



Te Tari Ture o te Karauna Crown Law

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OUTCOME OF SOLICITOR-GENERAL'S REVIEW OF THE PALMERSTON NORTH CROWN SOLICITOR, ARISING FROM A DECISION OF THE HIGH COURT

The Solicitor-General, Una Jagose KC, has completed her review of Palmerston North Crown Solicitor, Mr Ben Vanderkolk, arising from procedural issues raised in a 2023 High Court decision of Justice Rebecca Ellis.

The review included an independent assessment by former Judge of the Court of Appeal, the Hon Tony Randerson CNZM KC, into the facts of what had gone wrong procedurally. The Solicitor-General has accepted all of Mr Randerson's findings.

"I acknowledge that Mr Vanderkolk cooperated fully with Mr Randerson and with Crown Law throughout this process. He accepts Mr Randerson's findings and acknowledges the observations we have made in the review.

"We have worked with Mr Vanderkolk, to complete our own review of his performance. We are satisfied that he has learnt from what happened in this case. The Deputy Solicitor-General (Criminal), Madeleine Laracy, will continue to support Mr Vanderkolk in implementing the practice improvements," said Ms Jagose. "No further action by Crown Law is planned."

The Solicitor-General determined it was necessary as a result of Justice Ellis' findings to initiate the review to establish what had caused the failures identified by Justice Ellis, and to examine the Crown Solicitor's approach to his disclosure obligations both at the time of this proceeding and presently. Mr Randerson assessed each of the three issues on which Justice Ellis had made findings of procedural failure. Crown Law provides a summary of the findings on each issue within this media pack.

The Solicitor-General also thanks Mr Randerson and all the people who made themselves available for interview.

"Mr Randerson's assessment process was extremely thorough, and his findings are well supported. He concluded that in one instance Mr Vanderkolk had breached his obligations under the Crown Solicitors Terms of Office and that there was one instance of delayed disclosure of relevant documents. Assisted by the Deputy Solicitor-General (Criminal), I have carefully considered the report, and I agree with Mr Randerson's findings. I also accept his characterisation of the seriousness of the two procedural failures he found established.

"However Mr Randerson identified several mitigating factors, which we similarly recognise.

“Everyone engaged with the process extremely promptly and willingly. This has allowed us to complete the review in very good time,” said Ms Jagose.

Mr Randerson’s report and the review itself was conducted on assurances to all parties that it would be a confidential process. Crown Law therefore does not intend to release any further information about the findings or the review.

Mr Vanderkolk and the Solicitor-General agree that, in the interests of transparency, the Law Society should be provided with a copy of the confidential report (maintaining its confidentiality).

ENDS

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SUMMARY OF THE SOLICITOR-GENERAL’S REVIEW OF THE PALMERSTON NORTH CROWN SOLICITOR

While the report of Mr Randerson CNZM KC and Crown Law’s documents will remain confidential, this summary is intended to provide further information about the independent assessment and review.

Background

This review by the Solicitor-General follows the prosecution of three men for murder in relation to the death of Palmiro MacDonald in 2016. The prosecution was conducted by the Palmerston North Crown Solicitor, Mr Ben Vanderkolk between 5 April 2017 and 28 October 2020. The proceedings were long and complex but the result was that all the charges were ultimately withdrawn.

Two of the men charged later brought an application in the High Court for costs against the Crown and the Police. This resulted in an award of \$40,000 to be paid equally by the Crown and the Police. In her decision in the High Court last year in *R v Johnson & Brattle-Hemara* [2023] NZHC 2948, Justice Ellis found there were three procedural failures for which the Crown Solicitor was at least partially responsible. In brief summary, the three issues of procedural failure identified by Justice Ellis related to:

1. The timing and circumstances of disclosure to the defence a letter provided by the Police to a witness (known as Witness A) for the purposes of his sentencing on unrelated matters.
2. Redaction of the name of another witness from a statement made by Witness A. The name that was redacted had significance to the credibility of both witnesses.
3. A meeting between the Crown Solicitor and his assistant prosecutor and Witness A, following which the Crown Solicitor instructed the Police to omit the fact of his presence and that of his assistant from a Police job sheet recording the meeting.

Initiation of review determined necessary

The Solicitor-General determined it was necessary as a result of Justice Ellis' findings on these issues to initiate a review of what happened in this case to lead to the failures identified by Justice Ellis, and to understand the Crown Solicitor's approach to his disclosure obligations. As part of the review the Solicitor-General engaged Hon Tony Randerson CNZM KC, former Judge of the Court of Appeal, to independently assess these matters, make factual findings, and report to her.

Mr Randerson conducted interviews with 16 individuals, including defence counsel, Police and the Crown prosecutors who had been involved in the proceeding, as well as the Crown Solicitor.

The findings of Mr Randerson CNZM KC

Mr Randerson assessed each of the three issues on which Justice Ellis made findings of procedural failure on the part of the Crown Solicitor. He set the context for the summary of his findings by saying:

“The trial of the three men charged with the murder of Mr Macdonald was a difficult and demanding exercise for any Crown Solicitor. In the end, the charges were all withdrawn by the Crown and were dismissed. The proceeding in the High Court stretched over a lengthy period and required frequent resort to the court to deal with numerous issues including repeated concerns by defence counsel that adequate disclosure had not been made. It is against that background and, in light of the law and practice at the time of the relevant events, that the issues defined in the [Terms of Reference] have been addressed.”

Letter of assistance provided to Witness A for sentencing

Mr Randerson found the Crown Solicitor ought to have made inquiries of Police following receipt of defence counsel's memorandum raising the possibility Witness A had received some sort of inducement or benefit from Police when he was sentenced on another matter, in another Crown Solicitor's jurisdiction. Mr Randerson found that the Crown Solicitor's failure to pursue the matter with Police resulted in delayed disclosure of the memorandum of assistance that had been prepared for the Court by Police.

It was found that none of the police officers involved nor the Crown Solicitor recalled the existence of the letter when it was raised by defence counsel in November 2017, but it was disclosed during pretrial hearings in April 2018. The delay had a relatively minor impact on the proceeding given the short lapse of time before the letter of assistance was ultimately disclosed. There was no evidence of bad faith or intentional non-disclosure. The Crown Solicitor had acted with the proper objective of protecting Witness A. He genuinely, but mistakenly, believed that any disclosure relevant to Witness A's credibility could occur after anonymity for Witness A had been determined.

Redactions to Witness A's statement

After interviewing all relevant participants in the proceeding at length, including the Crown Solicitor, Mr Randerson did not attribute any fault to the Crown Solicitor on this issue. This was a complex and often-changing prosecution in a gang context over a five-year period. The defendants were charged at different times and then later discharged at different times over the course of the proceeding. It involved more than 100 witnesses and tens of thousands of documents.

Witness A's evidence was the focus during the pre-trial hearing in April 2018 when attention was principally on the letter of assistance. Police interview notes were disclosed at this time from which defence counsel much later made a link between Witness A and another witness at trial that was significant to their credibility. No one had picked up on this link at the time the interview notes were disclosed. By the time of re-trial in October 2020 the decision had long since been made that Witness A would not be called as a witness, and the focus was no longer on Witness A.

Mr Randerson found that, on close analysis, the link made by defence counsel was there to see but in the context of everything that had happened over the course of the proceeding, there was no fault on the Crown Solicitor's part in not identifying it sooner.

The meeting with Witness A

Mr Randerson found that the Crown Solicitor's direction to the Officer in Charge to omit reference to Mr Vanderkolk's (and co-counsel's) presence in a meeting with Witness A on 16 February 2018 from a subsequent disclosed job sheet resulted in an incomplete record of the meeting. It also breached the Crown Solicitor's obligation to uphold the highest standards of personal and professional conduct and to act as a "minister of justice" under the Crown Solicitors: Terms of Office.

This action was found to be serious in nature. Mr Randerson, however, identified as mitigating factors the absence of prejudice to the defence, the unprompted disclosure of the Crown Solicitor's presence at the meeting at the time of the costs hearing, the absence of any attempt to disguise the Crown Solicitor's presence at the meeting when later reporting to the Deputy Solicitor-General about the anonymity applications that were the subject of the April 2018 pre-trial hearing. Mr Randerson accepted the Crown Solicitor's decision was made on the spur of the moment and accepted his expression of deep regret about what occurred.

General disclosure practices

In his report, Mr Randerson found no reason to differ from the conclusion reached by Justice Ellis in her costs judgment about general disclosure practices. He agreed there was no material systemic non-disclosure in this case, and he found that the Crown Solicitor took his disclosure obligations seriously. To the extent the Crown Solicitor's approach to disclosure of the memorandum of assistance was not consistent with the requirements of the Criminal Disclosure Act 2008 and Evidence Act 2006, this reflected a genuine but mistaken view of the legislation.

Review

In response to Mr Randerson's report and with support from the Deputy Solicitor-General (Criminal), Madeleine Laracy, the Solicitor-General has conducted a thorough review into the Crown Solicitor's actions in this case and his disclosure practices generally. The Crown Solicitor cooperated fully with the review process as well as the independent assessment.

The Solicitor-General accepts Mr Randerson's findings. This includes his finding that the Crown Solicitor breached his obligations under the Crown Solicitors: Terms of Office in directing his name be omitted from the job sheet recording the meeting with Witness A. The Solicitor-General also accepts the mitigation identified in the independent assessment, including the Crown Solicitor's deep remorse and Mr Randerson's view that there is no likelihood the Crown Solicitor would repeat any conduct of this nature.

As part of the review the Solicitor-General has discussed with the Crown Solicitor areas for practice improvements, to learn from what happened in this case and to ensure it does not recur. As part of the Solicitor-General's oversight role, the Crown Solicitor will continue to be supported by the Deputy Solicitor-General and her team in implementing these processes. He accepts the findings in Mr Randerson's report and acknowledges the observations made in the review.

As provided by the [Terms of Reference](#), Mr Randerson's report and the review itself was conducted on assurances to all parties that it would be a confidential process. Crown Law therefore does not intend to release any further information about the findings or the review.