[App authorities at 489]].**

68 *Lyttle (CA),* **[[App authorities at 632 – 633]],** at [211] – [215].

69 *Bublitz (CA),* **[[App authorities at 235]]** at [44]. The Court did not determine whether an award equal to actual costs incurred could ever be warranted, and in declining leave to appeal the Supreme Court noted it "may well wish to consider at some point the extent to which s 364 …has a compensatory as well as a punitive purpose." *Bublitz v R* [2019] NZSC 139 at [16] **[[App authorities at 245]].**

70 *Lyttle (CA),* **[[App authorities at 578]]** at [14].

71 *Lyttle (CA),* **[[App authorities at 578]]** at [14(c)].

72 *Lyttle (CA)*, **[[App authorities at 578]]** at [14(e)].

(v) the extent to which it is necessary for the court to denounce the failures, hold the defaulting parties accountable and to deter similar breaches in the future.

Bill of Rights interpretation

42. Undoubtedly s 364 of the CPA must be given a meaning that is "consistent with the rights and freedoms" contained in BORA.[73] In particular, the reference to a sum that "must be no more than is just and reasonable" must be interpreted in light of BORA. The interpretation contended for here – that the primary focus of the provision is punitive – is clearly consistent with BORA rights.

43. Sanctions for significant procedural failures also support many of the values underpinning BORA. Encouraging procedural efficiency by discouraging delay and non-compliance enhances the right to be tried without undue delay.[74] Likewise, promoting compliance with Criminal Disclosure Act obligations supports the right to natural justice[75] and a fair trial.[76] If the procedural failure has impacted on these rights, that may be an aggravating factor relevant to the assessment of "just and reasonable" costs for the failure.

44. A relationship between s 364 - a section concerned with procedural (non)compliance - and the procedural fair trial rights guaranteed by BORA is therefore apparent. The court in assessing procedural non-compliance may look to all the circumstances, including the impact of the failure. In some cases this may include recognising a longer time was spent in custody than necessary. The court may consider the procedural failure more serious as a result, which will in turn impact the total sum awarded. However, the s 364 assessment is concerned with sanctioning procedural failure and not the vindication of rights breaches and therefore does not incorporate or give effect to BORA damages methodology. In addition, the

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73 NZBORA s 6, **[[App Authorities at 92]].**

74 NZBORA s 25(b), **[[App authorities at 97]].**

75 NZBORA s 27, **[[App authorities at 97]].** Disclosure of relevant material to parties so that they can know the allegations/case against them is part of natural justice: *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130.

76 NZBORA s 25(a), **[[App authorities at 97]].**

legal inquiry (as here) will stop well short of what is required to determine whether, as a distinct legal proposition, the defendant was arbitrarily detained in breach of s 22 of BORA.

45. That would be so whether or not the appellant attempted to advance a novel legal argument (as here) attributing responsibility for arbitrary detention to the s 3 BORA actor that did not order it.[77] In this case, Mr Apanui's remand status turned on a number of factors (unknown to the Courts below because they have not been the subject of pleadings) contained in the Bail Act 2000 and the Criminal Procedure (Mentally Impaired Persons) Act 2003. Section 364 does not provide the court with the evidence or the capacity to make broader determinations of BORA liability. Its primary function is to provide a prompt sanction for procedural failure.

Wider New Zealand framework

46. The wider legal framework in New Zealand – the legislative history and other means of redress – supports the interpretation contended for by the respondent. This framework reveals two key points: the statutory basis for s 364 costs favours a strict construction; but this does not leave an aggrieved defendant without means to seek other effective remedies.

47. Costs provisions must be narrowly construed. Unlike civil proceedings, costs in criminal cases do not follow the event.[78] At common law, in criminal cases costs were not payable either by the prosecution or defendant.[79] Over the past two centuries, common law jurisdictions, including New Zealand, have legislated exceptions to this rule.[80] Modern

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77 A defendant is remanded in custody by order of the court, not the prosecutor. While the prosecutorial act of filing a charge causes a defendant to be subject to the Bail Act, it does not "cause" a defendant to be remanded in custody, either as a matter of factual or legal causation. Similarly, a procedural failure to see the significance of, record, and disclose information cannot in itself give rise to detention, let alone an arbitrary one.

78 *Blackwood v R* [2020] NZCA 504 at [9].

79 "Report of Committee on Costs in Criminal Cases" (Wellington, 1966) at [2] **[[Resp authorities at 216]];** Dal Pont *Law of Costs* (4th edition, LexisNexis, 2018) at [24.2] – [24.3] **[Resp authorities at 237 – 238]];** *Latoudis v Casey* [1990] HCA 59, (1990) 97 ALR 45 at 60; *Henderson v Secretary of State for Justice* [2015] EWHC 130 (Admin), [2015] 1 Cr. App. R. 29 (QB) at [35] **[[Resp authorities at 252]].**

80 The history of costs in criminal cases in New Zealand is set out in "Report of Committee on Costs in Criminal Cases" (Wellington, 1966) **[[Resp authorities at Tab 06]].**

legislation has given the courts authority, in a variety of well-defined circumstances, to order costs to be paid to a party to criminal proceedings. The statutory basis for costs favours a strict construction as to the scope of costs awards. As observed by Lord Bridge in *Holden & Co v CPS (No 2)*:[81]

> The courts must always resist the temptation to engage, under the guise of statutory interpretation, in what is really judicial legislation, but that is particularly important in a sensitive constitutional area … where we should be scrupulous to avoid trespassing on parliamentary ground … I find it difficult to visualise any statutory context in which such a jurisdiction could be conferred by anything less than clear terms.

48. Accordingly, in the absence of any common law entitlement of costs, and in the absence of a statutory provision entitling an award to costs, there can be no award.

Other means of seeking redress

49. Costs under the CPA sit within a wider framework of other possible means of redress by a successful defendant. As the Court of Appeal has recently observed, each type of award serves a different purpose.[82] The role of s 364 CPA ought not to be distorted so as to infringe upon the framework provided by these other remedies.

CCCA

50. Unlike civil proceedings, costs in criminal proceedings do not follow the event, given a prosecutor brings the proceeding in the public interest rather than for personal benefit.[83] The Costs in Criminal Cases Act is the legislature's view as to how parties ought to be compensated in

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81 *Holden & Co. v Crown Prosecution Service* [1994] 1 AC 22 (HL), [1993] 2 WLR 934 at 41 **[[Resp authorities at 275]].**

82 In *Attorney-General v Morrison* [2025] NZCA 240 the Court of Appeal held **([[App authorities at 218]]**):

> … the awards made to the respondents under the CPA and under the CCCA, while significant, served different purposes to an award of public law damages. As we have explained, the awards under the CPA were to sanction or punish the FMA for its failure to comply with the CDA. On the other hand, the awards under the CCCA were primarily designed to compensate the respondents for the costs they incurred in successfully defending the charges. The primary role of public law damages is however to vindicate the breaches of the respondents' rights, and in this case, their right to a fair trial.

83 As has previously been said, "[a] prosecutor brings proceedings in the public interest, and so should be treated more tenderly." See *M v R* [2022] NZHC 529, citing *Berry v British Transport Commission* [1962] 1 QB 306 (CA) at 327 per Devlin LJ.

circumstances as listed in s 5 of that Act. That regime is broad and enables a successful defendant to receive an order that is "just and reasonable towards the costs of his defence". It is primarily focussed on legal costs but includes "any expenses properly incurred by a party in … carrying on a defence, or in making or defending an appeal".[84] Unlike CPA costs (which do not require the determination of a charge), only a successful defendant[85] may claim costs under the CCCA.

51. The CCCA offers a level of reimbursement to innocent defendants while also censuring improper prosecution conduct.[86] There is no presumption in favour of – or against – the award of costs where a defendant has been successful.[87] Where costs are ordered, the Act does not provide for full payment of all costs incurred by a defendant, but rather payments set by regulation, which can only be exceeded in specific circumstances.[88] Indemnity costs are rare and restricted to exceptional cases involving bad faith, gross misconduct, or where the prosecution should never have been brought.[89]

52. This is an area requiring difficult policy choices by government. The importance to society of the public prosecution function means that even when a defendant is successful and acquitted, there is no expectation in the CCCA that they will receive costs (in contrast to the position in civil proceedings).

53. The 1966 Report of the Committee on Costs in Criminal Cases framed the issue as follows:

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84 Costs in Criminal Cases Act 1967 ["CCCA"], s 2 **[[Resp authorities at 5]].**

85 A defendant who has been "acquitted of an offence or where the charge is dismissed or withdrawn, whether upon the merits or otherwise": s 5(1) CCCA, **[[Resp authorities at 6]].**

86 Law Commission *Costs in Criminal Cases* (NZLC R60, 2000) at [4] **[[Resp authorities at 63]].**

87 CCCA s 5 **[[Resp authorities at 6]].**

88 If the Court is "satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable": CCCA s13(3). The High Court has held "the manifest scheme of the Act is not …to indemnify a defendant for the costs actually incurred": *R v Connolly* HC Auckland CRI 2004-004-988, 1 December 2005 at [84] (This Court did not express a view otherwise in *R v Reid* [2007] NZSC 90, [2008] 1 NZLR 575).

89 See *R v Mather* HC Christchurch T33/97, 26 July 1999, Chisholm J and *Y v R* HC Auckland T281/96, 21 July 1997, per Salmon J.

> It would we think be common ground that by accepting the benefits of an ordered society the citizen becomes subject to various dangers and risks; among them the risks of being suspected, of being arrested and of being prosecuted for offences he has not committed. These dangers are minimised by the provision of fair procedures, trained and upright police forces, and speedy and efficient access to the Courts. Nevertheless there are and will always be cases where innocent men are prosecuted without any fault being necessarily laid at the door of the police. It does not seem to us to follow that in these circumstances the citizen must also be expected to bear the financial burden of exculpating himself. Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as practicable mitigate the consequences.

54. A deliberate policy choice has been made that a defendant is not entitled to repayment of all legal costs merely by virtue of an acquittal or dismissal of a charge. It would require clear statutory wording for s 364 orders to require full *compensation*, going well beyond legal and procedural costs. As has been outlined above, the text and legislative history of s 364 affirms the punitive purpose.

Cabinet Guidelines

55. In New Zealand a deliberate policy choice has been made only to provide compensation for successful defendants on a narrow basis. The Cabinet Compensation Guidelines for Wrongful Conviction and Detention provide for ex gratia payments in the limited circumstances of people who have served a period of custodial detention, had their conviction overturned, and established their factual innocence.[90]

56. In this case, the appellant had invited the District Court to apply the Cabinet Guidelines "by analogy" to give a daily rate for time spent in custody. While the appellant appears to no longer submit that the Guidelines are relevant, the exhortation to focus on *compensation* is at the heart of this appeal, and two points are worth observing.

57. First, the Guidelines respond to a different conceptual problem: individuals who have suffered a miscarriage of justice and were wrongly *convicted*. The

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90 *Compensation Guidelines for Wrongful Conviction and Detention* (Ministry of Justice, 2023) at [13] – [17] **[[03 CA Add Mat at 9]].**

genesis of the Guidelines is art 14(6) of the International Convention on Civil and Political Rights.[91] This article provides persons who have been convicted, suffered a miscarriage of justice, and suffered punishment, shall be compensated.[92][93] The Law Commission's 1998 report accordingly recommended the implementation of the Guidelines.[94] Compensation under the Guidelines is awarded in limited circumstances, when individuals have been wrongfully convicted, and must pass an innocence test.[95]

58. Second, a deliberate policy decision was made to exclude compensation for pre-trial detention from the Guidelines.[96] The Law Commission report addressed the question of whether eligibility should include persons such as those denied bail or remanded in custody, pending charges that were later withdrawn before trial or were there acquitted.[97] This was not recommended. Time in custody and the courts' ability to decline bail is an inherent part of the functioning of our criminal justice system, important for public safety, and compensation could have a chilling effect on police prosecution decisions.[98] Further, those who are convicted face greater stigmatism and continuing consequences.[99]

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91 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14(6).

92 Article 14(6) provides:

> 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.

93 New Zealand has not recognised art 14(6) in the Bill of Rights Act 1990 and has entered a reservation to the ICCPR (see Office of the High Commissioner for Human Rights "Country Profile for New Zealand". (2014) Status of Ratification):

> The Government of New Zealand reserves the right not to apply article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice.

94 Law Commission *Compensating the Wrongly Convicted* (NZLC R49, 1998) **[[Resp authorities Tab 04]].**

95 *Compensation Guidelines for Wrongful Conviction and Detention* (Ministry of Justice, 2023) **[[03 CA Ad Mat at 6]].** The applicant must prove they are innocent on the balance of probabilities. The criteria also requires that the system has failed to discharge them at or before verdict, and they must have spent time in custody.

96 This point was highlighted by Ellis J in *King v Attorney General* [2022] NZHC 695 at [148].

97 Law Commission *Compensating the Wrongly Convicted* (NZLC R49, 1998) **[[Resp authorities Tab 04]].**

98 At [95] – [96] **[[Resp authorities 153]].**

99 At [97] **[[Resp authorities 153]].**

59. It cuts across this regime for courts to order the Executive – outside of any Cabinet-approved regime, or statutory remedy or recognised common law cause of action – to pay compensation from public funds to defendants in the criminal process. It would be particularly problematic for a defendant to receive compensation for time spent in pre-trial detention who has (a) not been convicted, (b) not suffered a miscarriage of justice and (c) not proved their innocence. Parliament has placed other controls on pre-trial detention (i.e. tests for just cause for continued detention under the Bail Act 2000).

Civil redress

60. Civil redress, such as damages under the New Zealand Bill of Rights Act 1990 can be available where there has been a rights breach.[100] The primary purpose of redress in this context is to vindicate the right(s) infringed.[101] To pursue such a claim Mr Apanui would need to establish a breach of his rights (not accepted here) and causation by a s 3 actor (who does not have immunity) and to convince the court to exercise its discretion in favour of an award. In determining how to vindicate a breach of rights, and whether damages are necessary for this purpose, the Court assessing a *Baigent* claim will look at what other remedies have been afforded within the criminal process (which would include any s 364 order).

61. The primary reason the appellant contends any rights breach should be dealt with within s 364 is procedural efficiency.[102] But the substantive and procedural requirements of civil proceedings are not mere technicalities. For a court to conclude there has been a breach of rights (requiring a

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100 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) **[[App authorities at 635]].** The general approach to public law damages for breach of the Bill of Rights was set out in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 **[[App authorities at 688]].** And see the recent discussion in *Attorney-General v Morrison* [2025] NZCA 240 App authorities at 468 the Court held damages are available for breach of fair trial rights in relation to significant deficiencies in criminal disclosure: the Court upheld the High Court's awards of $10,000 each in public law damages to the two respondents in that case, as necessary to vindicate the significant and unprecedented breaches of their rights to a fair trial under s 25(a). The availability of damages for breach of fair trial rights was confirmed in *Attorney-General v Parore* [2025] NZCA 328 at [79] **[[Resp authorities at 333]].**

101 *Attorney-General v Morrison* [2025] NZCA 240 at [92] **[[App authorities at 218]],** *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [253] per Blanchard J **[[App authorities at 781]].**

102 Appellant's submissions paragraph 4.19.

remedy) significantly more information is necessary. The court cannot graft an entirely separate factual and legal inquiry, held in the civil context, into what is supposed to be summary hearing within a criminal proceeding designed to promote efficiency.

Overseas jurisdictions: the same policy approach for costs in public prosecutions

62. Some themes are apparent from a confined analysis of cognate jurisdictions:

62.1 No jurisdiction appears to have a statutory scheme for costs in the circumstances they are sought here.

62.2 Other jurisdictions, including those in Europe, recognise that domestic statutory frameworks would provide the only basis to award compensation as part of criminal costs and the scope of any statutory power is prescriptive.

62.3 In fact, other jurisdictions do not allow for damages or compensation that would otherwise be payable as civil damages for breach of fundamental human rights to be awarded by the courts in the context of statutory costs regimes. These must be sought separately through civil – i.e. tort or constitutional/public law – actions.

62.4 None of the statutory costs regimes allow *compensation* for *pre-trial detention* in circumstances where a defendant has been discharged or acquitted.

63. The United Kingdom has provision for compensating defendants for expenses properly incurred during the proceedings,[103] for compensating parties to proceedings for expenses incurred through the improper act or

[103] Prosecution of Offences Act 1985, s 16 and 16A – note the amount is limited to legal aid rates, the costs do not included expenses which do not directly relate to the proceedings (such as the loss of earnings) and if the circumstances make it inappropriate for the defendant to recover the full costs the court shall instead assess what amount would be "just and reasonable" (s 16(6)).

omission by another party,[104] and for prosecutors' costs to be paid out of central funds or by convicted persons.[105]

64. In Australia, there is provision for a defendant to recover legal costs when their charges are dismissed or withdrawn,[106] for costs to be ordered when a party has behaved in a way not consistent with the proper conduct of trial or has not complied with certain procedural requirements,[107] and when unnecessary costs have been incurred because of the conduct of a legal practitioner.[108]

65. Canada has provision for "just and reasonable" costs to be awarded against the defendant or prosecutor in an amount consistent with the fees established by the Criminal Code.[109] Separately, Charter damages for failures in "prosecutorial duty" that cause breach of fundamental rights can be awarded pursuant to the Canadian Charter of Rights and Freedoms or the inherent jurisdiction of superior courts to control their own process.[110] However, the threshold for a Charter remedy in the public prosecutions context is especially high, requiring deliberate wrongdoing or recklessness.[111]

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104 Prosecution of Offences Act 1985, ss 19 – 19B. There is also an inherent jurisdiction of the Crown Court to order that solicitors pay personally any costs thrown away by reason of a serious breach on the part of the solicitor of his or her duty to the court. This power should only be used in exceptional circumstances where a statutory power is not available. See *Practice Direction (Costs in Criminal Proceedings) 2015* [2015] EWCA Crim 1568 at 4.6.1 – 4.6.3.

105 Prosecution of Offences Act 1985, ss 17 and 18 respectively.

106 For example, in New South Wales, the Criminal Procedure Act 1986 provides for "just and reasonable" professional costs to be paid to the accused person when their charges are dismissed or withdrawn, but only in certain circumstances: see s 116 and 117. In Victoria, s 401 Criminal Procedure Act 2009 empowers the Magistrates' Court a broad discretion as to costs in summary and committal proceedings. In Tasmania, s 4 of the Costs in Criminal Cases Act 1976 provides a defendant who has been acquitted, his charges have been dismissed or withdrawn, or he is discharged upon an indictment, a court may pay his "just and reasonable" defence costs. In Northern Territory, a complainant may be ordered to pay costs to a successful defendant in certain circumstances (see s 77 Local Court (Criminal Procedure) Act 1928.

107 Criminal Procedure Act 2009 (Vic) s 404.

108 Criminal Procedure Act 2009 (Vic) s 410.

109 Criminal Code, R.S.C. 1985 C-46, s 809, 826 and 834(1) and 839(3). A party seeking costs should not expect to recover costs well in excess of the amount actually expended for his or her defence (*Singh* [2016] OJ. No. 665, 129 O.R. (3d) 241 at [66]).

110 For inherent power see *R v Pawlowski* [1993] O.J. No. 554, 12 O.R. (3d) 709, 101 D.L.R. (4th) 267 at [10].

111 *Henry v British Colombia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214 at [82] (majority). Note the Court of Appeal in *Attorney-General v Morrison* at [83] held such claims in the New Zealand context do not require intentional wrongdoing on part of the prosecutor **[[App authorities at 215]]**.

66. The European Court on Human Rights has observed that whether there is compensation for lawful restrictions on liberty depends on the wording of domestic legal provisions and the way they are interpreted by the courts. The Court has confirmed that the European Convention on Human Rights does not itself disclose such a right to compensation for pre-trial detention.[112]

Principled application of the criteria leads to a lower costs award

67. In light of the above principles, the sum that was "just and reasonable in light of the costs incurred by the court, victims, witnesses, and any other person" was no more $15,000. As observed by the Court of Appeal, the District Court's focus on a daily rate for custodial remand resulted in a quantum which was disproportionate to the seriousness of the oversight or error that led to the procedural failures.[113]

68. An order of $15,000 was sufficient to denounce the failure by Police. It reflected the significance of the late-disclosed information, the seriousness of the charge, and the consequence to Mr Apanui (contributing to him remaining in custody and being the subject of further psychiatric reports). Orders at a higher level must be reserved for cases of a deliberate procedural failure leading to significant disruption. Higher sums against prosecutors are only warranted where the failures are repeated, or otherwise reflect bad faith or deliberate withholding of information.

69. The need for denunciation and deterrence is also greater where failures occur at a senior level,[114] which was not the case here. Judge Winter failed to take into account that this case involved an inadvertent disclosure failure by a relatively junior Detective. Also, this was not a failure by Police to disclose material held on file – rather, the significance of the passing conversation appears to have simply not registered with the Detective

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112 *Masson and Von Zon v the Netherlands* (1996) 22 EHRR 491 (ECHR) (minority) at [49] **[[Resp authorities at 295]]**, cited in *Henderson v Secretary of State for Justice* [2015] EWHC 130 (Admin), [2015] 1 Cr. App. R. 29 (QB) at [19], **[[Resp authorities at 248]].**

113 At [46] **[[01 SC Casebook at 19]]**.

114 *Lyttle* at [14(e)(iv)] **[[App authorities at 578]]**.

Constable.[115] Consequently, he did not record it nor make it available for disclosure.

70. The period of time it took Police to ultimately make disclosure – and the consequent impact on Mr Apanui and the state's resources – were clearly relevant and referenced by the Judge. But Judge Winter did not take account of the fact the issue was rectified prior to any trial. This is not a situation of repeated failures or unmet assurances. In this respect, this case stands apart from others where significant costs orders under s 364 have been made.

71. A table of other cases in which CPA costs orders have been made is attached as **Appendix C**. The circumstances of the present case are closest in nature to the cases *Singh* and *M*. Both involved delayed disclosure without any indication of bad faith by Police. Both impacted the case against the defendant, but neither continued to be remanded in custody at the time.

71.1 In *Singh*[116] Police failed to promptly disclose that the complainant did not wish to pursue her allegations, and that she changed her mind as to the date the offending occurred. The charges were dismissed before any trial. The failures caused stress and legal expense to Mr Singh. There is no indication he was in custody. The Court of Appeal held the appropriate order was $5,000 under the CPA. A separate order under the CCCA was made to reflect inadequacies in the Police investigation.

71.2 Police were ordered to pay $6,000 in *M v R*.[117] There was a failure to disclose a telephone conversation between a complainant and her mother (recorded by Police) in the context of historic sex

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115 While Detective Elima mentions the conversation in his statement, Detective Constable Dhillon says he was first aware of Mr Sylva's connection to a second fire in when it was brought to his attention by Detective Sergeant Mead in October 2022, see Formal Statement of Detective Dhillon **[[03 CA Ad Mats at 28-29]].**

116 *Lyttle (CA),* from [177] **[[App authorities at 622]]**.

117 *M v R* [2022] NZHC 529 **[[Resp authorities Tab 12]].**

charges (no bad faith, it was explicable that this was not considered relevant).[118] At least a day and a half of trial time was lost due to the disclosure failure. A s 147 application was made during trial, and declined. Mr M was ultimately acquitted. CCCA costs were declined by the High Court. But an order of $6,000 under the CPA was appropriate to censure Police for non-compliance.

72. Higher orders have been made in cases involving far more serious and persistent failings, and greater impact on the justice system than the present case:

72.1 In *S*[119] there were multiple disclosure failings, including late disclosure of expert witness information and police notebooks, following repeated requests and assurances that disclosure was complete. CPA costs of $30,000 reflected the need for a stern penalty given the stakes were high (S was charged with manslaughter of his infant son), and the delayed disclosure included documents that had been repeatedly requested. Disclosure occurred during trial (causing an adjournment of the trial for a day).[120] S was also awarded $145,000 in costs under the CCCA.

72.2 A $40,000 order was made by the High Court in *Johnson* for three significant procedural failings which related to a prison informant and key witness for the prosecution.[121] The Crown failed to disclose that a letter of assistance had been given the informant.[122] The statement had also been redacted to exclude

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118 The recording did not manifestly discredit anything the complainant said, but there were some inconsistencies in details (the weight of these was a matter for the jury).

119 *Lyttle (CA),* from [105], **[[App authorities at 602]].**

120 The jury was unable to reach a verdict and the Crown elected not to proceed with a re-trial. The charges were dismissed.

121 *R v Johnson* [2023] NZHC 2948 **[[Resp authorities Tab 13]]**.

122 This fact which only came to light after defence counsel cross-examined police during a pre-trial hearing: at [155], [216] **[[Resp authorities at 394, 403]].** Ellis J accepted that Police did not deliberately withhold a letter of assistance but held that there was an obligation with Police and the Crown prosecutor to make pointed enquiries as they must have known witness A was a prison informant and that a letter of

reference to another prison informant, and there were inconsistencies between the two witness' accounts. This ultimately resulted in the murder charge against Mr Johnson being dropped.[123] Further, the Crown prosecutor instructed police to omit from a job sheet the presence of the Crown prosecutor and his junior at an interview with the informant. Ellis J considered this failure was significant in its potential impact on the public faith in the administration of justice.[124]

72.3 A $50,000 order was made in *Bublitz* where a list of 14,619 undisclosed documents was provided after the close of the Crown and defence cases, forcing a trial which had taken some nine months of High Court time to be aborted and wasting many millions of dollars of defence legal costs. The additional costs incurred by the defence for the disclosure failings were estimated at over $1.2 million. The High Court made a s 364 costs order of $50,000: $10,000 to each of the four defendants and $10,000 to the Ministry of Justice,[125] which the Court of Appeal upheld.[126]

72.4 An order of $75,000 was made under the CPA in *Lyttle,* where there were repeated disclosure failings which resulted in delays of around two and a half years, incorrect assurances were made to the Court, senior officers were involved in the errors, the errors persisted even after the Court put in place an audit process, the problems reflected inadequate systems, and the ongoing failure meant there was likely to be other significant material which was not disclosed. All this happened in the context of a murder charge.

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assistance was a live possibility (at [216]) **[[Resp authorities at 403]].**

123 After the inconsistencies came to light before the re-trial. The inconsistencies were discovered by defence counsel due to a mistake in the redaction of handwritten notes that had been disclosed for the first trial.

124 At [230] **[[Resp authorities at 405]].**

125 *R v Bublitz* [2018] NZHC 373 **[[App authorities Tab 12]]**.

126 See *Bublitz (CA),* **[[App authorities Tab 06]].** In upholding the award, the Court noted (at [49]) that it might have made a more substantial order "given the scale of the FMA's neglect and to reflect the fact that, at the time of the hearing, it appeared that Mr Bublitz would be unable to be represented by his preferred counsel at retrial".

The additional costs incurred by the defence resulting only from the non-disclosure were put at $250,000. The High Court made an order for costs under s 364 of $75,000, which was upheld on appeal to this Court.

73. The above cases confirm the Court of Appeal was correct to conclude the amount that is just and reasonable in these circumstances, and in light of the costs incurred, was in the vicinity of $15,000. This demonstrated that the error of principle made by the Judge (to provide compensation for time spent in custody and legal costs for seeking costs) resulted in an excessive costs award that was appropriately quashed by the Court of Appeal.

Conclusion

74. For the above reasons the appeal should be dismissed.

14 October 2025

M F Laracy / Z R Johnston / O A Jessop Boivin
Counsel for the respondent

TO: The Registrar of the Court of Appeal of New Zealand.

AND TO: The appellant.

APPENDIX A

364 Costs orders

(1) In this section,—

costs order means an order under subsection (2)

procedural failure means a failure, or refusal, to comply with a requirement imposed by or under this Act or any rules of court or regulations made under it, or the Criminal Disclosure Act 2008 or any regulations made under that Act

prosecution—

(a) means any proceedings commenced by the filing of a charging document; but

(b) does not include an appeal.

(2) A court may order the defendant, the defendant's lawyer, or the prosecutor to pay a sum in respect of any procedural failure by that person in the course of a prosecution if the court is satisfied that the failure is significant and there is no reasonable excuse for that failure.

(3) The sum must be no more than is just and reasonable in the light of the costs incurred by the court, victims, witnesses, and any other person.

(4) A costs order may be made on the court's own motion, or on application by the defendant, the defendant's lawyer, or the prosecutor.

(5) Before making a costs order, the court must give the person against whom it is to be made a reasonable opportunity to be heard.

(6) A costs order may be made even if the defendant has not yet been convicted, or is eventually discharged, or the charge is dismissed.

(7) The court may make more than 1 costs order against the same person in the course of the same prosecution.

(8) The court may order that some or all of the amount ordered to be paid under a costs order be paid to any person connected with the prosecution.

(9) Subsections (2) to (8) do not limit or affect the Costs in Criminal Cases Act 1967.

APPENDIX B: CHRONOLOGY

The below table sets out the important dates in this matter alongside a description of events. (This is adapted from the Chronology prepared by the respondent in the District Court.[127])

Date	Description of events
12 September 2020	Events from this day lead to Edmond Apanui being charged with two counts of male assaults female **(Police charges)**.
23 November 2020	Fire at an address in Massey. Patrick Sylva gives a statement to Police.
24 November 2020	Mr Apanui's first appearance on charge of arson endangering life. File records bail was opposed and he was remanded in custody by consent for a bail application.[128]
21 December 2020	Mr Apanui pleads not guilty to the charge of arson endangering life. A bail application was not advanced.[129]
19 January 2021	Crown assumes responsibility for the prosecution of the charge of arson endangering life (**Crown charge**).[130]
1 July 2021	Counsel for Mr Apanui indicate that fitness to stand trial may be at issue. Court sets down 11 August 2021 for Mr Apanui to be screened by the Court's forensic nurses.
11 August 2021	Screening takes place. Mr Apanui is found fit to stand trial. Defence counsel indicate that insanity may also be at issue. Dr John Jacques is therefore instructed to prepare a psychiatric report, but this is only in relation to the Police charges.
30 September 2021	Dr Jacques issues his report, opining that at the time of the alleged offending that gave rise to the Police charges, Mr Apanui was insane within the meaning of s 23 of the Crimes Act 1961.
18 October 2021	Court finds Mr Apanui insane on the Police charges. Disposition hearing set for 1 December 2021.
21 October 2021	Court allocates a three-day standby fixture starting 7 June 2022 for the Crown charge. Defence indicate that they are seeking an updated report regarding insanity for the Crown charge. Judge Lummis grants leave of the Court to bring the matter on should the issue of insanity require further consideration.

127 See 02 CA Casebook at 58.

128 See 02 CA Casebook at 7.

129 See 02 CA Casebook at 7.

130 See 02 CA Casebook at 9

	Defence in due course commission report pursuant to s 38(1)(b) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (**CPMIP**).
16 February 2022	Fire at a property in Henderson, originating from Mr Sylva's room. Detective Derek Elima is the officer-in-charge of the investigation. Mr Sylva is treated as the only suspect.
Later in February 2022	Detective Elima and Detective Constable Dhillon have a conversation at Henderson Police Station in which Detective Elima informs Detective Constable Dhillon that Mr Sylva was the suspect in the fire that he had attended that day. (Detective Constable Dhillon has no memory of this conversation.)
10 May 2022	Detective Elima receives the fire investigation report. The report concludes that the cause of the fire was undetermined: it could not determine whether the fire was deliberately lit or accidental.
19 May 2022	The file in relation to the fire of 16 February 2022 is closed with no further action.
19 May 2022	Defence counsel file a memorandum explaining that the report prepared by Dr Alex Kettner indicated that the Court may be likely to find Mr Apanui insane within the meaning of s 23 of the Crimes Act 1961 at the time of the alleged arson. Defence counsel seeks vacation of the standby trial date and for the matter to be brought on for a review hearing before the CPMIP Court.
1 June 2022	Judge Gibson grants the defence application to vacate the trial on 1 June 2022 and CPMIP review is set down for 20 July 2022.
Later in June	Review of the report prepared by Dr Kettner suggests that he had not had access primary documentation relating to the arson charge before providing his opinion. The formal witness statements of each of the witnesses, the DVD interview with Mr Apanui and the fire investigation report were provided and an addendum report sought.
10 July 2022	Addendum report provided. Dr Kettner alters view, now concluding that the Court may be likely to find Mr Apanui sane within the meaning of s 23 of the Crimes Act.
20 July 2022	At CPMIP review, Judge Winter orders a furthers 38(1)(b) report to assess whether Mr Apanui was insane at the time of the alleged arson.
5 September 2022	Dr Jacques issues further report. He opines that the Court would likely find that Mr Apanui was sane at the time of the alleged arson.
21 September 2022	Matter comes back before the Court. Counsel for Mr Apanui confirm that there is no dispute to the findings of the reports prepared pursuant to the CPMIP Act.

	Judge Ryan determines that the Court is unable to find Mr Apanui not guilty by reason of insanity. Mr Apanui seeks a sentence indication. Mr Apanui is remanded in custody to appear on 6 December 2022 for trial callover and then 16 December 2022 for a sentence indication.
Sometime in October	Detective Constable Dhillon is informed by Detective Sergeant Michael Mead about Mr Sylva's connection to the Henderson fire.
10 November 2022	Detective Constable Dhillon attends a training day, meets the Crown prosecutor on the file and advises her about Mr Sylva having been a suspect for a time. The Crown prosecutor advises Detective Constable Dhillon to gather more information on the file for her to review.
15 November 2022	Crown files the trial callover memorandum.
16 November 2022	Detective Constable Dhillon searches Mr Sylva in NIA, which shows that Mr Sylva was involved in another fire on 16 February 2022, with the incident being investigated by Detective Elima.
17 November 2022	Detective Constable Dhillon asks for, and receives access to, the Henderson fire file in the Investigation Management Tool.
21 November 2022	Mr Apanui's counsel are informed about the Henderson fire, with disclosure of the file to follow.
22 November 2022	All documents relating to the Henderson fire file are disclosed to Mr Apanui's counsel.
25 November 2022	Crown informs the Court registry that although Mr Apanui's next date is 6 December 2022 for callover, the Crown is now intending to offer no evidence and therefore asks for the matter to be brought on at the earliest date so that the s 147 application can be determined.
28 November 2022	Hearing before Judge Pecotic. Crown confirms that it intends to call no evidence at trial to prove the charge, and applies to have the charge dismissed. Judge Pecotic dismisses the charge and discharges Mr Apanui.
3 August 2023	Application for costs order made by Mr Apanui under s 364 CPA
25 August 2023	Costs hearing before Judge Winter
13 November 2023	Judgment of Judge Winter on costs application
7 December 2023	Crown files appeal against Judge Winter’s decision

APPENDIX C

Case	CPA quantum	Type of failure	Compensation at issue?	Other redress	Who pays
R v Rossiter [2025] NZDC 12681	$500	Failure to complete disclosure when directed by the court, failure to file formal written statements when directed by the court, failure to provide a witness list.	No. Only reference to costs incurred was that this information was not before the Judge but it was clear some costs had been incurred.	No.	The Crown ordered to pay
R v Walker [2016] NZDC 15474	$500	The defendant (self-represented) failed to advise she was not proceeding with her half day pre-trial fixture.	No.	No.	The defendant ordered to pay
Singh (in R v Lyttle [2022] NZCA 52, [2022] NZAR 117)	$5,000 (decreased on appeal from $15,000).	Multiple disclosure failings which, if disclosed earlier, would have made it apparent there was problems in the case against the defendant (complainant didn't want to pursue her complaint for six months before that fact was disclosed, and her account materially changed). Plus, Police failed to explain the allegations to Mr Singh when he was arrested. The charges were dismissed before trial.	No.	$10,000 under the CCCA (increased on appeal from a scale costs award under CCCA ($113)). This order reflected failures by police to properly investigate).	Police ordered to pay.
M v R [2022] NZHC 529.	$6,000.	Failure to disclose a recorded telephone conversation between a complainant and her mother in the context of historic sex charges. The officer in charge at the time	Defence costs attributable to the delay caused by the disclosure failure were approximate $8,000. The	CCCA costs declined (M sought full indemnity	Police ordered to pay (it was the Police failure which caused

	Ordered to be paid to the defendant.	had not realised the evidential value of the telephone call. At least one and a half days of trial time was lost due to the failure.	Court observed s 364 is a sanction for non-compliance and a compensatory award is not appropriate.	costs of $65,939.65 under the CCCA, the Court declined scale costs so did not consider the issue of costs in excess of scale).	the non-disclosure).
S v R (in *R v Lyttle* [2022] NZCA 52, [2022] NZAR 117)	$30,000 (upheld on appeal and said to be at the upper limit).	Manslaughter charge. Delay in disclosing expert medical evidence which the prosecution case turned entirely on, delay in disclosing surveillance information (which was of significant evidential value to the defence) and significant disclosure failure of Police records which required adjournment for one day during trial and a disclosure audit (which came after counsel had given an assurance to the Court that disclosure was complete). The jury was unable to agree on a verdict at trial and the Crown did not seek a re-trial.	No. The focus of the CPA costs were couched in terms of sanctioning the failure, for example: they "needed to be imposed a salutary warning to prosecuting authorities to discharge their disclosure obligations in a professional manner." (at [150]).	Above scale costs $145,000 under the CCCA (70 per cent of his actual costs).	Police ordered to pay.
R v Johnson [2023] NZHC 2948.	$40,000 equally to Mr Johnson and Mr Hemara and is to be applied to their	Three significant procedural failures. (1) The Crown failed to disclose that a letter of assistance had been given to Witness A – this only came to light after defence	Broad reference to the costs incurred (ie. accepted that the costs incurred as a result of the failures were not in the order of *Bublitz* or *Lyttle*).	No.	Ordered costs to be paid equally by the Police and the Crown prosecutor.

	debt to the Legal Services Agency	counsel cross-examined police during a pre-trial hearing. (2) Witness A's statement had been redacted to exclude reference to another prison informant, which showed inconsistencies between the two witness' accounts and ultimately resulted in the murder charge against Mr Johnson being dropped after the inconsistencies came to light before the re-trial (this came to light due to a mistake in the redaction of the handwritten notes that had been disclosed for the first trial). (3) the Crown prosecutor instructed police to omit from a job sheet the presence of the Crown prosecutor and his junior at an interview with Witness A.			
R v Bublitz [2018] NZHC 373. *R v Bublitz* [2019] NZCA 379 (leave to appeal declined in *R v Bublitz* [2019] NZSC 139)	A $50,000 order was made: $10,000 to each of the four defendants and $10,000 to the Ministry of Justice.	A list of 14,619 undisclosed documents was provided after the close of the Crown and defence cases, forcing a trial which had taken some nine months of High Court time to be aborted and wasting many millions of dollars of defence legal costs.	The additional costs incurred by the defence for the disclosure failings were estimated at over $1.2 million. The appellants argued the Judge should have made an order which meaningfully compensates the party affected by the failure.	Mr Morrison awarded $75,000 under the CCCA. Mr Morrison also brought civil proceedings (see *Morrison v FMA* [2022] NZHC 1654	The Financial Markets Authority was ordered to pay.

			The Court was satisfied the Judge had regard to the significance of the breach and the resultant wasted costs, the carelessness involved, the need for deterrence, the fact the FMA had the means to pay such an award and the need for overall fairness.	and *Attorney-General v Morrison* [2025] NZCA 240). The Court considered it was inappropriate at this stage to consider Mr Bublitz's application under the CCCA because the retrial was yet to take place.	
R v Lyttle [2022] NZCA 52, [2022] NZAR 117	$75,000 (part of this paid to Mrs Lyttle)	Repeated disclosure failings which resulted in delays of around two and a half years. Incorrect assurances were made to the Court, senior officers were involved in the errors, the errors persisted even after the Court put in place an audit process, the problems reflected inadequate systems, and the ongoing failure meant there was likely to be other significant material which	The additional costs incurred by the defence resulting only from the non-disclosure were put at $250,000. The CA, in upholding the order observed the HC judge did not set out to compensate Mr Lyttle for his wasted costs. The HC judge had regard to the costs	No. Mr Lyttle was convicted and serving his sentence at the time of the CPA application.	Police ordered to pay.

		was not disclosed. All this happened in the context of a murder charge which caused significant delays to his trial, where he was convicted. His conviction was quashed on appeal and the charges later dismissed.	that had been incurred by Mr Lyttle, but the assessment was not calibrated against the costs that had been incurred – when calculating the amount of the order.		