Review of the Ara Poutama Aotearoa Prosecution Function

August 2023

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Te Tari Ture o te Karauna
Crown Law

Table of Contents

This review is conducted as part of the Solicitor General's general oversight of public prosecutions pursuant to section 185 of the Criminal Procedure Act 2011.

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INTRODUCTION AND EXECUTIVE SUMMARY

1. According to its most recent annual reports, in the three years to July 2021,[1] Ara Poutama Aotearoa – the Department of Corrections – laid more than 60,000 criminal charges in District Courts across Aotearoa New Zealand, or more than 20,000 charges a year.[2] Ara Poutama is the second-largest prosecuting agency in the country.[3]

2. Corrections brings criminal prosecutions as part of its administration of community-based sentences and orders. Charges typically allege that defendants have breached the terms of a community-based sentence, such as community work, supervision or home detention. Others allege breaches of orders or conditions designed to help offenders re-integrate into the community while minimising the risk of further offending.[4] To put the pre-Delta charging numbers into context, on 30 June 2021 there were 29,243 people serving sentences or orders in the community.[5] Even allowing a margin for error in the charging figures, it is clear, in the recent past at least, that Corrections has brought criminal charges against a substantial proportion of those under its management.

3. Corrections charges are laid by probation officers (or, in the case of community work breaches, a community work supervisor holding an appropriate delegation).[6] In most cases initial charging decisions are made by the probation officer in charge of the non-compliant offender's sentence.

4. Probation officers report to, and are supervised by, a service manager; most service managers lead a team of up to a dozen probation staff. Whenever a probation officer decides to commence a prosecution, the charging decision and the relevant documents are reviewed by the responsible service manager before the charge is laid.

5. The pre-Delta rate of charging, while significant on its face, represents a notable decline from the peaks of the late 2000s. After the disaster of Graeme Burton's release

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1 The Delta COVID variant outbreak in mid-2021, and the subsequent red and orange settings in the first half of 2022, led to lengthy periods when sentences of community work – which is both the most common and commonly-breached non-custodial sentence – were suspended. This led to a significant reduction in prosecutions. In addition, the Department adopted a more restrained charging policy for breaches of other sentences and orders.

2 The reliability of the annual report figures may be questionable. I have not seen the detailed statistics underpinning them, and I have been given a number of other charging breakdowns, some maintained within the Department and others based on reporting from the Ministry of Justice. The Department has provided internal figures, based on a 1 August to 31 July year, that are perhaps 10% lower than the figures in the annual reports (indicating 21,679 charges in 2018-19, 17,320 in 2019-20 and 16,231 in 2020-21, giving an average of 18,410 charges a year). Those supplied by the Ministry of Justice are lower still, by up to 30%.

3 The New Zealand Police are by far the largest, laying between 190,000 and 200,000 charges a year.

4 Orders in this category include parole, post-detention conditions, extended supervision orders, returning offenders orders (which govern offenders deported to Aotearoa from another country following overseas offending), and post-release conditions, which are automatically imposed on those released from prison after serving sentences of between twelve months and two years.

5 Corrections Annual Report 2020-21, p 42. Throughout that year, an average of 34,331 offenders were serving a community-based sentence or order on any given day (report, p 93).

6 See Corrections Act 2004, s 26.

on parole in 2006[7] – which, fairly or unfairly, was blamed in part on the Department having adopting an unacceptably loose attitude to breaches of parole conditions – Corrections moved to an extraordinarily strict prosecution policy. Almost every perceived breach of a condition or order, no matter how minor, led to an enforcement response. For those with no previous history of breaching their sentence, that response may have been limited to a warning letter or a final warning, but a substantial proportion of breaches resulted in a charge.[8] The Department's internal figures indicate it laid 29,657 charges in the 2009-10 year; that year 62,108 offenders commenced a community-based sentence, and an average of 36,801 offenders were serving community-based sentences on any given day.[9]

6. The Department's response in the late 2000s and early 2010s – which paid no regard, for example, to the Solicitor-General's Prosecution Guidelines – was perceived by many, both internally and externally, as unhelpful. It was often petty. One senior manager suggested that during that period, charges "came from a place of fear". A service manager recalled charging an offender with four breaches of supervision because the offender reported ten minutes late on four occasions. Another long-serving service manager said this "tough" approach led to concerns about staff safety, as the relationship between offenders and probation officers became inherently more confrontational. Needless to say, it affected how open offenders were prepared to be.

7. Throughout the 2010s the Department implemented a change programme which took account of the need to exercise discretion and judgement before laying a charge. During this period charging decisions were, officially at least, made in the context of a framework which permitted a more lenient approach in the case of lower-risk offenders while still enforcing breaches strictly for offenders whose risk profile was regarded as higher. The framework emphasised that non-compliance, once detected, must be the subject of a response, but appropriately recognised that the response need not be a criminal charge.

8. Despite the new framework, it is clear many probation officers felt safer, and less exposed to risk of criticism, if they responded to even minor breaches by laying charges. Moreover, the new charging framework was not designed with the Prosecution Guidelines in mind, though plainly there would have been a degree of correlation between the Department's risk framework and the public interest analysis the Guidelines require. In any event – according to Corrections' annual reports at least – the number of charges the Department laid declined from the 2010 peak, before reaching a pre-Delta plateau of around 20,000 charges a year from around 2017.

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7 Burton embarked on a lengthy course of serious and violent offending, which culminated, six months after his release, in the unprovoked murder of a man named Karl Kuchenbecker.

8 Some staff described the historic charging policy as "one, two, three, breach", meaning offenders were warned twice then charged, without the third breach being independently assessed to determine whether prosecution action was appropriate. Others spoke of even less flexibility, and described charges as a near-inevitable consequence of non-compliance.

9 Department of Corrections Annual Report 2009-10, p 43.

9. During the most acute phases of the pandemic, the Department instructed its probation officers to lay criminal charges only where breaches imperilled public safety in some way. In cases that did not give rise to public safety concerns, probation officers were instructed to hold offenders to account using one of the other mechanisms available to them (for many sentences, probation officers have access to a variety of immediate sanctions short of prosecution, which can include informal and formal warnings, and an intensification of conditions). According to the Department's internal figures for August to July years, charging numbers fell from 16,231 in 2020-21 to 9,210 in 2021-22. It is not yet clear whether charging rates are now returning to their pre-pandemic levels.

10. The comments that follow should not be regarded as a criticism of frontline probation staff. While in large agencies prosecutorial decision-making should be regarded as a specialist discipline, probation staff (both probation officers and service managers) are generalists, who receive little training in how they should approach their discretion to bring criminal charges. Most have received little, if any, training in how to apply the Solicitor-General's Prosecution Guidelines. As one staff member put it "we expect probation officers to be experts in so many things; it's unfair to expect them to be experts in prosecutions as well".

11. With that caveat, I have found that prosecutorial decision-making within the Department is neither well understood nor well implemented. There are numerous areas where improvement is required. While charging practice immediately prior to the Delta outbreak was not as bad as it had been, say, a decade ago, it still fell short of the standards expected from a Government agency with a substantial prosecution function. This finding reflects an overwhelming consensus of views from frontline staff, service managers, Prosecution Support Team (PST) members, court-based probation officers, defence counsel and Judges.

12. It is common for both limbs of the Guidelines' Test for Prosecution – the need to show a reasonable prospect of conviction and the need for the prosecution to serve the public interest – to be misapplied or neglected when Corrections charges are laid. Probation officers are not trained to recognise admissible evidence, nor, in general, do they appreciate the need to identify the elements of criminal charges and prove each one beyond reasonable doubt.

13. The public interest analysis – which discourages minor prosecutions and involves, among other things, an assessment of the impact a charge is likely to have on the offender's rehabilitation and the long-term safety of the community – is often overlooked entirely. Probation officers and service managers commonly justify a decision to charge by referring to "the need to hold the offender to account", which begs the question of why a criminal charge best reflects the public interest in the particular case. Some probation officers, when pressed as to what they hope the prosecution will achieve, indicate they seek only to mark the breach with a conviction and discharge or an order to come up for sentence if called upon.

14. A number of other difficulties are common. Many probation officers do not understand they are enforcement officers, who assume heavy statutory

responsibilities when they decide to prosecute. They are not trained to assemble evidence, or to catalogue it in a manner which makes it accessible to those who have to prosecute the case in court. They are not trained to interview witnesses, prepare statements, investigate possible defences or conduct Bill of Rights-compliant interviews with suspects. They receive little instruction in criminal disclosure. Some do not appreciate that they may have to give evidence in court themselves. In addition, many staff spoke of probation officers being pressured by senior colleagues to bring charges, especially in cases involving high-risk offenders whose risk profiles were deteriorating, even if there was insufficient evidence. (There is widespread acceptance that this practice, to the extent it still occurs, must cease).

15. Only a relatively small proportion of charges – estimated at between 10 and 20% – result in not guilty pleas, and some within the Department regard the relatively high rate of guilty pleas as an indication that current charging practice is broadly sound. While it is true that relatively few defendants take the trouble to defend their charges, court-based Corrections staff advise that problems with evidential sufficiency and lack of regard to the public interest are frequently apparent even where defendants decide to plead guilty.

16. The fact most defendants plead guilty provides only limited reassurance about the quality of the underlying charging decisions. A guilty plea says nothing about whether the prosecution was in the public interest. Moreover, decisions not to contest the relatively minor charges laid by the Department may be made for a variety of reasons, including a desire to avoid inconvenience, the need for offenders to maintain an ongoing working relationship with their probation officer, and a misplaced sense of confidence that the charge would not have been laid if it could not be proved.

Why change is necessary

17. The case for change was summed up by one (now former) member of the PST, who observed that improving prosecutorial decision-making – preferably by moving final charging decisions to an independent and specialist unit – will save money, save court time, improve the Department's reputation in the justice sector, improve relationships between offenders and probation officers and improve rehabilitative outcomes for offenders. Plus, she added, "it's the law and it's the right thing to do".

18. The shortcomings outlined above give rise to a number of risks for the Department. Most fundamentally, many people are prosecuted who should not be. Prosecutions which are brought without sufficient evidence, or where the public interest would dictate a different approach, cause harm on multiple levels. Offenders who are charged (and even worse, convicted) when no charge should have been brought often suffer profound setbacks in their rehabilitation. The important and ongoing relationship between offender and probation officer will often be damaged. Staff advised that it is common to find notes on files which indicate the offender had become disillusioned and disengaged after being charged.

19. Damage to offenders' rehabilitation and reintegration is inevitably greater if they are remanded in custody. The Department commonly opposes bail where the defendant is regarded as higher risk. As noted already, in many cases it is the perception of risk

rather than the strength of the evidence which leads to the decision to charge, and it is not uncommon for charges against high-risk defendants to collapse when evidential difficulties become apparent. In the meantime, offenders will often have lost employment, accommodation, their placement in rehabilitative programmes and community support.

20. Even in cases where defendants are bailed, and receive (as around one in three convicted Corrections defendants do) a conviction and discharge, a conviction for breaching a community-based sentence or order will affect sentencing options in the future and make it harder for offenders to get bail if they come before the court again. There was a broad consensus among those I interviewed that charges which result in a conviction and discharge serve little purpose, especially given the range of non-judicial sanctions generally available to probation officers.

21. In addition, where charges are poorly-considered, Corrections is at risk of costs awards, reputational harm and (in particularly bad cases) awards of damages.[10] Defiant offenders who do not respect the authority of probation staff sometimes regard a charge which collapses as a victory, making ongoing engagement even more difficult. For high-risk offenders, whose compliance is critical, a failed charge will often do further damage to the mana of the Department, especially if it is accompanied by judicial criticism.

22. On a purely financial level, prosecutions which do not comply with the Guidelines are responsible for a significant drain on public resources. Every prosecution – even if it results in a quick guilty plea – is expensive. Aside from the time it takes for a probation officer to prepare the paperwork and the service manager to approve it, charges consume the resources of Corrections court staff, Ministry of Justice staff, legal aid and the limited (and expensive) time of District Court Judges. All of that money and mahi is wasted if the charge proves unsustainable, or fails to reflect the public interest.

23. If a not guilty plea is entered, the charge is referred to the PST, a dedicated and specialised unit based at Head Office in Wellington. The PST manages defended charges from plea through to setting down. Much of its time is spent either seeking to persuade the relevant service manager that the charge is not evidentially sustainable (or should at least be reconsidered having regard to the public interest), or directing inquiries and preparing the paperwork necessary to make a marginal charge viable.

24. Finally, if it looks as though the charge is going to go to trial, the PST instructs the local Crown Solicitor to conduct the prosecution, even in straightforward cases. In every case, the Crown Solicitor charges a fee for opening the file, and often spends considerable time on pre-trial matters that would normally be a prosecuting Department's responsibility (most notably preparing witness briefs). Most defendants eventually plead guilty, or the Department agrees the charge should be withdrawn,

10 Claims for malicious prosecution are very rare in New Zealand. Nonetheless, if a charge is brought without reasonable and probable cause, and its principal purpose is, for example, to get a high-risk offender off the streets rather than because of non-compliance which warrants prosecution in its own right, then the tort would be established.

but Crown Solicitors' fees still reflect the often-considerable time their offices spend ensuring the case is ready for trial.

25. I do not consider the present prosecutorial system appropriately meets the Department's wider strategic goals (for example those enshrined in Hōkai Rangi), nor does it meet the requirements of a 21st century public prosecution agency. Present practice does not serve the interests of the Department, the wider justice sector, the offenders whose sentences and orders the Department manages, or the public. There are many reasons to change, including a need to align prosecutorial practice with Hōkai Rangi but, all else aside, it is unacceptable that many thousands of prosecutions are commenced each year without proper regard to the requirements of the Solicitor-General's Prosecution Guidelines.

26. Ensuring adherence to the Guidelines forms an important part of the Solicitor-General's oversight of public prosecutions.[11] It follows that, in addition to the need to meet the Department's goals of ensuring the oranga, or wellbeing, of those in Corrections care, it is essential the Department's charging structures are redesigned to ensure prosecutorial decisions are transparently consistent with the Guidelines. The changes I propose, while they will impose a (modest) short-term cost, are necessary to ensure the Department performs its prosecution function lawfully. In any event, they will pay for themselves many times over in the years to come.

Key recommendations

Prosecutions

27. My principal recommendation is that the Department adds a third layer of assurance to the existing decision-making framework. I recommend charges should continue to be initiated by probation officers and reviewed by service managers, but that final approval should rest with specialist prosecution staff. Their primary function will be to assess proposed charges against the requirements in the Guidelines. In particular, they will ensure the file discloses a reasonable prospect of conviction, and that the proposed charge is in the public interest. The public interest assessment will reflect the unique set of factors which should inform all decisions taken within the Department, including the requirements of Hōkai Rangi and the need to promote the long-term safety of the community.

28. Many of those who perform this new function will be based in the regions, but will be members of the PST, and accountable to the Manager of the PST. They will be operationally independent of the probation officer and service manager who propose the charge. Regionally-based PST staff will also be available to provide informal advice and support to probation officers and service manager who are considering charges; where a charge is appropriate it will be part of their role to advise about how it should be framed and the type of evidence that will be required to sustain it.

11 See, for example, Criminal Procedure Act 2011, s 185(2)(a).

29. My second principal recommendation concerns the need to enhance the training probation officers and service managers receive. Court and frontline staff universally expressed the view that the prosecution training currently provided to probation officers and service managers falls well short of what is required for those with a statutory enforcement function. Among other things (and as is discussed in more detail from paragraph [272] below), training should ensure probation staff understand their basic obligations as enforcement officers (including the need to assemble evidence and manage the charge through to trial), where criminal charges fit within the range of available management and enforcement options, how to apply the Guidelines, common examples of inadmissible evidence, how to draft charges and summaries of facts, how to take statements from witnesses and how to take a Bill of Rights-compliant statement from the prospective defendant.

30. I recommend enhancing the role of court-based probation staff. Court staff should receive specialised training, and should be encouraged, if they are well-suited to the role, to regard court work as a discrete career path. They should not be required to rotate away from court work if they wish to advance within the Department. I recommend a new title; "court officer" should be replaced by a title (such as Prosecutor) which appropriately reflects the role and responsibilities of court-based Corrections staff.

31. As part of this, I recommend that after an appropriate period for transition and training, the Department no longer briefs routine defended charges to Crown Solicitors. While that course may still be necessary for the (very small) minority of cases that are complex or give rise to particular risk, most charges are straightforward and should be handled by Corrections staff.

32. The proposed changes to prosecutorial decision-making are likely to result in fewer charges being laid, increasing the capacity of court-based teams. Those charges that are brought should be well-supported by admissible evidence, reducing the risk of the Department's court-based staff having to contend with an inadequately-prepared case. Any remedial work, such as the production of additional written statements or additional disclosure, can be undertaken by court-based staff working together with the responsible probation officer. This shift will result in considerable savings, and should virtually eliminate the remediation and preparation fees the Department presently pays to Crown Solicitors for cases which do not get to trial.

Community Work

33. Breaches of community work give rise to a separate and discrete set of challenges. Community work is the most common community-based sentence, and it also has, by far, the highest rate of breach. Only around one in four of the roughly 11,000 offenders serving a sentence of community work is fully compliant. Despite the Department showing considerable restraint in its charging practice, prior to the Delta outbreak in 2021 breaches of community work accounted for at least 40% of Corrections charges. Nonetheless, compliance rates remain stubbornly, and unacceptably, low.

34. My recommendations in this area are designed to reduce the prosecutorial burden by seeking to reduce the number of breaches. One important way to help achieve higher

rates of compliance would be for probation staff to consider s 56 of the Sentencing Act in every case. Section 56 emphasises the need for sentencing Judges to take account of the likelihood of compliance before imposing community work; community work staff advise non-compliance is often predictable. The inclusion in Provision of Advice to Court (PAC) reports of an assessment of the likelihood of the offender completing a sentence of community work will help the Court make a well-informed decision in each case.

35. In addition, the Judges I interviewed indicated a preference for non-compliant offenders to be referred back to the court promptly. All expressed a willingness to cancel sentences of community work in cases where the offender is unwilling or unable to comply, either as a standalone application (where non-compliance is not the offender's fault) or in conjunction with a charge (where the offender simply decides to ignore the sentence).

SUMMARY OF RECOMMENDATIONS

New role for Prosecution Support Team

36. I **recommend** the creation of a new line of assurance – in the form of an independent PST review – to assess every proposed Corrections prosecution. While initial charging decisions should continue to be made by the offender's probation officer and service manager, I recommend every proposed prosecution is reviewed by a member of the PST before the charge is filed.

37. I **recommend** PST reviewers assess proposed charges against the requirements of the Solicitor-General's Prosecution Guidelines, appropriately tailored to incorporate factors of particular importance to Corrections, such as Hōkai Rangi. The analysis should bear in mind that it will generally not be in the public interest to charge a defendant who is likely to receive a non-punitive sentence (such as a conviction and discharge).

38. While there is never scope for criminal charges to be brought if the evidence does not disclose a reasonable prospect of conviction, I **recommend** PST reviewers depart from the responsible probation officer's analysis of the public interest only if satisfied it has not addressed the relevant questions adequately, or otherwise discloses a clear error.

39. I **recommend** that PST reviewers are held accountable for their assessments and decisions only within the management and reporting structures of the PST. I recommend that no-one should have the authority to direct that the PST review is bypassed,[12] and that no-one outside the PST – apart, in exceptional cases, from the Chief Legal Adviser[13] – should have the authority to overrule a PST decision not to approve a charge.

40. To reflect the PST's accountability for charging decisions, I **recommend** that charging documents are sworn (or affirmed) by the PST member responsible for approving the prosecution.

41. The PST should no longer be based entirely in Wellington. I **recommend** the PST continues to be nationally led, but is at least partly based in the regions, where team members will be available to provide prosecution advice and assistance to frontline staff.

Training

42. I **recommend** new and enhanced prosecution training for existing probation officers and new recruits, along with others who may have occasion to initiate a criminal charge, such as electronic monitoring teams and community work supervisors. The training should be delivered in person, by an expert in prosecutorial decision-making. As part of the training, probation officers should practise applying the Test for

12 The Department may wish to consider making an exception for cases of extreme urgency, provided a retrospective PST review is conducted as soon as possible after the charge is laid.

13 See [262] below.

Prosecution, with particular emphasis on Corrections-specific aspects of the Public Interest Test.

43. I **recommend** the new training includes practical guidance in planning and conducting non-compliance interviews, including training in how to administer an appropriate caution. The training should emphasise that non-compliance interviews are a near-indispensable step whenever prosecution is contemplated. The training should also include basic instruction in how to identify outstanding inquiries, interview witnesses and take statements.

Interviews

44. I **recommend** all non-compliance interviews be electronically recorded. I recommend probation officers retain the audio file as an exhibit, to be transcribed and disclosed if there is a not guilty plea, and that the file be retained, in accordance with the Department's usual policies, even if no charge is laid, as evidence of the offender's knowledge and understanding of the relevant sentence or order.

Investigations

45. I **recommend** the Department establishes a specialist investigative resource to help probation officers obtain evidence in cases where additional inquiry work is needed. I recommend the High Risk Team has first call on the investigators' services, with particular priority accorded to cases where there is reason to suspect high risk offenders are non-compliant, and where the offender's risk profile is deteriorating. I recommend, as a trial, that the Department establishes a panel of licensed private investigators in major population centres.

Court staff

46. I **recommend** the Department no longer briefs routine defended Judge Alone Trials to Crown Solicitors, and instead trains and encourages its own court-based staff to undertake that work.

47. I **recommend** a new title for the Department's court officers, such as Prosecutor, and that the Department provides staff who wish to remain in the courts with an appropriate career pathway.

48. I **recommend** Corrections prosecutors are made accountable to the PST for decisions taken while managing prosecutions. I recommend prosecutors are afforded the independence to make final decisions about prosecutions (including the power to withdraw charges, reach a plea arrangement or work out another pragmatic response), albeit in close consultation with the responsible probation officer and, where appropriate, the PST.

Alternatives to prosecution

49. Unless it would plainly be inappropriate to do so, I **recommend** the Department refers charges to Te Pae Oranga Iwi Community Panels, or an equivalent alternative to a standard criminal prosecution, whenever an alternative of that nature is available.

Community Work[14]

50. In any case where community work is a realistic sentencing option, I **recommend** the pre-sentence report expressly addresses s 56 of the Sentencing Act 2002, and offers the Court an assessment of the offender's suitability for community work. Particular care should be taken in cases where community work is recommended.

51. I **recommend** probation officers refrain from suggesting a sentence of community work unless broadly satisfied the offender is likely to complete the sentence without needing to be chased. Along with an assessment of the offender's compliance with previous community-based sentences, the report should address whether the offender suffers from any physical or mental health issues, and any alcohol or drug problems, which might impact upon the likelihood of compliance.

52. I **recommend** the Department does not suggest community work for less experienced offenders, who may be negatively influenced by working alongside those whose offending is more entrenched, unless a placement which avoids counterproductive associations will be available. The same comment applies to other vulnerable offenders (for example those who may be seeking to overcome an addiction, and who should not be forced to associate with others who may undermine their recovery).

53. I **recommend**, if the Judge indicates that he or she intends to sentence an offender without a pre-sentence report, that the prosecutor draw the Court's attention to any s 56 factors which might be apparent from the Department's Integrated Offender Management System (IOMS).

54. I **recommend** the Department explore making community work supervisors available to complete either a full or preliminary induction immediately after sentencing and before the offender leaves court, rather than waiting for the offender to report within 72 hours.

55. I **recommend** that, to the extent this does not occur already, offenders are asked at induction to nominate a family member or other responsible person who can act as an alternative point of contact and who can be relied upon to help locate the offender if they cannot immediately be found, and to help secure their attendance.

56. I **recommend**, in conjunction with the recommendations set out above, that action to address non-compliance is taken as early as possible once it is clear non-compliance is more than a one-off. In particular, early steps should be taken to identify and remove any obstacles to compliance.

57. I **recommend,** if it turns out the offender was never a suitable candidate for community work, particularly because of physical or mental difficulties which were not taken into account at sentencing, that an immediate application to cancel and substitute should be made. In those circumstances, prosecution is neither necessary nor appropriate. In cases where the offender simply elects to ignore the sentence, a

14 A more detailed list of community work recommendations begins at paragraph [389] below.

prompt prosecution in conjunction with an application to cancel and substitute may be appropriate. In either case, seeking the prompt removal of unsuitable or unco-operative offenders from the muster is preferable to spending months trying to secure compliance.

Longer term

58. I **recommend** that the restrictions imposed by s 66A of the Sentencing Act, which limit the number of community work hours that can be converted to training (both the 20% maximum and the need for the offender to be serving a minimum of 80 hours) be repealed.

59. I **recommend** that the 40-hour minimum for sentence of community work be reduced to 20 hours.

60. I **recommend** that the Department and the Ministry of Justice undertake policy work to design a 21st century alternative to community work. The old "atonement through hard labour" model has had its day. The old sentence of community service was (and would remain) an effective sanction for those guilty of minor offending who can be relied upon to work safely in the community.

61. In particular, I **recommend** development of a new sentence which addresses the particular needs of the individual offender, and emphasises training and the provision of basic skills for those motivated to acquire them. I do not recommend that any trappings of the old sentence of periodic detention, or today's community work "centre" placements, should remain in any form.

A NOTE ABOUT TERMINOLOGY

62. It is impossible to avoid the word "breach" in any conversation about Ara Poutama Aotearoa prosecutions. The term is ubiquitous. It is both a verb ("to breach", meaning to prosecute), and a noun ("a breach", meaning a charge). For example, the Department's online training module contains the following passage:

> REASONS FOR BREACH
> Arrange with your service manager to discuss a recent breach with a colleague. Discuss,
>
> - the incident that lead to breach
> - what factors did they consider before making the decision to breach and
> - outcome of the breach
>
> Also arrange with the colleague to study the documentation and IOMS entries related to the breach. Make notes as you discuss and study the file. We will be using this information throughout the module.
>
> To start with, list three factors your colleague took into consideration to support their decision to breach.

63. Almost no-one in the Department speaks of prosecutions and charges. Instead, "breach" has become a convenient shorthand, which reflects the fact that many charges the Department brings have that word somewhere in their title.[15]

64. But the word "breach", and the way it is used, often fails to capture the seriousness and consequence of the criminal prosecution that follows. That language, which is far removed from the vocabulary most prosecuting agencies employ, risks a Corrections charge sounding like a minor infraction – a disciplinary matter, akin, say, to an internal misconduct charge in the prison context. I have avoided it in this report, except as a term signifying the fact of non-compliance.

15 For example, breach of conditions of community detention, breach of conditions of supervision, breach of sentence of community work, breach of [home] detention conditions, breach of post-detention conditions, breach of non-association order.

FEATURES, SYSTEMS AND SAFEGUARDS IN A WELL-FUNCTIONING PROSECUTING AGENCY

65. The fundamental obligations the law places on those responsible for criminal charging decisions are deeply rooted in the common law. Many were canvassed by the Law Commission in its Criminal Prosecutions papers, published in 1997 and 2000.[16] Most importantly, the Law Commission described the discretion to prosecute as "a fundamental feature of our prosecution system". Under our system of criminal justice, a provable breach of the criminal law is only the starting point in the analysis every prosecutor must undertake before deciding to lay a charge.

66. Exercise of the discretion to prosecute is an executive decision for the prosecuting agency. Nonetheless, the decision-making process should be conducted with the same objectivity and detachment the court will bring to the charge itself. The Law Commission observed that the discretion must, in every case, be exercised in accordance with publicly available guidelines. It added that doing so would "promote consistency and fairness, and discourage arbitrary prosecutions".[17]

67. The Solicitor-General's Prosecution Guidelines were first published in 1992 and most recently revised in 2013.[18] They apply to all public prosecution agencies in Aotearoa, including the Department of Corrections. The Guidelines provide:

> [1.2] Compliance with these Guidelines is expected in respect of public prosecutions and Crown prosecutions. However, the Guidelines are intended to assist all those persons whose function it is to enforce the criminal law by instituting and conducting a criminal prosecution. Specifically these Guidelines are intended to assist in determining:
>
> [1.2.1] Whether criminal proceedings should be commenced;
>
> [1.2.2] What charges should be filed;
>
> [1.2.3] Whether, if commenced, criminal proceedings should be continued or discontinued.
>
> And to:
>
> [1.2.4] Provide guidance for the conduct of criminal prosecutions; and,
>
> [1.2.5] Establish standards of conduct and practice that the Law Officers expect from those whose duties include conducting prosecutions.

68. The Guidelines provide the standard against which all Corrections charges must be measured. The most important decision in any prosecution is the decision in [1.2.1] of the Guidelines, namely whether criminal proceedings should be commenced, though the selection of charges is also critical, as is the need to discontinue a prosecution in any case where the requirements of the Guidelines are no longer met. The decision to

16 NZLC PP28 and NZLC R66 respectively.

17 NZLC R66, at [128].

18 The Guidelines are currently under review.

bring a Corrections prosecution is presently made by probation officers under the supervision of their service managers, and accordingly it is mandatory for probation officers and service managers to make charging decisions in accordance with the Guidelines.

69. The Guidelines set out the Test for Prosecution as follows:

> **The Test for Prosecution**
>
> [5.1] Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:
>
> [5.1.1] The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
>
> [5.1.2] Prosecution is required in the public interest – the Public Interest Test.
>
> [5.2] Each aspect of the test must be separately considered and satisfied before a decision to prosecute can be taken. The Evidential Test must be satisfied before the Public Interest Test is considered. The prosecutor must analyse and evaluate all of the evidence and information in a thorough and critical manner.

Evidential sufficiency

70. What does a "reasonable prospect of conviction" mean? The Guidelines provide:

> [5.3] A reasonable prospect of conviction exists if, in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

71. The Guidelines go on to break down each element of the test. For present purposes it is sufficient to note that the prosecution must be able to "adduce [the evidence] before a court". In other words, the evidence on which the prosecution relies must be reliably available, and legally admissible.

72. Finally, the prosecutor must consider the way the presiding Judge is likely to assess the evidence as a whole. Is it reasonably likely the Judge will be convinced of guilt beyond reasonable doubt? This aspect of the test requires the prosecutor to consider any evidence the defendant may adduce as well as the evidence the prosecution intends to call.

73. The possibility of defence evidence is especially important in the Corrections context. Many charges require the Department to prove that, in breaching the relevant sentence or order, the defendant acted "without reasonable excuse". Accordingly, the prosecutor must consider whether a reasonable excuse might be available. For example, if an offender is serving an electronically-monitored sentence, and is found

outside the designated perimeter, the first question that must be considered is *why was the offender there?*[19]

74. Before going on to consider the Public Interest Test, it is notable that the Evidential Test is an exacting one. It is not enough simply to know the test; the person making the decision must be able to evaluate, among other things, the admissibility of the evidence available to support the charge and the way a District Court Judge is likely to assess the evidence as a whole.

The Public Interest Test

75. The Guidelines describe the Public Interest Test as follows:

> **The Public Interest Test**
>
> [5.5] Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution. It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.
>
> [5.6] In a time honoured statement made in 1951 Sir Hartley Shawcross QC MP, the then United Kingdom Attorney-General, made the following statement to Parliament in relation to prosecutorial discretion:
>
> > "It has never been the rule in this country … that suspected criminal offences must automatically be the subject of prosecution."
>
> [5.7] Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case. In some instances the serious nature of the case will make the presumption a very strong one. However, prosecution resources are not limitless. There will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. Prosecutors for instance should positively consider the appropriateness of any diversionary option (particularly if the defendant is a youth).

76. The Guidelines set out a non-exhaustive list of factors the prosecutor should take into account when determining whether a prosecution reflects the public interest, though only a handful are likely to be relevant in the Corrections context. The prosecutor should consider, for example, how serious the offending is. The Guidelines note that "[t]he gravity of the maximum sentence and the anticipated penalty is likely to be a strong factor in determining the seriousness of the offence",[20] and add that if "the Court is likely to impose a very small or nominal penalty", this may tell against a

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19 As noted in more detail below, I saw numerous examples of charges where no investigation of the reason for the prima facie breach was undertaken, and some where an entirely reasonable explanation for the defendant's conduct was apparent from the summary of facts.

20 Solicitor-General's Prosecution Guidelines at [5.8.1].

prosecution.[21] Notably, the maximum sentences and the actual penalties imposed in Corrections cases are overwhelmingly minor.

77. Other public interest factors which may be relevant to Corrections charges include whether the offender has previous convictions for similar conduct, the likelihood of the offending being repeated and whether the offending has caused or risked serious harm. Factors which may tell against prosecution include the youth of the offender, the fact any loss or harm was only minor, the fact the offender may have been suffering physical or mental ill-health, and "[w]here any proper alternatives to prosecution are available (including disciplinary or other proceedings)".[22]

78. There are a number of other factors, not mentioned in the Guidelines, which are likely to be particularly relevant in the Corrections context. These include the substantial public interest in keeping an offender's rehabilitation on track. This factor may tell in favour of prosecution (where an offender is contemptuously disregarding programmes or measures designed to prevent reoffending, and also disregards warnings about the need to comply) or against (where the breach is likely to be a one-off, or a charge is likely to alienate an offender who is otherwise making satisfactory progress). The direct and indirect consequences of every charge should be measured against the Department's ultimate aim of promoting community safety by reducing reoffending.

79. In addition, the Department's core guiding principles, such as those described in Hōkai Rangi, must be borne in mind. Hōkai Rangi is itself a strategy for promoting the public interest. Among other things, Hōkai Rangi is designed to help align Corrections practice more closely with the Department's obligations under Te Tiriti o Waitangi.[23] It emphasises the need to humanise and support the wellbeing of those in Corrections care. In the recent past, some prosecution decisions have appeared arbitrary and petty. While there will always be cases in which prosecution is unavoidable, asking whether a criminal charge promotes the goals of Hōkai Rangi will provide a useful cross-check for the Public Interest Test.

80. No two cases are the same, and there may be cases where reasonable people assess the public interest differently. Nonetheless it is important, as the Law Commission noted, that there be a measure of consistency in the way the Test for Prosecution is applied throughout the motu.

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21 Solicitor-General's Prosecution Guidelines at [5.9.1].

22 At [5.9.13].

23 See, for example, Dr P Harmer, J Paul, Dr M Hunia, *Hōkai Rangi: Context and background to the development of Ara Poutama Aotearoa Strategy 2019-2024*, Practice: The New Zealand Corrections Journal, Volume 8, Issue 1, June 2021:

> Renewed calls for changes in the justice sector, underlined by the Waitangi Tribunal's 2017 report, thus created the most favourable conditions for a strategic focus on Māori since the foundation of the department in 1995. The result was *Hōkai Rangi*, the first overarching departmental strategy specifically focused on improving outcomes for Māori.

Applying the Test

81. How is consistency to be achieved? First, it is essential that the test is actually applied. At present it is rare for those making prosecution decisions to pay express attention to the Guidelines. For example, the "Breach Checklist for Service Managers" requires the responsible service manager to check that "there is sufficient evidence to prove the alleged charge", but makes no mention of the need to confirm the public interest requires a prosecution. Secondly, requiring the Prosecution Support Team to review proposed charges before they are laid will ensure the Test for Prosecution, properly adapted and tailored to meet the needs and obligations of the Department, including the requirements of Hōkai Rangi, is applied correctly and consistently throughout Aotearoa.

Independence

82. There is a further reason, aside from the Guidelines, for introducing independent oversight into prosecutorial decision-making. It has long been regarded as best practice for public prosecution agencies to separate their operational functions (in the case of Police the detection and investigation of offending, in the case of Corrections the management of community-based sentences and orders) from their prosecutorial role. In England and Wales, for example, the Police assemble evidence to support criminal charges, but the ultimate prosecution decision is made by the Crown Prosecution Service, which evaluates the evidence and weighs it against standards very similar to those contained in the Guidelines.

83. In New Zealand, a similar sentiment underpinned the creation of the Police Prosecution Service (PPS) in the late 1990s. The PPS – which is operationally independent of the staff who investigate and prepare files for prosecution – was established following the Law Commission's 1997 discussion paper. The Law Commission made the following criticism of then-current Police practice:[24]

> [200] During the process of investigating an offence, the decisions made by the officer in charge of the case may be reviewed in some manner by that officer's supervisor and a prosecutions section officer. For various reasons these checks provide only a limited measure of internal control of the discretion to prosecute. First, both supervisors and prosecution section officers rarely take account of public interest factors. Second, prosecution section officers may be influenced by the arresting officer's preference for prosecution and therefore not make independent decisions to prosecute. Third, there is a common belief that the Crimes Act 1961 s 316, which sets out the duties of arresting officers, makes it desirable for a prosecution to proceed whenever an arrest is made.

84. Apart from the reference to s 316 of the Crimes Act, the Law Commission's concerns about pre-PPS charging practice in the Police apply with at least as much force to the structure operating within Corrections today.

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24 NZLC PP28.

85. In 1997 the Law Commission noted the Police could meet the concerns it had identified by separating their investigative and prosecutorial functions:

> [325] Separating investigation and prosecution functions and vesting them in different agencies has been recommended overseas as a good method of introducing more accountability and transparency into prosecution decisions. …
>
> [326] Commonsense, experience and practical realities suggest that an absolute wall cannot be erected between investigation and prosecution decisions. It is inevitable that prosecution decisions will be based to some extent on information provided by the investigating agency; they will never be independent decisions in an absolute sense. For example, the English Crown Prosecution Service (CPS) relies on the police construction of the case, rather than on the raw police files, when making prosecution decisions. Initial charging decisions continue to be made by the police, although they may seek prior advice from the CPS. Yet, this police involvement has not prevented the CPS from making independent decisions about whether or not to prosecute. Indeed, the number of cases discontinued by the CPS was initially a source of friction in its relationship with the police.

86. The Law Commission's final report, published in 2000, noted that "until a recent change of policy, on which the police are to be congratulated, the fusing of investigation, arrest, and prosecution functions in the police could give the impression of unfairness".[25]

87. The Law Commission listed a series of key principles which guided its reform proposals. They included:[26]

- Prosecution should be separated from investigation. Separation of these two key functions ensures that there are checks and balances incorporated into the system to protect the individual. It also promotes impartiality and ultimately respect for the criminal justice system and the rule of law. A separate evaluation of a case by someone who is independent, and seen to be independent, of the investigation process:
  - helps to ensure the prosecution decision is not prompted by bias or prejudice;
  - lessens the chance of corruption or improper motives; and
  - brings greater independent judgment to bear.
- Prosecution decisions must be exercised in a *consistent* way in order to be fair. Where possible, discretions and decisions should be exercised in accordance with publicly available guidelines developed by the Solicitor-General.
- Decision-making processes should be transparent.
- Those who make the decisions should be accountable for them.

25 NZLC R66, p 2.

26 Ibid, p 4.

88. As will be apparent from the discussion below, the need for charging decisions to be made by specialist staff independent of those on the frontline is even more acute in the Department of Corrections in 2023 than it was for the Police in the late 1990s. Probation officers are unique among enforcement officers in that it is part of their job to maintain an ongoing professional relationship – ideally a relationship of trust and confidence – with potential defendants. That factor alone makes it essential that charging decisions are removed from frontline staff and put in the hands of someone independent who can evaluate the evidence and the public interest dispassionately.

89. The Department recognises the need for independence in prosecutorial decision-making. Ara Poutama's prosecutions policy, as outlined on its website, sets out the role criminal charges play in holding non-compliant offenders to account. The policy lists three key obligations on prosecuting staff, namely that they:

89.1 Gather sufficient evidence;

89.2 Make an independent decision to prosecute; and

89.3 Seek a meaningful outcome.

90. As is discussed in more detail below, none of those objectives is consistently reflected in the Department's current practice. Neither probation officers nor service managers are trained to gather and weigh evidence or evaluate the public interest as the Guidelines say they must. Despite the need for an independent decision to prosecute, the policy confirms the prosecution decision is regarded as part of the probation officer's ongoing management of the offender. It provides:

> The decision whether to take legal action to hold the offender to account is a key professional decision for probation officers in the management of offenders and guidance is provided to staff regarding making this decision is (*sic*) supported by processes to lay breaches and applications in court. Probation officers make the decision to prosecute an offender on a community based sentence or order independently and free from political or public pressure.

91. As to the need for a prosecution to produce a meaningful outcome it is notable that one in three of those convicted of Corrections charges is convicted and discharged.

92. My conclusion that decisions about Corrections prosecutions lack the independence required of a public prosecution agency is not new. In 2011, John Spencer concluded a wide-ranging review of New Zealand's public prosecution services.[27] On the question of prosecutorial independence, Mr Spencer observed:

> **Key Findings on Independent Decision-Making in Relation to Summary Prosecutions**
>
> 344. The [Police], Customs, DIA, DOC, DOL, Fisheries, IRD and MSD have all struck an appropriate balance between mechanisms that promote independent decision-

[27] John Spencer, Review of Public Prosecution Services, September 2011 (Spencer Report)

making and those that encourage accountability, consistency, co-operation with investigators and management of cost.

345. Corrections has insufficient mechanisms in place at present to promote independent decision-making by its in-house prosecutors.

93. In addition, there is a strong case for court-based probation staff to report to the PST rather than their current line managers. Prosecutors are obliged to act at all times with scrupulous fairness and impartiality when they appear in court. That obligation attaches at every stage of a prosecution, including the prosecutor's review of the file, initial appearances, bail applications, case review hearings, pre-trial matters, Judge Alone Trials and at sentencing.

94. While it may not be practical for some smaller Government agencies to separate their operational and prosecutorial functions, basic prosecutorial independence is essential in a department the size of Corrections, which lays so many charges each year, where the relationship between enforcement officer and prospective defendant is an ongoing one, and which accounts for such a significant proportion of the District Court's workload. My principal finding is that the lack of specialist, independent consideration is one of two main reasons[28] the Department commences so many prosecutions which would not withstand scrutiny if measured against the Guidelines.

95. Much of the basic infrastructure for the reforms I propose exists within the Department already. The main changes would be a modest (and probably temporary) expansion of the PST, the de-centralisation of some PST tasks and a change in reporting structures and lines of accountability. The up-front investment required would not be significant, and the changes will result both in a significant improvement in the quality of charges the Department brings, and in substantial and near-immediate financial savings. It is almost certain that fewer (but stronger) charges will be brought, freeing existing staff to undertake tasks such as timely disclosure, briefing witnesses and conducting Judge Alone Trials.

28 The lack of effective prosecution training for probation officers and service managers is the other.

CURRENT PROSECUTIONS PRACTICE WITHIN CORRECTIONS

96. On any given day, Ara Poutama Aotearoa is responsible for administering around 30,000 people who are subject to community-based sentences and orders. The most common, according to Corrections' 2020-21 Annual Report, are community work ("average volume" 11,299), supervision (7,638), intensive supervision (5,028), post-release conditions (2,809) and parole (2,513).[29] Two sentences – community detention and home detention – have electronic monitoring as an inherent component, while other sentences and orders, such as parole, extended supervision orders (ESOs) and sentences of intensive supervision may have an electronic monitoring condition attached.

97. Prior to the pandemic, breach of community work was by far the most common charge brought by the Department. Departmental figures show that in the last full year prior to the pandemic, community work breaches accounted for just under 43% of all Corrections charges,[30] well ahead of the next most common, breaches of post release conditions (17%). In the 2019-2020 and 2020-21 August to July periods, community work breaches comprised 34% and 32% respectively;[31] both years included periods of lockdown when community work sentences were suspended. The 2021-22 year, which involved far lengthier periods when community work was suspended, saw a commensurate collapse in community work prosecutions, down to just under 20%,[32] relegating them to second place, behind prosecutions for breaches of post-release conditions (23%).[33]

98. Compared with most criminal charges, prosecutions brought by the Department are overwhelmingly minor. Breaches of community work and supervision, for example, carry a maximum penalty of only three months' imprisonment. The maximum penalty for breaching community detention and intensive supervision is six months' imprisonment. A uniformly high proportion of those convicted of Corrections charges – roughly one in three – are convicted and discharged.[34] Though no figures were available, it is fair to infer that a significant proportion of the remainder are ordered to come up for sentence if called on; like a conviction and discharge, an order to come up for sentence involves no immediate punishment. It is almost unheard of for offenders to be sent to prison for breaching a community-based sentences (unless it is imposed concurrently with sentences for other offending, or a successful application for recall). Breaches of an ESO or a related drug or alcohol condition have a maximum

29 Some offenders are serving more than one community-based sentence. For example, sentences of community work and supervision are commonly imposed together.

30 1 August 2018-31 July 2019 – 9265 charges out of 21,679.

31 5,952 out of 17,320 and 5,249 out of 16,231 respectively.

32 1,822 out of 9,210.

33 As noted at [9] above, in addition to the suspension of community work, Corrections' general approach to criminal charging was modified to reflect the challenges posed by the pandemic.

34 The approximate one in three ratio was maintained across the four years from 2018-19 to 2021-22, regardless of the reduction in charges in light of the pandemic.

sentence of two years' imprisonment.[35] They are the only Corrections charges which carry the right to a jury trial.

Breaches

99. Community work breaches are the most uniform in character; generally they involve offenders sentenced to a term of community work who simply fail to turn up, either for induction or to complete their hours. Similarly, breaches of sentences or orders which involve electronic monitoring are, at least on their face, relatively similar – offenders are detected beyond their permitted boundary at a time they should be within it. Even then, the circumstances leading to breaches of community work or electronic monitoring are infinitely variable.

100. Many sentences or orders (including supervision, intensive supervision, ESOs and parole), require the offender to maintain an ongoing reporting relationship with a probation officer. The Sentencing Act 2002 and the Parole Act 2002 empower probation officers to impose a wide variety of conditions, including where the offender can live and work, people they may (or may not) associate with, conditions about the consumption of alcohol or drugs, and attendance at rehabilitative or educative programmes. Some offenders are strictly forbidden to enter particular areas, or to cross particular geographic boundaries. Conditions of this kind are designed to prevent offending in the short term, while supporting rehabilitation in the long term.

101. The relationship between probation officer and offender is simultaneously pastoral and disciplinary (or, as described in probation officer training, "counsellor and cop"). Probation officers provide support and encouragement to offenders in their care, while also ensuring conditions are observed, programmes are completed and that any new risks are identified and addressed. Ideally, offenders will trust and respect their probation officers, and feel comfortable confiding information which may point to new opportunities to promote rehabilitation, and indicate the emergence of new areas of risk.

102. At present it is an offender's probation officer who decides whether a (suspected) breach of the terms of a sentence or order should result in prosecution. Having decided the breach warrants a prosecution, it is the probation officer who drafts the charging document and summary of facts, and who is responsible for assembling the evidence in support. In theory, at least, the probation officer will then act as officer in charge of the prosecution while the case is before the court.

Service manager review

103. Proposed charges are reviewed by the probation officer's immediate supervisor, or service manager, before the final charging decision is made. Service managers are provided with a checklist of things to review before approving the charge. The checklist must then be signed and added to the file.

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35 Parole Act, ss 107T and 107TA.

104. The service manager's checklist is principally designed to ensure all necessary paperwork has been completed. Among the documents the checklist requires are copies of the court order establishing the sentence, the offender's criminal history, the charging document, summary of facts and "evidence". Later in the same document, the service manager must confirm there is sufficient evidence to prove the charge, that all relevant information has been recorded in IOMS and that "all relevant documents/exhibits are completed, signed, and dated (where appropriate)".

105. The checklist notes that the charging document must accurately set out which condition the offender is alleged to have breached and the relevant legislation. It also provides guidance as to the information which should be contained in the summary of facts, including any previous warnings, sanctions or other actions taken to encourage compliance and "any explanation or excuse offered by the offender for the offence".

106. As is discussed in more detail below, the quality of the reviews undertaken by service managers varies widely. I interviewed some who examine the charges their probation officers bring to them with a fine-tooth comb, and allow only well-supported and carefully-considered charges to move forward. The overwhelming experience of those who handle prosecutions within the Department, however, is that in many cases service managers provide inadequate oversight.

Online Probation Officer training modules

107. New probation officers receive only limited training in how they should deal with non-compliance, including when prosecution should be considered, and how the discretion to prosecute should be approached. The training provides a helpful high-level introduction to a complex topic, but it is not designed to equip trainees to make prosecution decisions without a further period of on-the-job training. It stresses the need to learn about "breaches" by shadowing and observing senior colleagues.

108. The training is delivered as part of an online learning module, which includes, for example, brief video presentations from the Chief Probation Officer and a member of the PST. There is limited interactivity in the form of a handful of multiple-choice questions. The training introduces some basic prosecutorial concepts, such as the importance of the charging decision and its potential consequences, which include the likelihood of a further conviction and (especially if a recall application is being considered) the risk the offender will return to prison.

109. The training appropriately stresses the need to avoid a charge if possible, noting that probation officers "always try to use alternative responses if it is possible to achieve an effective and long-term outcome". It stresses that offenders should always be offered an interview under caution to explain their non-compliance, and emphasises the "without reasonable excuse" element of most charges.[36] There is also a helpful presentation which stresses the utility of seeking to cancel and substitute a sentence

36 See [165] below.

when it is clear the original sentence, for whatever reason, is unsuitable for the offender.

110. The module introduces probation officers to the Solicitor-General's Prosecution Guidelines. It instructs trainees to look the Guidelines up and write down the two steps in the Test for Prosecution, then provides a brief overview of what constitutes evidence. The module emphasises that while second-hand material, like a Police report, may point to the existence of evidence elsewhere, it cannot be used as evidence in and of itself, adding "you will have to investigate further and gather some tangible evidence". In a helpful video presentation from a (now former) member of the PST, trainees are instructed to "always ensure you have your evidence before you commence your breach – that is critical; you have to be satisfied that you have sufficient evidence to proceed with the charge *before* you lay the charge". He also reminds trainees that PST advice is only a phone call away.

111. Aside from a brief mention by the PST adviser, the training does not discuss the Public Interest Test, though an officer who had followed the instruction to look the Guidelines up would at least be aware of it.

112. Instead of attempting to explain the detail and subtlety of the prosecutorial discretion, the module stresses the need for trainees to learn by observing and shadowing their more experienced colleagues, for example by reviewing files where non-compliance led to a decision *not* to charge, sitting in on a non-compliance interview and discussing the factors their colleagues took into account when determining the appropriate response. It stresses the collaborative nature of the decision-making process and the availability of support.

113. While the online training is broadly accurate, as far as it goes, Corrections staff were almost uniformly critical of it. They noted that, as a largely passive module which forms part of a much longer online training programme, it is unclear how much of the information it conveys will "stick". As is discussed in more detail below, many of the important points the training makes are not reflected in day-to-day practice. For example, one senior manager agreed that most probation officers probably consider there is sufficient evidence to proceed if they believe they know where they can find the evidence in the event the defendant pleads not guilty. And while the training emphasises the critical importance of conducting a pre-charge non-compliance interview with the offender, complete with caution and Bill of Rights Act warning, that step is commonly overlooked.[37]

114. The training is not designed to provide a thorough grounding in the relationship between non-compliance and prosecution, nor does it ask trainees to practise making decisions with reference to case studies (as happens in other areas of probation officer training). Instead, it assumes that observation and working with senior colleagues are the best ways to familiarise probation officers with the myriad of difficult issues they will encounter in exercising their prosecutorial function. As several staff pointed out,

37 See [166] below.

that approach assumes the more experienced staff, who newer probation officers will be observing, understand and apply the correct approach themselves.

Practice Centre

115. Probation staff have access to additional information about charging on the Corrections intranet. If consulted, the Practice Centre reminds probation officers of the two limbs of the Test for Prosecution. Like the online training, it stresses that prosecution is a serious step which should be carefully considered. It confirms that a "breach" should not be laid unless there is sufficient evidence to prove the charge, and emphasises that probation officers have an ancillary role as investigators, noting that "staff should take time and care to collect all the required evidence before submitting the breach in Court".

116. The Practice Centre briefly explains hearsay evidence; it notes:

> - Hearsay evidence is not admissible and is not sufficient for the purposes of laying a charge
> i.e. *A told PO he saw the defendant associating with V. The PO cannot give evidence to what A saw. We would need a statement from A or V, who can speak directly to the associating*.

117. The Practice Centre also sets out some questions designed to help the probation officer address the public interest limb of the test:

> **Once you are satisfied there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution. You should consider:**
>
> - What is the purpose for the breach and what outcome are you seeking? What outcome is the court likely to impose?
> - Are there other ways to achieve the outcome you are seeking without taking breach action?
> - Would the outcome of any breach outweigh the severity of the offence?

118. The first two questions might provide a helpful starting point if the document also offered guidance as to how particular answers might affect the public interest assessment. For example, there is no suggestion that if the answer to the first question is "the purpose of the charge is to hold the offender to account, and I only want the court to mark the breach",[38] a charge is probably *not* in the public interest. There is also no guidance to indicate that the likelihood of a nominal sentence will usually point away from a decision to charge. Indeed, the third question may add to the confusion; it appears to imply that if the offending was minor, a prosecution may be in the public interest if the likely outcome is also minor, as the court's response to the breach will be proportionate.

38 I was advised that that phrase, or some variation of it, is commonly cited when the "public interest" justification is queried.

Departmental Prosecutions Policy

119. As noted at paragraph [89] above, the Department's online prosecutions policy stresses the need for probation officers to gather sufficient evidence, make an independent decision to prosecute and seek a meaningful outcome. Under the "sufficient evidence" heading, the policy provides:

> As part of the decision making process as to whether to take legal action, the probation officer must be able to provide sufficient Evidence Act 2006 compliant evidence to satisfy the court that all the elements of the charge of non-compliance is proved beyond reasonable doubt.
>
> The probation officer must be sure that there is credible evidence available to prove every element of the charge, and that this evidence is sufficient to satisfy a Judge.

120. The policy also lists a series of factors probation officers should take into account when deciding whether to prosecute. All reflect important components of the Public Interest Test, but they are overwhelmingly focused on perceptions of risk. Hōkai Rangi is not mentioned, nor are a number of the other key public interest factors referred to in the Guidelines.[39] It provides:

> We match the level of response with the level of non-compliance:
>
> We use professional judgement to determine the most appropriate response to non-compliance. We always have a rationale for responding in the way that we do and consider the offender's current risk, their escalating risk, sentence integrity and public safety. We approach our consideration of non-compliance in an offender centric way, taking into account what we know about the offender and their circumstances when making a professional judgement. However, public safety is paramount when responding to non-compliance.
>
> Where appropriate we use alternative responses for non-compliance, other than prosecution or recall. The alternatives we use are efficient and effective in their own right, they uphold sentence integrity and discourage future non-compliance whilst ensuring continued engagement with sentence/order. Sanctions are an effective tool for resolving and addressing non-compliance which require a response, but when considered against the public interest test, the offending (non-compliance) does not warrant prosecution and it is considered that a more effective long-term outcome can be achieved using an alternative.
>
> To ensure that the level of response matches the instance of non-compliance we consider:
>
> - the type of non-compliance that has been identified
> - the risk the offender poses
> - the imminence of offender's likelihood of reoffending and risk of harm to self and others
> - what we are trying to achieve with the response to non-compliance

39 See [76] above.

- the response to any previous non-compliance and what the outcome of this was
- whether the non-compliance [is] part of a larger pattern in terms of their history of non-compliance
- how the factors that contributed to the non-compliance and barriers to compliance can be addressed
- how can whanau, family and key supports be involved to assist the offender to comply with their conditions in the future.

121. The policy describes the process that should be followed in the event of disagreement as follows:

> Should there be any disagreement between the staff involved in making the decision to either commence or continue a prosecution, probation staff can approach and discuss the case with an independent service manager, a practice leader or the operations helpdesk.

122. The policy, perhaps surprisingly, does not mention seeking advice from the PST as an option if staff are uncertain about whether to lay a charge.

Prosecution Support Team

123. The PST is based at Ara Poutama's Head Office in Wellington. It consists of a manager – Erin Olsson,[40] an experienced former Crown prosecutor – and ten advisers, whose principal job is to manage prosecutions where the defendant has entered a not guilty plea. The PST is the only unit within the Department with national responsibility for prosecutions.

124. The PST – originally called the Prosecution File Preparation Team – was established following the enactment of the Criminal Procedure Act 2011. For a few years some members were based outside Wellington, but the team is now entirely centralised. Ms Olsson is the first lawyer to serve in the team. Many of its members are former probation officers, often with experience working in the courts.

125. One of the PST's roles is to assist frontline staff who are thinking about bringing a charge. Team members are available to discuss proposed charges and the evidence likely to be needed, and there is a standing invitation to frontline staff to consult with the PST before deciding to prosecute. Some probation officers and service managers do not hesitate to ask for advice. Nonetheless, the overwhelming majority of charges are laid without any consultation with the PST. Staff identified the remoteness of the PST as an obstacle. Canterbury staff advised they sought pre-charge advice more often in the early years of the team, when a PST member was based in Christchurch.[41]

126. Prosecutions are referred to the PST if a not guilty plea is entered. Only a minority of defendants – 10-20% – plead not guilty. The remainder of charges are handled by

40 Ms Olsson reports to the Chief Legal Adviser.

41 Canterbury staff spoke warmly of their former Christchurch-based PST colleague, who left his job when the Department decided all PST members should be based in Head Office.

court-based Corrections staff (or court officers; see [216] below). Annual case numbers referred to the PST over the last ten years are as follows:

2013	2014	2015	2016	2017	2018	2019	2020	2021	2022[42]
429	759	274	692	2186	2363	3137	2572	1949	1093

127. The PST manages defended charges through their pre-trial stages. After receiving a file, the PST reviews the charges in light of the Guidelines, handles disclosure, engages in case management discussions with defence counsel, prepares the case management memorandum and prepares instructions for the court officer who will appear at case review. The PST retains responsibility for the case until the defendant pleads guilty,[43] the charge is withdrawn, or the case is set down for trial.

128. Whenever a trial is set down, no matter how straightforward the charge, the PST instructs the local Crown Solicitor to take over the prosecution. The Crown Solicitor then attends to those preparatory tasks which remain to be completed, including, in almost all cases, the preparation of witness statements. Assuming the not guilty plea is maintained, the Crown Solicitor then appears for the prosecution at trial. If the defendant is convicted, the file almost always returns to the Department's court-based staff for sentencing.

129. Very few charges make it to a defended Judge Alone Trial. At each stage, large numbers fall away. As already noted, most defendants plead guilty. Of those that remain, a large proportion of charges – perhaps 25-30%[44] – turn out not to be viable. It is often clear there is insufficient admissible evidence to sustain the charge, and no amount of additional work will remedy the shortfall. Sometimes the defendant's conduct does not disclose an offence at all, and in others a reasonable excuse for the (prima facie) breach is readily apparent. Where this happens, the responsible PST adviser seeks to persuade the relevant probation officer or service manager to withdraw the charge, though the PST has no power to direct them to do so.

130. In addition, PST staff often query whether proceeding with the charge is in the public interest, usually by reminding probation officers of Hōkai Rangi, and asking why they consider it necessary for the defendant's conduct to result in a conviction. In a substantial proportion of cases – estimated at around 15% – this discussion is, by itself, sufficient to prompt the probation officer to withdraw the charge, especially where circumstances have changed significantly since the charge was laid (if, for example, the offender has completed his or her sentence, or has re-engaged constructively). Defence counsel told me they often advise their clients that there is a good chance

42 As at 11 August 2022; the PST Manager advises that the team is likely to receive around 2000 cases for the full year.

43 Guilty pleas may be entered either to the original charge or to a modified version. The PST adviser may also engage in plea negotiations with a view, for example, to withdrawing some charges while the defendant agrees to plead guilty to others.

44 Different staff members gave slightly varying estimates as to the proportion of charges in each category, but their overall assessments were broadly consistent.

the charge will be withdrawn if the breach caused no real harm and the defendant has been fully compliant since.

131. One PST member kept a record over an extended period of those cases which, in his opinion, did not comply with the Guidelines. He assessed 42% as non-compliant, mostly because there was insufficient evidence to support the charge.

132. Sometimes service managers and probation officers are reluctant to accept the PST's advice that the evidence is too weak to sustain the charge. A small number flatly refuse to withdraw the charge, particularly where the offender is regarded as high risk,[45] while others do so only grudgingly. One regionally-based staff member disparagingly referred to the PST as the "prosecution withdrawal team".

133. PST members described a second broad category among the cases that come to them, which they anecdotally estimate as comprising a further third. Charges in this category are salvageable, but require considerable work. Sometimes the charge needs to be amended, and most charges in this category require the probation officer to obtain additional evidence before the prosecution will be viable. Files that come to the PST rarely have proper statements attached, though the better ones at least disclose an evidential narrative in the IOMS notes, which can be converted into witness briefs later. Many files are missing critical documents, but these can often (though not always) be retrieved. With remedial work from the PST adviser, in conjunction with the probation officer, charges in this category may be capable of proof.

134. Most charges are resolved while in the PST's hands, either through a decision to withdraw, a change of plea or a compromise, where some charges are dropped and guilty pleas are entered to the remainder.

135. PST staff expressed grave concern about systemic non-compliance with the Criminal Disclosure Act 2008. It is almost unheard of for initial disclosure – which should be made as a matter of course shortly after a charge is laid – to be completed before the case reaches the PST. The fact disclosure is not available early in the process contributes to the number of defendants who plead not guilty, then change their plea later once the case reaches the PST or the Crown Solicitor. As one member of the PST put it, "[defendants] should not have to plead not guilty just to see the evidence against them".

136. PST members advised me that they struggle to complete full disclosure in a timely fashion. The team tries to attend to disclosure upon receipt of the file, but the team is not resourced to brief witnesses, and sometimes the file is incomplete. Section 13(1) of the Criminal Disclosure Act requires the prosecutor to make full disclosure "as soon as reasonably practicable after a defendant has pleaded not guilty". Full disclosure should include witness statements, witness briefs, an exhibit list, and copies of relevant information provided to the prosecutor, whether the prosecutor intends to

45 See, for example, footnote 61 below.

call the person who supplied the information or not. In Corrections cases, disclosure should include all potentially relevant information from IOMS.

137. While the PST discloses what it can, witness statements, and sometimes IOMS notes, are not supplied until after the file reaches the Crown Solicitor, several months later. Defence counsel noted they often receive vital information "literally at the last minute". A PST member expressed her concerns in writing, noting:

> … the Department is not complying with the Criminal Disclosure Act timelines. Limited disclosure (of everything except statements) only happens after a [not guilty] plea is entered and the matter is referred to PST. Even then, PST is not resourced to prepare witness statements. Defence counsel mostly do not get the statements until a few weeks before trial, when the Crown does them. Often, once they get them, they can take instructions and we get a [guilty] plea.

Crown Solicitors

138. Any charges which are set down for trial are briefed to the Crown Solicitor. In August 2022, around 7% of the PST's caseload was in the hands of Crown Solicitors. In almost all cases considerable additional work is required before the case is ready for hearing. One Crown Solicitor described receiving only "bare bones" files from Corrections – the charging document, the summary of facts, IOMS notes (which are often extensive) and documents like the defendant's induction.

139. It is the Crown Solicitor's responsibility to brief the witnesses and organise the evidence. The absence of witness statements means disclosure invariably remains incomplete. In addition to the need to brief witnesses, Crown Solicitors sometimes find that IOMS notes have not been disclosed. In other cases, the notes have been disclosed, but with redactions, which creates additional work – any redactions have to be justifiable, and capable of being defended if challenged.

140. While junior staff in the Crown Solicitor's office are often involved in this kind of pre-trial legwork, it remains an expensive exercise for the Department. Even Crown Solicitors acknowledge that turning notes into witness briefs is an inefficient use of their time.

141. Corrections is unusual in this respect. When asked to describe the difference between Corrections prosecutions and those which originate within other Government departments, one senior Crown prosecutor said Corrections charges tend to be far less serious and much simpler than charges briefed by other agencies, and that Corrections is the only agency which does not routinely provide witness briefs along with the file. She agreed that most charges would be well within the capability of a competent departmental prosecutor.

142. Relatively few briefed charges – around 30% – actually go to trial. Sometimes defendants plead guilty when they receive full disclosure or realise the case really is going ahead. In other cases, the Crown Solicitor determines that the charge is likely to fail, and persuades the responsible probation officer or service manager to withdraw it. Sometimes the prosecutor brokers a plea arrangement. While only around three in

ten of the files sent to Crown Solicitors result in a trial, Corrections, needless to say, incurs a fee for all of them.

143. Prior to the pandemic, the Department spent around $500,000 each year instructing Crown Solicitors to conduct its prosecutions.[46]

144. Crown Solicitors who conduct defended Judge Alone Trials are in a solicitor-client relationship with the Department. Nonetheless, the Prosecution Guidelines confirm the Solicitor-General's expectation that if instructed, even on a departmental matter, the Crown Solicitor is entitled to take *de facto* control of the prosecution. The Guidelines provide:

> [28.2] When acting on instructions, the Crown prosecutor is instructed in that capacity as an agent or officer of the Crown and should still act in accordance with the applicable guidelines. While Crown prosecutors are expected to consult closely with and take into account the views of the investigator or officer in charge of the case on all significant matters, it is also the Law Officers' expectation that government agencies who commence proceedings will follow the advice of the Crown prosecutor as to the nature of the charges and conduct of the prosecution.[47]

145. At present, paragraph [28.2] of the Guidelines provides the only formal measure of prosecutorial independence in the conduct of Corrections prosecutions.

46 The Department advises it spent $607,669.08 in the 2017-18 year, $431,669.24 in 2018-19 and $503,317.19 in 2019-20. That sum has fallen recently, reflecting the overall reduction in the number of charges as a result of the pandemic ($361,071.70 in 2020-21, $214,417.83 in 2021-22).

47 It is likely, given their inherently criminal character, that paragraph [28.2] also applies where the Department instructs the Crown Solicitor to seek an ancillary order, like an ESO.

OBSERVATIONS ABOUT CORRECTIONS PROSECUTIONS

146. The PST is the only unit within Ara Poutama which has criminal prosecution as its sole focus. It provides services throughout the country, and is well placed to comment authoritatively on the extent to which the Department's prosecutions fall short of an appropriate standard. That said, and as noted above, there is a measure of tension between the PST and staff closer to the frontlines. Some staff (both non-PST staff in Head Office and staff in the regions) sought to persuade me the PST has an unduly negative view of the quality of the charges probation officers bring. Some described it as too risk-averse. Others correctly noted that the PST sees only a small and (because they all involve not guilty pleas) non-representative sample of the charges the Department lays.

147. With those criticisms in mind, I interviewed court-based probation staff and service managers in several centres. Those staff overwhelmingly endorsed the PST's observations about the general quality of Corrections prosecutions, and about the steps that will need to be taken if charging practice is to improve. They were, if anything, more critical than the PST of the quality of the charges they see. Those staff concur that the Department prosecutes too often, and without appropriate regard to either element of the Test for Prosecution. The same observations were made by Judges and representatives of the Public Defence Service.

148. PST members each have responsibility for a different part of the country, and are therefore able to give a snapshot of the way the various regions are performing. They noted that charging practice is often dictated by the preferences of local District Court Judges, and also by the attitude of particular service managers. For example, I was advised that the quality of prosecutions in the Hutt Valley is excellent; a former PST member, who I later interviewed, now works as a service manager there, and always ensures charges are well drafted, well supported by evidence and reflect the public interest.

149. Overall, however, the picture PST members painted was discouraging. They trace many of the problems they have identified to the very basic nature of the prosecutorial training probation officers (and service managers) receive.

150. The Guidelines are often overlooked or misapplied when charging decisions are made. One overarching complaint – which does not appear to be disputed by anyone – is that the public interest limb is seldom applied in the manner the Guidelines contemplate. While the PST sometimes persuades probation officers to withdraw charges which do not meet the Public Interest Test, there is presently no independent examination of the public interest before the defendant is charged, or in cases the PST does not see.

151. Instead, to the extent non-evidential factors are considered in the decision to prosecute, enforcement staff are often heavily influenced by their perception of the short-term risk the offender poses. An offender who is thought to pose a moderate or serious risk of further offending (sometimes described by staff as "creating a victim")

is far more likely to be prosecuted than one who does not, regardless of the strength of the available evidence.

152. In other cases, charges reflect the probation officer and service manager's view that they have run out of ways to manage an offender's non-compliance. This sentiment is often accompanied by a genuine if misplaced view that laying a charge will help secure compliance in future. Sometimes, charges reflect a decline in the relationship between offender and probation officer; several staff relayed instances of charges being brought because the offender's attitude had deteriorated, and the probation officer decided the offender needed to be taught a lesson.

Evidence

153. Aside from the absence of a Guidelines-compliant examination of the public interest, the most common complaint is that most probation officers and service managers do not understand evidence. This lack of understanding takes a number of forms. First, the requirements of proof beyond reasonable doubt – and in particular the need to identify the elements of an offence and prove each of them – are not well understood.

Proof

154. Many charges are based on evidence which does not rise above the level of suspicion. I was shown numerous examples. One very common mistake arises when an electronically monitored defendant is charged with breaching a non-association order. Charges are commonly based on nothing more than the defendant being shown to have visited a particular address, and without any steps being taken to confirm, for example, that the "prohibited person" was actually home.

155. Another common example arises because, as already noted, in most cases a *prima facie* breach will constitute an offence only if it occurs "without reasonable excuse". This element is often overlooked when charging decisions are made. Instead, it is common for charges to be laid, without further inquiry, as soon as a *prima facie* breach is identified.

156. I reviewed one file in which the bracelet of a defendant on home detention went offline. In addition, he did not answer the door when probation staff visited at 2:29am. He was charged first thing the next morning with being absent from his address. He was not asked to explain what had happened. It emerged his bracelet had been faulty, and that he and his wife had been too frightened to answer the door at that hour. The Department had no evidence he had actually left the house.

157. In another case, a defendant (also serving home detention) had undoubtedly left his address. The electronic monitoring team noted the absence and immediately laid a charge. The defendant spent two nights in Police custody before it emerged that he and his probation officer had agreed, as part of a safety plan, that he should leave the property if gang members, from whom he was trying to disassociate, should visit. No inquiries were made before the defendant was charged (for example with the co-occupant of the address, who could have confirmed the visit); his absence from the address was deemed sufficient.

158. Often the evidence does not include documents fundamental to the prosecution. For example, proving breach of a non-association order requires the Department to show both that the order has been made, and that it has been communicated to the defendant effectively. Often there is no contemporaneous paperwork available to prove either step. Similarly, if an offender is charged with being outside the "perimeter" of an electronically monitored sentence, it is critical that the prosecution proves both the establishment of the boundary and the fact it was communicated to the defendant. Prosecution files commonly omit the offender's boundary map, and / or evidence that the limits on the offender's movements had been properly explained.

The rules of evidence

159. A second common area of concern is probation officers' lack of training in what constitutes *admissible* evidence. Charges are frequently based entirely on hearsay. Once again, I was shown numerous examples. One fairly typical file alleged the defendant had breached a term of his returning offenders order by failing to reside at an approved address. The evidence offered in support came from a probation officer who (in IOMS notes, later incorporated into the summary of facts) recorded a home visit. The defendant was not home, and the probation officer noted that an unnamed occupant had "advised [that the defendant] is no longer residing at the address". The probation officer did not name the person she spoke to, nor did she ask the witness to make a statement.

160. Hearsay evidence presents a particular problem where charges are laid at the urging of staff or agencies who are not directly responsible for the offender's management. For example, the High Risk Team (formerly the High Risk Response Team, or HRRT) oversees the progress of offenders who may pose a risk to community safety in the short term. It was common for the HRRT to respond to perceptions of escalating risk by recommending that the offender's probation officer lay a charge.[48] The HRRT often had no admissible evidence of a breach – it was often reliant on second-hand information – but nonetheless harboured a genuine and well-founded concern that the offender may be at imminent risk of causing harm.

161. The same concern frequently arose in cases where the Police made representations to the Department. The Police sometimes identify an offender whose behaviour is causing (entirely legitimate) concern, but who they cannot charge themselves, perhaps because the victim is too frightened to make a statement. It has been common practice, in those circumstances, for Police to refer the matter to Corrections, along with an informal, and often second-hand, account of a breach, perhaps of a non-association order. PST staff often see charges where probation officers, perhaps influenced by the fact the Police have greater expertise with prosecutions, use that information to support a charge. The documents filed in support would note that the relevant information had been supplied by the Police, but

48 See [190] below. The PST and other frontline staff reported a large number of charges based entirely on inadmissible evidence which, in conjunction with opposition to bail, were laid "to get the offender off the street".

would attach no formal statements, and give no indication of who (if anyone) within the Police might be available to give evidence in the event of a not guilty plea.

162. In another (apparently common) example, a charge of breaching an abstinence condition relied on nothing more than the fact the defendant was facing Police charges arising from her (alleged) possession of drugs. The summary of facts read:

> On the 2 June 2021, Community Corrections Court staff have advised that Ms X is in custody to appear before the courts on further drug charges. Ms X has failed to comply with her abstinence condition on the 1 June 2021 and charged by Police with Procure/Possess methamphetamine and Amphetamine, Possess for supply Cannabis plant.

Interviews

163. A third area of ongoing concern is the process by which those suspected of a breach are interviewed. As noted above, a non-compliance interview should form part of the preparation for most charges, especially where a breach is a criminal offence only if it occurs without reasonable excuse. Interviews provide probation officers with a golden opportunity to confirm all the elements of the offence, thus mitigating any evidential difficulties that might otherwise arise, but they also allow suspects the opportunity to offer any explanation they might have.

164. Sometimes, as in the cases described in paragraphs 156 and 157 above, the offender's perspective, once explained, will reveal either the existence of a (plainly reasonable) excuse, or a set of circumstances which indicate a charge is not in the public interest. In other cases, suspects will admit they had no good reason for the breach, thus removing the "reasonable excuse" element as a possible defence. In still others, the suspect will offer a plausible-sounding excuse which can then be investigated and debunked, a process that is much more difficult if the excuse is offered at or close to trial.

165. The need to interview suspects prior to a decision to charge is stressed in probation officer training. The relevant online training module includes the following:

> **Breaching – next steps**
>
> As we have discussed before, whatever the action we have decided to take, it is important that we give the person an opportunity to provide an explanation/excuse.
>
> When you have evidence and if you are intending to breach, ie, when you are specifically interviewing someone about non-compliance with a view to obtaining evidence or verifying third party information, this interview has legal implications.
>
> It is important that we talk about the intent and caution the person that you intend to breach.
>
> See the following extract from the Practice Centre:
>
> When interviewing the offender about non-compliance and possible enforcement action, the Community Corrections staff member has a legal obligation to notify the offender that they:

- are going to be asked questions/interviewed about non-compliance with their sentence/order, and a possible breach charge or application to court/NZPB;
- do not have to answer any of the questions;
- are free to leave/terminate the interview at any time

To reduce any doubt that offenders are free to leave/terminate the interview at any time, interviews should be conducted during a report-in to the Service Centre, not a Home Visit.

166. Nonetheless, it is very common for charges to be laid without the offender being offered the opportunity of an interview. Summaries of facts will include the line "the defendant has not offered any explanation", or "at the time of preparing this statement [the defendant] did not provide a statement", without revealing that this is because they were never asked for one. One service manager, with extensive experience in reviewing prosecutions, advised me that many probation officers do not offer the suspect an interview because they are worried they may make a mistake or because they do not wish to receive an explanation that might require more work. Some even decline to offer an interview because they are concerned that if they do so the suspect might provide an answer to the charge.

167. One court-based probation officer advised me that defence counsel often provide him with evidence – which could have been produced prior to charging if the defendant had been asked – that clearly answers the charge. Common examples include detailed medical certificates, information (in cases where the defendant was charged with changing address without permission) confirming the termination of a tenancy and contemporaneous text messages which fully explained a defendant's failure to report.

168. In cases where suspects are spoken to, the resulting interview nearly always falls well short of the objectively reliable, rights-compliant standard that characterises interviews conducted by the Police. Probation officers are not trained in how to interview criminal suspects. They receive no instruction in interviewing technique, and they often fail to follow the requirements in the extract from the Practice Centre set out above.

169. Often probation officers address the potential breach in the course of a normal reporting interview, without alerting the suspect to the fact these particular questions are part of a criminal inquiry. Regardless of whether interviews take place as part of regular reporting, or are set up as a formal non-compliance interview, the PST advises that suspects are rarely warned of their right to decline to answer questions, are not informed their answers may be used against them in court, and are not advised of their right to consult a lawyer.

170. Interviews are neither recorded nor transcribed, and suspects are not asked to sign the probation officer's notes of the conversation. Instead, the suspect's remarks are usually paraphrased or summarised and recorded in IOMS. The imprecision regarding what the suspect said, and the fact many suspects are interviewed without being advised of their rights, means the offender's remarks may well be inadmissible even if included in a formal statement later.

171. The way probation officers approach interviews with suspects represents, at best, a missed opportunity. By laying charges without interviewing the suspect the Department loses the chance to tidy away any elements which might otherwise be on shaky evidential ground (for example, by asking a suspect believed to have breached a non-association order "when you went to X's property, who did you see?").

172. In addition, current interviewing practice means probation officers regularly make prosecution decisions without crucial, and potentially decisive, information. An uninterviewed defendant who offers a belated but reasonable explanation is likely to defeat the charge. PST members advised that one of the regular bases on which they seek the withdrawal of charges is where an explanation is offered by an offender who was never asked for one before the charge was laid. By the time the explanation emerges, it is usually far too late to follow it up to assess its veracity.

173. Similarly, the prosecution must prove the defendant's non-compliance was deliberate. A non-compliance interview provides the Department with the opportunity to secure an admission to that effect. Alternatively, if it emerges the breach may have been inadvertent or accidental, the interview will allow the prosecutor to take the possible *mens rea* defence into account when considering whether there is a reasonable prospect of conviction. As an example, I was shown a case where a defendant strayed inside the boundary of a reserve he was forbidden to enter. A river ran through it, and the defendant said he did not appreciate its boundary extended to land on the far side, so did not realise he was in breach. The Department had opposed bail. It laid the charge without asking the defendant for an explanation, and without taking any steps to determine whether it could prove the *mens rea* of the charge.

Wider investigations

174. A related issue concerns the fact probation officers are not trained to identify and interview non-Departmental witnesses or conduct other pre-charge inquiries, and have little time to devote to that task in any event. Inquiries of this kind are sometimes necessary to ensure prosecution decisions are based on a complete evidential picture. It is impossible to make a properly-informed decision about whether there is a reasonable prospect of conviction, as the Guidelines require, without seeking to identify *all* relevant evidence. It is not sufficient simply to examine the evidence the Department has to hand when it identifies a possible breach.

175. As already noted, senior departmental staff expressed disquiet at any suggestion that probation officers have an obligation to conduct a criminal investigation (no matter how rudimentary) before laying charges. That unease is understandable. Criminal investigation is a specialised skill. Probation officers are generalists, who are immensely busy as it is. Many in the Department believe tracking down witnesses and taking statements is not a role probation officers are equipped for, and one it would be unreasonable to expect them to perform.

176. The problem, of course, is that if probation officers do not take it upon themselves to identify and evaluate the evidence relevant to the proposed charge, no-one does. Yet identifying all relevant evidence is an essential component of any decision to prosecute. Probation officer training and the Practice Centre emphasise that

investigation is an important part of a probation officer's role if charges are contemplated. Under the Department's prosecutions policy, the first role of a probation officer considering a prosecution is to "gather sufficient evidence".[49]

177. The Department does not employ specialist investigators. Instead, it is common for evidential gaps to emerge later in the process; I was shown numerous examples where charges had to be withdrawn because the defendant put the Department to proof, and it was, by then, too late to assemble the evidence the charge required. For example, in the common non-association scenario described in paragraph 154 above, the charge would require either a useable admission or evidence from a person who was both present and available as a witness.

178. It is common for even straightforward inquiries to be neglected. A clear (though, because of the identity of the defendant, somewhat atypical) example, can be found in the District Court's 2021 costs decision in *Arps.*[50] Mr Arps was, and continues to be, an offender the Department regards as high risk. He holds, in the words of the Judge, "anti-Semitic, anti-Muslim, white supremacist views".[51] He was imprisoned for distributing the video of the 2019 Christchurch Masjidain attack, then released on conditions which included a direction that he should not "loiter near any mosque" without permission from a probation officer.[52]

179. One afternoon,[53] Mr Arps' GPS tracker showed him to have travelled to an address adjacent to the Linwood Islamic Centre, and to have remained there for five minutes. He was located, arrested and charged; the decision was made by the Community Probation Service with input from the (then) High Risk Response Team. Mr Arps immediately protested that he had been visiting a liquor store next door to the mosque, and had not been "loitering". Nonetheless, the Department resolved to continue with the charge, and unsuccessfully opposed bail.

180. Straightforward inquiries with the liquor store – initiated by Mr Arps' lawyer – revealed Mr Arps had simply entered the store, purchased some products and left. Nonetheless, the Crown (which took over the charge at an early stage) did not withdraw the charge for around six weeks. The Judge made an award of $3,000 in Mr Arps' favour,[54] noting the prosecution had no excuse for failing to withdraw the charge as soon as it became aware of the complete evidential picture.[55]

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49 See [89] and [119] above.

50 *Arps v R* [2020] NZDC 25341.

51 At [5].

52 At [9].

53 In the week of the terrorist's sentencing.

54 That sum was less than half what he sought – the Judge was, in part, influenced by Mr Arps' behaviour, which could reasonably be considered provocative.

55 PST members noted – given the number of charges which, on proper examination, should never have been brought – that Corrections is fortunate it does not face costs applications more often than it does. The Department is protected from greater liability by the fact most defendants are legally aided.

181. Mr Arps' prosecution owed more to his status as a high-risk offender than it did to any aspect of the evidence against him. If even simple inquiries had been conducted, the fact the charge was unsustainable would immediately have been clear.

182. The *Arps* case drew together a number of poor practices, all of which PST members and court staff have become used to encountering. They include a tendency to allow assessments of risk to overwhelm the decision to prosecute, a misguided perception of "reputational risk" (in this case, fear the Department will be criticised if it does *not* proceed), a misunderstanding of the requirements of the charge, a failure to interview the suspect (and an unwillingness to listen to the explanation he volunteered), a failure to undertake obvious inquiries before laying the charge and a failure to withdraw the charge as soon as the full evidential position was clear.

The Public Interest

183. As already noted, it is common for the Public Interest Test to be overlooked prior to charges being laid. Instead, the Department's response to an apparent breach often turns on immediate perceptions of risk. Assessing risk is a skill in which probation officers receive extensive training. While there may be a rough correlation between a risk-based exercise of the discretion to prosecute and the broader public interest analysis contemplated by the Guidelines, the overlap is far from complete. The PST, in an assessment endorsed by court-based probation staff, considers that far too many Corrections charges, when reviewed with the Public Interest Test in mind, should not have been brought.

184. Corrections staff (understandably) benchmark their cases against other Corrections cases, rather than against the standards that might be applied by, say, the Police when they make charging decisions. But in the wider context of criminal offending, most Corrections charges are very minor.[56]

185. As noted in paragraph 76 above, the Guidelines require prosecutors to consider the maximum penalty and the likely sentencing outcome before deciding to charge. The rate of conviction and discharge for those convicted of Corrections charges – roughly one in three – far exceeds the average for non-Corrections prosecutions (fewer than one in ten).[57]

186. The frontline and prosecutorial staff I spoke to agreed that very minor charges, which attract only a nominal sentencing outcome, provide a very poor return relative to the resources they consume. Minor charges achieve little in terms of securing ongoing compliance; in many cases a nominal penalty, even if accompanied by judicial telling-off, only underlines the fact offenders can breach their sentences with few immediate consequences.

187. In addition, minor charges, at least where the breach causes no actual harm, often do long term damage to an offender's rehabilitation and/or reintegration. Experienced

56 See [98] above.

57 Ministry of Justice data tables, People Charged and Convicted, 1980-2021.

staff were unanimous that charging decisions which appear petty or officious often come at the expense of trust and candour in ongoing dealings between offenders and probation staff.

188. Charges are particularly counter-productive if they are likely to make offenders less likely to confide in their probation officers. I saw one file, for example, where at a routine report the offender told his probation officer he was happy because he had a new girlfriend. The offender was promptly charged with breaching a condition which required him to disclose new intimate relationships. It will rarely be in the public interest, at least in the absence of conduct that is independently unlawful or results in actual harm, to charge offenders over conduct they have volunteered.

189. The Guidelines note that a prosecution will often not be in the public interest when an alternative to prosecution is available. PST and court-based probation staff agreed that many charges are laid as a management tool, often as an expression of frustration with an offender who has been persistently unco-operative. Many staff – both those who work in prosecutions and those on the frontline – suggested that charges often reflect a lack of imagination and experience in deploying the various alternatives to prosecution available to probation officers. Sanctions for non-compliance, when properly deployed, can be tailored to the offender's circumstances, and applied with immediate effect.

The Role of the High Risk / High Risk Response Team

190. The High Risk Team (HRT), and its responsibility for overseeing the management of the Department's most dangerous offenders, may complicate prosecutorial decision-making.

191. The HRT has a presence in each of Ara Poutama Aotearoa's four regions. Its advisers provide specialist support to frontline staff who manage the Department's highest risk offenders. Typically, offenders in this category are those on life parole, those subject to ESOs or returning offenders orders,[58] and those with extremist beliefs.[59]

192. The progress of high-risk offenders is often supervised by a bespoke multi-disciplinary team, which may include a high-risk adviser, a psychologist, a representative of the Police and an adviser on the offender's physical and mental health. In some cases, there is an additional layer of oversight in the form of a governance group, which is often chaired by a senior regional manager. Much of this work occurs behind the scenes, without the offenders' active involvement, though their interactions with their probation officers provide critical input.

58 This category includes a substantial number of offenders with convictions for sexual offending against children.

59 The HRT defines its cohort as "highest risk and most complex people, including those who have committed serious child and adult sexual offences, significant violence and extremist crimes as well as those involved in transnational organised crime".

193. The HRT has a simple objective – to keep the community safe from the highest risk offenders. Many of those under HRT oversight have the capacity and inclination to cause substantial harm.

194. High risk offenders often face criminal charges that originate outside the usual hierarchy. While still (usually) laid by their probation officers, charges in this category are often brought following intervention from the HRT. Almost every member of the PST could recount instances of hastily assembled and poorly-supported charges that had been laid at the HRT/HRRT's behest. Some staff recounted stories of coming under (sometimes intense) pressure to lay charges they did not regard as justifiable or sustainable on the evidence.

195. While it is often clear when an offender's risk profile is worsening, the HRT has only a limited range of tools at its disposal. The team has, until recently at least, regarded the possibility of advising frontline staff to charge high risk offenders, even if the immediate non-compliance is relatively minor, as one of the few mechanisms available to disrupt an escalating cycle of risk.

196. The HRT acknowledges it is often difficult to obtain much admissible evidence before deciding to suggest a prosecution, especially if the risk appears acute and urgent. It might, for example, receive information from the Police, a family member or a housing provider that a high-risk child sex offender is breaching an ESO condition by associating with children. That information is often unusable in the form in which it arrives, perhaps because it came from a confidential informant – sometimes a concerned member of the offender's family (and/or a potential victim) who is unwilling to make a formal statement.

197. As already noted, the Department does not have a dedicated investigative resource of its own. This is an absence the HRT feels keenly. Senior HRT staff observed that some offenders on ESOs have up to 20 special conditions, and as their risk profile deteriorates it is almost certain they are increasingly in breach. Staff noted that the limited inquiries that do take place are usually conducted by probation officers, who have neither the time nor the training to do it effectively. The Police do not typically conduct inquiries on the Department's behalf, though it is unclear how often the Department asks for Police assistance; some staff had experience of serious cases where the Police were happy to help, and offenders on the Child Sex Offenders Register retain a dedicated Police case manager.

198. In any event, the HRT often finds itself in a difficult position. It is appropriately concerned about the risk of harm to the community (and often to an identifiable potential victim) if it does not act. It is also concerned to avoid criticism of the kind the Department received following its inaction in the Burton case. This sometimes leads the HRT to advise probation officers to lay charges even where the evidence is marginal or incomplete. The result may be a prosecution which disrupts the defendant's immediate ability to offend (hopefully enabling steps to be taken to improve the safety of those at particular risk), but which may have to be withdrawn if the defendant maintains a not guilty plea.

199. One senior member of the HRT acknowledged the team has particular influence in charging decisions involving parolees and those subject to ESOs, and that in those cases the HRT may give stronger advice which probation officers and service managers reasonably interpret as a direction. This team member observed that by the time the communications filter down to the probation officer or service manager it may appear the HRT has taken the decision, especially as frontline staff will not usually be familiar with the extensive internal analysis which has led the HRT to intervene. Sometimes regional managers effectively take the decision themselves, though it is often filtered through the HRT before it reaches staff at the front line.

200. PST members and service managers shared several examples of cases from the recent past where the HRT recommended charges with little admissible evidence, or where no effort was made to determine whether there was a reasonable explanation for the (prima facie) breach. One service manager, who also has extensive court experience, outlined his concerns in writing:

> [Charges that come from the HRT are] most often reactive. And that increases the likelihood of the breach being poorly executed and I will provide examples in a table below. There are also difficulties when opposing these directions. Sometimes I have had my opposition characterised, minimised, as the being the 'Devil's advocate', though my position rests squarely within the [Prosecution Guidelines] and the Criminal Procedure Act.
> … the common practice is to breach first ask questions later. This approach works for the Department as it is seen as taking affirmative action. Sometimes this is the case – there are cases that I have seen the risk and fully support the action – but there are other cases also considered high risk where this action is unnecessary.

201. While the PST is critical of the HRT's role in advising staff to bring charges without sufficient evidence, HRT staff, in turn, criticise the PST for being too risk-averse. (Indeed, I heard similar criticism from some experienced non-HRT staff; one described the PST as "gun-shy"). They suggest a reluctance to test novel points and a lack of confidence in managing charges that attract firm pushback from the defence. One senior HRT member said she believes the PST would rather withdraw a charge than risk an acquittal.

202. HRT members also suggested the PST does not give sufficient consideration to the high-risk nature of a case before recommending withdrawal or concluding a plea deal. A senior HRT member added that once a prosecution is commenced there is often a lack of consultation between the PST and HRT about its progress. She noted that charges dropped pursuant to a plea arrangement are sometimes those that reflect the highest risk pathway.[60]

203. HRT staff advised they do not mind being told that no prosecution can be brought because the evidence is inadequate; indeed, one senior HRT member described it as

60 An example was of a gang member whose particular risk arose from association with other members of the gang. As a result, it was the breach of his non-association order which was most important to the HRT. Nonetheless, the PST traded that charge for a guilty plea to a charge of failing to report.

"very impressive" when probation officers or service managers push back, on a principled basis, against the suggestion that a charge should be laid. If that occurs, the HRT will recommend a different (though often more resource-intensive) response, such as enhanced surveillance.

204. That said, principled pushback from frontline staff is uncommon. The PST is the only unit within Corrections which offers specialised advice about whether charges are appropriate, and most charges are laid without PST input.[61] Without specialist support, probation officers and service managers often lack the expertise, experience and confidence to resist an approach from the HRT, especially where it appears there may be an immediate risk of harm. This means that in high-risk cases, even more than in "normal" Corrections prosecutions, the Department's perception of short-term risk is often the driving factor in determining whether, and when, a charge is laid.[62]

205. Senior HRT staff in Canterbury recalled that their decision-making used to have better support, as a PST member was located in Christchurch for several years. They described a healthy tension; while they were more concerned about risk, their PST colleague would identify limitations in the available evidence and outline the steps that would need to be taken to resolve them. The presence of a locally-based PST resource allowed informal and in-depth consultation, and meant charging decisions were informed by expert advice.

206. One experienced service manager (and former PST member) described his interactions with the HRT in similar terms. He observed that it is common for the HRT to approach probation staff to suggest high-risk offenders should be charged. Drawing on his experience in the PST, he has no difficulty rejecting the HRT's advice if the evidence does not support a prosecution. Instead, he and the responsible HRT member work together to determine what charge might be appropriate and what evidence will be required before it can be considered. He observed that it is easy to get caught up in the urgency of a perceived high-risk case, but that taking time to gather evidence – sometimes, if the case is sufficiently serious, by enlisting the support of the Police – is always the better course.[63]

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61 That said, I heard accounts of even firm PST advice being rebuffed. For example, a life parolee, who was evicted because his building was condemned, advised his probation officer that he was required to move address. Nonetheless, he was charged with changing address without permission. The PST advised "this constitutes a reasonable excuse and in such circumstances, it would be against the public interest to proceed." (In fact, the better analysis was that there was not sufficient evidence to prove all elements of the charge). In any event, despite the PST's advice, the charge was not withdrawn, and the defendant, who consulted only the duty solicitor, pleaded guilty.

62 Senior HRT staff rejected the suggestion, implicit in the comments of some court-based staff and some members of the PST, that charges are sometimes brought without any real evidence in support. Rather, the HRT says it recommends charges when it considers the evidence is adequate, though in "cases of imminence" they may decide to proceed with less evidence than they would like. HRT staff noted they are often required to resist intense pressure, both from those close to the offender and from their superiors in the Department, to take urgent action.

63 Both the service manager and the Christchurch HRT staff noted that in appropriately serious cases the Police are often willing to help gather the necessary evidence. Offenders on the child sex offender register will already have a dedicated Police case manager. In addition, a properly focused inquiry with the Police can ensure Corrections has access to relevant Police notes and other helpful paperwork.

207. Several staff noted that a prosecution which collapses can deal a blow to Community Corrections' authority in its ongoing dealings with the offender. Many high-risk offenders are difficult to manage at the best of times. They sometimes feel emboldened, and less willing to accept direction from probation staff, if the Department has prosecuted them only to be forced to withdraw the charge soon afterwards, especially if it sought a remand in custody.

208. There was unanimous agreement among HRT staff that a dedicated investigative resource within the Department would make a significant difference, particularly if priority is given to cases with a deteriorating risk profile where there is strong suspicion the offender is non-compliant. In addition, all supported the creation of a regionally-based (though centrally supported) PST presence. HRT and PST members agreed that closer consultation with an expert prosecutions adviser prior to charges being laid is desirable, especially as the PST member may be able to identify straightforward inquiries which will help strengthen an otherwise-marginal case.

Other issues

209. PST and court-based staff identified a number of other common issues. Most stem from a lack of detailed prosecution training among probation officers and service managers.

Documents

210. The PST observed that the paperwork filed in support of prosecutions is often poor. Charges often fail to correspond with the offence provision or omit even the most basic particulars. I was shown numerous examples. One charging document – which I was told was far from an isolated example – alleged the defendant "breaches (*sic*), without reasonable excuse, any standard release conditions or any special conditions imposed by the New Zealand Parole Board".[64] Another alleged the defendant had "associated with a named person in contravention of one of his special conditions". Similarly, it is not uncommon for a charging document simply to allege that the defendant "did breach home detention".

211. PST and court-based staff advised that summaries of facts are highly variable in quality. Some contain extensive detail unrelated to the charge while omitting critical elements. Others (as is apparent from some of the examples reproduced above) highlight the fact the charge is dependent on hearsay. Other summaries disclose a plainly reasonable excuse for the prima facie breach.

212. It is not uncommon for staff in the court registry to reject poorly-prepared documents; I heard from several people that the registry is sometimes blunt when it does so, which can cause friction between Ministry of Justice and Corrections staff. For example, difficulties sometimes arise when the Department applies for a warrant in lieu of

64 The defendant was actually charged with consuming alcohol in breach of a special condition. There was no admissible evidence he had done so. He had been arrested by the Police. While asleep Police had placed a passive (i.e. non evidential) breath test device under the defendant's nose, and taken a photograph of the positive result, which they sent to the defendant's probation officer.

summons, which requires evidence outlining unsuccessful attempts to serve the defendant. Applications will often be rejected if they are insufficiently detailed (for example they simply say "attempts have been made to serve [the defendant]"), or do not indicate how often service has been attempted.

Service manager review

213. Defects in the charging document or summary are often missed by the service managers who review the charges. There was a consensus that many service managers check documentation for spelling and grammar, but lack the training and expertise to conduct a more substantive review. One service manager suggested that while her colleagues check prosecutions, many do not fully understand what they are checking. While the Breach Checklist for Service Managers requires service managers to confirm there is sufficient evidence to prove the charge, they are not trained to identify problems with admissibility, or the requirements of proof beyond reasonable doubt.

214. In addition, and as already noted, the Prosecution Guidelines are not mentioned in the Breach Checklist. The Guidelines' Evidential Test[65] requires the evidence to disclose a reasonable prospect of conviction. It requires the decision-maker to take account, among other things, of any explanation likely to be tendered by the defence. The Evidential Test requires a higher standard than a simple prima facie case, and it is not always a straightforward test to apply. And, as already noted, the service managers' checklist does not refer to the Public Interest Test at all. Many probation officers and service managers do not appreciate that a separate public interest assessment is required before they approve a charge. Some still enforce breaches strictly.

215. There was broad consensus that the absence of detailed prosecution training for frontline staff, along with the absence of an independent or specialist review of proposed charges, accounts for most of the problematic prosecutions the Department brings. As discussed in more detail below, I recommend the Department makes significant changes in both areas.

Court-based probation staff

216. While Ara Poutama's court-based probation staff do not conduct trials, they handle virtually everything else after a charge is laid, from first appearance through to sentencing. Some also continue to manage their own frontline caseloads. Many are very experienced, while others come into the court team on rotation and leave again only a few months later.

217. I interviewed senior (and junior) court-based Corrections staff in three of our busiest District Courts. As noted above, the court-based staff were, if anything, even more critical of the Department's charging practices than their PST colleagues. Their observations provide a compelling answer to the suggestion that PST members are

65 See [69] above

excessively critical because they see only the small proportion of cases defendants decide to contest. Court-based staff echoed the PST's comments about their frontline colleagues' lack of basic familiarity with the requirements of a criminal charge, including the need to identify the constituent elements of a charge and to have admissible evidence available to prove each one.

218. Senior court staff in one large centre advised me that they had, in conjunction with a practice leader, taken it upon themselves to offer training to local probation staff. (As noted below, the PST is also rolling out specialist training). One exercise, which could easily be incorporated into basic probation officer training, involved probation officers drafting a summary of facts, and then being required to read it out (as often happens in court). The exercise compellingly made the point that summaries need to be concise, well-organised, and explain the offending clearly.

219. Court-based staff told me they frequently despair at charging decisions. Echoing the PST's concerns about the non-application of the Public Interest Test, staff noted that many charges appear unnecessary. Many reflect either the relevant probation officer's frustration at an offender who is proving difficult to manage, or a concern the probation officer may face criticism if the offender is seen to "get away with" a breach. Frontline staff are often unable to articulate what they hope the charge will achieve, other than the need to mark the breach; as discussed in more detail below, there are other ways to do that.

220. One experienced court-based probation officer estimated that at least 30% of the charges he and his colleagues see lack sufficient evidence to obtain a conviction in the event of a not guilty plea, a proportion which is similar to the estimate made by the PST. The lack of admissible evidence can pose difficulties for court officers, who are often asked about the strength of the prosecution case, particularly when the Court is considering bail.

221. Staff observed that unless there is a real prospect of a remand in custody or recall to prison, a further charge usually does little to make management of the offender easier, and often makes it more difficult. Convictions overwhelmingly result either in a non-punitive sentence,[66] or yet another low-level sentence for Community Corrections to administer.

Career progression

222. Court-based probation staff identified a number of other concerns. As noted above, many hold their positions for only a few months before being moved to another position. They receive little, if any, dedicated court training when they assume their roles, instead observing colleagues and learning on the job. As one court officer put it, "you learn well if you have a good mentor". Staff receive no training in how to prepare critical documents, like Opposition to Bail forms.[67] There is no equivalent of the (extensive) training the Police provide to their prosecutors, nor has the Department

66 A conviction and discharge or an order to come up for sentence if called upon.

67 See also [230] below.

been inclined to fund Corrections court officers to participate in Police Prosecution Service training.

223. Many are rotated away just as they are becoming effective. After some months in the job, most court-based probation officers successfully get to grips with a difficult and onerous job, only to be moved to another position.

224. While court work is regarded as a relevant discipline for a probation officer, I was advised it is impossible to progress to the highest grade while holding that position. In order to advance, probation officers must demonstrate competencies which cannot be achieved while working in court, such as an ability to manage high risk offenders. There is no separate career path, or parallel professional development, for probation officers who are well-suited to court work and would like to continue to do it. There is a widespread perception that the Department fears probation officers will lose their basic frontline skills if they remain part of the court team for too long.

225. A number of court-based staff (and former court-based staff) expressed frustration that court officers, and the expertise they acquire, are not valued more highly within the Department. One added that he believes even the title is belittling, and that describing staff as "court officers" highlights the gulf in status between court-based probation officers and, for example, Police prosecutors, despite the fact they often manage comparable caseloads and, trials aside, do similar jobs. I was advised that many ended up leaving the Department due to poor pay and the lack of a career path, despite the urgent need for staff with experience and expertise in the unique environment of Corrections court teams.

226. Similarly, court-based service managers are often involuntarily rotated in and out of their positions, and many arrive in the court team without previous experience as a court officer. A lack of basic grounding in court work, combined with the general lack of training for court staff, sometimes leads inexperienced service managers to propose (or direct) outcomes that are entirely inappropriate. For example, one court-based probation officer described his service manager threatening to oppose bail if a defendant pleaded not guilty.

227. Court-based probation staff do not enjoy the independence the Police Prosecution Service assigns to those who handle Police prosecutions. Like the PST, the most a concerned court officer can do is make recommendations to the responsible probation officer.[68]

228. All the court staff I interviewed expressed the view that court officers should be recruited directly into a prosecutorial role, and should have the option to advance their careers in the courts if they wish. The same sentiment was expressed by Judges. Creating specialist prosecutorial roles within the Department, and encouraging continuity, will improve the overall levels of confidence and competence among court-based staff. In addition, with a relatively short period of additional training,

68 One experienced court-based service manager told me he does sometimes act unilaterally to withdraw charges, but only if the case requires urgent action and he cannot get hold of the responsible probation officer or service manager.

Corrections court staff will be equipped to take on much of the straightforward trial work currently sent to Crown Solicitors.

Judges' comments

229. Judges noted that many of the more experienced court-based probation staff are outstanding, and provide invaluable assistance to the Court. In particular, the best court officers are thoroughly familiar with the law, and have the dexterity to suggest sensible solutions, such as an oral application to vary the sentence. The Judges observed, however, that the absence of specialised training is often clear. Probation officers are fine on routine matters, when they are in their comfort zone, but their lack of training and expertise is often exposed when something unexpected arises, or where detailed familiarity with the law is required. In those situations, one Judge described it as "unfair to expect [probation officers] to be footing it with the lawyers". Counsel sometimes intimidate Corrections staff, who tend to lack the confidence to stand up to them.

230. One Judge observed that, in some courts at least, Corrections prosecutors do a poor job of opposing bail. By contrast with Police, whose Opposition to Bail (OTB) forms are generally very good, Corrections prosecutors often provide insufficient detail. The Judge noted Corrections OTB paperwork often appears pro forma, and prosecutors appear unaware of the arguments they need to make. It is clear specialist training would be helpful.

231. Another Judge was critical of the Department's practice of briefing defended matters to the Crown Solicitor, observing "you get the big guns coming in on what's usually a minor charge which would benefit from a practical, pragmatic analysis". She added that Crown Solicitors are often unfamiliar with the practicalities and inner workings of the community-based sentence that has (allegedly) been breached, and accordingly opportunities for a tailored and proportionate response are sometimes missed. The Judge echoed the suggestion of many Corrections-based court staff that Corrections should employ its own prosecutors, either from the legal profession or from within its own ranks, who have the authority and autonomy to agree to a pragmatic resolution at case review.

CONCLUSIONS AND RECOMMENDATIONS (PROSECUTIONS)

232. My review overwhelmingly demonstrated that Ara Poutama Aotearoa does not fully appreciate the importance of its role as an enforcement and prosecuting agency. For many years in the recent past, even the existence of the discretion to prosecute was overlooked. In many cases criminal charges were the first and only response to breaches of the strict terms of a community-based sentence or order.

233. Subject to any ongoing change in charging practice in the wake of the pandemic, far too many offenders are prosecuted even now. Only a relatively small number of people – the 30-odd thousand serving community-based sentences or orders on any given day – are candidates for prosecution by the Department. In light of that limited pool, the 17,000-21,000 charges commenced each year (prior to the Delta outbreak) is extremely high, especially given the minimal penalties that are routinely imposed, and the fact probation officers have a variety of mechanisms to manage non-compliant offenders which do not require recourse to the criminal law.

234. If implemented, the recommendations that follow will significantly reduce the number of charges the Department brings. I propose an additional line of assurance which should eliminate the large proportion of charges that are currently brought without sufficient admissible evidence. In addition, careful and independent scrutiny of the public interest – with emphasis on those parts of the Public Interest Test that discourage prosecution where only a nominal sentence is likely, and on Corrections-specific considerations, like the principles of Hōkai Rangi – will eliminate many more.

235. The elimination of inappropriate charges will free resources to ensure that those prosecutions the Department does bring are well investigated and well prepared. PST members and court-based Corrections staff should operate with a substantially reduced caseload, enabling them to manage defended matters through all their stages, including, in most cases, at trial.

Successful models

236. As part of my review, I met and interviewed service managers across the motu who have a reputation for producing immaculate prosecution files and exercising appropriate restraint. All had one thing in common – they had either acquired a degree of prosecutorial expertise, or had easy access to high-quality advice. One was a former member of the PST, another was a former senior Police officer, while another has two court officers attached to her service centre who carefully scrutinise the documents and underlying evidence before any charge is approved. One typical comment from a member of this group was that whenever a charge is suggested, his invariable mantra is “Evidence First”. If those suggesting a charge cannot demonstrate how they propose to prove it – with proper regard to the rules of evidence and any explanation the defendant is likely to offer – he tells them to go away and come back when they can.

237. Another long-serving service manager with a reputation for producing excellent files had a background in local body enforcement in another country, and recognised the

need to become an expert in any legal framework she is expected to administer. She noted her surprise, upon joining the Department as a probation officer, that she did not receive specialist training before she was given prosecutorial responsibilities, so she taught herself, finding and studying the Prosecution Guidelines, the Evidence Act and the Sentencing Act.[69] She suggested that most probation officers have little idea of the formal implications of swearing (or affirming) that there is good cause to suspect the defendant of committing the offence. Unsurprisingly, this service manager advised she would never authorise a prosecution without enough evidence to prove the charge and a careful analysis of the public interest, no matter how much external encouragement she might receive.

238. The success of these service managers highlights two main areas for improvement. The first is the creation of an independent third line of assurance, after probation officers and service managers, whenever a criminal charge is proposed. The new line of assurance is designed to ensure that every criminal charge has sufficient evidential support and reflects the public interest.

Independent PST pre-charge review

239. An important factor in the success of those service managers who are managing their prosecution function well has been the *ad hoc* creation of a specialist line of assurance which ensures an appropriate level of expert oversight when charging decisions are made. The former PST member and the former Police officer approach the discretion to prosecute by applying specialist skills learned in their old jobs. The "self-taught" service manager researched the correct tests and applies them in the methodical way she learned in her overseas enforcement role, while a fourth ensures all her proposed prosecutions are critically reviewed by one of the court officers attached to her team.

240. The present system of service manager review is often an inadequate line of assurance. Too often, service managers miss the fact that charges either require more work or should not be brought at all, whether because of insufficient evidence, because the charges do not reflect the public interest, or both. In addition, and despite the Service Manager Checklist encouraging service managers to ensure relevant documentation is present and the charge is appropriately drafted, many charges are not accompanied by foundational documents, such as the underlying court order, signed induction or boundary map. Errors, sometimes serious, often go undetected in the charging document or summary of facts.

241. As already noted, this observation is not intended as a criticism of service managers, most of whom have themselves never received any specialist prosecution training. While it is appropriate for service managers to review their probation officers' assessment of the way offenders in their care should be managed, and to stop

69 She also described, as a new probation officer 14 years ago, working under a service manager who believed all breaches should attract charges, as it created a formal record of the offender's non-compliance.

proposed prosecutions they regard as inappropriate, it is unfair to expect them to conduct an expert review of compliance with the Test for Prosecution.

242. I recommend the creation of an expert and independent line of assurance for every Corrections prosecution. I recommend the PST deploy members in the regions, where they are available to provide advice to frontline staff, and that every proposed prosecution is referred to either a Wellington-based or regionally-based PST member before the charge is filed.

243. The Spencer Report made a similar recommendation more than a decade ago. Mr Spencer observed:

> 342. Corrections is responsible for initiating 12% of all summary prosecutions. This means that at present, for a substantial number of prosecutions, there is no formal independent review of the original prosecution decisions. This concern could easily be remedied by simply giving the peer review function to part of Corrections which is outside the management line within Community Probation Services.
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> 343. In making these comments, I acknowledge that Corrections only prosecutes relatively minor offences, such as breaching sentences of community work or supervision and that only 1% of these result in a defended hearing. However, even in that context such convictions (especially multiple convictions over time) can have material consequences for the offender. They may bear on the leniency, or lack thereof, that the Court is prepared to extend at a sentencing hearing in the future and in some cases may affect the type of sentence imposed. My view is that these ramifications warrant an independent peer review of the decision to prosecute, regardless of whether the accused is likely to defend the charge.

244. Aside from the need to introduce an additional layer of quality assurance in the decision-making process, pre-charge review by the PST will separate the Department's role of managing community-based sentences and orders from the prosecutorial process. As noted above,[70] it is an important feature of a well-functioning prosecutorial system that an agency's prosecutorial arm is able to exercise the discretion to prosecute independently of the views of its frontline operational personnel.

245. As a first step, PST reviewers will satisfy themselves there is sufficient admissible evidence to disclose a reasonable prospect of conviction. If the case for charging the offender is strong but more work is required, perhaps because documents are missing or no inquiries have been directed to the "without reasonable excuse" limb of the charge, the appropriate response will usually be to send the file back to the responsible probation officer for those tasks to be completed.

246. Because the independent review will require PST staff to review the evidence available to support the charge, the evidence will always need to be assembled prior to the

70 See [82]-[90] above.

charging decision.[71] The current (relatively common) practice of laying a charge if the probation officer "knows" the evidence can be found later in the event of a not guilty plea must cease. The PST will also check there are no reasonable but unexplored lines of inquiry that might affect the Department's ability to prove the charge,[72] and evaluate any explanation the defendant has offered.

247. The assembly of evidence before the prosecution commences will also mean disclosure can be completed promptly if charges are laid. The fact defendants will be fully informed of the case against them from the outset is likely to result in more, and quicker, pleas of guilty than at present. Aside from the fact that weak or unsustainable charges should no longer be pursued, defendants will no longer need to wait for the file to reach the PST or the Crown Solicitor before they receive meaningful disclosure.

Public interest factors

248. Where the evidence shows a reasonable prospect of conviction, the PST review will consider whether the public interest limb of the Test for Prosecution has been considered properly. This inquiry (along with a review of the adequacy of the evidence) is a standard part of the PST's function in cases where the defendant pleads not guilty, but at present there is usually no independent scrutiny of the Public Interest Test in cases the PST does not see.

249. Most importantly, and as noted above,[73] probation officers should assist this process by setting out why they consider prosecution to be the appropriate response in the particular circumstances of the case. What will this charge achieve? Are there any factors, with reference to the offender's rehabilitation, the wider risk to the community and the principles of Hōkai Rangi which point away from prosecution? A prosecution that appears petty or gratuitous will neither reflect the requirements of Hōkai Rangi, nor the wider public interest. What will the likely sentence be if the defendant is convicted? Is there another effective way of dealing with the offender's non-compliance which does not require a criminal charge?

250. The likelihood of a non-punitive or very modest sentence will militate against prosecution in most cases. It will not usually be in the public interest to bring a charge which is likely to result in a conviction and discharge; "marking the breach" – which is the only utility of a conviction and discharge – can be achieved in other ways, including formal warnings, changes to reporting frequency and a reduction in approved absences for those on home detention. One probation officer noted that a formal (and fully documented) non-compliance interview can itself provide a suitable alternative to prosecution. The interview can serve as a fresh induction to the sentence, disclose a clear warning, and remove any doubt that the offender fully understands his or her obligations, thereby making a charge arising from a future breach considerably easier to prove.

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71 In accordance with standard prosecutorial practice and probation officer training (see [110] above).

72 Such as an interview with shop staff in *Arps*.

73 See, for example, [229] above.

251. On the other hand, it may well be in the public interest to bring charges in high-risk cases, especially where there is a risk of serious harm if an escalating risk profile is not disrupted. Provided the evidence discloses a reasonable likelihood of conviction, the offender's risk profile will continue to be highly relevant to the public interest analysis.

252. It may also be in the public interest to lay a charge in cases of persistent and obstinate non-compliance which have defied all other attempts at management. Even then, however, a charge will only justify the effort and expense if it is likely to achieve something. For example, a charge which is laid in conjunction with an application to cancel and substitute may help emphasise that the offender's non-compliance is deliberate and defiant, rather than the product of non-culpable personal factors; this may, in turn, help the Court settle upon an appropriate replacement sentence. Single instances of non-compliance which cause no other harm are unlikely to attract more than a nominal response from the Court; those charges will rarely be in the public interest.

253. I anticipate, as enhanced prosecution training is rolled out across the country, that the PST will receive fewer and fewer charges which fall short of the standards in the Guidelines, and that the PST review will involve lighter levels of scrutiny as time goes on. I envisage PST staff, especially those who are regionally located, consulting more frequently with frontline staff before the charge is formalised, and PST and frontline staff working collaboratively to ensure not only that charges pass muster under the Test for Prosecution, but also that they are as strong as they can be.

254. Frontline staff stressed the need for the PST to retain the confidence of service managers and probation officers. The PST review will create resentment if staff appear unfamiliar with the practical considerations which affect probation officers' decision-making. This concern can be mitigated by ensuring (as occurs at present) that the PST retains a substantial number of former probation officers and service managers in its ranks.

255. In addition, it is important that the PST's review is pragmatic rather than technical. While there is never room to approve charges which lack an adequate evidential foundation, there is scope for greater deference to frontline staff in the assessment of the public interest. There is often an extensive background to a decision that this breach (unlike others involving the same offender) warrants a charge. The need for deference is particularly clear in high-risk cases.

256. Whether a criminal charge reflects the public interest is a value judgement, which often turns on a subjective assessment. There will be many cases where reasonable minds can differ, and PST reviewers should be hesitant about rejecting a charge on public interest grounds unless satisfied the probation officer and service manager have either failed to take the public interest into account, or have made a clear error in the way they evaluated the competing factors (for example by failing to consider possible adverse consequences of a charge, or by asserting, without more, that a charge is necessary to hold the offender to account).

Accountability and independence

257. As already noted,[74] a fundamental attribute of a well-functioning prosecuting agency is that its operational and prosecutorial arms must be, and be seen to be, functionally separate.

258. The need for separation is even greater in the case of Corrections prosecutions given the proposed defendant and the responsible probation officer will generally have an existing professional relationship, which in most cases will continue regardless of the prosecution decision. The PST review will promote consistency, allow the decision to charge to be overseen by an independent expert, and should free probation officers from any accusation that the decision was based on personal factors. It should also help mitigate any damage to the ongoing working relationship between offenders and probation officers, as probation staff will be able to say, in all honesty, that the final decision to charge was not theirs.

259. Under the model I propose, ultimate accountability for the quality of charging decisions will move from probation officers and service managers to the PST, which means the PST needs the freedom to decline to pursue a charge, and the freedom to manage existing charges as it sees fit. By ensuring the PST review sits in a separate reporting line, which is not subject to oversight or direction from probation staff, PST members will be free to resist pressure from anyone outside the team.

260. That said, there should be no suggestion that the views of the responsible probation officers (and their service managers) will be disregarded in the decision-making process. As happens in the case of Police prosecutions, frontline staff and prosecutors will communicate freely and work together, especially when making decisions about how a prosecution, once brought, should be managed (including whether to withdraw some charges in return for a guilty plea). This process is particularly important in high-risk cases. There should be ongoing discussion, and it is important that both frontline and PST staff recognise that disagreement is a healthy and expected aspect of an independent prosecution structure.

261. In order to underline that the PST is responsible for final charging decisions, and is accountable both to the court and the Department for the quality of those decisions, I recommend that the PST member who approves the prosecution should execute the final charging document.[75]

262. Under the model I propose, the manager of the PST (or a senior delegate) will have the authority to override the initial decision of a member of the team, and there may, in exceptional cases, be occasions when the Department's Chief Legal Adviser wishes to overrule the PST's assessment. Such cases should be extremely rare, however, and

74 See [82]-[90] above.

75 Though a draft charging document should always be prepared by the relevant frontline staff member, and included as part of the file which is referred to the PST.

should arise only where the Chief Legal Adviser is satisfied the PST's assessment is unsustainable.

263. Importantly, I recommend that no-one, from the Chief Executive down, should have the authority to "direct" the commencement of a charge which does not meet the Test for Prosecution, and which has not been independently approved by the PST (or, in a rare and exceptional case, the Chief Legal Adviser).

Concerns and responses

264. The move to independent PST oversight may not immediately be welcomed by everyone in the Department. Some may be concerned it will signal a lack of support for the judgement of frontline staff, or will limit the autonomy they currently enjoy in managing clients. One of the well-performing service managers I interviewed made it clear she would be deeply unimpressed if staff from outside her service centre, who know little about the (often lengthy, often complex) context in which a decision to prosecute has been made, or her team's management strategy, were to second-guess a well-considered decision to charge. Others may worry about the up-front cost of the change.

265. There is no doubt the new approach will take some getting used to. Tension between operational and prosecutorial staff is common in other agencies and other jurisdictions. Indeed, the detachment and independence the PST reviewer will bring to the charging decision is one of the main reasons for the change; as already noted, disagreement is healthy and expected.

266. It is important the PST retains credibility with frontline staff. Doing so will, among other things, require open lines of communication, including clear reasons for any decision not to approve a charge, and constructive suggestions in cases where a prosecution is clearly a good idea, but where more work is needed to make the charge viable. Ensuring most PST staff have frontline experience, and the deference I expect PST staff to show when frontline staff have reached a considered decision about the public interest, will also help.

267. Removal of the final prosecution decision from frontline staff will emphasise that a criminal charge is *not* simply another tool for managing non-compliance. Loss of autonomy is an inevitable consequence of laying a charge; it is, after all, a decision to surrender direct control and place the offender's conduct and fate in the hands of the court. Compared with relinquishing control in favour of a Judge, an internal review of the charging decision, designed to confirm the charge will withstand judicial scrutiny, is only a small additional imposition. In many cases, the result of the review will be a short delay while additional evidence is obtained, strengthening the charge which is ultimately brought.

268. Importantly, the new layer of assurance is not designed to limit probation officers' freedom to manage their clients as they see fit, or to bring appropriate and well-supported charges. The change reflects the fact that no amount of autonomy can authorise charges which lack sufficient evidence, or are not in the public interest. It is those charges the new layer of assurance is designed to curtail.

Cost

269. As for cost, and as already noted, much of the infrastructure for the new line of assurance exists already. There will be a short-term increase in the PST's workload as it takes on its new functions while continuing to manage its existing files, but its case management load will fall over time as fewer charges are laid overall, and the improved scrutiny of evidential sufficiency leads to fewer not guilty pleas.

270. The Department may need to second additional staff to the PST, at least in the short term, and new positions may be required to provide the PST with a regional presence. That said, I anticipate that over time the team's workload is likely to change rather than increase. I recommend the Department meets any increase in demand by redeploying some court-based staff, many of whom already have the expertise to step into the new oversight role, and whose court-based workloads are likely to fall as the new system beds in.

271. While the new regime may result in modest short-term costs and the redeployment of some staff, the reduction in poor-quality prosecutions will quickly result in savings to the Department and the wider justice sector. The Department will significantly reduce many of the direct costs it currently incurs, such as the sums it spends each year on Crown Solicitors, and the overall reduction in prosecution workloads will allow many existing staff to be redeployed to more productive areas.

Training

272. I recommend new and enhanced prosecution training for probation officers. The training should be delivered in person, by an expert in prosecutorial decision-making, to all existing probation officers, members of electronic monitoring teams and community work supervisors, as well as to new recruits as part of an enhanced prosecution training module.

273. Trainees should be taken through hypothetical examples, and demonstrate a practical understanding of the Test for Prosecution in the Corrections context. An appreciation of the way Corrections-specific considerations such as Hōkai Rangi should be integrated into the Public Interest Test is essential, as is a detailed familiarity with responses to non-compliance that do not involve a criminal charge. When assessing the public interest, two key questions must always be "what will this prosecution achieve?", and "what harm might it do?". "Marking the breach", and "holding the offender to account" never provide sufficient justification on their own. The likely impact of a criminal charge on the offender's rehabilitation and reintegration must always be considered.

274. I recommend that in addition to expanded guidance about the evidential requirements of a criminal charge, the Practice Centre should provide a summary of the public interest factors most likely to be relevant in the Corrections context, including Hōkai Rangi and the (general) undesirability of bringing charges where only a nominal sentence is likely.

275. In addition, frontline staff should receive enhanced training in how to conduct non-compliance interviews. As noted, this is a step which, though important in obtaining a full evidential picture and excluding the possibility of a reasonable excuse, is often overlooked. Some staff lack the confidence to do it properly. I recommend that staff practise non-compliance interviews, which should include the creation of a basic interview plan and training in when and how to administer the appropriate caution and Bill of Rights advice. It may be appropriate to develop a card, to be given to all probation officers, which sets out the warnings and advice they must give. As discussed below, I also recommend that staff be trained to create a full electronic record of the interview, which can be transcribed if necessary.

276. The current model also relies on probation staff to interview any non-departmental witnesses whose evidence might be necessary to prove the charge. Interviews of "civilian" witnesses are uncommon at present, which sometimes leads to evidential gaps.[76] As noted below, I propose, at least on a trial basis, that the Department acquires a dedicated investigative resource. Unless and until that resource becomes widely available, however, there will be cases where obtaining a complete evidential picture requires probation officers to approach and interview witnesses. Prosecutorial training should include basic instruction in how to take a formal statement.

277. Creating the new training resource will not require substantial additional investment from the Department. The PST has, of its own initiative, designed a training programme for frontline staff, and has delivered it in parts of the motu over the past two years, though delivery has been disrupted by the pandemic, and some court-based staff have taken a similar initiative. I have reviewed the PST's training material. It stresses the distinct components of the Test for Prosecution, including the need to break the charge into its component elements and to obtain and evaluate the evidence in support of the charge *before* deciding to proceed. It contains good workshopping exercises and emphasises the many compliance options available to probation officers which do not involve prosecution.

278. While I would recommend even greater restraint than the PST's training suggests, particularly when assessing the public interest in cases where only a nominal penalty is likely,[77] the PST's training would, if rolled out across the whole country, result in an immediate improvement in prosecutorial decision-making. I recommend that all probation officers and service managers, along with other staff who may exercise a prosecutorial function, receive specialised prosecution training in the next 12 months.

Interviews: change of practice

279. I propose a change to interviewing practice. At present, non-compliance interviews involve a conversation between probation officer and offender/suspect. The probation officer will usually take notes of that conversation and enter them into

76 See [174] above.

77 See [250] above.

IOMS. No verbatim transcript of the interview is prepared, nor is the offender given the opportunity to review and sign the probation officer's notes.

280. I recommend that all non-compliance interviews be electronically recorded. Doing so will not require the creation of interviewing suites, nor is there any need to record the interview on video (as commonly occurs when the Police conduct interviews). An audio recording on a smartphone should be sufficient (perhaps with the offender asked to confirm the exact length of the recording at the end of the interview to help verify the integrity of the recording). I recommend probation officers upload the audio file and retain it as an exhibit, to be transcribed and disclosed if there is a not guilty plea. I also recommend the audio file be retained, in accordance with the Department's usual policies, even if it ultimately decides not to prosecute the offender, but instead resolves to treat the interview as a fresh induction and as evidence of the offender's understanding of the relevant orders.[78]

281. The practice of probation officers creating a summarised or non-verbatim record of a formal interview should cease. It is a practice the Police (who at least used to require suspects to verify their notes or the contents of written statements by signing them) abandoned as imprecise and too risky around 30 years ago, and as a result controversy about the conduct and content of evidential interviews has been virtually eliminated. Today, almost everyone carries a device capable of creating a high-quality electronic record of a conversation. There is no longer any reason for probation officers to use such an outdated method of documenting a formal interview.

282. Creating an audio recording of non-compliance interviews should remove any dispute about exactly what the offender said, and should also preclude any suggestion that – for example – the offender misunderstood the probation officer's questions, or that the offender's remarks were ambiguous or taken out of context. The Bill of Rights warning and caution will also be evident, removing any potential for defendants to suggest they did not realise they were at risk of incriminating themselves, or would have sought legal advice if they had known they might be charged.

Specialist investigative resource

283. As already noted, some staff expressed understandable concern about probation officers assuming a greater investigative role. Probation staff have many other responsibilities, and criminal investigation is a long way from a probation officer's "core" function.

284. That said, at present the Practice Centre and probation officer training assume frontline staff will conduct the necessary investigations before laying a criminal charge.[79] Unless the case is a very serious one and the Police can be enlisted to help, there is no-one else. The fact probation staff generally do not identify and interview witnesses means charges are often laid without any inquiries, beyond identification of a *prima facie* breach, being made. As already noted, this means prosecution decisions

78 The usual caution may need to be amended to accommodate this possibility.

79 See, for example [110] above.

are often made with an incomplete evidential picture. In many cases, charges proceed with much weaker evidential support than might be available. In others, the prosecution may fail because exculpatory evidence emerges which simple inquiries would have identified.

285. I recommend that probation officers receive basic training in how to identify outstanding inquiries, interview witnesses and take statements. Training which focuses on identifying and proving the separate elements of an offence will help. In many cases, follow-up inquiries will be simple. For example, if the offender claims to have a reasonable excuse, his or her explanation should usually be checked.

286. On the other hand, where the evidential picture is complicated, and in particular in high-risk cases where the HRT suspects a breach but where the evidence is tenuous or second-hand, having access to a specialist criminal investigator would be highly beneficial. Trained investigators have the skills to identify the evidence that will be required to prove a charge, and can take the time required to assemble it (or, alternatively, to establish no offence has occurred). The availability of a dedicated investigative resource means probation officers will not be diverted from their core functions, and will not be required to perform tasks beyond the basic investigative training they receive.

287. I do not recommend, at first at least, that the Department employs its own investigators; until staff get used to using the new resource the investigators may find themselves under-utilised, or swamped with requests for assistance in cases that do not require it. Rather, I recommend the Department looks to establish a panel of licensed private investigators in each major population centre. Appointment to the panel, and the promise of ongoing work, may enable the Department to negotiate competitive rates. The panel will cost the Department nothing when investigators are not being used, but in cases where more than basic investigation is required a pre-approved investigator will be available.

Changes affecting court-based probation staff

288. Improvements in prosecutorial training and the introduction of a pre-charge PST review should result in a rapid decrease in the number of charges the Department brings. In particular, the volume of charges which lack sufficient evidence, or for which there is no public interest justification, should fall rapidly. Indeed, if the Department resolves to refrain from charging offenders who are likely to receive only a conviction and discharge, the number of Corrections prosecutions should fall even further.

289. This likely reduction in prosecution volumes should have a number of positive consequences. Aside from a general reduction in the expenditure of public resources (both within Corrections and the Ministry of Justice), reduced caseloads for court-based staff should present attractive opportunities, both in terms of the efficient deployment of staff time and in the responsibilities court-staff will be freed to assume.

290. Once the new system is in place, I see no reason why Corrections court officers should not see departmental prosecutions through all their stages, including conducting (most) Judge Alone Trials. Several government agencies have an in-house

prosecutorial capacity. All except the Police bring far fewer charges than Corrections. Even Crown Solicitors acknowledge that most Corrections charges are straightforward, and do not require external counsel. Corrections prosecutors need not be lawyers.[80]

291. While training will be required as the new system settles in (perhaps with assistance from the Police, whose prosecution training is excellent) that investment will quickly pay for itself. As already noted, the Department receives a poor return on the money it spends on Crown Solicitors, as most of the files sent to them are eventually resolved by way of guilty plea or withdrawal. In addition, Crown Solicitors perform (and charge for) tasks all other agencies perform in-house, such as briefing witnesses.

292. In addition, prosecutors from outside the Department are not always the best advocates in Corrections cases, especially where a pragmatic solution is required. As noted above, one Judge commented on Crown prosecutors' lack of practical familiarity with the sentences and orders in question. Corrections prosecutors, immersed in the practicalities of community-based sentences and orders, will often be able to respond more quickly and constructively.

293. I recommend that court-based probation staff receive a new title – such as Prosecutor – and that those who are well suited to court work are allowed and encouraged to advance their careers there.

294. I recommend that the reporting lines for (re-branded) Corrections court officers should change. While Prosecutors will continue to report to their court-based service managers, they, in turn should report to the PST rather than the current frontline hierarchy. The PST will have ultimate responsibility for the conduct of prosecutions, though as happens at present most cases will result in guilty pleas, and there will generally be little need for active PST involvement. Over time, day to day management of defended matters is likely to move from the PST to the court teams, albeit with PST oversight and support.

295. I recommend that when appointing new court-based service managers, the Department should place particular emphasis on candidates with a strong background in court work, or with analogous experience in another job. Emphasising the distinct skill required to lead a court team will encourage staff to regard court work as a field where they can advance their careers if they wish.

296. Final responsibility for decisions about the management of prosecutions, including whether charges should be withdrawn, and whether to accept guilty pleas on some charges in return for guilty pleas to others, will reside with court staff and the PST, though the views of the responsible frontline staff will always be highly relevant. As in the case of Police and Crown prosecutions, part of the independence of the prosecutorial function involves entrusting final responsibility for decision-making to those accountable to the court.

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[80] See Criminal Procedure Act 2011, s 10(1)(d).

Other initiatives

297. New and constructive alternatives to criminal prosecution have begun to gain momentum throughout the motu. One important and promising initiative involves the Department providing offenders with the opportunity to be referred to Te Pae Oranga Iwi Community Panels as an alternative to the usual court process. Te Pae Oranga panels are made up of respected members of the community, including iwi leaders and businesspeople. The Te Pae Oranga process emphasises dialogue, re-connection with the offender's community in a culturally sensitive and appropriate way, and the need to work constructively and supportively to address the offending and its underlying causes. Te Pae Oranga panels are only deployed where the offending is relatively minor, but that restriction suits Corrections charges well.

298. While in many respects a Te Pae Oranga panel has similar objectives to a probation officer managing a community-based sentence – most notably identifying the underlying causes of offending and proposing solutions which promote rehabilitation – in many cases the involvement of a respected independent group outside Ara Poutama has proved influential in encouraging non-compliant offenders to re-engage. In some cases, offenders have been provided with the opportunity to undertake training and acquire skills, and some have even ended the process with offers of employment. It is an initiative which may be particularly well-suited to younger offenders who are in a state of persistent and defiant non-compliance, who may have become alienated from staff in the Department, and who would benefit from the circuit-breaker the intervention of an Iwi Community Panel may provide.

299. Whenever a breach is sufficiently serious to warrant a criminal charge, but referral to a Te Pae Oranga Panel is available, I recommend that the PST (in conjunction with the responsible probation officer) satisfies itself that there are good reasons *not* to refer the offender to a panel before it proceeds through court in the usual way.

COMMUNITY WORK

300. While all the sentences and orders for which Corrections has responsibility pose enforcement challenges, sentences of community work have proved a particular thorn in the Department's side. Community work is the most commonly-imposed community-based sentence; an average of 11,299 people were serving community work at any given time between 1 July 2020 and 30 June 2021,[81] compared with 7,638 on supervision, 5,028 on intensive supervision, and 1,693 and 1,654 on community detention and home detention respectively. It is often the first port of call when offenders are sentenced for moderately serious offending. Section 55(2) of the Sentencing Act provides that offenders may be sentenced to community work "for the number of hours, being not less than 40 or more than 400, that the court thinks fit".

301. Community work is also – if official figures are reliable – a cheap sentence to administer. The Department estimates that it costs, on average, $13 per person per day,[82] compared with, for example, $37 for community detention, $22 for supervision and $85 for home detention. It is designed to provide offenders with a practical way to atone for their offending; the Sentencing Act 2002 envisages it as a mechanism by which the offender "can be held accountable to the community by making compensation to it".[83] Given it does not involve any formal deprivation of the offender's liberty, and community work can, to an extent at least, be tailored to the particular offender's skills, it is, on its face, a constructive and progressive sentencing option.

302. As the discussion below illustrates, however, the reality is quite different. Community work is not a suitable sentence for most of those who receive it. Only a minority – between a quarter and a third – comply without having to be pursued by Corrections staff. Community work musters overwhelmingly consist of offenders who are either in long-term default or those whose compliance is under active management (a catch-all term for those subject to various levels of warning and those being prosecuted). Although Corrections treats prosecution for non-compliance as an absolute last resort, in the last decade[84] breaches of community work have accounted for far more prosecutions than any other Corrections charge. There are many reasons for the high levels of non-compliance, some of which have their roots in the historical background to the sentence.

History

303. The sentence of community work was created by the 2002 Act. It combined two existing sentences – periodic detention and community service. Periodic detention was a semi-custodial sentence in which offenders attended a centre, usually once a week, and did around nine hours of closely-supervised manual labour, usually

81 Department of Corrections, 2020-21 Annual Report, p 160-161.

82 This figure does not take into account the costs of securing compliance.

83 See, for example, Sentencing Act, s 56(1)(a), s 66A(3)(b).

84 Community work was heavily disrupted by the COVID-19 pandemic; sentences were suspended for the latter part of 2021 and the first few months of 2022, dramatically cutting prosecutions for breach.

outdoors and often in view of the community. Offenders were in the legal custody of the warden during this period.

304. Periodic detention was regarded as the most severe sentence short of imprisonment, and was designed "as a halfway house between full imprisonment on the one hand and some of the more liberal community-based sentences on the other."[85] There was little flexibility. Offenders would be sentenced to periodic detention for a certain number of months and, barring illness or some other well-documented excuse, were required to attend every week.

305. Community service, on the other hand, was designed for less serious offending and less problematic offenders. It was less common than periodic detention,[86] and could be imposed only with the offender's consent.[87] The Criminal Justice Act 1985 provided that community service could include work "at or for a hospital, or at or for a charitable, educational, recreational or cultural institution or organisation", or "at or for an institution or organisation for old, infirm or handicapped persons".[88]

306. Offenders would complete their community service without the direct supervision of a probation officer. As a result, the sentence was only suitable for offenders who could be trusted to work safely around vulnerable members of the community, without a coercive eye being kept on them. The Criminal Justice Act provided that community service should not be imposed unless the court was satisfied the sentence was "appropriate having regard to the offender's character and personal history, and to any other relevant circumstances".[89] There was no equivalent restriction on sentences of periodic detention.

307. *Hall on Sentencing* described community service as a sentence "inappropriate … for the aggressive anti-authoritarian individual, or the inadequate excessively dependent person." It noted that community service required "a measure of motivation and active consent".[90]

308. By 2002 periodic detention was regarded as an outdated sentence. In its 1999 review of community-based sentences, the Ministry of Justice described periodic detention as "an old sentence, … largely unchanged in most of its essential features since 1962". It noted that the "public shaming aspect … does not sit well in a modern penal system and may be counter-productive as far as the goal of preventing reoffending is concerned".[91] It also referred to a study of reconviction rates (within two years) for offenders with cases finalised in 1991, which found periodic detention had a

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85 See, for example, *Wijlens v Police* HC Auckland, 20 June 1994, 17 TCL 39/10.

86 In the decade to 1998, sentences of community service were imposed between 25% and 45% as often as sentences of periodic detention (see Ministry of Justice, Criminal Justice Group, *Review of Community-based Sentences in New Zealand*, June 1999 ("MOJ review") at p 76).

87 Criminal Justice Act 1985, s 29.

88 Ibid, s 60(1).

89 Ibid, s 31(a).

90 *Hall's Sentencing* (updated to 12 January 1999), Butterworths, Wellington, at p 469, quoted in MOJ review at p 27.

91 MOJ review at p 96.

reoffending rate of 76.9%, compared with 81.8% for prison and 51.8% for community service.[92]

309. It is notable that compliance rates for both periodic detention and community service were good. Periodic detention was the community-based sentence most likely to be breached (though, given the high level of supervision it required, it was also the sentence where breaches were most likely to be detected immediately). In the decade ending in 1998 the number of periodic detention sentences which involved a breach was relatively consistent, never rising above 22.2%, and never dropping below 16.2%. The breach rate hovered around 20% most of the time.[93]

310. The breach rate for community service was exceptionally low. Over the same ten-year period, the number of cases which involved a breach never exceeded 4.5%, and some years fell below 3%.[94]

311. Community work was designed to combine the best features of periodic detention and community service. Like community service, an offender is sentenced to perform a certain number of hours of work in the community, with a degree of flexibility over exactly when those hours are completed. The sentence is also designed to offer flexibility in terms of the kind of work offenders undertake. Those who can work safely and effectively without Corrections supervision can – assuming an appropriate provider is available – receive a placement with a community agency, such as a local council, government agency, voluntary organisation, school, marae or sports group. The rest – those for whom a greater level of supervision is required or where no agency placement is available – report to a Community Work centre, where they work off their hours as part of a work party; the kind of work done in a centre placement closely resembles the work historically done by those serving periodic detention.

312. The Sentencing Act provides that offenders serving at least 80 hours of community work may, at the direction of a probation officer, spend up to 20% of their hours in "training in basic work and living skills".[95]

Problems with Community Work

313. As noted above, community work was designed to combine the best features of community service and periodic detention. Most importantly, it removed the quasi-custodial aspect of periodic detention, instead relying on a self-directed compliance model similar to community service. Like community service, community work relies on offenders reporting when required and working their way steadily through their hours. But while compliance with periodic detention was secured by the coercive

92 Ibid at p 78. Needless to say, it is difficult to rely on reconviction statistics as an indicator of each sentence's effectiveness. The lower reoffending rate for community service, and the higher rate for imprisonment, were almost certainly influenced by the type of offender likely to be sentenced to each. It may not be much of an exaggeration to describe community service as a sentence skewed towards middle-class, non-habitual offenders.

93 MOJ review at p 76.

94 Ibid.

95 Sentencing Act, s 66A(1).

nature of the sentence, community service depended on self-motivation and active consent. Those qualities are present in only a minority of those sentenced to community work.

314. As a result, compliance with sentences of community work is extremely poor. For example, one senior practitioner, responsible for managing over 400 sentences of community work, advised in February 2022 that only around 25% of her muster were fully compliant. Another senior manager explained that during the pandemic fully compliant offenders were entitled to "epidemic remission"[96] – a reduction in required hours to reflect the non-availability of work while community work sentences were suspended. But because epidemic remission requires full compliance, only 25-30% of her muster qualified.

315. By contrast, a substantial number – over 60% – were under some form of compliance management, including warnings and prosecutions, while 10-15% were regarded as "unmanaged defaulters". Another community work manager, responsible for a nominal muster of around 1,000 offenders, advised that in June 2021 he had offenders on his books, all still subject to their sentences, who had not reported for several years; 17 had not reported since 2013, and 215 had not reported since the end of 2020. Between two-thirds and three-quarters of offenders sentenced to community work cause compliance problems.

316. Community work has, by some margin, the poorest compliance rate of any community-based sentence. Compliance with community work is far worse than either of the sentences it replaced. Sentences of community work are breached at least three times as often as the old sentence of periodic detention,[97] and around *fifteen* times as often as the old sentence of community service.

317. Compliance rates – while poor across the board – are materially higher for agency as opposed to centre placements. For example, a snapshot showing compliance rates in Auckland for June and July 2021 indicated the Department's compliance target each

96 Sentencing Act 2002, s 67A.

97 In fact, compliance with community work is likely to be far worse even than this comparison with periodic detention suggests. Under the old legislation, each instance of non-compliance with periodic detention was recorded separately; each week the offender missed was a separate breach. In other words, 80% of those on periodic detention never missed a day (at least without reasonable excuse). A breach of community work is not recorded until the offender has been in default for some time, and efforts to bring the offender back into compliance have failed. For example, one community work manager advised that he only considers prosecution for offenders who have been completely absent for two months.

week was 70% for agency placements, but only 30% for those on centre, with actual compliance rates of around 50% and 30% respectively.[98]

318. At present defaulters are prosecuted for breaching their sentence only after repeated warnings, and after other options to encourage and coerce compliance have been exhausted. Far more offenders could be prosecuted than are prosecuted. For some managers, at least, charging decisions are once again heavily influenced by perceptions of the risk the defaulting offender poses.

319. Charging decisions are also influenced by the resources available to process the charges. In mid-2021, the manager of one large centre, with a muster of around 1,000, most of whom are in default, advised that he strictly, and arbitrarily, limits the number of community work charges his office brings to avoid overwhelming his court-based colleagues and the District Court list.

320. Before discussing prosecutions for breaching community work – which all participants in the system acknowledge serve little purpose other than as a last-ditch effort to promote compliance – it is worth noting that Corrections staff identified a number of other problems with community work. There is a widespread view within Community Corrections offices around the country that community work is no longer an effective community-based sanction, and that it should now be regarded as obsolete. That view is not universal by any means, but even those who continue to regard community work as a worthwhile sentence were adamant that it requires considerably greater investment if it is to fulfil its potential.

321. The most common model of community work – offenders being loaded into a van and working outdoors in a group of around 8 people for a day – is the one most staff regard as problematic. It is also the form of community work most likely to give rise to compliance difficulties. The more closely tailored the work is to the personal and cultural needs of the offender, the more likely it is that the sentence will be completed, and that it will prove a safe and worthwhile experience for the provider and the offender.

322. The discussion that follows summarises only a handful of the concerns staff expressed about community work, and is far from a comprehensive critique of the sentence.

98

End of Month Results

Northern Region Community Work

		DISTRICT	Jun-21	Jul-21
Target		AUCKLAND	59%	56%
Link		MANUKAU	64%	62%
		NORTHERN REGION	52%	52%

	Centre Average	DISTRICT	Jun-21	Jul-21
	of Weekly Report In Rates for the month	TAITOKERAU	39%	39%
		WAITEMATA	33%	30%
Target	30% Centre	AUCKLAND	33%	29%
Link		MANUKAU	25%	24%
		NORTHERN REGION	32%	30%

KPI	Agency	DISTRICT	Jun-21	Jul-21
	Average of Weekly Report In Rates for the month	TAITOKERAU	65%	66%
		WAITEMATA	39%	38%
Target	70% Agency	AUCKLAND	27%	25%
Link		MANUKAU	76%	65%
		NORTHERN REGION	53%	49%

323. The need for the Department to ensure compliance with health and safety requirements for both centre and agency placements has made it increasingly challenging to find appropriate outdoor work. For example, I was advised that – in one large centre at least – work parties no longer use machetes to cut vegetation, and no longer undertake tasks such as log-splitting to provide firewood for the elderly. One lead service manager noted her anxiety about the safety of both offenders and supervisors on work placements; aside from any risk inherent in the work, she noted that some offenders are volatile.[99]

324. Many people find community work intimidating. Fear of gangs or bullying is a commonly-cited excuse for non-compliance. One service manager described community work as counter-productive in terms of rehabilitation – she noted that in a normal work group of 8 offenders, there will be hardened criminals mixing with younger offenders who do not have an extensive criminal history. The younger offenders are often negatively influenced. She also advised that gangs are a constant malign presence, and that they often influence the way the day's work proceeds and seek to use community work as a recruiting opportunity.

325. The likelihood of intimidation or counterproductive associations (with a consequent impact upon compliance) increases as the number of agencies prepared to sponsor placements decreases. There are many offenders whose vulnerability means a centre placement is unsuitable. Many find themselves forced to work alongside people they are trying to disassociate from. It is extremely unhelpful, for example, for someone who is trying to overcome a drug addiction to find him or herself doing community work alongside a dealer. The risk that community work may expose younger and less experienced offenders to negative influences has been well understood for many years. For example, a wide-ranging literature review into the effectiveness of overseas community work schemes[100] observed (p 36):

> The findings of Trotter's (1993) study appear supported by other studies that have examined the importance of not mixing lower and higher risk offenders, due to the risk of 'contamination' for the lower risk offenders (Andrews et al. 1990; Latessa & Lowenkamp 2006b; Lowenkamp & Latessa 2004; Lowenkamp et al. 2006). Latessa and Lowenkamp explain that, 'placing low-risk offenders in with high-risk offenders may lead to an "education" in anti-social behavio[u]r for the low-risk offender.' (Latessa & Lowenkamp 2006a) As noted, Trotter's (1993) study found this to be the case, regardless of the risk levels of offenders. Hence, given the connection between group community service work sites and increased rates of recidivism and breach for offenders placed in these groups, community work service schemes that rely on, or have as their majority, group placements are likely to be less successful in terms of their overall completion rates.

326. Community work can be an especially frightening sentence for women; in Auckland compliance has improved greatly following the establishment of dedicated wāhine

99 The Department was successfully prosecuted when an offender was killed by a rolling tree in the course of a 2014 agency placement (*Worksafe New Zealand v Department of Corrections* [2016] NZDC 18502). The Court's decision noted substantial systemic failings in probation officers' training regarding their health and safety obligations.

100 Turner S and Trotter C, Monash University Criminal Justice Research Consortium, August 2013.

programme, which is designed to enable women to acquire skills with a view to employment or even establishing a business. Staff recognise it is essential the Department provides a safe, inviting, constructive environment, but also acknowledge that, with a few exceptions such as the wāhine programme, it often fails to do so.

327. Compliance difficulties often begin immediately after a sentence of community work is imposed. Offenders are presented with an order requiring them to report for induction within 72 hours,[101] but many fail to do so; indeed there is a substantial core of defaulters who have never taken any steps to comply with their sentence. Those offenders also tend to be the most difficult to track down later. One Judge noted his frustration that offenders are not met by Corrections staff before leaving court; he suggested a probation officer should explain the requirements of the sentence and conduct a preliminary induction on the spot. Many offenders do not speak English well, suffer difficulties with literacy, or simply fail to appreciate the importance of the paper they have been given.

328. The same sentiment was expressed by some community work staff, one of whom suggested that improved investment at the "front-end" – meeting and greeting the offender straight after sentencing, obtaining contact details, gaining an understanding of their capabilities, encouraging the offender to see the sentence as an opportunity to acquire useful skills, carefully explaining the sentence and the offender's obligations and ensuring the requirements of the sentence are fully understood before they leave court – would reduce the number of offenders whose sentences never get underway.[102] Another suggested that the better the induction (and the more closely it is tailored to the skills and needs of the offender), the better the chances of compliance.

329. Where offenders are concurrently serving a sentence of community work and another non-custodial sentence, such as supervision, the first port of call in the event of default should be the offender's probation officer. He or she should be in close contact with the offender, and well-placed to monitor compliance and intervene quickly in the event of breach.[103] I was advised that co-ordination between community work supervisors and probation officers is often poor, and that opportunities to enlist probation officers to help manage non-compliance are often missed.

330. Those on community work continue to make valuable contributions. I heard anecdotes about offenders who, for example, take pride in re-beautifying outdoor areas, and encouraging stories of offenders who benefitted greatly from agency placements with marae and other iwi-based work providers. A recent re-forestation project in North Canterbury has resulted in extremely positive comments from nearby

101 As required by s 59(a) of the Sentencing Act.

102 See also [377] below.

103 Intervention might, for example, include requiring defaulting offenders to report to their probation officer weekly or fortnightly so compliance with community work can be monitored, with a view to returning to less frequent reporting once the offender is making acceptable progress.

residents, and was generally regarded as a very positive experience for the offenders involved.

331. Culturally relevant programmes, where they are available, are more likely to engage offenders, make them feel they are doing something worthwhile and promote rehabilitation. Staff were unanimous that placements which take account of the offender's particular needs, circumstances and cultural background are likely to be far more effective at promoting compliance than the "one-size-fits-all" model that usually characterises centre placements. Those observations reflect longstanding international experience. For example, Turner and Trotter observed (p 35):

> McIvor (1992) observed in her study a connection between offenders' experiences of community service and the occurrence of absenteeism. Specifically, offenders who described their community service work placements as enjoyable and their community service experience as very worthwhile had lower levels of unauthorised absences (McIvor 1992). Lower rates of absenteeism were also recorded for offenders in the Scottish schemes allocated to personal tasks (e.g. care duties, organising sporting or other group activities), rather than practical work (e.g. painting and decorating, kitchen and cleaning tasks, gardening), in voluntary agencies (McIvor 1992). Offenders who completed their community service in agencies had lower rates of authorised and unauthorised absences than those in group placements (McIvor 1992).

332. In New Zealand tailored programmes are very much in the minority. As already noted, in some parts of the country at least – in part because of more onerous health and safety requirements – fewer community organisations are prepared to offer agency placements to offenders performing community work. A South Auckland practitioner advised that, as at February 2022, 90% of her muster was on "centre" rather than an agency placement, despite a centre placement being unsuitable for many vulnerable offenders.[104]

333. Centre placements – with the exception of outstanding initiatives like the wāhine programme – tend to combine many of the features which can lead to high rates of non-compliance, as well as being at best ineffective, and at worst positively counterproductive, in terms of promoting rehabilitation. Moreover, I was advised that the actual productive output of most of those on centre placements is usually poor. One supervisor advised that productivity is around 20% of what he would expect from a paid worker.

334. The staff and Judges I interviewed universally held the view that the 20% "work and life training" component of the sentence is far too low. Experience has shown that offenders are generally more motivated to comply with their sentence if, in doing so,

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104 The availability of agency placements is not declining everywhere. For example, in July 2022 a Canterbury Lead Service Manager noted the success of her staff in expanding the range of agency placements; she noted that a number of community organisations which tended to rely on older volunteers, had become increasingly reliant on community work placements during the pandemic. She estimated that around 25% of her muster are currently in agency placements.

they acquire practical skills. The 20% maximum, which community work supervisors have no official discretion to increase, means opportunities to provide a genuinely rehabilitative experience are often lost, though some advised me that from time to time they find a way to count training time as completed hours, particularly where they see the prospect of improved engagement.

Compliance and enforcement

335. The community work staff I spoke to advised that it is often easy to predict which offenders will cause compliance difficulties. Community work is a sentence which relies on offenders being able to turn up reliably and complete a day's work. It is a blunt instrument in the context of an offender population with complex and diverse needs, many of whom are not used to thinking far ahead and whose offending is underpinned by a range of personal difficulties.

336. The philosophy underpinning community work differs little from the thinking which led to the creation of periodic detention in 1962, namely "repayment" of the "debt" the offender owes to the community, and that the sentence provides a non-custodial option which will nonetheless deter and denounce offending. The thinking of the time is exemplified by a speech by the then-Minister of Justice, which suggested periodic detention would "provide a useful method of dealing with young louts, vandals and the like who may be headed towards a criminal career if not diverted at an early age".[105] In assuming that forced hard work would be sufficient to deflect vulnerable or wayward young people away from criminal offending, those who created the sentence of periodic detention echoed the outdated philosophy that gave rise to other now-abandoned sentences, such as corrective training.

337. At the same time, the place of community work in the sentencing hierarchy has slipped. As noted above, while community service was always regarded as a relatively low-level sentence for minor offenders, periodic detention was only one step down from prison.[106] The immediate detection of non-compliance, and the fact the only real alternative was a prison term, may well have helped keep compliance rates high.

338. Today, s 10A of the Sentencing Act characterises community work, along with supervision, as the third-least restrictive sentence available, ahead only of a completely non-punitive response (such as a conviction and discharge or an order to come up for sentence if called upon) and a purely financial sanction like a fine. It is regarded as less restrictive than sentences of intensive supervision, community detention and home detention.

339. Nonetheless, community work is more onerous than some of the sentences above it in the hierarchy, most notably community detention. I heard many anecdotes about offenders who ask to be sentenced to community detention rather than community

105 NZPD, vol 331, 1962, p 1848, reproduced in MOJ report at p 23.

106 At the time it was introduced, officials hoped it would provide an alternative for offenders who would otherwise be imprisoned, and even late in the 20th century courts regularly described periodic detention as a real alternative to a custodial sentence.

work. Judges will often refuse, observing that a sentence of community detention would effectively require the offender to do nothing more than sit at home and watch TV, and that by imposing community work the offender would be required to "give something back".

340. A number of those I interviewed, including several Judges, noted the perverse incentives that arise where a more "serious" sentence, like community detention, is more appealing to offenders than a sentence of community work. Many who are sentenced to community work are not deterred by the risk of being prosecuted for non-compliance – a s 71 charge is nearly always much less serious than their original offending. Moreover, the prospect of their sentence being cancelled and replaced by community detention is often a welcome one (though I was advised that the prospect of more serious sanctions still, and especially fear of imprisonment, may be a more effective deterrent).[107]

341. Those I interviewed agreed an offender who is most likely to complete a sentence of community work successfully will have most, if not all, of the following:

336.1 An existing work ethic.

336.2 No criminal history, or a good record of compliance with community-based sentences.[108]

336.3 Access to reliable transport.

336.4 If they have dependent children, access to childcare.[109]

336.5 No physical or mental health issues that make completing a day's work difficult.

336.6 No addiction issues that will make completing a day's work difficult.

336.7 A willingness to engage with and respect authority.

336.8 Sufficient motivation – and ability to plan ahead – to complete their sentence.

342. The proportion of offenders whose lives equip them to navigate a sentence of community work – especially a longer sentence of 200 hours or more – is relatively small. There was broad consensus that community work rarely, if ever, instils a work ethic in an offender who does not have one to begin with. Ironically, those with busy lives, who are therefore experienced at organising their time and accommodating

107 For example, one of the senior practitioners I interviewed advised that when she joined the Department around ten years ago in a small provincial town, community work compliance rates were excellent because the local District Court Judge regularly sent non-compliant offenders to prison.

108 One very experienced manager advised that there is a near-100% correlation between those who fail to pay their fines and those who fail to comply with a sentence of community work. He advised that remitting fines in favour of a sentence of community work is nearly always pointless.

109 Children cannot be brought to a community work centre, and the Department does not offer any form of childcare, even on wāhine days.

competing demands, are far more likely to comply with a sentence of community work than those with little else to do.

343. That said, even employed offenders who are motivated to complete their sentences may find that today's employment environment makes compliance less straightforward. While employment is the best predictor of compliance, many jobs require staff to work or be available in weekends. Many announce rosters only from week to week making forward planning difficult.

344. In addition, many people work more than one job, or have to travel to accommodate the demands of seasonal work, particularly in regions like Hawke's Bay or the Bay of Plenty. Those who already work long hours often spend little enough time with their families as it is. While most larger centres offer several community work options each week, it will sometimes be difficult for offenders to attend reliably given the demands of their job and their families. Transferring between centres – for example if an offender picks up seasonal work in another town – is not always straightforward.

345. Once an offender falls into persistent non-compliance, the Department's enforcement options become time-consuming and expensive. My overall conclusion – and key recommendation – is that the best way to reduce the number of prosecutions for breach of community work is to ensure those unlikely to comply are sentenced to something else.

Section 56 and the information provided to Judges

346. As already noted, the old sentence of community service had an exceptionally high compliance rate. In requiring the offender's express consent and prohibiting the sentence if the offender was unsuitable for it, the Criminal Justice Act recognised the sentence would quickly become unworkable if imposed on offenders who were unlikely to comply.

347. In the same way, the Sentencing Act 2002 attempts to steer Judges away from community work in cases where compliance is unlikely. Section 56 provides:

> **56 Guidance on use of sentence of community work**
>
> (1) In considering whether to impose a sentence of community work, the court must give particular consideration to—
>
> (a) whether the nature and circumstances of the offending make it appropriate for the offender to be held accountable to the community by making compensation to it in the form of work, in addition to, or instead of, making reparation to any person in respect of the offending; and
>
> (b) whether the sentence is appropriate having regard to the offender's character and personal history, and to any other relevant circumstances.
>
> (2) A sentence of community work is inappropriate if the court is satisfied that—

(a) the offender has alcohol, drug, psychiatric, or intellectual problems that indicate that it is unlikely that he or she would complete a sentence of community work; or
(b) for any other reason it is unlikely that the offender would complete a sentence of community work.

348. All the Judges and nearly all the Corrections staff I interviewed agree probation officers give insufficient attention to s 56 before recommending community work. As already noted, Corrections staff broadly agree it is not difficult to predict which offenders are likely to default, and many of the common indicia of non-compliance are expressly mentioned in s 56(2)(a). In particular, those with a history of non-payment of fines, non-compliance with other community-based sentences, addiction, unstable living arrangements and mental health difficulties are far less likely to comply with the sentence than offenders who do not have those issues. The best indicator of compliance is employment. For those not working (especially, and self-evidently, those on ACC, those receiving jobseeker support because of illness and those receiving sole parent support) community work is unlikely to be a suitable sentence.

349. Nonetheless, community work is routinely imposed upon those unlikely to comply, and probation officers often recommend it even in the face of obvious characteristics which make the sentence inappropriate. For example, I was given a PAC report which noted the defendant had been on ACC for the preceding three months, but which nonetheless recommended community work.[110] A senior practitioner described another case involving an offender who had defrauded ACC and was confined to a wheelchair. The offender was sentenced to 300 hours' community work, which she spent in an agency placement in a church, but she had very little to do. Community work is commonly imposed on those whose offending is directly linked to factors which make finding employment difficult.

350. The Judges expressed similar frustration. They noted that community work is an easy sentence to impose, and it is low enough in the hierarchy that they often feel comfortable doing so without a PAC report. Many offenders lack the means to pay a fine or make reparation, and if they are not sentenced to community work, the Judge usually has to consider a sentence such as community detention, which requires a careful (and, for Corrections, resource-intensive) inquiry about the suitability of the offender's address. While conscious of the risk of non-compliance that accompanies sentences of community work, one Judge observed "we want to move the case on … so we just do it".

351. Despite its being a relatively easy sentence to impose, Judges recognise that sentencing defendants to community work when they are likely to default is a waste of everyone's time. Aside from the requirements of s 56, Judges are conscious of the

110 The report noted the offender was hoping to return to work soon after his sentence date, but he had not yet done so, and there was no assessment of how his injury and recovery might impact upon his ability to complete a sentence of community work.

burden non-compliance places on Corrections, and they are acutely aware of the disproportionate number of community work breaches which come before them.

352. There was broad consensus that giving more consideration to the likelihood of compliance will save time and resources later. All agreed that PAC reports should, in every case, address the likelihood of compliance whenever community work is a possibility, with particular care in cases where it is the recommended sentence. Report writers should also consider any vulnerabilities which might make community work inappropriate, and consider whether (perhaps because of work commitments, or transport or childcare difficulties) the sentence will be logistically feasible, along with any other factors which might cause the Judge to hesitate.

Restraint in charging

353. Periodic detention's relatively high levels of compliance owed a great deal to the coercive nature of the sentence, and the likelihood that non-attendance would result in immediate enforcement. Because of its place in the hierarchy, prison was the only realistic alternative for an offender who refused to comply. In addition, for much of its existence, jobs which required work on Saturdays were uncommon. And while community service had an exceptional level of compliance, it was imposed only on offenders who consented and who the court deemed suitable; it is likely many were anxious to avoid something tougher.

354. By contrast, many of those sentenced to community work – particularly those on centre placements – quickly slip into non-compliance. Charges do not follow immediately. Offenders are given varying degrees of latitude from centre to centre, but throughout the country defaulters are only charged after repeated warnings and attempts to persuade them to engage. Prior to laying charges, staff attempt to contact offenders by text, email, phone call, letter, via family members and, if possible, home visits. Sometimes the offender simply cannot be found. Those able to be contacted are almost always encouraged, cajoled and warned before they are charged.

355. Often offenders simply refuse to engage, no matter how hard Corrections staff try. For those who are open to conversation with community work supervisors – as one senior practitioner described it – staff "try to problem-solve". The first step is to try to identify the reasons for non-compliance, and address them if possible. This process may include a reassessment of the offender's placement.

356. On a visit to one large site, the manager pointed out eight to ten community work supervisors at their desks, and advised that all were actively engaged chasing defaulters. At that centre, no-one is prosecuted unless they have failed to report for at least two months, but even then, staff will (in the manager's words) "do anything to avoid a breach", even if it means clinging to a vague promise of compliance in the future. He also advised that the Ministry of Justice asked that charges be staggered to avoid overwhelming the court; as a result his centre can only lay around thirty charges a week, regardless of how many offenders are in long-term default.

357. A service manager at the other end of the motu described a similar situation, noting that the District Court is understaffed, and struggles to cope with the charges the

Department brings. Another lead service manager in a large centre said that at least half of her staff's time is spent trying to manage non-compliance; as she put it, "we just chase our tails". While from time to time staff manage to re-engage a defaulting offender (usually by removing an identifiable obstacle), the staff time spend attempting to corral non-compliant offenders, like the money spent prosecuting them, represents a substantial waste of departmental resources. A Senior Practitioner in a North Island community work team supplied the following table, which outlines steps to be considered in the event of non-compliance with a sentence of community work:

Identify Non-Compliance	Offender has **FAILED to meet a condition of the sentence**. The report in screen is updated within the required timeframes. The Non-compliance, Event and Response are actioned within 10 working days of the identified non-compliance. *Possible actions to take ...*	**Make Contact** - reminder e-text, phone calls, text messages, email, whanau engagement
		Multiple Sentence Liaison - discussion with supervising PO regarding overall management plan of the offender
		Establish Whereabouts - external agency checks (MSD, Immigration, Police), whanau contact, employment, home visits (according to HV policy) **Re-induction** - remind offender of sentence requirements and consequences of non-compliance
		Formal Sanction - verbal and/or written warnings outlining consequences of further non-compliance
		Take Breach action - gather evidence to support your response. Consider taking prompt action for increased indications of risk to the community Complete an **Application to Cancel or Vary** the sentence
		Reassess ITR to allow the offender to complete 100hrs in 6 months. Consider increasing reporting requirements
		Reassess Remission - use as an incentive for compliance

358. While in some centres, community work staff do an outstanding job of reducing non-compliance by making community work a more attractive and positive experience for offenders, the staff I spoke to agreed that securing compliance with a court-imposed sentence should not be this difficult. Compliance is not optional even if community work is hard and dull; it is not Corrections' job to make offenders *want* to comply.

359. In light of the extraordinary levels of non-compliance, only a fraction of which is reflected in the charges the Department lays, reducing the delay, waste and prosecutorial burden associated with non-compliance will require a more significant change in the area of community work than elsewhere. As noted above, a substantial part of the problem lies with the sentence being imposed too often upon those unable or steadfastly unwilling to comply. Many of those I interviewed, including Judges, expressed the view that once it is clear offenders fall into either of those categories, the best solution is to cancel the sentence of community work and remove them from the community work muster.

Prosecutions for breach of Community Work

360. As already noted, prosecutions under s 71 consume a substantial proportion of the resources the Department expends on criminal prosecutions. They also represent an

extremely poor investment. Prosecutions are always a substantial drain on public resources, both for Corrections and, in its various roles,[111] the Ministry of Justice.

361. Breaches of community work are usually simple to prove provided the charges are framed correctly.[112] That said, given the volume of s 71 charges, the resources each charge consumes, the very low penalties typically imposed and the negligible effect the threat of prosecution has on compliance, it is doubtful that even Corrections' relatively-restrained charging regime serves the wider public interest.

362. Service is often difficult. Many offenders do not respond to attempts to contact them, and by the time the Department decides to bring a charge the offender's address and other contact details are often out of date. Ministry of Justice staff will not issue a warrant for an offender's arrest unless Corrections can demonstrate that all options for serving the summons have been exhausted; in practice this requires multiple documented attempts, as well as Police checks, checks with the Ministry of Social Development, inquiries with relatives and follow-up inquiries with people living at the offender's last known address. While around 75% of attempts at service are eventually successful, laying a charge often requires enormous effort.

363. The maximum penalty for breaching community work is only three months' imprisonment. When cases come to court defendants are often "remanded for compliance", meaning the charge is adjourned for a few weeks and then withdrawn if the defendant has made sufficient progress towards completing the sentence.

364. Most defendants who plead guilty to breaching community work[113] – particularly those who have no previous convictions for breaching a community-based sentence – promise to comply and are convicted and discharged. In addition, unless the Court can be persuaded to cancel it (see discussion at [370] below), the sentence of community work remains to be completed, meaning that in most cases the prosecution takes the Department no closer to removing the defaulting offender from its muster. One Judge told me that in his court, "your first breach is [usually] free", but that he favoured predictable and escalating consequences if non-compliance continued, including the prospect of imprisonment in the event of a third breach. To the frustration of many staff, sometimes a further sentence of community work is imposed.

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111 Including the court registry, legal aid and the judiciary.

112 Section 71 summaries tend to follow a standard template. While they do not attempt to exclude the possibility of "reasonable excuse", in practice only persistent defaulters are prosecuted and in each case the summary reveals how long the defendant has been non-compliant.

That said, I was advised that poor document management, and in particular an inability to locate evidence that the offender has been properly inducted into the sentence, can derail the charging process.

One Judge noted that – because Corrections does not seek to interview prospective defendants about why they failed to report – prosecutions can be vulnerable to a last-minute excuse offered by the defendant. Some defendants claim their non-attendance was the result of an emergency, or to have "rung up on the day". In general, however, the summaries I have reviewed make the possibility of an excuse passing muster appear remote. The fact non-compliance is usually persistent will mean any attempt explain away individual instances of non-attendance are unlikely to be convincing.

113 Not guilty pleas are rare in community work cases.

365. Several managers told me they recognise the futility and inefficiency of laying such a minor charge so often, especially if a conviction and discharge is the likely outcome. Of all the available mechanisms for securing compliance, a criminal charge is by far the most cumbersome and expensive. The manager of one large centre advised that he only ever brings a charge as a final attempt to persuade the offender to engage, and only after every other option has failed. He also acknowledged that for an offender who has been in default for several months, even the threat of prosecution is not much of a deterrent. At his centre, summonses always carry first appearance dates around six weeks after service. He advised he would happily withdraw the charge if the offender made an effort to comply in the meantime.

366. While there are other areas where the Department is too quick to charge, the fact persistent non-compliance often continues for several months before the case is brought back before the Court – whether by way of an application to cancel or a charge under s 71 – may be contributing to the scale of the problem. One senior practitioner observed that, once offenders appreciate that non-compliance carries no immediate consequences, they begin to regard attendance as voluntary, and something they can pick and choose. Attempting to cajole reluctant offenders into compliance is an inefficient use of the Department's resources, and the delay before official action is taken does little to emphasise that non-compliance is a criminal offence.

367. Several Judges made similar observations, and suggested that if an offender falls into non-compliance the Department should take action quickly – perhaps within a month. They noted that offenders tend to be acutely aware of the way breaches are handled. Laying charges promptly would help underline the seriousness of non-compliance, and help prevent it from becoming entrenched.

368. As a result I recommend, on a trial basis at least, that the Department moves to enforce community work breaches more promptly. In cases where initial approaches do not produce a quick return to full compliance, it may be that the best approach for a persistent defaulter is to emphasise the deliberate nature of the breach by laying a charge and moving to have the offender removed from the community work muster.

369. It may be impractical for this recommendation to be implemented immediately – it would, at present, produce a substantial and potentially unmanageable surge in the number of s 71 charges. I suggest this recommendation be implemented in conjunction with the enhanced advice to Judges about the likelihood of compliance. That recommendation is designed to ensure that fewer offenders are sentenced to community work, and that those who do receive the sentence are less likely to default.

Applying to cancel and substitute

370. In cases where it becomes plain that community work was never the right response, the Judges indicated they are sympathetic to a prompt application to cancel the sentence in favour of something else.[114] In July 2021 I attended a special community

114 Section 68(1)(b) of the Sentencing Act allows a sentence of community work to be cancelled if "having regard to any

work court day in Christchurch. It involved more than 50 offenders, all facing charges of breaching community work, which had been convened in an effort to address the substantial backlog of s 71 prosecutions in the Christchurch District Court. Judge Gilbert presided, and indicated he required only an oral application before he was prepared to consider cancellation and substitution; indeed, he frequently suggested this course to the prosecutor. Ten of the 41 offenders who answered their summonses that day had their sentences cancelled.

371. Other Judges agreed that once offenders have shown they lack either the ability or inclination to comply there is little point in continuing with a sentence of community work. Several drew the obvious distinction between those who fail to comply because of practical difficulties (for example health issues or problems with childcare), and those who simply cannot be bothered. It emerged that Judges will generally be sympathetic to a simple application to cancel and substitute where there is no real culpability associated with the breach, while they will usually be happy to deal with an application to cancel and substitute *in conjunction with* a charge under s 71 for those who breach without any real excuse. One Judge commented "if you're going to lay a charge, apply to cancel too". He suggested it would be appropriate to emphasise that offenders who are disinclined to comply will quickly find themselves moving up the sentencing hierarchy, while their removal from the muster will reduce the Department's enforcement burden.

372. The Judges noted that substituting a sentence such as community detention, which is officially more restrictive but may in fact be more lenient, can suit some offenders well, and risks the perception they are rewarding bad behaviour. One Judge advised that in such circumstances he attempts to ensure the substituted sentence has a genuinely punitive element to it. For example, if the substituted sentence is community detention (which it usually is), he looks to impose a full weekend curfew "so it bites a bit".

373. Corrections staff advised me that probation officers are often daunted by the formal requirements associated with an application to cancel and substitute. An application under s 68 of the Sentencing Act requires more work than laying a charge. One senior practitioner described the template for s 68 applications as unwieldy, and indicated probation officers lack the training and confidence to use the provision more robustly.

374. Formal applications under s 68 need not be complicated. The court will need to be satisfied the offender is non-compliant (whether due to practical or personal difficulties, or a persistent unwillingness to engage), and that this situation is unlikely to change. In most cases a description of the offender's compliance history, similar to what the Department includes in its summaries of facts, will be sufficient to demonstrate the problem is intractable, especially where the application is combined with a criminal charge. Evidence that the offender has missed, for example, four of

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change in circumstances … and to the manner in which the offender has responded to the sentence", continuing the sentence is no longer in the interests of the community or the offender. Section 68(3) allows the Court to reduce the number of hours of work, to cancel the sentence, or to cancel the sentence and substitute another that could have been imposed when the offender was convicted.

five reporting dates, or has never reported for induction, will usually be enough. Indeed, as noted above, Judges are often willing to entertain oral applications to cancel at the same time as they deal with a charge.

375. An application to cancel and substitute which is based on the offender's physical or mental health, or on logistical problems, may require a short affidavit, but the paperwork should not be unduly burdensome, at least by comparison with the ongoing need to manage an intractably non-compliant offender. Better training, more streamlined templates and some model documents would help.

Further observations from Judges

376. As noted above, all Judges indicated that the restrictions the Sentencing Act places on Corrections' freedom to convert part of a community work sentence into training are unhelpful. At present no part of a sentence can be spent acquiring work and living skills if the offender is sentenced to fewer than 80 hours. Even for offenders who are eligible, the training component may not exceed 20% of the sentence.[115] The Judges described these restrictions as arbitrary and counter-productive. Their observations reflected the unanimous view of the community work staff I spoke with. While community work is intended as "compensation" to the community, where Corrections identifies a training need which will both improve the offender's engagement with the sentence and reduce the likelihood of reoffending, it makes little sense to restrict its availability.

377. One Judge suggested that, if pressed, most offenders could identify an older whānau member who would be willing to help guarantee compliance, and who could act as an alternate point of contact. He suggested (to the extent this does not reflect the Department's practice already) that inquiries to identify a suitable person to fulfil this role could usefully be made when the offender is inducted. The Judge strongly endorsed the suggestion that offenders should have at least a preliminary induction into their sentence immediately after sentencing, and that this process should include any whānau who have come to court to offer support.

378. Another Judge commented: "We need an alternative to community work. People turn up with no job, no skills and no licence. We need to address those factors." He suggested the creation of a sentence the offender's probation officer could tailor, which addresses the offender's skills deficit while retaining an element of giving back to the community. The Judge went on to note that, to the extent training needs are currently addressed in other sentences, such as supervision, that training needs to be made available immediately.

379. Another Judge noted his disappointment in the procedure where an offender presents to do community work but there is no work available, usually because there are insufficient supervisors or not enough space to accommodate everyone. He advised that (in his area at least) in those circumstances the offender is sent home and credited two hours. The offender may have set aside the whole day, and even

115 Sentencing Act, s 66A.

foregone paid work, contributing to a sense of disillusionment with the sentence. The Judge suggested that in those circumstances the offender should receive a full day's credit.

380. The Judges agreed the maximum of 400 hours' community work is far too high. All indicated they would never impose a sentence that long. Even 200 hours is a very substantial burden; the prospect of a very long term of community work, and the perception it will hang over the offender for the foreseeable future, is often demoralising and helps contribute to non-compliance. Similarly, several Judges indicated they would like to be able to sentence offenders to fewer than 40 hours. The availability of a short sentence the offender can complete quickly would often be a useful tool.

Longer-term solutions

381. The extraordinary number of prosecutions for breaches of community work, and the even greater rates of non-compliance, represent the Department's greatest enforcement challenge. While Corrections has sought, as best it can, to manage the extensive non-compliance, the present situation should not be regarded either as inevitable or sustainable. Seeking to confine sentences of community work to those likely to comply, along with quicker enforcement and more aggressive removal of those who prove ill-suited to the sentence should help reduce the burden community work places on supervisors and prosecutors alike. That said, it is hard to disagree with those who argue that community work, at least in its current form, is no longer fit for purpose, and that a return to (anything like) the compliance levels achieved by either community service or periodic detention will require the sentence to be redesigned.

382. It goes without saying that, to the extent possible, the Department's progressive initiatives, designed to make community work a more constructive, culturally relevant and rehabilitative experience should continue and expand. Those initiatives are plainly desirable regardless of the overall difficulties with compliance; anything which improves offenders' motivation and encourages them to engage and acquire skills is positive and worthwhile, and should contribute both to improved completion rates and reduced reoffending over time.

383. As is apparent from the discussion above, most of the difficulties with community work are linked with centre placements. Non-compliance rates are higher, and the other concerns staff and Judges have raised, including intimidation and counterproductive associations, are much more likely to arise at a centre placement than placement with an agency. The recent experience in New Zealand echoes trends observed overseas. Turner and Trotter concluded (p 48):

> Community service schemes achieve better completion rates and associated lower rates of recidivism when they exclude the use of work crews or gangs or other such group placements in favour of more individual placements in the community.

384. That said, the Department is already doing everything it can to maximise the availability of agency placements, and there is a substantial core of offenders for whom the enhanced supervision of a centre placement is necessary in any event.

385. The recommendations below incorporate the combined analysis of the Judges and frontline staff. The principal mechanism to address the prosecutorial burden associated with community work lies in making s 56 and the likelihood of compliance a critical consideration in every case where community work may be imposed. In particular, the Department should ensure the Court is as fully informed as possible about the offender's suitability for community work in any case where it is recommended (even as a second or third option). Community work should not be recommended if a robust assessment, based on the offender's history and lifestyle, indicates compliance is unlikely. Equally, it should not be recommended for vulnerable offenders whose rehabilitation may be negatively affected by being required to associate with more experienced offenders.

386. Community work should not be recommended for those on ACC, those receiving jobseeker support because of illness,[116] and those who, for whatever reason, are suffering from physical or mental health difficulties which affect their ability to work. Indeed, probation officers advised that even those seeking work who promise they will attend often fail to do so. Given the high correlation between unemployment and default it may be preferable not to recommend community work unless the report writer is persuaded the offender would be likely to comply.

387. In any event, providing the courts with better information about compliance risks should help reduce the number of unsuitable offenders who receive a term of community work. If a Judge indicates an intention to sentence the offender without a pre-sentence report, it is incumbent upon the prosecutor to draw the court's attention to any information on the file which may be relevant to the likelihood of compliance. If the prosecutor is concerned the risk is substantial, he or she should ask that the case be adjourned briefly for a stand-down report.

388. Once my recommendation regarding the routine provision of s 56 information to sentencing Judges has bedded in, I recommend a more proactive enforcement policy, at least on a trial basis. For those who do not comply (and who do not have a reasonable excuse, such as a short-term illness or injury) the Department should move from warnings to enforcement as soon as it is apparent the breach is more than a one-off. This recommendation is designed to facilitate the prompt removal from the muster of those otherwise likely to cause months (or years) of enforcement difficulties. The prospect of prompt enforcement will help emphasise the consequences of non-compliance, reduce the time Corrections staff spend chasing defaulters, improve the chances of being able to track the offender down and (by making more extensive use of s 68 either instead of or alongside a prosecution) remove those who are unwilling or unable to complete the sentence from the muster.

Community Work recommendations

389. In any case where community work is a possible sentencing option, I **recommend** the PAC report expressly addresses s 56 of the Sentencing Act, and offers the Court an

116 Those who would, under the old system, have received the sickness benefit.

assessment of the offender's suitability for community work. Particular care should be taken in cases where community work is recommended.

390. Probation officers should not recommend community work unless broadly satisfied the offender is likely to complete the sentence without needing to be chased. Along with an assessment of the offender's compliance with previous community-based sentences, the report should address whether the offender suffers from any physical or mental health issues, and any alcohol or drug problems, which might impact upon the likelihood of compliance.

391. In addition, it would be prudent to examine the offender's employment history and current workload with a view to confirming that a period of community work will be manageable and logistically feasible. Report writers should inquire about the management of child-care for offenders with dependent children, and ask questions like "if you are sentenced to community work, how would you get there?".[117] The report should also address any other factors which might indicate the offender is likely to find community work unduly onerous.

392. I **recommend** that report writers refrain from proposing community work for less experienced offenders, who may be negatively influenced by working alongside hardened criminals, unless it is clear a placement which avoids counterproductive associations will be available. The same comment applies to other vulnerable offenders (for example those who may be seeking to overcome an addiction, and who should not be forced to associate with others who may undermine their recovery).

393. I **recommend**, if the Judge indicates an intention to sentence an offender without a pre-sentence report, that the prosecutor draws the Court's attention to any factors relevant to the likelihood of compliance which might be apparent from IOMS. For example, the prosecutor will, as a matter of course, ensure the court is aware of the offender's response to any previous community-based sentences, but it may also be appropriate to draw an express link between the offender's performance in previous sentences and the likelihood of compliance with a sentence of community work. If the prosecutor is in doubt, it may be prudent to ask that the matter be adjourned briefly for a stand down report.

394. I **recommend** the Department explore making community work supervisors available to complete either a full or preliminary induction immediately after sentencing, and before the offender leaves court, rather than waiting for the offender to report within 72 hours.

395. I **recommend** that, to the extent this does not occur already, offenders are asked at induction to nominate a responsible family member or other responsible person who can act as an alternative point of contact and who be relied upon to help locate the

117 This may be a particularly pertinent question for an offender who does not have their own vehicle, does not have easy access to public transport or is disqualified from driving.

offender if they cannot immediately be found, and who can help ensure their compliance.

396. I **recommend**, in conjunction with the recommendations set out above, that action to address non-compliance is taken as early as possible once it is clear non-compliance is more than a one-off. In particular, early steps should be taken to identify and remove any obstacles to compliance.

397. I **recommend**, if it turns out the offender was never a suitable candidate for community work, particularly because of physical or mental difficulties which were not taken into account at sentencing, that an immediate application to cancel and substitute should be made. In those circumstances, prosecution is neither necessary nor appropriate. In cases where the offender simply elects to ignore the sentence, prompt prosecution in conjunction with an application to cancel and substitute may be appropriate. In either case, seeking the prompt removal of unsuitable or unco-operative offenders from the muster is preferable to spending months trying to secure compliance.

Longer term recommendations

398. I **recommend** that s 66A's restrictions on converting hours of community work to training (the 20% maximum and the need for the offender to be serving a minimum of 80 hours) be repealed.

399. I **recommend** that the 40-hour minimum for sentence of community work be reduced to 20 hours.

400. I **recommend** that the Department and the Ministry of Justice undertake policy work to design a 21st century alternative to community work. The old "atonement through hard labour" model has had its day. The old sentence of community service was (and would remain) an effective sanction for those convicted of minor offending who can be relied upon to work safely in the community.

401. For those not in that category, I **recommend** development of a new sentence which addresses the particular needs of the individual offender, and emphasises training and the provision of basic skills for those motivated to acquire them. I do not recommend that any trappings of the old sentence of periodic detention, or today's community work "centre" placements, should remain.

APPENDIX: CORRECTIONS RESPONSE AND REVIEWER'S REPLY

The Department, while broadly content with the recommendations set out in this review, disagrees with some of the changes I propose with in the sections of my report which deal with community work. The Department's response is set out in full below, and is followed by my reply.

6 July 2023

Philip Coffey
Manager Public Prosecutions Unit
Crown Law

By Email: publicprosecutionunit@crownlaw.govt.nz

Tēnā koe Philip

Re: Department of Corrections – Ara Poutama Aotearoa Response to Crown Law Office Prosecution Review

On behalf of the Department of Corrections – Ara Poutama Aotearoa (Corrections), I would like to again acknowledge the work undertaken by David Boldt in his review of Corrections' prosecution function. Ensuring our processes and practices are robust and fit-for-purpose is important to ensure we continue to effectively administer community-based sentences and orders.

Thank you for the opportunity to provide a further written response to the review, in addition to our initial letter dated 14 April 2023, and subsequent meeting held Wednesday 24th May 2023.

It is noted that the review was completed as part of the Solicitor General's general oversight of public prosecutions pursuant to section 185 of the Criminal Procedure Act 2011.

As highlighted in the review, Corrections brings criminal prosecutions as part of our administration of community-based sentences and orders. Charges typically allege that defendants have breached the requirements of a community-based sentence or order.

Corrections is committed to an enhanced prosecution function
As previously advised, Corrections accepts the majority of the report's findings. We are committed to ensuring the conduct of our prosecutions are consistently lawful and justified, and we are dedicated to making appropriate changes to our approach, which are aligned to recommendations outlined in the review. These changes are likely to include enhanced prosecutorial training, increased oversight of the decision to prosecute, and the development of formal interview and investigation approaches to ensure successful and lawful prosecutions, as well as further exploring alternatives to prosecutions where available and appropriate.

A project team has been established to deliver on our response and we have commenced planning for our approach.

Any changes to our prosecution function requires significant engagement across the justice sector, resource, investment, and time. Legislative changes may be required, alongside careful planning for learning and development. We are committed to the development of this programme of work and will provide ongoing updates as we progress.

Concerns in relation to the findings of the Review – Community Work
While we accept the majority of the review's findings, it is our view that the findings in relation to Community Work exceed the intended scope of the review, which was to review Corrections' prosecution function.

Our view differs from the findings in the report in relation to Community Work, specifically in relation to the proportion of individuals who successfully complete a sentence, and the associated implications of a greater number of individuals being assessed as unsuitable for this sentence. Importantly, we are concerned that the recommendations related to Community Work may encourage a more punitive response to sentencing and management of people subject to Community Work.

It is our view that continuing to work with people to address or remove barriers to successful completion of Community Work, and to identify more tailored opportunities to complete the sentence is a preferable approach.

How Community Work functions
To give further context to our position on this matter, outlined below is an overview of Community Work and its purpose and place within the sentencing hierarchy.

The courts impose around 31,000 new Community Work sentences each year, and Community Work accounts for just over 40 percent of all sentences being served in the community at any given time. It is usually imposed for lower-level offending, such as theft and driving convictions, failure to pay fines etc.

Community Work requires people to undertake unpaid work in the community to make amends for the offence they have committed. It provides an opportunity to take responsibility for their offending and learn new skills and work habits.

People who are sentenced to Community Work can be required to undertake between 40 and 400 hours of Community Work. The number of hours is determined by the sentencing Judge. People are encouraged to complete their hours as quickly as possible, and can work up to 10 hours a day, or up to 40 hours in any one week. They must complete at least 100 hours every six months, or the remaining balance of their sentence if less than 100 hours. While completing these hours, people will normally be able to continue with their regular employment. Those who work particularly well and comply with their sentence may receive a reduction in hours of up to 10 percent.

People serving at least 80 hours of Community Work can spend up to 20 percent of those hours in work and living skills training. This training can range from writing a CV and preparing for job interviews, to parenting, literacy and numeracy, road safety, and budgeting support.

Where there are extended periods of non-compliance, Corrections take appropriate enforcement action. This may include verbal or written sanctions, breach action or applications to cancel or vary the sentence.

Each year, Community Work contributes approximately three million hours of labour to support non-profit groups and organisations. These hours are completed at reserves, community gardens, marae,

charity shops, recycling centres, sports clubs, parks, schools, churches, cemeteries, and in natural disaster zones, and is of benefit to local communities. Most individuals subject to Community Work will work in a team supervised by Corrections staff who arrange and oversee work projects and transport the team to the worksite.

In addition to teams supervised by Corrections' staff, over 1,000 agency partners are approved Community Work agencies and take responsibility for supervising a person while they complete their hours. Corrections still manages the person's compliance with the sentence and ensures the placement is working for all parties.

Compliance rates

The rationale for the Community Work recommendations appears to be largely based on the author's assessment of a low level of compliance with Community Work. The report's data focuses on a snapshot in time where day to day compliance is in the range of 30-40 percent.

Over time however, and with the support and efforts of our staff, the majority of people we work with do in fact successfully complete their sentence of Community Work. Since 2015, the percentage of people who have completed their Community Work hours successfully has been between 78 to 84 percent as per the table below. Almost all cases which are not successfully completed are taken back before the Courts and are cancelled by the Judge or replaced with an alternative sentence.

Financial Year	**Successful Completion Rate**
2015/16	84%
2016/17	85%
2017/18	83%
2018/19	83%
2019/20	84%
2020/21	83%
2021/22	78%
2022/23	83%

Suitability and potential barriers to compliance

While we recognise and acknowledge the effort and investment required of our staff to assist people to comply with Community Work, we are of the view that this should not be interpreted as indicative of a suitability issue. Acknowledging that many of the people we manage, and their families, are some of the most vulnerable members of society, we strongly encourage the approach of working alongside people, supporting them to address the real-life barriers that may impact on their ability to complete their sentences, and to take an individualised approach to how these hours might be achieved.

Corrections currently undertakes an assessment of suitability before recommending Community Work and other sentences. This considers potential barriers to compliance such as alcohol, drug, psychiatric, physical, mental or intellectual challenges, employment and childcare responsibilities and lack of transport. Many potential barriers to compliance, although challenging, do not in our view necessarily make someone unsuitable for Community Work.

The inevitable impact of taking a view that potential barriers to compliance make someone unsuitable for Community Work is that a significant proportion of people will be sentenced to more punitive options such as Community Detention, Supervision, Intensive Supervision, Home Detention or Imprisonment. Additionally, increased formal compliance action (additional breaches and applications

to cancel Community Work sentences) will result in increased pressure on the Court system, further exacerbating existing challenges.

Compliance with alternative sentences
Assessing someone as unsuitable for Community Work and recommending higher tariff sentences will not in itself reduce potential barriers to sentence compliance. The issues which limit a person's ability to complete a sentence of Community Work will likely also impact their ability to comply with other sentences and orders. Our general approach to the management of sentences and orders is to work closely with the person to address any barriers to engagement and enable them to successfully comply with their sentences. While it requires persistence and follow-up – in our view this investment of effort pays dividends for the people we work with, their families and our communities.

Additionally, supporting people to address the barriers preventing them from successfully engaging in Community Work are likely to be transferable in assisting them to address barriers in other areas of their lives, which can result in them gaining employment or accessing appropriate support services. It reduces the likelihood of unfavourable future outcomes, including imprisonment.

Impact on Māori
Currently 47 percent of people subject to Community Work identify as Māori. Noting that a significant shift in the assessment of suitability for Community Work is likely to have negative impacts, we consider it highly likely that these consequences would negatively and disproportionately impact Māori.

Cost analysis
We estimate that adopting the recommendations around suitability for Community Work would result in approximately 25 – 50 percent of the Community Work cohort being deemed unsuitable for Community Work and therefore funnelled to higher tariff sentences or orders. Comparisons are provided below as an indication of financial implications of a reduction in the number of sentences of Community Work and a likely replacement with a sentence of Supervision, due to the increased operating costs of the differing sentences and orders within the community.

Sentence or order	Daily operating cost to administer	Average cost (based on average length of sentence)	Annual difference when compared with Community Work sentence average
Community Work	$13.00	$3,718 (average length of 286 days)	-
Supervision	$25.00	$7,150 (average length of 286 days)	+$3,432

Each year the court sentences to approximately 31,000 new sentences of Community Work.

If 25 percent of these 31,000 (7,750) people sentenced to Community Work were instead subject to a sentence of Supervision this would have a financial impact of $26,598,000.

If 50% of these 31,000 (15,500) people sentenced to Community Work were instead subject to a sentence of Supervision this would have a financial impact of $53,196,000. Were Community Work to be replaced with sentences of Community Detention, Intensive Supervision or Home Detention, the financial implications would be more significant.

Our preferred approach to Community Work concerns raised in the Review

As an alternative to the recommendations related to Community Work in the review, I have asked our project team to explore the variety of ways Community Work could be applied in a more individualised way to further reduce or remove potential barriers to compliance.

Examples may include:

- Reconsideration of the proportion of work and living skills that can be attributed as Community Work hours
- Partnering with a wider range of external agencies to identify courses or additional opportunities which could be considered work and living skills or Community Work options
- Exploring additional approaches to agency placements
- Wider consideration of iwi and community-based oversight of Community Work options
- Consideration of further options to address common barriers to Community Work attendance, for example childcare and employment

We will keep you informed as we work through these options, and as we work more broadly to enhance the way we administer our prosecution function.

Thank you again for the opportunity to provide a written response to the Crown Law Office review into Corrections' prosecution function.

Nāku noa, nā

Brigid Kean
Acting National Commissioner

Reply

1. The Department's clear and generally positive response to my review is encouraging. Our agreement as to what needs to be changed will provide the Solicitor-General with confidence that the Department is committed to strengthening its prosecution function and associated structures.

2. Understandably, not everything is agreed. The Department's response highlights a significant difference of opinion between its Head Office and the frontline staff I interviewed with respect to community work. That disagreement perhaps explained, at least in part, by their respective roles in the organisation, and it also reflects the complex and conflicting social policy considerations that underly the sentence of community work.

3. Among the numerous probation officers, service managers and senior operational staff I spoke with, none regarded the current approach to entrenched non-compliance as appropriate or sustainable. While some consider community work to be a worthwhile sentence if properly resourced, all expressed the view that the sentence is of little utility for those unwilling or unable to comply, and that the time and resources the Department expends managing non-compliant offenders could be better and more productively deployed elsewhere. The opinion of those frontline staff is that in most cases the low levels of day-to-day compliance are strongly "indicative of a suitability issue".

4. Section 56 of the Sentencing Act requires sentencing Judges to consider any factors which affect the likelihood the offender will complete the sentence. My principal recommendation is intended to give better effect to s 56 – I suggest that in cases where community work is a possible sentencing option, PAC reports should offer an assessment of the likelihood of compliance. I do not suggest that potential barriers to compliance will inevitably make someone unsuitable for community work. Sometimes barriers to compliance can be appropriately managed; my recommendations are designed, in part, to free more time for constructive engagement between community work staff and offenders. But in many cases it is clear, without any element of hindsight, that completion is unlikely. That is information the Court is entitled to have in front of it when weighing different sentencing options. Similarly, if compliance is likely to be secured only after an extended period of cajoling, persuasion, warnings and enforcement action, the sentencing court may decide that another sentence would be preferable.

5. At present, Judges do not have consistent access to the information they require to apply s 56. The Judges I spoke with indicated that this information would be helpful. The Court may of course determine that community work remains appropriate even if there are identified barriers to compliance, but it is important that decisions of that kind are fully informed and made by the Judge. The Department has explained the many advantages of community work as a sentence, but squarely addressing s 56 should be part of Corrections' role in any case where community work is among the available sentencing options.

6. The Department is right to refer to the vulnerability of many of those sentenced to community work. That said, the imposition of an unsuitable sentence on vulnerable offenders is unlikely to help them, especially if they face issues with addiction or mental health, and does not enhance the safety of the community.

7. As Corrections acknowledges, in many cases supervision is the most obvious alternative. That is particularly the case for offenders who face personal challenges which can be addressed in the course of a sentence of supervision, which has a focus on reducing the risk of reoffending and promoting rehabilitation. The Sentencing Act provides that community work and supervision are equally restrictive.[118] Factors likely to inhibit compliance with community work will not necessarily prevent compliance with other community-based sentences. Community work is a demanding sentence. A sentence of supervision will often provide a good opportunity to address issues of (for example) substance dependence, time-management and work readiness, all of which affect the likelihood of compliance with community work, and affect rehabilitation more generally.

8. I agree with the Department that in implementing any changes we must be vigilant not to further disadvantage Māori. As noted in the report, some community work placements – particularly those offered in conjunction with iwi – are culturally sensitive and provide meaningful work and cultural connection, but most are not designed with Te Tiriti in mind. A centre placement is often a blunt instrument which does not reflect the offender's cultural needs. Moreover, it is not in the interests of Māori offenders, or consistent with Hōkai Rangi, for offenders to be sentenced to community work in the face of identifiable physical, psychological or logistical difficulties which make compliance unlikely. My point is that it is in everyone's interests for the Court to have the opportunity to assess those factors at sentencing.

9. As to enforcement, the report acknowledges the significance of the changes I propose. While there is currently scope for staff to be more proactive (especially with applications to cancel) in appropriate cases, I do not recommend substantial changes to the Department's approach to enforcement until the new practice of routinely providing s 56 information is established. If that recommendation works as intended, community work musters will be smaller, and default less common.

David Boldt
Wellington
August 2023

[118] Sentencing Act, s 10A(2)(c)