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

5 May 2015
Criminal Rules Minutes 01/15

Circular 44 of 2015

Minutes of the Criminal Rules Sub-Committee meeting held on 13 March 2015

The meeting was held at the High Court, Wellington, on Friday 13 March at 9 am.

1. Preliminary

In Attendance

Hon Justice Winkelmann, Chief High Court Judge
Hon Justice Simon France, Chair
His Honour Judge Davidson
Mr David Jones QC (by AVL)
Ms Lynn Hughes (by AVL)
Mr Mark Harborow (by AVL)
Ms Megan Anderson

Ms Helen Bennett, Clerk

Apologies

2. Minutes

The Sub-Committee confirmed the minutes of the 14 November 2014 meeting.

3. Matters arising from 14 November 2014 meeting

(a) Action point 3(a): linking reg 6 of the Crown Prosecution Regs and r 4.12

France J: Bill Moore advised that he thinks it can be done without substantive repetition and cross-reference with a small explanatory statement with a detailed description of the time limits. Suggest that France J get back to Bill Moore and ask him come up with the best suggestion he thinks appropriate.

Action: France J to contact Bill Moore for suggestions.

(b) Action point 3(c): return of amended charges to Youth Court after election of jury trial in the District Court

France J: left on the agenda for Ms Anderson to provide update to the Sub-Committee if she has one. Megan Anderson: the policy team at the Ministry of Justice picked it up and has had meetings with Crown and also Principal Youth Court Judge. It is progressing. There is a Bill that should be introduced later this year that used to be called CATES - the Courts and Tribunals Enhanced Services Bill, now called the Courts and Tribunals Modernisation Bill and it still needs to get approval from the Minister to be included. The Bill looks at situations where young people have gone into the adult jurisdiction usually because of an adult co-offender or because it will need a jury trial. Once in the adult jurisdiction the charges against the young person will be reduced or if there is an adult co-offender then there will be a pathway of sending the young person back into the Youth Court jurisdiction. Judge Davidson: the Principal Youth Court Judge will know? Megan Anderson: Yes and if anyone has a question then send an email to her. France J: This matter will now be left off future agendas.

(c) Action point 3(g): report from CMM and TCM working group

Megan Anderson: talked to Court staff and they reported that there has not been a huge increase in compliance. However they are finding the new CMM easier to use. Talked to Judge Keller and he is going to follow up with the other Judges and get their views. Talked to PDS briefly and received more detailed feedback including that the CMM is easier to use and they are happy with it. Asked what Ms Brook thought. Charlotte Brook: Yes the Christchurch Crown also agrees that there is still non-compliance.

Judge Davidson: asked if there was a specific trial period because this is the one thing that will really help. Megan Anderson: yes they started coming back in mid-February. In a few weeks will be back in Court. A lot of counsel are still using the old one because they have it saved and have not transitioned to using the new one. It is intended to be six weeks. Winkelmann J: asked if it was published. Megan Anderson: said it was published in LawTalk. Went to counsel and gave opportunity for feedback.

France J: queried if the Sub-Committee would get formal reports back at the end of the trial period. Charlotte Brook: said the thought was to compile all the feedback together and circulate a report on it to the Sub-Committee and put in the changes to the form. Winkelmann J: queried whether six weeks was a long enough trial period. Suggested making another push because noncompliance issues may be linked to non-use. Charlotte Brook: currently compliance is at 14 per cent. The number one reason by defence counsel was "I forgot". It was not late disclosure or any other reasons. Winkelmann J: there should be a reprimand for non-compliance, i.e. some sort of "three strikes" system. After two strikes counsel would have to go and explain him or herself to list Judge why he or she is disrupting the process of the Court.

France J: next meeting is 29 May and Sub-Committee wants to be in a position to make a decision that it is in a form that is ready to be introduced. Shares Judge Davidson's concern. Judge Davidson: the form is much simpler and user-friendly. Non-compliance has previously been excused for not understanding the form and not asking the right questions. Agreed with Ms Anderson that the Sub-Committee should get the materials collated and distributed. *Future discussion ensued.*

Action: Megan Anderson to provide report by early May to Sub-Committee and report back on trial at next meeting. Lynn Hughes to circulate to PDS and other appropriate parties. Charlotte Brook to circulate to Crown Solicitors.

(d) Action point 3(f): Judicial CPA training

France J: it is more of a District Court matter because it is such a small pool in the High Court who do it. Judge Davidson: for the District Court the best way might be the individual common room training sessions, which is a new method . Winkelmann J: asked if it would be more useful to have it be an IJS webinar so the judges can access it from their own common rooms and have it recorded so it would be ongoing training resource. Judge Davidson: agreed. Winkelmann J: it is a unique way to use as a resource.

Action: Winkelmann J to talk to IJS.

(e) Action point 4: Information for unrepresented defendants

France J: Items 4 and 7 are on the agenda so they can be there for the next meeting as they have not progressed.

Action: keep item on the agenda for France J to address at next meeting.

(f) Action point 5: Amendment of r 5.9 – time for filing the Crown Charge List

France J: there is an issue of amending the time for filing the Crown Charge List under r 5.9. Ms Brook has feedback on that. Charlotte Brook: the Crown wrote to France J and the letter was attached to the agenda that was circulated. The Crown commented on a proposal for a five working day period prior to trial and there is universal support for filing a charge list. A strict "five working day" timeframe may be difficult due to different practices in different regions. One possibility is filing a charge list at or prior to the judicial conference/callover and five days prior to trial in any other case. France J: it does not need more consideration. Will discuss with Bill Moore. Propose to add five working days in the amendment. Judge Davidson: there is varying in regional practice so add "as the Judge directs". Charlotte Brook: there may be situations where require more than five working days.

Action: France J to put proposal to Bill Moore. France J to add to pool of changes.

(g) Action point 7: Access to notes of evidence

Action: keep item on the agenda for France J to address at next meeting.

4. New Crown Charge Notice

Judge Davidson: it is now a lot clearer. Have only had good reports from Judges and staff members. France J: agreed that it looks better. How about in Auckland? Mark Harborow: agreed that it has improved. It is probably one of the best changes they have had France J: let it roll for awhile. If something emerges later then the Sub-Committee will deal with it then.

5. Draft sentencing rules

France J: attached to the agenda is a document prepared by Ms Anderson. The document is the one that has been sent to Bill Moore asking him to translate it into new rules. Once the Sub-Committee gets it back then France J will sent it to the Chief High Court Judge and the Chief District Court Judge since it is a Practice Note that is being taken over. It accurately reflects what was previously discussed but if anyone noticed anything or has issues then please feel free to raise them.

David Jones QC: 6B.1(4) –after the guilty plea, what is the reference to the second indication? Judge Davidson: it is what relevance disputed facts have. Winkelmann J: a judge may find the disputed facts significant or not. France J: in practice if the person raises it at the time of the plea, nine times out of 10 a judge will give a blunt observation of its importance. However there is a formal way to seek weight under the Sentencing Act by seeking a sentencing indication. David Jones: the Judge isn't going to necessarily be the sentencing Judge. France J: no. But it is a good indication. David Jones: it is a robust indication. 6B.4(1) is obligatory "must contain". No issue with that at this stage.

6B.4(4)(a)

David Jones*:* (a) includes "particular relevance", would it be better to say "relied upon by the Crown"? It is taking certain principles as read. Suggested that the Crown identifies the purposes and principles it is relying on and then the defence is required to address those principles and say which ones they accept apply and which ones they do not. The Court is then left with disputed principles or principles at issue. For "particular relevance", it is more a term of art. It is more saying what the specific features the Crown is saying are paramount in this case. The Judge is thinking about purposes and principles and identifying which are at issue.

Winkelmann J: concerned about going back to the protocol and recitations. It is to get the defence to narrow. It also says that defence does not respond in non-engaging way and the defence says it accepts those or it does not. Asked shouldn't it really change (4)(a) and whether defence accepts what the prosecutor says.

Judge Davidson: the Sub-Committee discussed at a previous meeting and narrowed it to this phraseology.

France J: Narrowed to phraseology on the basis that (1) it was logged in the Practice Note and (2) there was a concern more in the District Court where they realistically do all the sentencing it was useful for the sentencing Judge to have it is modelled on the Practice Note and is useful for a sentencing judge. The question really was whether particular relevance could be worded more clearly. Previous Sub-Committee discussion was about keeping (1)(a) at all. Discussion was the concern about the length of these documents and routines. The Sub-Committee made a call that it needed to leave it in there and trust counsel's better judgment as they get more experienced. It is to get the Crown to identify and express more clearly.

6B.4(1)

David Jones: pointed out a typo in (1)(e) "an" before sentence. Subparagraph 4 should include mandatory and cite exactly what the Crown should put. Should say something that the defence must respond to the Crown memorandum and say what principles and purposes it accepts. There should be something saying the defence must respond and identify any others. Winkelmann J: can pick up some ideas from the Civil Rules. It is simply to highlight the differences. Charlotte Brook: asked if it would be simpler to have responses to each point in the Crown memorandum. France J: it will involve tweaking the flipside for defendant to emphasise need for responsiveness to what has been advanced rather than just as a mirror without engagement. The Sub-Committee can look at that from a wording viewpoint. Not only subparts but one of the issues was that by putting in subpart one separately makes it sound like it applies to all sentencings.

6B.4(4)(c)

David Jones: concerned with "any applicable aggravating factors". Because the rule says "must", it might require disclosure of privileged information. Winkelmann J: the defence is not required to

identify aggravating factors, but defence is to respond to what the Crown says are aggravating factors. This is going to change if it is accepted that the defence is to be responding. David Jones: not just to be a replication.

6B.4(4)(f), (g), (h) and (i)

David Jones: (f), (g), (h) are the same basis as Crown. Concern with (i) – "any relevant matter". "And any other relevant matter", defence counsel may know something as defence counsel that he or she necessarily does not want to raise. Charlotte Brooke: any other matter that relates to the sentencing charge. France J: the Sub-Committee will look at that.

Lynn Hughes: (f) – restorative justice and with legislative change of mandatory referral and whether it has been considered. "Mandatory" change to referral. France J: the Sub-Committee looked at it and thought that it was consistent. It is indicating the defendant's viewpoint. Megan Anderson: one thing that did come out of discussions was whether when the defendant was indicating a guilty plea if defendant's views recorded on the memorandum.

6B.5(1)(a)

Mark Harborow: concern over the phraseology of it. It might sound a bit easier to roll of the tongue to say that prosecutor's submissions to be heard first followed by defendant. Wondered about a reply. Sometimes the Crown seeks a reply. France J: asked if Mr Harborow was ever granted a reply. Mark Harborow: about 50 per cent of the time. Judge Davidson: it is a thing that crops up in Court. It would be overly prescriptive to put that in. Charlotte Brook: if the prosecution is going to seek a reply, it generally is the police who seeks reply and indicates this at beginning of submissions. Winkelmann J: could include "unless the Court directs otherwise". David Jones: Perhaps just insert in 6B.5(1)(a), "the normal order", that might take away concerns about the law. Winkelmann J: no. France J: said they should wait to see what Bill Moore says.

6B.6

Charlotte Brook: noticed "must" whereas the Practicing Note says "should". Was unsure whether this is a deliberate change. Sometimes defendants do not want the lawyer to know about his or her help to the police. Winkelmann J: thought "should" is fine, as "must" is compulsory word. France J: said he knows that happens quite a bit. Winkelmann J: "is to" is fine, but "must" is unnecessary. France J: said he would mention these to Bill Moore and monitor it and see what he says.

6B.6(4)

David Jones: 6B.6(4) – it may be obvious but there may be confusion over "the sealed envelope". Winkelmann J: this should not be a problem as usually competent people reading these rules. David Jones: does it have to be resealed or what happens? France J: Sub-Committee can look at taking that out.

Disputed facts procedure

Charlotte Brook: concern with disputed facts procedure that the Crown set out in a letter to Heads of Benches. The main concern that at time a defendant pleads guilty the prosecutor is not always there and sometimes it is an alternative police prosecutor present who is agreeing to the summary of facts. The Crown has a proposal to address those circumstances so when the Crown subsequently receives the file and takes a different view, then summary of facts can be amended. The police often prepare summaries of facts but then the Crown prosecutor will find bits more relevant. It can lose time on the

procedure if Crown receives it later and takes a different view. The Crown position is that it is the charge not summary of facts that person is pleading to.

France J: That is a more fundamental issue. The Sub-Committee wants at the time police take the guilty plea, there needs to be clear record of what the person understood they are pleading to. If the Crown receives it and they want to amend it, then say there are aggravating features. And if the defendant says that he or she won't accept the facts and would not have pleaded guilty to them, it might raise fundamental issue. Did not think Ms Brook's proposal was realistic.

Judge Davidson: the summary of facts operates on the principle that they are the core facts make out the offence. Once the Crown takes over the file and there are facts that appear that make it worse then that goes into the sentencing memorandum. It does not disturb the core allegations.

Winkelmann J: The Rules are designed to let people understand what the nature of the charges is and goal for people to have a clear idea of what they are pleading guilty to.

Lynn Hughes: usually senior police prosecutors that being dealt with and are more aware of the issues Ms Brook is talking about and are more in tune with the issues. It is a small pool that Ms Brook is referring to.

France J: Ms Brook should write a memorandum to the Sub-Committee about concerns and discussion to take place. If it can be accommodated then the Sub-Committee can think more about how it can be included without disturbing what is already in place. The concerns should be in writing so they can be more clearly understood by the Sub-Committee. Charlotte Brook: said she can do this within two weeks.

Action: Charlotte Brook to write memorandum to the Sub-Committee about concerns regarding ability to amend summaries of facts after a guilty plea has been entered.

6. Expert witness rules

France J: this is a project for the Sub-Committee for the year. It is more common for expert witnesses to refer to the High Court Rules. The proposal from Winkelmann J is right that a modified version should be in the Criminal Rules. Megan Anderson: Ministry is looking at a review of the Evidence Act and looking at introducing a Bill to set out changes to the Evidence Act. Interpreters may have taken a back seat.

7. General business

France J: publication of the Committee in *NZLawyer* and will appear in *LawTalk*. It appears to convey a message of inviting feedback so members of the Sub-Committee may start to receive feedback from members of the profession. Winkelmann J: the Sub-Committee should carry on engaging with the profession.

Judge Davidson: asked Ms Anderson if interpreters rule was outside the High Court Rules and whether it has been picked up by Evidence Act Amendments. Megan Anderson: yes, but it might be that some of it is appropriate for Criminal Procedure Rules.

Judge Davidson: also asked Ms Anderson about question of ethnicity on charging documents in the Youth Court and the appointment of lay advocates. Megan Anderson: yes, the information comes from the police. Sometimes comes from inquiry of young people. Youth Court Judges can find out what is being put on charging documents. We have had discussions in the past. We do get the

information from the backdoor. Judge Davidson: so you will go back directly to the Principal Youth Court Judge? Megan Anderson: yes.

8. Next meeting:

Date:	29 May 2015	Time:	9 am	Venue:	Wellington High Court

Meeting closed at 9.55 am.

Criminal Rules Sub-Committee

Summary of Action Points: 14 November 2014

Minute Item	Description of Action Point	Responsibility	
3(a)	**Linking reg 6 of the Crown Prosecution Regs and r 4.12** • France J to contact Bill Moore for suggestions.	*France J*	
3(b)	**Return of amended charges to Youth Court after election of jury trial in the District Court** • Megan Anderson to report back at next meeting.	*Megan Anderson*	
3(c)	**Report from CMM and TCM working group** • Megan Anderson to provide report by early May to Sub-Committee and report back on trial at next meeting. • Lynn Hughes to circulate to PDS and other appropriate parties. • Charlotte Brook to circulate to Crown Solicitors.	*Megan Anderson* *Lynn Hughes* *Charlotte Brook*	
3(d)	**Judicial CPA training** • Winkelmann J to talk to IJS.	*Winkelmann J*	
3(e)	**Information for unrepresented defendants** • Keep on the agenda until next meeting.	*France J*	
3(f)	**Amendment of r 5.9 – time for filing the Crown Charge List** • Action: France J to put proposal to Bill Moore. • France J to add to pool of changes.	*France J*	
3(g)	**Access to notes of evidence** • Keep on the agenda until next meeting.	*France J*	
6	**Draft sentencing rules** • France J to discuss changes to wording with Bill Moore. • Charlotte Brook to write memorandum to the Sub-Committee about concerns regarding ability to amend summary of facts after a guilty plea has been entered	*France J* *Charlotte Brook*	