

3 March 2021

Chief High Court Justice Thomas and Chief District Court Judge Taumaunu
High Court and District Court
Wellington

By email

Tēnā korua Chief Justice Thomas me Chief Judge Taumaunu,

Re: Conducting jury trials at alert level 3 – feedback from legal profession

Thank you for the opportunity to provide feedback on whether jury trials are capable of proceeding during Covid-19 alert level 3. The Law Society has sought feedback from members of its Criminal Law Committee (which includes members of the private bar, Public Defence Service, Crown and those currently practicing across the Auckland metropolitan and Manukau areas).

Summary

While all members are acutely aware of the need to progress matters in the interests of justice, there is a continued concern there will be heightened levels of anxiety amongst those participating in a jury trial (practitioners, witnesses, jurors etc) due to the ongoing threat that Covid-19 poses in the community, particularly in South Auckland where the current cluster stems from.

On this basis, there was a shared view that we should not be attempting to empanel any new juries during level 3. However, a narrower, bespoke approach could be put in place for enabling trials that have already commenced to continue, so long as it is safe to do so. That approach would require a tailored response for specific trials in specific courts, depending on the circumstances, and would need the agreement of all parties to proceed. We have set out a range of practical factors to consider below.

Finally, it may assist to distinguish “short/sharp” lockdowns (like the current lockdown and preceding one), from a situation where something longer term is required. The suspension of jury trials for short lockdowns is appropriate in our view. However, as is in the case currently in England, further work may be required to consider alternative solutions to facilitate the administration of justice rather than risk it grinding to a halt.

Practical concerns

As noted above, members consider that a jury trial that has already commenced, is capable of proceeding during level 3, if safe to do so. Some factors that will need to be considered include:

- Has there been consent of counsel, defendants, jurors, witnesses etc.
- Whether counsel can get adequate instructions from their clients (for example if the client is in prison, have they been able to speak with that client, and are there sufficient AVL meeting times available etc).
- Use of virtual meeting rooms wherever possible especially for vulnerable witnesses.

- How different courts will accommodate physical distancing and space issues.
- How many jury trials could run simultaneously and the impact on the numbers coming into Court.
- The location of latest hotspots – for example Manukau District Court would need extra precautionary measures put in place.

Members have also raised the following general concerns about conducting a jury trial in level 3:

- a. Some counsel involved in lengthy and complex trials feel uncomfortable about going ahead under the 'stricter' level 3 requirements. Members felt this increased anxiety could run the risk that fixtures do not immediately proceed on the day if (for example) there are issues with jurors failing to answer their summons or remote participation had to be organised at the last minute.
- b. Running a jury trial in level 3 as standard practice risks jurors being alarmed/ distracted/ under pressure to make decisions especially if Covid-19 related events occur/change during the duration of the trial.
- c. It may also affect the representative nature of juries as people over the age of 60 are more likely not to want to expose themselves to risk.
- d. Those under that age will also have a lot of pressures on them (for example) precarious business/employment factors or working from home. Many within that group may also be vulnerable/unfit/at risk for medical reasons not directly related to age.
- e. Many jurors will also have additional childcare demands (with schools and childcare closed) placed on them and will have to juggle those with their legal commitments.
- f. Under level 3 it may become a health and safety workplace issue. By way of example, a recent High Court trial was delayed in Rotorua under Level 2 this week. Although the Judge was ready to start, the Court manager refused access to anyone from Auckland on health and safety grounds under the Health and Safety at Work Act 2015 as the complainant and several witnesses were attending from Auckland.
- g. There might also be appeals on the basis that the trial was not "fair" because the jury would not, in the circumstances of a level 3 lockdown, have been able to concentrate fully on the evidence.
- h. Lastly, there is the risk that unsatisfactory trials (in the sense that the jury found it hard to assess the merits of the case) might lead to unmeritorious acquittals.

International experiences

As an aside, when considering long term implications of a sustained lockdown, it may be helpful to look at international experiences to see what approaches have been taken in comparable jurisdictions. We note that jury trials recommenced under the strict lockdowns in the United Kingdom. The HM Courts and Tribunals Service have published guidance about safely running a jury trial which has been endorsed by Public Health England and Public Health Wales.¹ Many of the factors to consider – physical distancing, layout of the courtroom, additional courtrooms for deliberation, Perspex screens etc – are similar to those already adopted at level 2 in New Zealand

¹ See here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885672/HMCTS_Jury_trials_checklist_V1.0.pdf

and may be appropriately adopted at level 3 in accordance with the stricter government requirements.

Conclusion

I hope these comments are helpful and would be happy to discuss them further if that assists. Should any decisions be made about conducting jury trials during alert level 3, I hasten to add that lawyers would of course comply with any decision to proceed and ensure that any witnesses are also prepared for the arrangements that will be in place.

Nāku noa nā,

A handwritten signature in blue ink, appearing to read 'Tiana Epati', with a stylized flourish at the end.

Tiana Epati
NZLS President