The Rules Committee

PO Box 180
Wellington

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

23 October 2014
Criminal Rules Minutes 04/14

Circular 85 of 2014

Minutes of the Criminal Rules Sub-Committee meeting held on 12 September 2014

The meeting was held at the High Court, Wellington, on Friday 12 September 2014 at 9 am.

1. Preliminary

In Attendance

Hon Justice Simon France, Chair
His Honour Judge Davidson
Ms Megan Anderson
Mr Mark Harborow (by AVL)
Ms Lynn Hughes (by AVL)

Ms Justine Falconer, Provider and Community Services, Ministry of Justice (for item 4)

Mr Matt Dodd, Clerk

Apologies

Hon Justice Winkelmann, Chief High Court Judge
Mr David Jones QC

2. Minutes

The Sub-Committee confirmed the minutes of the 20 June 2014 meeting.

3. Matters arising from 20 June 2014 meeting

(a) Action point 3(b): time requirement for Crown notices

France J: Crown Law has expressed reservations about moving reg 6 out of the Crown Prosecution Regulations 2013.

Action: France J to discuss options with Winkelmann J.

(b) Action point 3(f): funding for additional member

Action: Megan Anderson to contact Lynn Hughes directly.

(c) Action point 3(g): nominated persons for feedback

France J: Crown Law suggested representation on the Sub-Committee. France J will discuss with Winkelmann and Asher JJ.

Action: to be discussed at the next meeting.

(d) Action point 4(b): PN2 - notes of evidence - official record

Action: keep on agenda for next meeting.

(e) Action point 4(x): publicity, consultation and timing of cancellation of PNs

France J: met with Asher and Winkelmann JJ. A process has been agreed. Once draft rules are ready, France J will hold a telephone conference with Winkelmann and Asher JJ to identify any potential issues. Asher J will then take the draft to the Rules Committee for discussion and acceptance in principle. The Rules Committee will decide what consultation is needed. Clear preference expressed for producing large packages of amendments, rather than numerous ad hoc amendments, unless urgent.

(f) Action point 6: return of amended charges to Youth Court after election of jury trial in the District Court

Action: France J to write letter to MoJ and MSD.

(g) Action point 7: report from CMM and TCM working group

Judge Davidson: have surveyed District Court Judges who indicated a clear preference for freetext forms. Megan Anderson: have surveyed Police, MoJ and the Crown who indicated a clear preference for the tickbox form.

Action: Judge Davidson and Megan Anderson to meet a produce a compromise form for use in a trial within the next few weeks. Draft to be circulated to Sub-Committee by email before trial.

(h) Action point 8(b): alignment of time for filing formal statements and Crown TCMs

Mark Harborow: David Jones QC indicated previously that given the requirements of the Criminal Disclosure Act, the proposed amendment is not a big issue. Formal statements are filed well in advance anyway. Lynn Hughes: happens most of the time anyway. Not a big issue for defence counsel.

Action: France J to advance consultation with Law Society, Police, Criminal Bar Association etc.

(i) Action point 8(c): filing of documents by email

Megan Anderson: have talked to Manukau District Court directly. Lynn Hughes: Auckland District Court has improved a lot but Manukau District Court is still problematic.

Action: members to contact Megan Anderson directly if problems continue.

(j) Action point 8(d): judicial CPA training

Action: France J to refer to Heads of Bench.

(k) Action point 8(f): comments on CPA from Ron Mansfield

Megan Anderson: MoJ IT officers are working on a Notice of Response form to go on the website. It should be ready within the next month.

Action: Megan Anderson to circulate Notice of Response form to Sub-Committee before it is put on the website.

(l) Action point 9: draft rules ready for consideration by Rules Committee

Action: France J to ask Asher J to put draft on the agenda for the next Rules Committee meeting.

(m) Action point 10(a): service of documents on prisoners

France J: there is no clear foundation for raising the issue formally at this stage. The evidence is too anecdotal.

Action: France J to monitor the situation as List Judge. Megan Anderson to discuss as part of MoJ's ongoing relationship with Corrections.

(n) Action point 10(d): sensitive evidence

Megan Anderson: electronic exhibits register requires exhibits to be signed in and signed out. Generally sensitive evidence is shrink-wrapped and marked "not to be opened except on the order of the Judge".

Action: Megan Anderson to circulate internal protocols on exhibit handling to the Sub-Committee.

(o) Action point 11: information for unrepresented defendants

France J: have received some examples of material that Judges give to unrepresented defendants. Many judges use the standard document from Bench Book. New document should be produced for inclusion in the Bench Book and Court staff should be made aware of its existence. Judge Davidson: have collected some materials from District Court Judges.

Action: Members to send any useful materials they encounter to Matt Dodd. Matt Dodd to review material to identify core information and produce a draft document.

4. Access to documents for domestic violence and restorative justice providers

Ms Justine Falconer attended from Provider and Community Services at the Ministry of Justice. She presented a proposal that would give domestic violence programme and restorative justice providers easier access to court documents. The proposal would require the rules to be amended, to contain a presumption that certain documents would be made routinely available to those providers, unless a Judge directs otherwise.

For domestic violence programme providers, the documents sought would be: the charging document, the defendant's contact details, the summary of facts and conviction history of the defendant, and any protection orders or bail decisions. For restorative justice providers, the documents sought would be: the summary of facts and defendant's criminal conviction history. Those documents would be used to assist in risk assessment and defendants' suitability for programmes.

When s 24A of the Sentencing Act 2002 comes into force, the number of adjournments to enable restorative justice conferences to take place will increase. That will increase the number of documents requested by restorative justice providers. The Ministry expects there will be 10,000 to 12,000 requests for documents from providers per year.

Lynn Hughes: the current practice is that restorative justice providers are provided the summary of facts without any formal application. Megan Anderson: that informal practice used to occur because there were no access to documents rules in the summary jurisdiction. With the abolition of the summary jurisdiction Court staff have been instructed that they must follow the formal process in the rules. Justine Falconer: the former Domestic Violence (Programmes) Regulations 1996 contained an information sharing provision, but that appears to have been inadvertently repealed in 2014.

The Committee expressed reservations about the adequacy of the proposal and the need for such wide access to confidential documents.

Action: France J to write to MoJ outlining the Sub-Committee's response to the proposal. Megan Anderson to circulate a copy of the proposed s 24A of the Sentencing Act 2002 to the Sub-Committee.

5. Reg 6, Crown Prosecution Regulations: time requirement for Crown notices to add/amend/withdraw

France J: this proposed amendment is motivated by two concerns:

(1) change notices coming in close to case review cannot be processed promptly because the process is manual rather than electronic, as originally envisaged; and
(2) the more serious problem of a lack of clarity as to the charges the defendant is facing at case review.

France J wrote to Crown Law, and he and Judge Davidson then met with Crown Law personnel. Crown Law had consulted with Crown Solicitors, and suggested an alternative solution. It was proposed to create a new Crown Charge Notice which would include a summary that makes clear exactly what charges are before the Court and which charges have been amended. A draft from was provided for discussion purposes.

Judge Davidson: proposal is a very good one. Suggest that on the right hand side of the form, in the withdrawn charges section, there be a bold "**WITHDRAWN**" notice. That will make the status of charges absolutely clear. The advantage in this proposal is that it can be done without a law change or rules change, is clear and remedies the primary concern. France J: it is important that the date remains prominent on the front page. While manual entering of change notices will still take some time, the significance of that delay is diminished by the fact that a clear list of charges will now be available to participants on the day. Crown Law expects it to take one to two weeks to finalise the form.

Mark Harborow: is this an issue in non-schedule jury trials? Judge Davidson: no, the required information is captured in the TCMs.

Agreed: proposal to amend timeframes in regulations parked in order to assess if new form solves the issue.
Action: France J to write to Crown Law asking for minor amendments to be made and for the form to be introduced as soon as possible.

6. Rules Committee's proposed amendments to the Access to Court Documents rules

(a) Is amendment desirable?

Mark Harborow: not clear why aligning civil and criminal rules is desirable. Megan Anderson: definition of "document" in proposed amendments is inconsistent with the definition in the CPA. The volume of documents accessed under the criminal rules is also much larger. If all access requests had to be referred to Judges, the increase in workload would be concerning. Judge Davidson: we spent a lot of time converting the 2009 access rules to the access part of the 2012 rules. They appear to be working. Megan Anderson: the purpose of amending the criminal rules is to align them with the civil rules. But the proposed amendments would in some instances simply introduce new inconsistencies.

(b) Specific concerns identified with the proposed amendments

(i) Rule 6A.1

France J: the definitions of "document" in r 6A.1, paras (a) and (b), are new and different to the definition in the CPA. This should be avoided.

(ii) Rule 6A.8(2)

France J: The governing principles in r 6A.8(2) remove the existing distinction between stages in the proceeding. They are replaced by a new set of principles identifying priorities for each stage. Those principles are not easy to understand and are likely to be difficult to apply – particularly 6A.8(2)(d).

More specifically r 6A.8(2)(c) reverses the normal approach whereby privacy interests are thought to diminish as time passes. The Courts regularly get requests to search for material that is 40 or 50 years old. Because it is less "raw" the Courts are more likely to release it.

Megan Anderson: it would be helpful to get the views of the Privacy Commissioner on the matter.

(iii) Rule 6A.6

France J: this rule largely repeats existing rr 6.6 and 6.7. There are some problems with those rules.

In high-profile cases, there needs to be general discretion for the Judge to suspend the prescribed timeframes for responding to access requests *during the trial*, and the requirement that requests be served on counsel. The Judge is busy trying to run a complex trial and is not always able to respond within time. The current regime is very frustrating when there are 20 or 30 media representatives making requests. In practice, judges often have counsel agree to deviate from the rules. A rule allowing the Judge to vary or suspend the specified timeframes would be helpful.

In addition, the bulk of requests for documents *after trial* are in criminal cases. The three day response period is unworkable. It can take weeks for counsel to find and contact their former clients and other interested persons such as witnesses. A better rule would be one that gave the Judge discretion to contact the parties only where it was thought necessary.

Judge Davidson: while it might be possible to extend time under r 1.7, there is a lot to be said for inserting a particular rule that gives the Judge the power to depart from the specified timeframes. Mark Harborow: the opt-out provision in r 2.11(3) might serve as a model.

(iv) Decision maker

France J: the existing rules allow for some decisions to be made by a Registrar. The new scheme requires every decision to be made by a Judge. This may be too onerous and seems unnecessary for routine matters. There are indications that the impending increase in the use of restorative justice will significantly increase the number of applications for documents.

Agreed: the Sub-Committee is not convinced that there is a need to align the civil and criminal access to document rules, although ultimately this is a decision for the Rules Committee. A substantial amount of work went into drafting the existing rules. A desire for consistency with the civil rules may not be of sufficient importance to merit changing them. If the amendments are to proceed, then changes as outlined above are recommended.

Action: France J to write to Asher J conveying the above.

7. Draft Interpreters in Criminal Proceedings rules

France J: Bill Moore from PCO is of the view that these rules have to be made under the Evidence Act 2006 as Evidence Regulations. Megan Anderson: PCO has the final say on which provision should be used. France J: if not in the Criminal Procedure Rules, then they could go in the Evidence Regulations or a practice note. We are not getting rid of all practice notes. Mark Harborow: it would still be better to have them in rules or regulations because they are easier to find.

Agreed: the Sub-Committee accepts PCO's advice that the interpreters rules cannot be included in the Criminal Procedure Rules.
Action: Megan Anderson to refer draft to MoJ for consideration of whether it is appropriate to include them in the Evidence Regulations. France J to write to Bill Moore explaining that course of action.

8. Draft Sentencing rules

France J to refer all proposed changes below to Judge Doogue and Winkelmann J.

(a) Rule 6B.2(1)

France J: r 6B.2(1)(a) should be removed. The requirement that the defendant be provided with a summary of facts after being charged is really to do with disclosure. Judge Davidson: existing practice note ties requirement to furnish a statement of fact to a defendant signalling their intention to plead guilty.

Action: rule 6B.2(1) should be replaced with wording closer to that of the practice note. For example: "If a summary of facts has not already been provided, the prosecution must provide the defendant with a copy of the summary of facts before the defendant enters a plea of guilty".

(b) Rule 6B.2(3)

Mark Harborow: rule 6B.2(2) requires the defendant to state whether the summary of facts is accepted. Often counsel will make clear that the summary of facts is not accepted. It would be helpful to require counsel to tell the Judge of the nature of the dispute and why the summary is not accepted. Judge Davidson: that could be done by amending r 6B.2(3) to say "If the defendant does not accept the summary of facts the defendant … *must identify the facts disputed and the defendant and the prosecution* … must try to resolve dispute". It is valuable to note the dispute early so the Judge can identify disputes that are not going to change the outcome and advise accordingly.

Action: r 6B.2(3) should be amended to say "If the defendant does not accept the summary of facts the defendant … must identify the facts disputed and the defendant and the prosecution … must try to resolve dispute".

(c) Rule 6B.2(4)

Mark Harborow: requirement in r 6B.2(4) that "if the dispute is resolved, prosecution must file an amended summary of facts with the prosecution sentencing memorandum *as soon as practicable after the resolution of the dispute*" imposes a strange timing requirement. It should simply be filed at the same time as the prosecution's sentencing memorandum as required by r 6B.3(1).

Action: r 6B.2(4) should amended by deleting the words "as soon as practicable after the resolution of the dispute".

(d) Rules 6B.2(5), 6B.3(1) and 6B.3(2)

Mark Harborow: rule 6B.2(5) uses the expression "14 days" rather than "10 working days". That should be changed. The phrases "5 whole working days" and "3 whole working days" in r 6B.3(1) and (2) should be changed to "5 working days" and "3 working days".

Action: rules 6B.2(5), 6B.3(1) and 6B.3(2) should be amended as suggested.

(e) Rules 6B.4 and 6B.5

Megan Anderson: rule 6B.4 and 6B.5 require memoranda on assistance to authorities to be placed in a sealed envelope. That ought to make allowances for documents filed electronically. Judge Davidson: documents of that nature ought not to be filed electronically. France J: it is better to have those documents in hard copy. Mark Harborow: should r 6B.4(3) and (4) be repeated in r 6B.5? Judge Davidson: no, what happens to the sealed envelope in those circumstances is covered by submissions "on whether that information should be disclosed to any other person" as required by r 6B.5(1).

Agreed: no change required.

(f) Defendant rather than offender

Lynn Hughes: the words "offender" and "defendant" are used inconsistently. For example rr 6B.3(1),(2) and (3), 6B.4 and 6B.5 all use the wording "offender". The terminology used in the CPA is "defendant".

Action: all references to the word offender in part 6B should be replaced with the word "defendant".

(g) Length of submissions

Mark Harborow: rule 6B.3 is very prescriptive as to what should be contained in sentencing memoranda. There is a risk that junior practitioners will think they have to include everything. A caveat in rr 6B.3(3) and (4) stating "must include… to the extent applicable" would be helpful. Megan Anderson: there is already a qualifier "must include submissions on *all relevant issues*". If the matter is not applicable (eg. home detention is unrealistic) then it will not be relevant. France J: Ritual citation of sentencing principles is undesirable but is hard to avoid because of the requirements of the Sentencing Act. Judge Davidson: there is a public notification aspect to the recitation of sentencing principles that is important. France J: an amendment to rr 6B.3(3) and 6B.3(4) is desirable. The phrasing should be "must include submissions on all relevant issues, including … *to the extent applicable*".

Action: rules 6B.3(3) and 6B.3(4) should be amended to include the phrase "to the extent applicable".

(h) Copies of authorities relied upon

Megan Anderson: rule 6B.3(3)(b) requires the Crown to include "a copy of any decision relied upon that is not a guideline judgment". There are differing views as to the utility of including copies of authorities. Judge Davidson: it is still useful to have copies of all authorities relied upon. The District Court is not overwhelmed by the number of authorities being included.

Agreed: copies of authorities relied upon that are not guideline judgments should still be included.

9. General business

Action: Megan Anderson to send Lynn Hughes a copy of the standard form three strikes warning.

10. Next meeting:

Date:	14 November 2014	Time:	9 am	Venue:	Wellington High Court

Meeting closed at 11 am.

Criminal Rules Sub-Committee

Summary of Action Points: 12 September 2014

Minute Item	Description of Action Point	Responsibility	
3(a)	**Time requirement for Crown notices** • France J to discuss options with Winkelmann J.	*France J*	
3(b)	**Funding for additional member** • Megan Anderson to contact Lynn Hughes directly.	*Megan Anderson*	
3(f)	**Return of amended charges to Youth Court after election of jury trial in the District Court** • France J to write to MoJ and MSD	*France J*	
3(g)	**Report from CMM and TCM working group** • Judge Davidson and Megan Anderson to meet a produce a compromise form for use in a trial within the next few weeks. • Draft to be circulated to Sub-Committee by email before trial.	*Judge Davidson* *Megan Anderson*	
3(h)	**Alignment of time for filing formal statements and Crown TCMs** • France J to advance consultation with Law Society, Police, Criminal Bar Association etc.	*France J*	
3(i)	**Filing of documents by email** • Members to contact Megan Anderson directly if problems continue.	*All members*	
3(j)	**Judicial CPA training** • France J to refer to heads of bench.	*France J*	
3(k)	**Comments on CPA from Ron Mansfield** • Megan Anderson to circulate Notice of Response form to Sub-Committee before it is put on the website.	*Megan Anderson*	
3(l)	**Draft rules ready for consideration by Rules Committee** • France J to ask Asher J to put draft on the agenda for the next Rules Committee meeting.	*France J*	
3(m)	**Service of documents on prisoners** • France J to monitor the situation as List Judge. • Megan Anderson to discuss as part of MoJ's ongoing relationship with Corrections.	*France J* *Megan Anderson*	
3(n)	**Sensitive evidence** • Megan Anderson to circulate internal protocols on exhibit handling to the Sub-Committee.	*Megan Anderson*	
3(o)	**Information for unrepresented defendants** • Members to send any useful materials they encounter to Matt Dodd. • Matt Dodd to review material to identify core information and produce a draft document.	*All members* *Matt Dodd*	
4	**Access to documents for restorative justice and domestic violence providers** • France J to write to MoJ outlining the Sub-Committee's response to the proposal. • Megan Anderson to circulate a copy of s 24A of the Sentencing Act 2002 to the Sub-Committee.	*France J* *Megan Anderson*	

5	**Reg 6, Crown Prosecution Regulations: time requirement for Crown notices to add/amend/withdraw** • France J to write to Crown Law asking for minor amendments to be made and for the form to be introduced as soon as possible.	*Megan Anderson*	
6	**Rules Committee's proposed amendments to the Access to Court Documents rules** • France J to write to Asher J.	*France J*	
7	**Draft Interpreters in Criminal Proceedings rules** • Megan Anderson to refer draft to MoJ for consideration of whether it is appropriate to include them in the Evidence Regulations. • France J to write to Bill Moore explaining that course of action.	*Megan Anderson* *France J*	
8	**Draft Sentencing rules** • France J to refer all proposed changes to Judge Doogue and Winkelmann J.	*France J*	
9	**General business** • Megan Anderson to send Lynn Hughes a copy of the standard form three strikes warning.	*Megan Anderson*	