

**CHIEF JUSTICE’S REPORT TO THE
OPENING OF THE GRAND COURT, 13TH JANUARY 2016**

PRELIMINARIES:

The Chief Justice welcomed everyone – H.E. The Governor, Hon. Premier, Hon. Speaker of the Legislative Assembly, Hon. Members of Cabinet, other distinguished guests, Members of the Bar, Ladies and Gentlemen.

A special thank you was extended to Father Suresh Rajaian of St. Ignatius Catholic Church for the inspiring prayer to commence the proceedings.

He then extended the invitation to the Hon. Attorney General to move the motion for the Opening of the Court, seconded by Mr. Colin Mckie Q.C. on behalf of Mr. Alasdair Robertson, president of the Cayman Islands Law Society who was unavoidably absent, then to Mr. Mckie in his own right as the secretary of the Grand Court Rules Committee and thereafter, Mr. Abraham Thoppil, president of the Caymanian Bar Association.

The Chief Justice then made comments on the various speeches, before proceeding to present his Report as follows:

TRANSITIONS

Retirements.

- As you would no doubt have seen announced in the Press and as the Attorney General mentioned, President Chadwick of our Court of Appeal presided at his final session in November. At that time a brief ceremony in his honour was held in the foyer outside this court room and as a result, you will see that his portrait now hangs over the foyer to commemorate his distinguished service to the administration of justice in our jurisdiction.
- He will be succeeded as President by Justice Sir John Goldring, who like Sir John Chadwick, is a former justice of appeal for England and Wales. Sir John Goldring, will be sworn in by Her Excellency, on the 20th. I also join with the Attorney General in noting the knighthood honour bestowed on Sir Edward Zacca.
- While on the subject of transitions, you will also have been very pleased to hear from the Attorney of the appointment of Justice

Morrison of our Court of Appeal to be the President of the Court of Appeal of Jamaica, his home court. Justice Morrison succeeds Justice Panton as President of the Court in Jamaica. It is therefore also fitting that I take this opportunity to join with the Attorney to note Justice Panton's retirement in Jamaica and to thank him publicly for the many occasions over the last 20 years when he served as a judge in this jurisdiction.

- At the Opening of the Courts last January, Justice Henderson's and Justice Foster's retirements were announced. Given the extensive list of dedicated FSD cases to which those judges were assigned, the process of winding down meant that Justice Henderson's retirement actually took place later last year. I therefore take this opportunity to once more thank Justice Henderson for his invaluable service to the people of these Islands as a judge of this court for more than 12 years. It is good to see Justice Henderson in attendance this morning and we wish for him and his Family all the very best for the New Year and beyond.

- Justice Foster is unable to be present this morning; he continues as a judge to wind down his FSD cases, a process which we estimate will run to the end of next month. During last year Justice Foster also managed to find the time to produce an update of the FSD User's Guide and to re-convene the FSD Users' Committee for a meeting at which many important issues were discussed. There are plans for an occasion when we can more appropriately mark the retirement of this fine judge and thank him for his service on this court.
- I am also very pleased to announce that Acting Justice Robin McMillan has been appointed by Her Excellency the Governor as an established judge of this Court. This is a very welcome and much needed appointment as it will allow for his assignment to the FSD even while he might continue to assist with cases on the general Civil Division of the Court. This is all to be facilitated by the fact that Mr. McMillan, who will, of course, relinquish his practice at HSM Chamber, will be resident on Grand Cayman and so available to serve on a full time basis, if the cases so require.

- We look forward to an even closer working relationship with him.
- You heard mention made by the Attorney and Mr. McKie of the invaluable service which the Acting Judges and Magistrates continued to give during the course of last year. This is a sentiment I wish strongly to endorse and I will indeed have some more to report in this regard when I come to deal with case disposals. At this juncture, I also wish to note that last year the JLSC reviewed the list of Judges who are pre-approved for appointment to act as judges of this court and two names were added: that of Mr. Michael Wood QC, Judge Paul Worsley QC, and Judge Philip St. John-Stevens. These gentlemen bring with them very wide experience as barristers and judges in England and Mr. Wood QC has appeared as leading counsel for the defence in notable cases before this court. We welcome their selection.

Staffing: the Administration

- We welcomed a number of new members of the administrative staff last year: Mrs. Shiona Allenger (Registrar of the FSD),

Kimberley Pearson (PA to three of the FSD judges), Yvane Dixon, Daniella Jackson and earlier this month, Ms. Tanya Meyerhoff and Ms. Jairia Barton.

- The internship program to assist with the development of young Caymanians which I mentioned at last year's opening continued with even more vigour last year when 25 young people were provided with opportunities to intern or volunteer with the Courts, often for quite long periods. A sign of the success of this program is that two participants became members of permanent staff during the course of the year. I must note that this program would itself not be achievable without the hard work and commitment of the Administrator and his staff, especially the Human Resources staff. I thank them for this important initiative.

- Last year we marked and celebrated two well-earned retirements: that of Mrs. Ermyn Berry after 40 years of dedicated service, almost all of which was given within the courts and of Janis Daley, after 18 years in the Civil Service.

The Court Building

I return to the perennial subject of concern and thank the Speakers for their unanimous support once again in emphasizing its importance. Last year I reported on the Government's recommitment to the provision of the new court house and advised that some tangible progress was made with the formation of a Steering Committee to identify and assess the various alternative ways of realizing the project. Following their report, PWC are now to be engaged to develop the outline business case, a prerequisite for all large scale Government capital projects. They will have 100 days in which to do this. Once complete, the business case will go to Cabinet for approval and assuming the project is approved, we then move into the construction phase. On this basis, we are expecting that construction should be well underway by this time next year.

As you will hear when I come to report especially on the rate of disposal of indictments, the need for the new court house has become even more urgent and again, I am pleased that the Hon. Premier has

once again pledged the support of his Government and is present to hear of the concerns himself.

Re-launch of website and e-services

In the meantime, we continue to improve our services to the public to the extent we can do so from within the confines of the existing facilities and given the small size of our existing complement of staff, a factor which is itself also linked to the lack of space.

Despite those strictures, by embracing the further use of technology before the end of this month we will re-launch the judicial and legal services website with new and more user friendly branding and content and we would welcome your feedback on the new look and contents of the site.

A modest beginning with e-filing has begun with the electronic transfer of probation reports directly from Probation Department to the Courts. However, progress on other aspects of e-filing and e-payment has been very slow. This, I am told by Administration, has primarily been because of the acute shortage of staff during the year.

The major challenge has been managing the volume of work. Most days we are scheduling 8 or 9 contemporaneous hearings in Court rooms and chambers, some days as many as 10 or more.

In addition to running the registries, court funds office, security details and other administrative functions, staff must be deployed to provide administrative support at all hearings in Chambers or court and a consequence is that special projects needed for the ongoing modernization of the courts, such as electronic filing, are too often relegated to the “back burner”. But everyone knows that the way forward depends on our improved use of technology and so we must keep making the case to Government for the required support, including of course, the additional space required to accommodate for the delivery of the services.

Legal Aid

The long awaited reform and modernization of the Legal Aid Law and System can now be implemented with the passage last year of the Legal Aid Law 2015. New Rules must now be promulgated by

Cabinet in consultation with the Chief Justice and I acknowledge the excellent work being done by the LRC, legislative drafting and Ms. Cheryl Neblett in particular, to bring this all to fruition. The importance of these reforms cannot be overstated, either from the point of view of the public need or from the point of view of providing a slightly more realistic hourly rate for those hard working and dedicated practitioners who represent persons on legal aid briefs. In particular, we cannot speak too highly of the members of the Cayman Islands Criminal Defence Bar, especially their Chairman and senior Mr. John Furniss. John and his colleagues on the CICDB have worked very hard for the same rate for many years and also undertake pro bono work on a daily and weekly basis, well beyond the call of duty. We look forward to their continued support for the administration of justice and are pleased to be able to say that the long awaited reforms, including, we expect, a dedicated program for duty counsel to provide representation in the criminal Youth Justice Court, will soon be implemented.

Conditional Release Law

As we heard from the Attorney, the Conditional Release Law is soon to be implemented. This is another significant development from the point of view of the Judicial Administration as the law requires the courts to review the former mandatory sentences of life imprisonment for offences of murder. The procedural regulations to govern the review process will soon be promulgated, following which the Judges must conduct these reviews in keeping with the order of priority to be set by the regulations.

Secure Facility for children in care/Youth Offenders

At last year's Opening of the Court the opportunity was taken to renew the urgent call to Government for the secure facilities mandated by the Children Law. I am pleased to be able to join with the Attorney General to note the Government's commissioning last year of **Phoenix House** for these purposes on the site of the **Bonaventure Property** at West Bay. The Attorney General has also advised that work is near completion on another facility at the site of

the **Frances Bodden Girls Home**. This second facility is also very urgently needed to ensure that girls and boys can be kept in separate and equally secure accommodations.

Youth Offenders

We are obliged to note the ongoing absence of an appropriate remand facility for youth offenders and must renew once again, the call to Government to rectify the situation. Everyone accepts that **Eagle House** does not meet the appropriate standards because it is within the confines of the adult prison at Northward (as indeed the facility at Fairbanks Prison for women renders that institution unsuitable for the detention of young girls). We understand that regrettably, work which should have commenced last year on a suitable facility has once again been delayed and we therefore take this opportunity to remind those in charge of the importance of doing everything we possibly can to restore our young offenders to a proper way of life. Exposing them to the adult prison environment continues to be an unacceptable and sad failure on the part of the state and a terrible

abrogation of the rights of these young people to fair and proper treatment under the law.

DCFS and Probation services

A related problem that continues to hamper the disposal of cases involving children and young persons is the insufficient number of personnel at DCFS and Probation assigned to handle the mandates of the Courts.

Of necessity, social workers and Probation officers are involved in public law applications under the Children Law and cases involving youth offenders. DCFS officers are also needed to provide welfare and social enquiry reports in private law cases and in Family Court matters. The shortage of personnel affects the timeliness of their output and this in turn inevitably slows down the rate at which cases can be disposed. Once again, we therefore urge the Government to provide the increase in personnel so badly needed by these very pressed and hard-working Departments.

Practical and Procedural Reforms: the work of the GCR Committee, the Criminal Justice Reform Committee (CJRC), the FSD Users Committee and other practice reforms (following on the report of Criminal Justice Advisor, Claire Wetton of the Crown Prosecution Service UK, International Division).

The important work of the Committees established for the reform of rules and practice continued apace last year.

The GCR Committee promulgated new rules under the Coroner's Law for the management of inquests; under the Registered Land Law to regulate mortgage enforcement actions; under the Grand Court (Amendment) Law 2014 to allow for injunctive orders to be made in aid of foreign proceedings; under the Children Law for prohibited steps orders; under the Judicature Law for interim awards of costs other members of the Committee also advised me on the issuance of a number of practice directions.

Only last Friday this Committee settled the rules for the reference of Family Court proceedings to **Mediation**, a practice which has been adopted by the courts in the UK and elsewhere, including in some Caribbean jurisdictions, with remarkable success.

The Mediation rules will require the parties in all family proceedings which are amenable to resolution by mediation, to first go for a mediation information and assessment meeting (“MIAM”) at which the benefits of mediation will be explained, before the case will be allowed to proceed to trial.

If the parties, having had the benefit of this meeting agree to mediate, their case will be referred to a mediator who will be either a judge, magistrate or private practice mediator who is trained and certified to mediate in family proceedings.

The philosophy of the rules is that spouses or partners who are facilitated to arrive at their own solutions on family disputes by way of mediation rather than having a solution decided and imposed upon them by order of the court, will more readily abide by the outcome of the process. In this way, mediation is seen as a means by which a less acrimonious, less expensive but more acceptable and lasting outcome to family disputes can be attained.

These new rules will be the first step to be taken by our Administration towards alternative dispute resolution but it is an idea

whose time has certainly come and to which we are generally committed. And indeed, in affirmation of this, all members of the local judiciary will be trained to certification as mediators by the faculty of the London School of Mediation at a workshop to be undertaken here over the long weekend of 5th - 7th February 2016. Time does not permit for a more detailed discussion now but information will be available on the re-launched judicial website and more will be added as the program develops.

Please allow me to express my thanks to my fellow members of the GCR Committee, the Hon Attorney General, Mr. Hector Robinson and in particular Mr. Colin McKie QC, our researcher and scribe extraordinaire, for their excellent work on the development of the Rules of Court.

The **CJRC** continued its important work last year under the chairmanship of Justice Quin and we published the first set of new Sentencing Guidelines, setting out the general overarching principles and the specific guidelines for dealing with burglary and robbery offences. Justice Quin informs me that work has begun on the

drafting of the guidelines for Death by Dangerous Driving and Firearms offences to be issued this year. Research into the treatment of sexual offences has also begun, with the intention to issue those guidelines as the next major step.

As a result of a recommendation by Ms. Claire Wetton in her Report, Practice Direction #5 of 2015 was issued to improve criminal case management in the Summary Courts. While it introduces no fundamental rule that was not already being observed in the Summary Courts, the Chief Magistrate reports that it has helped with the streamlining of case management, especially in those cases where defendants are represented by lawyers. In such cases, it is possible to agree on the narrowing of the issues for trial and, in particular, identify what evidence will be utilized at trial. Although very regrettable because of the disproportionate use of court time and resources, it is not surprising that agreement on such matters has not proven to be readily attainable where defendants are unrepresented, which is very often the situation in cases before the Summary Courts.

It must be noted therefore, that this situation is a compelling example of the cost effectiveness of providing legal representation for all offences which could result in a defendant's loss of liberty and so it is a very welcome development that the new Legal Aid regime will allow for representation for wider categories of offences in the future.

The FSD Users Committee and Users' Guide

This Committee, chaired by Justice Foster, held its last meeting on 12 November 2015. It was a well-attended meeting, including by special invitation, two members of the Court of Appeal. A number of important issues requiring of attention were raised and to which the Judges, the Administrator and I are committed to providing solutions early this year. The meeting followed on the publication in August 2015 of the Second Edition of the Users' Guide which as Justice Foster comments in his Foreword, "(now) reflect(s) much more Cayman practice and procedure as it has developed in the FSD over the years since (the Division was established in November 2009)".

The Guide will of course, as Justice Foster also notes, continue to be a work in progress but the excellent work done for its adaptation from the Guide of the Commercial Court in London to reflect the local practice and procedure has been very significant. Allow me therefore to extend our appreciation to Justice Foster and the other members of the Users' Committee for their work on this important project, first introduced by Justice Cresswell.

THE WORK OF THE SUMMARY COURTS

The Summary Criminal Cases Backlog Court

This Court was established in 2014 by the Chief Magistrate and her colleagues Magistrates to deal with backlogged cases. These are cases in which delay seems a chronic problem, again typically because the defendants are not legally represented.

Reports about the performance of this court continue to be very positive however, and I acknowledge the dedication and hard work especially of the Acting Magistrates who have agreed to take on the unenviable task of resolving these cases. They continue to

struggle with the usual problems affecting the efficacy of the lists; such as the non-service of summonses on witnesses and the late arrival at court of witnesses and defendants on bail. Another problem I am told are those many occasions when the overall numbers of criminal trials or other logistical difficulties such as the lack of court rooms, make it impossible to list only unrepresented trials on a given day. This leads to the unavoidable outcome that those cases involving defence counsel – typically the more serious cases- take precedence.

And so, despite the best efforts, Summary Court criminal trials are now being listed for as far away as July of 2016. In too many instances, this will be well beyond the benchmark for bail cases of 12 months from first hearing to final disposal, and of 9 months for custody cases save for exceptional circumstances – the international benchmark which is recognized and set out in PD#5 of 2015.

While this is yet another telling example of the need for the new court house and more support staff, the Chief Magistrate in her

Report (which will be published with mine on our website) has undertaken to continue to meet with the DPP and the Private Criminal Bar to re-assess the effectiveness of Criminal Case Management in the Backlog Courts.

Diversionsary (“Treatment”) Courts

- The **Drug Court** continues to sit on Thursday afternoons and Magistrate Foldats currently presides. He is assisted from time to time in the judicial oversight of this program by Chief Magistrate Hall and Magistrate Gunn. There was an intake of 54 applicants into the program last year and 8 participants graduated from the 18 month rehabilitation program. This treatment court is now in its 9th year and there is now a significant body of statistics from the point of view of which its success can also now be assessed and confirmed.
- **Mental Health Court** meets on the third Wednesday afternoon of every month. The objective of this diversionary program is to stabilize the condition of each alleged offender/client, to the point where there can be a proper disposal of the charge he or

she faces. It has been clear for a number of years now that legislation is needed to create a proper frame work for the operation of this and other diversionary court treatment programs. The continuing absence of facilities for the placement of patients must also be addressed and I am encouraged to report that a meeting was held between the Chief Magistrate, the Court Administrator and consultants brought in by the Ministry at the end of last year.

- **Non-violence Review Courts** are convened on the second Wednesday morning of each month. Participants must attend the Men's Non-Violence Programme, the Anger Management Programme or one of the programmes dedicated to strengthening domestic partnerships. All of these programmes are run by the Department of Community Rehabilitation and the officers provide monthly reports to the Courts on each individual's status and participation. The Chief Magistrate reports that these courts continue to work well, largely due to the input of the Department of Community Rehabilitation. Here

too, legislation is required for this programme to be put on the same formal footing as the Drug Court.

There are still further alternative or diversionary treatment programs which are available for dealing with crime, in particular youth crime and a renewed effort will be made this year to reach out to the Executive for an effective, collaborative approach. Indeed, this is an area in which discussions have already been had with Her Excellency the Governor and it is the hope of the judiciary that the full support of Government will be forthcoming as we move to formalize the existing programmes and introduce new ones.

Law Reporting

We have had from Mr. McKie, his usual thoughtful, instructive and informative report on this subject to which I need add very little indeed except to thank him and his fellow consultant editor Mr. Alberga QC for the outstanding work they continue to do, entirely voluntarily and simply out of love and respect for the development of

the law. The fruit of that labour of love – the CILRs – has become, as you have heard, a respected source of reference around the common law world. For the same reasons, the CILRs have become ever more marketable and I am to advise that their sale outside of Cayman (apart from sales to legal libraries still managed by our publisher Dr. Milner) will be carried by JUSTIS, an online provider specializing in the law reports of international financial jurisdictions and which I believe is already well-known to local law firms.

External events and public education.

Our commitment to continuing education and the promotion of public information on the administration of justice was reaffirmed last year by participation in a number of events.

In April, with the assistance of the professional associations, we hosted the 5th Annual Grand Court Distinguished Guest Lecture and this was delivered by Lord Mance of the Supreme Court and the Privy Council, our final appellate court. Lord Mance's erudite lecture was on the subject of Jurisdiction and Justiciability: the issues which

lawyers and courts must consider when deciding on the forum or place where cases can and should properly be heard and decided.

The judges were again last year invited to speak at a number of conferences or other events, in some instances overseas, the expenses were also covered by the convenors. And so I addressed a trust conference in Bermuda, the INSOL Judicial Colloquium in San Francisco and the Campbell's Funds conference here in Cayman. Justice Williams addressed the Commonwealth Magistrates and Judges Triennial Conference in Auckland New Zealand, Justice Segal spoke at the INSOL International Bermuda Seminar and Justice Mangatal gave the key note address to the Annual Gala of the Caymanian Bar Association where her speech on the need for a new Legal Practitioner's Law was very well received, and made time to give the Graduation Address at the Cayman Academy High School in June.

Finally, on this subject, in November we co-hosted with the **Commonwealth Secretariat**, a meeting of all Caribbean Regional Heads of Judiciary to consider the development of a Model Law for

the establishment of Judicial Services Commissions. This was the final of four such regional meetings around the world and the draft Model Law will soon be presented to the Commonwealth Heads of Government for adoption.

CASE DISPOSAL

I now turn to the topic on which I usually conclude my report : a brief overview of case disposal

Privy Council

Four (4) appeals from our Court of Appeal were filed in the Privy Council last year, one more than the year before.

Court of Appeal

In the Court of Appeal, 28 criminal appeals and 24 civil or FSD appeal were filed from cases heard in the Grand Court.

The Grand Court

- **FSD**

255 cases were filed in the FSD, up from 167 in 2014. This sharp increase in FSD intake mainly involves petitions to wind up or restructure entities and is attributable to the fact that a significant proportion of holding companies listed on the Hong Kong Stock Exchange and doing business in mainland China are Cayman Islands companies. These like many others doing business there are being affected by the recent volatility in the Chinese economy. Factors like these would suggest that the business of the FSD will continue apace for the foreseeable future.

- **Civil**

In the General Civil Division 318 cases were filed, as well as 136 estate matters.

- **Family Division**

In the Family Division 260 cases were filed, all giving rise to the usual difficult and challenging issues involving the care and

custody of children and the tensions of divorce. These cases demand the constant case management attention of Justice Williams as head of the Division and require the full support of the officers of the Family Support Unit.

- **Criminal Division**

In the Criminal Division, 108 new indictments were filed in the Grand Court last year and it is in this Division that the now perennial concerns about delay affecting the liberty of the subject, still persist

As at 31 December 2015, there were 149 indictments awaiting trial, an increase of 31 compared with the year before. During 2015, only 72 indictments were completed, including 23 which were laid in 2015 itself. The rest of those laid in 2015, that is 85, were carried over.

The consequence is that of the 149 indictments pending as at 31 December 2015:

➤ 1 is from 2009

- 2 are from 2010 (down from 7 last year)
- 1 is from 2011 (down from 5 last year)
- 9 are from 2012 (down from 10 last year)
- 16 are form 2013 (down from 20 last year)
- 35 are from 2014 (down from 75 last year)

And as already mentioned 85 are from 2015 and this is relative to 75 indictments carried over from 2014.

This therefore is a troubling trend, even more so than when I reported last year. It has developed despite our best efforts, as you have heard with the crucial support of the visiting judges (special mention to Justice Mettyear) and court staff, to try at least two indictments simultaneously throughout the year.

The trends clearly show that we must try more than two indictments at once in order to address the back-logged indictments and prevent further back logs but this will not be possible within the existing court facilities and without even further disruption and delays in the Summary Courts about which I have already spoken.

And so again I must remind us that the chronic lack of court space has become a real matter of national concern: it affects our ability to dispose of the very many complex and important cases coming before the FSD and of even more immediate concern, our ability to provide justice in a timely manner in cases which involve the welfare of children and the liberty of persons.

I therefore welcome the declared commitment of the Hon. Premier on behalf of his Government that this problem is now to be at long last addressed.

In closing, I join with Mr. Thoppil in extending condolences on the passing of attorney-at-law Irvin Banks to his family and express our deep appreciation for the fine work he did especially for persons in need of his pro bono services. He was an officer of the Court whom the judges came to admire and respect. I also express condolences on the passing of Magistrate Hall's mother – the reason for her absence this morning.

On a brighter note, I join with the Hon. Attorney General in expressing appreciation for the continued dedication and hard work of

the Commissioner and men and women of the RCIPS. I ask Commissioner Ennis to extend our usual thanks and appreciation to the officers who turned out on parade in their symbolic and important display of support for the role of the judiciary in the rule of law and the administration of justice.

I also thank all the movers for their expressions of support and appreciation for our administrative staff. These sentiments are very well deserved and I am sure will be much appreciated by them as they recommit themselves from year to year to their important work in support of the administration of justice.

With those final remarks, I join in extending best wishes to everyone for the New Year and now accede to the motion and declare the Court to be open for business for 2016.

Hon Anthony Smellie Q.C.
Chief Justice of the the Cayman Islands