



**THIS REPORT IS NOT BE PUBLISHED ON THE INTERNET OR OTHERWISE MADE PUBLICALLY
AVAILABLE**

COOK ISLANDS PILON 2020 COUNTRY REPORT

1. Effect of COVID-19

The COVID-19 pandemic has resulted in some complex and challenging work for the Crown Law Office, and there have been numerous novel issues relating to law and procedure. The Crown Law Office drafted a standalone COVID-19 Act to give the Cook Islands the ability to act quickly to the ever changing situation, as the Cooks Islands had insufficient existing legislation to be able to effectively respond to the pandemic. The drafting of the COVID-19 Act 2020 from scratch occurred over four days prior to it being presented to members of Parliament, tabled and passed in March 2020.

COVID-19 has resulted in the borders being closed from March 2020. Throughout the year, a series of Orders have been passed under the new COVID-19 Act 2020 to supplement the government's work in protecting Cook Islanders against this deadly disease, including by restricting social gatherings and enforcing the requirement for supervised quarantine in Rarotonga for those still eligible to return to the Cook Islands (Cook Island citizens and permanent residents).

As of October 2020, the borders have not yet fully opened and those returning are still subject to quarantine requirements on arrival in the Cook Islands.

The Crown Law Office has also provided assistance to key stakeholders to ensure quick and timely implementation of the COVID-19 Economic Response Plan for which there have been a number of phases in order to provide adequate social and economic assistance for the Cook Islands people during this difficult time.

Another challenge that has arisen due to COVID-19, is that as our High Court Judges are from New Zealand they have not been able to travel to Rarotonga because of the need to undertake quarantine on arrival in the Cook Islands and then in New Zealand on return. Therefore, no jury trials or Judge alone trials have been able to progress since the border closure.

The Judges of the High Court have appeared by audio-visual link to attend to sentencings, and by telephone to deal with some other matters, but we are still facing a significant backlog in Court matters.

The Court of Appeal has conducted one audio-visual link appeal in relation to a criminal matter, and will shortly be conducting an appeal in relation to a land matter.

2. Major law and justice sector achievements

The Cook Islands has developed and implemented specific COVID-19 legislation to assist in the whole of country response.

The Cook Islands has now completed its second review (conducted by the Maldives and Oman) in respect of the United Nations Convention against Corruption (UNCAC). This was the review of the implementation of Chapters II (preventative measures) and V (asset recovery) of UNCAC. The Deputy-Solicitor General also represented the Cook Islands at the 8th Conference of State Parties in respect of UNCAC and this took place in Abu Dhabi on 16-20 December 2019.

A positive impact of COVID-19 is that politicians have remained in the Cook Islands resulting in Parliament sitting days increasing (although this has also generated more work for the Crown Law Office).

This year, the Cook Islands saw a transition of Prime Ministers mid-term where some legal issues arose both Constitutionally and under the Standing Orders of Parliament. The Cook Islands was without a government for a few hours, however the situation was successfully resolved. The previous Prime Minister has stepped down after 10 years of service, and it is the first time a Prime Minister has stepped down mid-term.

3. Significant Court decisions and the impact of COVID-19 on the Court system

In terms of significant Court decisions:

Webb v Webb [2020] UKPC 22

This was a significant case for the Cook Islands as the matter reached the highest appellate Court of the Cook Islands, the Privy Council in London. The case involved the division of matrimonial assets under the Matrimonial Property Act 1991-92 (the Act) and considered the validity of family trusts and whether the assets settled under them were matrimonial property. Hinging on the Court's decision was also the question of whether "personal debts" accrued by one of the spouses in New Zealand could be enforced in the Cook Islands and thus absolved by the assets in the trust. The Privy Council upheld the Court of Appeal's decision that Mr Webb's tax debt could not be enforced in the Cook Islands and therefore could not be considered "personal debt" as per section 20 of the Act. Therefore reaffirming the long-standing principle in common law referred to as the foreign tax principle that Courts will not

collect taxes of a foreign state for the benefit of that foreign state. It also upheld that the trusts were invalid and could therefore be divided under the Act.

Crown v Virivirisai [2019] CKCA 1

This was an appeal by the Crown against a sentence for an offence of grievous bodily harm (GBH) where the Chief Justice had sentenced the defendant to 2 years and 9 months' imprisonment. The Crown's ground of appeal was that the sentence was manifestly inadequate. The Court of Appeal held that, based on the facts of this case, the Chief Justice erred in his starting point for the sentence and erred in his allowance for intoxication as a mitigating factor. The Court of Appeal confirmed that the starting point for this gravity of offending should have been considered in band 2 of the sentencing guidelines for GBH set out in *R v Taueki (2005)* 21 CRNZ 769, a New Zealand case that has been adopted in the Cook Islands. The sentence was therefore quashed, and in its place a sentence of 4 years' imprisonment was imposed.

Crown v Tonorio [2019] CKCA 2

This was a very serious case involving three counts of arson where supermarkets had been burnt down. The case was significant because arson of this scale in a small country like the Cook Islands had a noteworthy impact, instilling fear and substantial economic loss on such a close-knit community. The trial was conducted over six days and the jury ultimately returned guilty verdicts. The Judge imposed a sentence of eight and a half years' imprisonment for the arson charges. The conviction and sentence were appealed to the Court of Appeal. The conviction was appealed on the basis that the confessions relied upon by the Crown lacked corroboration and credibility, and the defence alleged prosecutorial misconduct. In regards to the sentencing, it was argued that there had been a failure to adequately account for the appellant's age (17) and therefore the sentence was manifestly excessive.

The Court of Appeal dismissed the appeal against conviction, stating in relation to the lack of corroboration, that the evidence was fairly put to the jury without any corroboration requirement or specific reliability warning. The Court of Appeal also dismissed the allegation of prosecutorial misconduct, stating that "*it was the Crown's job to firmly and clearly point out weaknesses in a defence case... There was no over-reach by the Crown, and no excessive use of adjectives, or any abusive language*". The Court of Appeal also dismissed the appeal against sentence, and the Court of Appeal noted that the Judge in these circumstances could have arrived at a much higher starting point for the offending, which even after making appropriate deductions for the defendant's young age, would have meant a longer end sentence.

The appellant later received a further sentence of six months' imprisonment, in addition to the eight and a half years imposed, after also admitting a burglary offence and thefts.

O'Carroll v R [2020] NZSC 92

This is a significant Court decision for the Cook Islands as it sets the precedent for the right of appeal to appellate Courts in New Zealand for crimes committed in the Cook Islands and dealt with in New Zealand. Also, whether sentences available in New Zealand can be imposed even where they are not available sentences under the Cook Islands Crimes Act 1969.

Section 155 of the Cook Islands Act 1915 provides that a person who offends in the Cook Islands under the Crimes Act 1969 can be prosecuted in New Zealand with leave of the Cook Islands Attorney General. The issues considered by the New Zealand Supreme Court here were whether the interpretation and purpose of section 155 of the Cook Islands Act 1915 was such that it conferred a right of appeal in New Zealand, and also allowed for a sentence of home detention to be imposed in New Zealand albeit not an available sentence in the Cook Islands.

The appellant had indecently assaulted a woman while he was on holiday in the Cook Islands. The appellant was prosecuted in New Zealand. He pleaded guilty and was sentenced in the New Zealand High Court to 22 months' imprisonment. The High Court and Court of Appeal both held that the appellant could not be sentenced to home detention given that Cook Islands law does not provide for home detention as a sentencing option. The Court of Appeal also held that, in any event, there is no right of appeal from a sentence handed down in the New Zealand High Court in relation to offending in the Cook Islands.

In regards to the right to appeal, the Supreme Court firstly ruled that a broad interpretation of section 155(1) was favoured because this interpretation would be consistent with the New Zealand Bill of Rights and the International Covenant and Political Rights (the ICCPR) which both affirm the right for a conviction to be reviewed by a higher tribunal according to law. Secondly, the Supreme Court held that if the New Zealand Parliament had wanted to curtail that right, it would have done so expressly, and because it had not the usual appeal pathways were still available. Thirdly, the Supreme Court took a purposive approach and held that a narrow reading would create "*an unsatisfactory and plainly unintended anomaly*". Finally, the Supreme Court also held that to take a narrow reading would then create practicality issues around parole and whether the Parole Board would then be obliged to apply Cook Islands parole law. The broader interpretation would avoid these associated difficulties.

In regards to home detention, the question was whether the reference in section 155(4) to the "punishment to be imposed" by the High Court shall be that which is provided for the offence by the law of the Cook Islands, refers only to the maximum sentence available, or to the end sentence actually imposed. The Supreme Court held that the reference to "punishment to be imposed" is referring to the maximum sentence only, and this meant home detention was available. The appeal was allowed and a sentence of 10 month's home detention was substituted.

4. PILON strategic priorities

The Crimes Bill is now with the Select Committee who have completed consultations, and it is anticipated that they will report to Parliament in the next Parliamentary session (possibly December 2019).

Cybercrime

Due to COVID-19, the anticipated Oceania Cyber Security Centre cyber-security capacity review was not able to happen.

The Cook Islands has as of August this year connected to the Manatua cable. This may present opportunities for discussion around how legislation can provide protection against cybercrime in the near future. However, we are still missing cybercrime offences as these are contained in the new Crimes Bill which is still before the Select Committee.

SGBV

A sexual offence that was committed by a New Zealand tourist on another New Zealand tourist whilst both holidaying in Rarotonga was successfully prosecuted in the New Zealand jurisdiction after a referral from the Cook Islands under section 155 of the Cook Islands Act 1915 (in force in both New Zealand the Cook Islands) (*O'Carroll v R* [2020] NZSC 92 – see above).

Sexual and gender based violence continues to be a growing issue which unfortunately has not been prioritised by the Cook Islands Police who have recently lost their video interview capability and have not replaced it. The Crown Law Office has had to intervene in one domestic violence case where the matter was not dealt with appropriately by the police (the defendant having been bailed by the Court when this was not appropriate).

Corruption

As noted above, the Cook Islands has completed its second country review of the implementation of UNCAC. Due to the COVID-19 pandemic, the Anti-Corruption Committee (ACC) has not been able to meet regularly due to the commitments and workload COVID-19 has placed on the key government officials who are the members of the ACC.

UN-PRAC is in the process of liaising with the Cook Islands and the ACC regarding the development of the Cook Islands National Anti-Corruption Strategy.

5. Significant issues affecting the law and justice sector, and options to address these issues

Resources

The Crown Law Office receives a significant amount of work from across all of government (including advisory work, criminal prosecutions and civil litigation), and this has been

handled by only five lawyers (and a part-time consultant), who also have to manage legislative drafting (with the assistance of the Pacific desk at the New Zealand Parliamentary Council Office).

A sixth lawyer has become stuck in Australia due to COVID-19 border closures, and a seventh lawyer has only just joined the Office. Unfortunately, the Office is in the process of losing one of the senior lawyers due to contract expiry.

COVID-19 has added further to the work load of the Crown Law Office, and the work level carried by the Office continues to be very high and puts the Office under a significant amount of pressure.

6. Significant initiatives/projects involving the member country and its law and justice sector

Consolidation of Laws

The last consolidation of Cook Islands Law took place in 1994. The tender process started in 2019 and resulted in the Cook Islands contracting with Lexis Nexis to undertake the consolidation. The project has faced delays due to COVID-19, however the scoping part of the project (phase 1) is coming to a conclusion. Phase 2 (the actual consolidation) is now expected to start at the beginning of 2021.

Bills

The Immigration Bill Select Committee has reported back to Parliament in respect of the Bill, with the recommendations being accepted. Those recommendations resulted in a change being made to the Constitution, which has also been unanimously supported by members of Parliament in September 2020. The Bill, and the change to the Constitution, are now waiting for a mandatory 90-day period prior to the final votes being conducted which are due to take place in early 2021.

Other important Bills, namely the Crimes Bill, Agriculture Bill and To Tatou Vai (Water) Authority Bill are currently before Parliament and with various Select Committees. The Crimes Bill continues to face delays in its passage through Parliament due to the issue of same sex relationships and the criminality or otherwise of them.

7. Technical legal assistance

Training Undertaken by Crown Law Staff

No training was undertaken by the Crown Law Office staff this year due to COVID-19 border restrictions.

Training Needs

There are capacity building and training needs across all aspects of government legal work.

8. Contact information for key law and justice agencies

Agency	Key responsibilities	Contact person and position	Phone number and email
Crown Law Office	Advice, Litigation and Legislation drafting for the Crown. Mutual Legal Assistance	Stuart Baker Solicitor-General	+682 29337 stuart.baker@cookislands.gov.ck
Police	Investigation and Enforcement	The appointment of the present Commissioner of Police ends on 31 October 2020, and his role has just been advertised. The newly appointed Deputy Commissioner is Aka Matapo	+682 22449 akataura.matapo@police.gov.ck
Ministry of Justice	Registry and Enforcement	Tamatoa Jonassen Secretary of Justice	+682 29410 tamatoa.jonassen@cookislands.gov.ck
Financial Intelligence Unit	Investigation and Enforcement	Walter Henry Acting Head of FIU	+682 29182 walter.henry@cookislands.gov.ck