



The Rules Committee

Te Komiti mō ngā Tikanga Kooti

March 2024

Criminal Rules Minutes 03/24

Circular 5 of 2025

Minutes of the Criminal Rules Sub-Committee meeting held on 24 March 2025

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

Mr Joshua Chin, Criminal Manager Christchurch High Court

Ms Julie-Anne Kincade KC

Ms Megan Noyce, Chief Advisor, Courts and Justice Service Policy

Ms Zannah Johnston, Crown Law

Ms Cathy Rodgers, Parliamentary Counsel Office, standing in for Ms Cathy Pooke

Ms Georgia Barclay, Clerk to the Rules Committee

Mr Oliver Sanders, Ministry of Justice Policer Manager, Sentencing and Rehabilitation

Mr Harry Smith, Ministry of Justice Policy Advisor, Sentencing and Rehabilitation

Apologies

Ms Cathy Pooke, Parliamentary Counsel Office

1. Preliminary

The Sub-committee confirmed the Minutes of the 28 November 2024 meeting, with one small change.

The project on name suppression in sexual cases was briefly discussed. A draft of potential amendments was provided to the select committee for the Victims of Sexual Violence (Strengthening Legal Protections) Bill. The Bill has now completed its select committee stage and was reported back on 10 March 2025. It is currently awaiting Second Reading.

The Sub-committee agreed that if the Bill did not require any changes to the substance of the suggested amendments, the amendments could proceed to the Rules Committee for its consideration. Otherwise, the Sub-committee would consider it at its next meeting.

2. Reinstated Three Strikes

The provisions in the Sentencing (Reinstating Three Strikes) Amendment Act 2024 that relate to the three strikes regime will commence on 17 June 2025. The provisions apply different standards for what will cause a warning, first or subsequent, to appear on an offender's criminal record.

Oliver Sanders and Harry Smith, from the Ministry of Justice, spoke to proposals from the Ministry of Justice to make four rules changes. Mr Sanders and Mr Smith clarified that the Ministry is undertaking work to automatically update criminal histories so that they flag which warnings incurred under the old three strikes regime apply under the new regime as first or subsequent warnings (under new s 86U).

The Sub-committee agrees with the proposals made by the Ministry of Justice to make the following amendments to the Criminal Procedure Rules 2012:

- Reinstates r 4.14(2)(b) and (5), revoked by the Criminal Procedure Amendment Rules 2024. The provisions would require the prosecutor, when filing a notice about a protocol offence, to state whether the proceeding must be transferred to the High Court because the defendant is charged with a stage-3 offence. This will ensure the facilitation of new s 86Q of the Sentencing Act 2022 (which mandates that stage-3 offences be transferred to the High Court).
- Amend r 3.1 so that the charging document discloses whether a charged offence is a qualifying offence as defined in new s 86J (an offence against any of the provisions of the Crimes Act 1961 listed in Schedule 1AB). It was clarified at the Sub-committee meeting that no information about whether something was a potential stage-2 or stage-3 offence, or any other information about a defendant's previous criminal history, would be in the charging document and so before the jury.
- Amend r 2.12(2) to include applications made under new s 86V(4). Rule 2.12(2) specifies the types of applications that must be made in writing. New s 86V relates to the situation where an offender ceases to have a record of warnings (because of a change to a qualifying sentence or a conviction for a qualifying offence) but continues to be subject to a qualifying sentence, that was imposed upon them for an offence committed when the offender did have the previous record of warning. Subsection (4) deals with the situation where the District Court is dealing with an offender who continues to be subject to a qualifying sentence imposed by a higher court. It is envisaged that for such a matter to come to the High Court's attention, an application under s 86V(4) would need to be made. The Sub-committee obtained clarification that applications under s 86V(4) would be rare.

The Sub-committee had some concerns about the amendment to r 4.8(1)(b) set out at paras [14] and [15] of the Ministry of Justice's memorandum. That amendment would require a case management memorandum to include whether a charge is a qualifying offence and whether the defendant has any warnings on their record. The purpose of this amendment is to ensure a defendant is made aware that they are facing a higher potential sentence due to previous warnings. Concerns that remained were:

- The District Court judge in a judge alone trial will likely be exposed to the fact a defendant is subject to warnings, because judges will look at the case management memorandum.

This could engender a perception of bias, although the point was made that a defendant's criminal history is often on file and available to District Court judges sitting on judge alone trials in any case.

- It may not be the Court's role to ensure a defendant knows they are potentially facing a second or third strike and the consequences of that. That is for counsel, and it may be thought inappropriate for the Court to check what information has been discussed with the defendant. The point was made that self-represented parties would not have counsel to inform them, but might, as a matter of practice, be informed by the prosecutor that they should seek legal advice on the meaning of a "qualifying offence" and what that could mean for sentencing, upon seeing the charging sheet.
- If the purpose of the suggested amendment to r 4.8(1)(b) is to ensure the Court has available to it such information in case a sentence indication is sought, that may not be necessary because a defendant's criminal history is provided as part of an application for a sentencing indication (under r 4.8(1)(b)(ii)), and the criminal history will contain any warnings.

The Ministry of Justice advised it will investigate alternative options in an endeavour to address the concerns raised, and those options will be put to the Rules Committee at its next meeting.

Subject to further inquiries regarding the amendment of r 4.8(1)(b), the Sub-committee agreed that the Ministry of Justice instruct the Parliamentary Counsel Office to draft amendments to the Criminal Procedure Rules 2012, in accordance with the proposed amendments, for the Rules Committee to consider approving at its meeting on 31 March 2025. The Sub-committee clarified that because of the time constraints on the promulgation of the three strikes amendments, it would prefer them to be separate from amendments that relate to victim impact statements.

3. Victim impact statements

The Sub-Committee considered updated draft amendments to the Criminal Procedure Rules that would see victim impact statements filed, but not served, five working days prior to a sentencing hearing.

The updated proposed rule addresses the Rules Committee's concerns by:

- a. replacing references to "defendant" with "offender", in line with the wording in the Victims Rights Act 2002;
- b. replacing a requirement that a victim impact statement is "submitted to the judicial officer" with a requirement that a victim impact statement is "filed in court"; and
- c. removing the requirement in the formerly proposed 5A.5A that a victim impact statement be served "on the defendant" and substituting it with a requirement that a statement is served "on a lawyer (if any) representing the offender".

The new draft also amends r 2.4(2) to explicitly provide that victim impact statements filed should not be served "on every other party" to ensure compliance with s 23 of the Victims Rights Act, which

provides restrictions on offenders having access to victim impact statements. A suggestion was made to clarify the wording of the amendment.

The new draft also makes the service requirement explicitly subject to any order, directions or conditions imposed under ss 25 or 27 of the Act.

The Sub-committee approved the updated amendments, prepared by Ms Pooke from PCO, subject to Ms Pooke's consideration of whether the wording of the amendment to r 2.4 could be clarified. It was agreed these amendments could go before the Rules Committee at its next meeting, with PCO to confirm the final wording of r 2.4(2)(e) at that meeting.

4. Code of conduct for expert witnesses in criminal proceedings

The Sub-committee did not substantively discuss this topic, due to time constraints, other than to raise the idea of whether further consultation or research was required. The Sub-committee agreed to consider this again at its next meeting.

Justice Cameron Mander
Chair

Addendum: Minutes of urgent Criminal Rules Sub-Committee meeting held on 8 April 2025

In Attendance

Hon Justice Van Boheman, Judge of the High Court
His Honour Judge Collins, Acting Chair and Judge of the District Court
Ms Clare Cheesman, Manager, Justice Services, Auckland District Court Criminal
Ms Fiona Guy Kidd KC
Mr Joshua Chin, Criminal Manager Christchurch High Court
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 Office
Ms Georgia Barclay, Clerk to the Rules Committee
Mr Oliver Sanders, Ministry of Justice Policer Manager, Sentencing and Rehabilitation
Mr Harry Smith, Ministry of Justice Policy Advisor, Sentencing and Rehabilitation

Apologies

Hon Justice Mander, Chair and Judge of the High Court

1. Reinstated Three Strikes

The Rules Committee considered the Subcommittee's recommendations about reinstated three strikes at its meeting of 31 March 2025, along with updated suggestions from the Ministry of Justice. The Rules Committee approved of the proposed amendments, subject to the Subcommittee's endorsement of any updated suggestions from the Ministry of Justice. The Rules Committee asked the Subcommittee to consider the Ministry's updated suggestions as well as the wording of written warnings to be provided under possible amendments to the Sentencing Regulations 2002.

The Subcommittee endorsed the Ministry's updated suggestions. The main difference was that now the Ministry recommended case management memoranda should either disclose a defendant's three strikes history or that the prosecution and defence have discussed that history, depending on what would be appropriate for a judge to see at the time of the case management conference. They also recommended the information be on sentencing memoranda. The Ministry's essential concern remained the same; that defendants should know if they are facing a higher potential penalty because they have a history of warnings.

The Subcommittee also endorsed the wording of written warnings to be given under proposed amendments to the Sentencing Regulations 2002.