The Rules Committee
Te Komiti mō ngā Tikanga Kooti

December 2024
Criminal Rules Minutes 11/24

Circular 20 of 2024

Minutes of the Criminal Rules Sub-Committee meeting held on 28 November 2024

The meeting was held at 9:00am using the Microsoft Teams facility.

In Attendance

Hon Justice Mander, Chair and Judge of the High Court
His Honour Judge Collins, Judge of the District Court
Ms Clare Cheesman, Manager, Justice Services, Auckland District Court Criminal
Ms Fiona Guy Kidd KC
Ms Julie-Anne Kincade KC
Ms Megan Noyce, Chief Advisor, Courts and Justice Service Policy
Ms Zannah Johnston, Crown Law

Ms Cathy Pooke, Parliamentary Counsel
Ms Georgia Barclay, Clerk to the Rules Committee

Apologies

Mr Joshua Chin, Criminal Manager Christchurch High Court

1. Preliminary

The Sub-Committee confirmed the Minutes of the 15 August 2024 meeting.

It was agreed that meeting dates for 2025 would be decided and circulated before the new year.

2. Notice of appeal forms

The Chair relayed that the Court of Appeal is already in the final stages of its proposed overhaul of the Court of Appeal (Criminal) Rules, having brought proposed replacement rules to the Rules Committee at its last meeting. The proposed new rules had come about after an extensive internal process to the Court of Appeal, which had included public consultation. Relevantly, the proposed rules are likely to include a flowchart and update all forms to make them easier to follow, including by adding headings and tick boxes where relevant to make it easier to select appropriate options. The content of these rules are a matter for the Court of Appeal not the Sub-Committee. In light of that Court's recent review

of its rules, and advice that the issue raised before the Sub-Committee regarding the inclusion of guidance in appeal forms as to the appropriate appeal court was raised with the President, the matter cannot be further progressed by the Sub-Committee.

3. Victim impact statements

The Sub-Committee considered draft amendments to the Criminal Procedure Rules that would see victim impact statements filed and served five working days prior to a sentencing hearing. The Rules Committee had, at its 30 September 2024 meeting, agreed that two changes to the draft rules should be made. First, it agreed that references to "defendant" should be changed to "offender". Secondly, it agreed that the wording of the proposed rule which requires a statement to be submitted to a judicial officer should be changed so that statements must be "filed with the court". On referral of the draft amendments to the Sub-Committee, the Rules Committee asked the Sub-Committee to consider an alternative to the requirement that victim impact statements be served on the defendant, which the Committee considered to be problematic in light of s 23 of the Victims' Rights Act 2002 (the Act) (which provides offenders should not be given copies of statements to keep).

The Sub-Committee agreed that the present wording of the draft amendments does conflict with s 23 of the Act. It went on to make several observations. First, the Act does not provide for service at all – possibly to avoid this very issue. Secondly, the essential purpose of the amendments is to ensure victim impact statements, and notice of how they are to be presented, was before the Court and known to defence counsel in advance of the sentencing hearing. Thirdly, in practice statements are provided to an offender's lawyer who will then allow their client to read it under supervision, and without giving their client a copy to keep; although this approach is only workable where the defendant has counsel. This usual practice is governed by convention and conforms with the principle that what is put before the court by one party should be seen by the other party. And under s 23 of the Act, where defence counsel or a defendant asks to see a victim impact statement the prosecutor must show it to them unless s 25 of the Act is in play.

The Sub-Committee went on to discuss two broad pathways for addressing the tension with the current wording. The first was to provide that service of victim impact statements was to be effected by serving the statement only on an offender's lawyer. An alternative would need then to be provided for when an offender was unrepresented. A further issue is whether the rule can impose an obligation which goes beyond that required by the Act. The Act does not explicitly refer to the provision of victim impact statements to the defence but, arguably, contemplates a lawyer for an offender being provided with a copy. The second pathway was for the Rules to be, like the Act, silent on service. It was observed that the existing r 2.4 provides that any documents "filed" must be served. Accordingly, r 2.4 would need to be borne in mind should the second pathway be taken; although the point was made that there are real advantages to requiring that victim impact statements are filed with the Court, in that it would prevent the practice of a statement being placed on the Court file by a victim advisor without the prosecutor becoming aware of it.

The Sub-Committee also canvassed some options for what an amendment could practically look like in the Rules. One option would be to add the requirement that victim impact statements be filed in advance into the existing r 5A.4(1), which provides timing for the filing of the prosecutor's sentencing memoranda. Initially, it was thought this could potentially avoid the problems of requiring service,

although that does not appear possible given the interplay of the rule with the existing r 2.4 as discussed above. The point was also made that this option would require the heading of Part 5A, Subpart 2 to be changed. The second option discussed was to have the requirement in a separate rule, as proposed in the draft provided by the PCO to the Rules Committee. This option could, it was pointed out, emphasise the importance of providing a victim impact statement.

The Sub-Committee also discussed the Rules Committee's two recommendations. It accepted that the term "offender" would be more consistent with the Act. However, it observed that the Rules Committee's second recommendation did not necessarily sit comfortably with r 2.4, which requires that any documents "filed" must be served. For the Rules Committee's suggested wording of "filed with the Court" to be appropriate, the first pathway discussed above — that a separate definition of service in regards to victim impact statements be introduced — would be necessary.

Finally, the Sub-Committee discussed how firmly worded the requirement that victim impact statements be provided in advance should be. The preliminary view was that the term "should" rather than "must" may strike the right balance between the need to shape a new norm around the rule and the right under the Act for a victim to provide a statement. It was observed that the existing r 1.7, under which the court may extend a time set under the rules for "doing anything in a proceeding", could operate to provide for that right even if stronger wording such as "must" were used.

The Sub-Committee decided to address this matter again at the next meeting. In the interim, Ms Pooke was asked to draft alternative forms of an amendment, in light of the Sub-Committee's discussion, for its further consideration.

4. Code of conduct for expert witnesses in criminal proceedings

At its last meeting, the Sub-Committee raised concerns about the appropriateness of amending the Criminal Procedure Rules to require experts to comply with a code of conduct, without there being an equivalent amendment to s 26 of the Evidence Act. The Sub-Committee decided, after considering some research on the matter, it would be appropriate to make such an amendment so long as it did not unduly hamper the ability of witnesses to give evidence.

The Sub-Committee agreed that experts in criminal proceedings should in substance be subject to a code of conduct. It observed that requiring experts in criminal proceedings to comply with a code of conduct had broad support from the profession and that the Court of Appeal had endorsed the idea that experts in criminal proceedings had to comply in substance with aspects of the existing Code.

The Sub-Committee then discussed whether requiring experts to state they have complied with a code before being able to give evidence, would unduly hamper the ability of other witnesses who are not specifically called to give an expert opinion, but are able to give expert answers in response to questioning that falls within their specialist field (i.e., doctors, paramedics, telecommunications technicians). A distinction was made between traditional expert witnesses, who are called exclusively to provide an expert opinion, and narrative witnesses, who are called to give factual evidence but who may be asked questions that require them to provide an opinion that arises from their specialist field. An example discussed was a doctor that was assisting a victim of an alleged crime, who is then asked in cross-examination what force they thought would be required to cause the injury to the victim. A

suggestion was made that there could be a distinction in the Rules between these kinds of experts, to avoid objections being taken to particular lines of questioning of these witnesses.

The point was made that it is common practice for many expert witnesses who may also give narrative evidence, such as ESR staff, to state they have read the Code of Conduct and will comply with it.

The Sub-Committee then discussed the questions of (a) whether a code of conduct in criminal proceedings would be substantively different from the existing Code and (b) whether, regardless, there should be a separate criminal code of conduct contained in the Criminal Procedure Rules. In relation to the second question, the Committee agreed a separate code would be useful so the rules relating to criminal procedure were all in one place, regardless of whether the code was substantively different from the existing Code.

In relation to the first question, it was common ground that it would be appropriate for cls 1 and 2, which relate to the duty of impartiality, and cls 3–5, which relate to the substance of the evidence given by the witness, of the existing Code to continue to apply in criminal proceedings. Clauses 2A and 2B were not seen as applicable.

There were different preliminary views about the applicability of cls 6 and 7, which relate to the duty to confer. A point was made that conferral can be useful in criminal proceedings, particularly if there is conferral about what can be agreed between the witnesses so the Court can be directed to where there is genuine dispute between experts. A suggestion was made that a duty to confer could be subject to the agreement of the Crown and defence.

The final point made was that thought would need to be given to whether there were additional duties, not present in the existing Code, that would nonetheless be appropriate in a criminal context.

The Sub-Committee agreed to continue to discuss these questions at its next meeting.

Justice Cameron Mander
Chair