



The Rules Committee

PO Box 180
Wellington

Telephone: (09) 970 9584
Facsimile: (04) 494 9701
Email: rulescommittee@justice.govt.nz
Website: www.courtsfnz.govt.nz

14 April 2014
Criminal Rules Minutes 02/14

Circular 30 of 2014

Minutes of the Criminal Rules Sub-Committee meeting held on 7 April 2014

The meeting was held at the Court of Appeal, Wellington, on Monday 7 April at 9 am.

1. Preliminary

In Attendance

Hon Justice Winkelmann, Chief High Court Judge (by AVL)
Hon Justice Ronald Young, Chair
Judge Davidson
Mr Mark Harborow (by AVL)

Mr Matt Dodd, Clerk

Apologies

Mr David Jones QC

2. Minutes

The Sub-Committee confirmed the minutes of the February 2014 meeting.

Agreed: the minute-taker should produce an action sheet from now on.

3. Section 400 of the CPA

Mr Mark Harborow tabled a copy of a presentation entitled "The good, the bad and the ugly: the first (almost) nine months of the CPA", delivered on 6 March 2014 by Mr Ian Murray (Luke Cunningham Clere, Wellington), for discussion. The presentation raised an issue around the operation of s 400 of the Act.

Under s 397 criminal proceedings commenced pre-CPA continue under the old law. Where the prosecutor wishes to have a combined trial involving charges laid both pre and post-CPA (for instance where a new charging document for similar offending against another complainant is filed post-CPA) s

400 applies. Where the offences charged both arise “from the same transaction, or set of circumstances, or incident, or series of incidents” then they must both be heard under the pre-CPA law.

Mark Harborow: More serious concern with s 400 process is functional rather than legal. Crown frustrated by court staff not understanding how s 400 works. Manukau, Waitakere and Auckland District Courts respond to s 400 notice by saying their computer systems do not allow them to administer a charge laid post-CPA under the pre-CPA law. Judge Davidson: appears CMS is totally inflexible. Suggest a site visit to see CMS working, in particular the s 138 and s 400 processes. Winkelmann J: agree that need a full demonstration.

Action: Judge Davidson to contact Megan Anderson, arrange to observe s 400 process in action and report back with issues. Specific issues to be raised with MoJ after report.

4. Feedback from Judge Davidson

(a) Time requirement for filing charge list

Under r 5.9 the prosecutor must give jurors a charge list after they are sworn in. But the court needs a clear list of charges earlier, at pre-trial stage. It is often difficult to determine the exact charges a defendant is facing as a consequence of Crown add/amend/withdraw notices (particularly in sexual, fraud and domestic violence cases). The Crown Charge Notice is described by Ian Murray in his presentation as earning the “gold star for the worst form”. The Crown Charge Notice lists changes to charges, but not a list of all the charges the defendant now faces.

Judge Davidson: Propose requiring the Crown to file a draft charge list with TCM. Mark Harborow: charge list not produced until trial in Auckland because it takes a lot of time to produce. Best body to produce list of charges is the Ministry. Query whether list of charges can be produced from CMS. Young J: under old system, draft indictment filed 6 weeks before trial. Court and defendants must know what charges they face. Mark Harborow: issue is with CMS. Have experience of withdrawing charges, then go to court and charges are still on file. Winkelmann J: we need to understand how CMS works. May only be a “sticking plaster” solution if just getting Crown to do job of MoJ. Judge Davidson: process should be - charging document filed > notices come from Crown > notices take effect in CMS. Doesn’t appear to work. Young J: Two issues. First, redesign of TCM form or Crown Charge Notice to include current charge list. Second, check CMS is actually responding to amendments.

Agreed: at some point all members of Sub-Committee should together observe CMS and other MoJ electronic systems in action.

Action: Judge Davidson to observe add/amend/withdraw process in CMS and report back. Put issue on agenda for next meeting. If contemplating change to TCM, will need feedback from Crown Solicitors, Mark Harborow to obtain.

(b) Status of sexual violation under Class 2 of the Trial Protocol for Category 2 and 3 Offences

Simon France J has issued a minute interpreting the Protocol. Sexual violation falls into Class 2 when “the complainant is under 16”. Simon France J held that the relevant feature is that the complainant was under 16 *at the time of the alleged offending*.

Winkelmann J: Protocol will be updated in time to clarify. Young J: in the meantime should inform defence and Crown.

Action: Mark Harborow to circulate minute to Crown network. David Jones QC to circulate to defence bar. Young J to mention at CPC meeting.

(c) Time requirement for Crown notices to add/amend/withdraw

Court staff not clear what time restrictions apply to Crown notices. They are set out in reg 6 of the Crown Prosecution Regulations 2013. In most cases, Crown notices to add/amend/withdraw must be filed no later than the case review hearing.

Young J: obscure to have prescribed period in Crown Prosecution Regulations. Adams refers to it though. Section 387 of the CPA means the period can only be set by regulation. Judge Davidson: propose a “crumb trail” linking the rules with the regulations.

Action: amend r 4.12 to make clear that the relevant time periods are set by r 6 of the Crown Prosecution Regulations.

5. CMM and TCM forms

Clear need to redesign forms. A variety of groups are starting to make their own forms. Christchurch forms are visually more user-friendly. The Wellington Criminal Bar Association is in the process of developing its own forms. Tauranga lawyers may also have their own forms from CPA pilot.

Mark Harborow: should have separate forms for jury trials.

Action: Megan Anderson (MoJ), Matt Dodd and Michael Madden (District Court research counsel) to form a working group. Mandate to gather feedback from stakeholders, review CMM and TCM forms and produce a draft of new forms before the next meeting on 20 June 2014. Judge Davidson to provide Christchurch forms to working group.

6. Timing of formal statements and TCM

Keep on the agenda until the next meeting when feedback is available from David Jones QC.

7. Draft amendment rules from Parliamentary Counsel Office

(a) Draft r 4 (s 138 notifications)

The Sub-Committee received a letter from Superintendent Craig Tweedie regarding the proposal that rr 2.4 and 2.5 apply to s 138, requiring written notice to given. Superintendent Tweedie expressed strong concerns about the proposal, particularly the significant amount of extra work that would be required by Police prosecutors in order to file written notices on every occasion.

Winkelmann J: assumption is that CMS records s 138 notifications. Appears it does not. Mark Harborow: a wholly electronic system is desirable. Should refer to Megan Anderson. Young J: two things must occur – there must be some record of the fact that joining has occurred and the persons affected must know. How that is done requires an examination of the computer systems involved.

Action: Judge Davidson to observe s 138 process and report back.

(b) Draft r 6 (summary of facts in CMM)

Draft r 6 amends r 4.8, requiring “a summary of the facts (including an indication of any matters on which the parties disagree)” to be included in the CMM.

Young J: phrase in parentheses seems to have little utility. Doesn't matter whether defence agrees with summary of facts unless sentence indication requested, in which case the defence must agree. Mark Harborow: some judges are extremely effective at resolving factual disputes at case review if they are aware of the matters in dispute at that point. Young J: sympathetic to that idea, but Parliament made it clear that compulsory disclosure of matters in dispute was left out of the Act. Judge Davidson: propose that phrase be amended to include a “hint” that resolution of disputes at case review is possible and desirable but not compulsory.

Action: parenthetical phrase in draft r 6 to be replaced with “(including any dispute about the summary of facts the parties wish to raise before the court)”. Refer the amendment back to Parliamentary Counsel with the suggested change.

(c) Draft r 5 (service of documents)

Draft r 5 amends r 2.8, allowing the court or Registrar to approve a person to serve documents generally in criminal proceedings or in connection with a class of proceedings. This has resourcing implications for the Ministry because a list of approved persons would have to be created and maintained.

Action: Young J to discuss resourcing implications with the Ministry.

8. Conversion of practice notes

The Chief Justice has given her general approval for the conversion of all practice notes to rules. On some matters, further consultation with the Chief Justice may be required.

The Chief District Court Judge has also given her approval for the removal of all practice notes except the domestic violence practice note. She has asked that all new material should be included in the rules. Judge John Walker is currently reviewing the Domestic Violence Prosecutions practice note.

Action: before the next meeting, the Sub-Committee will compile a list of all practice notes to cancel and a list of those to be redrafted as rules. Judge Davidson will advise the Sub-Committee on the District Court's approach to the Domestic Violence Practice Note.

9. Ministry support

Agreed: it is clear that a Ministry representative is needed on the Sub-Committee.

Action: Young J to write to Megan Anderson to invite her to attend each meeting.

10. Areas for expansion of the rules

Agreed: to be kept on the agenda until next meeting. The Sub-Committee has already set itself a very full workload.

11. Publicity

An article publicising the existence of the Sub-Committee and calling for feedback has been published on page 32 of LawTalk 839 (dated 11 April 2014).

Winkelmann J: Perhaps the Sub-Committee should hold a consultation forum.

Action: Young J to write to the Law Society, asking them to inform the Sub-Committee when they are hosting seminars on criminal procedure. A member of the Sub-Committee will endeavour to attend.

12. Engaging with defence counsel

The Sub-Committee needs to build feedback networks that include the PDS and Law Society as well as the Criminal Bar Association.

Action: Young J to write to:

- (a) Madeleine Laracy suggesting Lynn Hughes, Deputy Public Defender in Manukau, should join the Sub-Committee.*
- (b) The Ministry asking for funding for the expenses of an additional member.*
- (c) David Jones QC to enquire who he should be responsible for obtaining feedback from.*
- (d) The Criminal Bar Association and the Law Society, asking them to nominate a person to aggregate feedback and pass it on to the Sub-Committee.*

13. General Business

(a) Website

Action: Winkelmann J to ask Tom Cleary about creating a separate page for the Sub-Committee on the Courts of New Zealand website.

(b) Retirement

Young J is retiring. Simon France J will take over as Chairperson at the next meeting.

Meeting closed at 10.30 am.

Criminal Rules Sub-Committee

Summary of Action Points: 7 April 2014

Minute Item	Description of Action Point	Responsibility	
1	Section 400 of the CPA <ul style="list-style-type: none"> Judge Davidson to contact Megan Anderson, arrange to observe s 400 process in action and report back with issues. Specific issues to be raised with MoJ after report. 	<i>Judge Davidson</i>	
4(a)	Time requirement for filing charge list <ul style="list-style-type: none"> Judge Davidson to observe add/amend/withdraw process in CMS and report back. Keep issue on agenda for next meeting. If contemplating change to TCM, will need feedback from Crown Solicitors, Mark Harborow to obtain. All members of the Sub-Committee should gather in one place to observe CMS and other MoJ electronic systems in action. 	<i>Judge Davidson</i> <i>Mark Harborow</i> <i>Judge Davidson</i>	
4(b)	Status of sexual violation under Protocol <ul style="list-style-type: none"> Mark Harborow to circulate Simon France J's minute to Crown network. David Jones QC to circulate to defence bar. Young J to mention at CPC meeting. 	<i>Mark Harborow</i> <i>David Jones QC</i> <i>Young J</i>	
4(c)	Time requirement for Crown notices <ul style="list-style-type: none"> Amend r 4.12 to make clear that the relevant time period are set by r 6 of the Crown Prosecution Regulations. 	<i>Matt Dodd</i>	
5	CMM and TCM forms <ul style="list-style-type: none"> Megan Anderson, Matt Dodd and Michael Madden to form a working group. Mandate to gather feedback from stakeholders, review CMM and TCM forms and produce a draft of new forms before the next meeting on 20 June 2014. Judge Davidson to provide Christchurch forms to working group. 	<i>Matt Dodd</i> <i>Megan Anderson</i> <i>Michael Madden</i> <i>Judge Davidson</i>	
7(a)	Draft r 4 (s 138 notifications) <ul style="list-style-type: none"> Judge Davidson to observe s 138 process and report back. 	<i>Judge Davidson</i>	
7(b)	Draft r 6 (summary of facts in CMM) <ul style="list-style-type: none"> Parenthetical phrase in draft r 6 to be replaced with "(including any dispute about the summary of facts the parties wish to raise before the court)". Refer the amendment back to Parliamentary Counsel with the suggested change. 	<i>Matt Dodd</i>	
7(c)	Draft r 6 (service of documents) <ul style="list-style-type: none"> Young J to discuss resourcing implications with the Ministry. 	<i>Young J</i>	
8	Conversion of practice notes <ul style="list-style-type: none"> Before the next meeting, the Sub-Committee will compile a list of all practice notes to cancel and a list of those to be redrafted as rules. Judge Davidson will advise the Sub-Committee on the District Court's approach to the Domestic Violence Practice Note. 	<i>Young J</i> <i>Judge Davidson</i>	
9	Ministry support <ul style="list-style-type: none"> Young J to write to Megan Anderson to invite her to attend each meeting. 	<i>Young J</i>	

Minute Item	Description of Action Point	Responsibility	
11	<p>Publicity</p> <ul style="list-style-type: none"> Young J to write to the Law Society, asking them to inform the Sub-Committee when they are hosting seminars on criminal procedure. A member of the Sub-Committee will endeavour to attend. 	<i>Young J</i>	
12	<p>Engaging with defence counsel</p> <ul style="list-style-type: none"> Young J to write to: <ul style="list-style-type: none"> (a) Madeleine Laracy suggesting Lynn Hughes, Deputy Public Defender in Manukau, should join the Sub-Committee. (b) the Ministry asking for funding for the expenses of an additional member. (c) David Jones QC to enquire who he should be responsible for obtaining feedback from. (d) the Criminal Bar Association and the Law Society, asking them to nominate a person to aggregate feedback and pass it on to the Sub-Committee. 	<i>Young J</i>	
13(a)	<p>General business</p> <ul style="list-style-type: none"> Winkelmann J to ask Tom Cleary about creating a separate page for the Sub-Committee on the Courts of New Zealand website. 	<i>Winkelmann J</i>	