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

26 February 2014
Criminal Rules Minutes 01/14

Circular 17 of 2014

Minutes of the Criminal Rules Sub-Committee meeting held on 21 February 2014

The meeting was held at the High Court, Wellington, on Friday 21 February 2014 at 9 am.

1. Preliminary

In Attendance

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

Mr Matt Dodd, Clerk

2. Feedback from Mr Mark Harborow

Mr Mark Harborow sought feedback from the Crown Solicitors' Network, Police and the Departmental Prosecutors Forum on the operation of the rules. The following issues were raised:

(a) Rule 2.8(5)(c)

Departments want to have process servers generally approved, rather than approved on each occasion they are used. The wording of r 2.8(5)(c) "approved... in a particular case" is ambiguous.

Young J: Inefficient and unnecessary to require constant re-approval. Judge Davidson: permanent approval was possible under the Summary Proceedings Act.

Action: agreed r 2.8(5) should be amended. Existing para (c) should enable particular approval in a particular case. Shift to para (d). Insert new para (c) enabling service by any person generally approved.

(b) Case management memoranda forms

No particular form is stipulated for in the Act, or Rules. The Ministry have produced a CMM form which can be accessed and completed electronically. There are problems with filling out the Ministry form electronically. Defence counsel sometimes produce their own CMM form instead of using the standard Ministry form. Police prosecutors are reluctant to sign non-standard CMM forms because it is not clear whether they cover all the matters required by the rules.

Mark Harborow: content of the Ministry form is appropriate but it is difficult to fill out electronically. Judge Davidson: Non-standard forms being used in Christchurch. Ministry form not user-friendly. Information electronically populated on the Ministry form will not display when printed. Must simplify the form. Young J: form difficult to read for judges, and overly long.

Action: agreed proliferation of forms undesirable. Rules should mandate the use of standard forms for procedural management of cases. Existing Ministry form to be redesigned in consultation with prosecution and defence counsel.

(c) Notice under s 138 of the Criminal Procedure Act 2011

Section 138 deals with multiple charges or multiple defendants being tried together. Prosecutors "may notify the court... proposing that" charges be heard together. Typically notice is given electronically from NIA (police) to CMS (Ministry). No separate written notice is given, nor is the matter necessarily recorded on the file. This causes problems when files are transferred between police and the Crown. It does not provide for notification of defendants or counsel affected by the notice.

Mark Harborow: this is a very significant issue in Auckland. Crown have no access to NIA or CMS and often there is no record on Crown or court file. Appears police simply select multiple CRNs in NIA and forward to CMS, which becomes one CRI number automatically. Judge Davidson: Appears electronic notification itself effects the amalgamation. CMS updated, assigned case officer made aware, but no-one else. Young J: s 138 odd because although it says "proposing" to join, it actually means "has joined". Important that all defendants notified by service.

Action: Agreed a rule should be drafted making explicit that rr 2.4 and 2.5 apply to s 138 and therefore notice must be served. Police to be informed that they may be challenged as to when service occurred, so they must keep a record on file of when notice is service.

(d) Young persons' ethnicity on charging documents

Youth Court registrars rely on ethnicity listed on charging documents to assist with appointment of appropriate Youth Advocates. Ethnicity is no longer listed under the CP Act. Section 163(2) of the Children Young Persons and Their Families Act 1989 requires that Advocates appointed have an appropriate cultural background so far as practicable.

Judge Davidson: in the past the ethnicity listed was often incorrect. Based on what defendant tells police. Moreover ethnicity not useful apart from in Youth Court. David Jones QC: CP Act, s 16(2)(f) compels inclusion of matters specified in the rules. Could insert a rule requiring ethnicity listed only for young people.

Action: Young J to consult Judge Becroft on proposed modification to the rules.

(e) Timing of formal statements and trial callover memoranda

Formal statements are due 25 working days before callover (r 5.5) and prosecution trial callover memoranda (TCM) due 15 working days before callover (r 5.6). Time between case review hearing and callover is no longer than 40 working days (r 4.3).

Mark Harborow: The Auckland District Court Registry often truncates the 40 day period, making the deadlines impossibly tight. This is a significant issue in category 3 cases where defendant elects trial by jury and as a consequence the file shifts from police to Crown. Crown frequently has to make an application for extension under r 1.7. In addition, having formal statements and TCM due separately creates unnecessary duplication because TCM must detail portions of written statements upon which prosecution does not intend to rely (r 5.8(h)). Judge Davidson: MoU with police that file will be transferred to Crown within 5 days generally observed. Young J: concerned to hear Registry giving less than 40 days. That was not the intention of r 4.3. David Jones QC: Key issue is communication of what Crown intends to lead from formal statements.

Action: suggestion is that time for filing formal statements should be aligned with time for filing TCM at either 15 or 20 days before callover. Before issue is taken further, David Jones QC to get feedback on proposal from defence bar. District Court through Judge Davidson to consider if general instruction should be given to Court staff that trial callover should be 40 days from CRH.

(f) Inclusion of summary of facts with case management memoranda

It is not currently mandatory for a summary of facts (SoF) to be included with case management memoranda. Having a SoF before the court is helpful at case review hearings.

Judge Davidson: In Wellington police do so already out of courtesy. David Jones QC: It seems clear cut that this should be compulsory.

Action: Insert new para (i) into r 4.8(1) requiring a SoF to be included in case management memoranda.

3. Ministry of Justice support for the Committee

From the Committee's viewpoint only need ad hoc support from the Ministry. Ministry representatives to be invited when necessary. However as rules have operational support implications for the Ministry, need to discuss with Ministry what engagement they wish to have.

4. Conversion of practice notes

(a) Is it desirable to convert all practice notes to rules?

Winkelmann J: rules designed for certainty and accessibility. Practice notes provide neither and can stray into areas we shouldn't be regulating. The discipline imposed by the formulation of rules is salutary. David Jones QC: rules take a long time to draft and amend, what if urgently need to modify? Would be easier to have practice notes. Winkelmann J: the experience has been that the hypothetical flexibility of practice notes has never needed to be used. Judge Davidson: practice notes only honoured in the breach. Accessibility desirable. Young J: May still need to be some practice notes. But the default position is that rules should be used wherever possible. Winkelmann J: some informational material that is not suitable to be included in rules could simply be posted on the Courts of New Zealand website.

Agreed: in principle, rules rather than practice notes, should be used wherever possible.

(b) Practice notes to be converted

The Sub-Committee reviewed a draft conversion to rules of the sentencing and interpreting in criminal proceedings practice notes. It also reviewed all existing practice notes.

Agreed: some practice notes should be converted to rules, some kept, and others revoked.

Action: *Young J to draft a letter to the Chief Justice requesting a statement be issued to the effect that the relevant practice notes are of no effect (avoid "revocation") and will be incorporated into the rules. Young J to publish an article in professional publications explaining the changes.*

The table below reflects the proposed course of action.

Practice note	**Agreed action**	**Comments**
Sentencing - HCPN 2014/1	Convert to rules	Judge Davidson: Chief District Court Judge agrees should be in rules.
Draft note – Interpreting in criminal proceedings	Convert to rules	Winkelmann J: At 1.1 of draft rules, change to "must be able to be recorded". Technology may enable use of chuchotage.
PN1 – Use of hypothetical questions in cross-examination	Revoke	Superseded.
PN2 – Notes of evidence – official record	Revoke (but check for matters to preserve in rules)	Superseded.
PN3 – Form of indictment – particulars of sexual offending	Revoke	Superseded.
PN4 – Criminal jury trials caseflow management High Court	Revoke	
PN5 – High Court bail applications and appeals	Revoke (but check for matters to preserve in rules)	
PN6 – Sexual offences involving child complainants and child defendants	Revoke	Odd subject matter for a practice note.
PN7 – Sentencing	Revoke	Superseded by HCPN 2014/1.
PN8 – Criminal appeals	Leave notice of revocation	
PN9 – Bail practice note	Revoke (but check for matters to preserve in rules)	
PN10 – Civil caseflow management	Leave notice of revocation	
PN 11 – Criminal Appeals to the High Court	Revoke (but check for matters to preserve in rules)	Superseded.
PN12 – Supreme Court	Write to the Chief Justice advising should be revoked	Superseded by Supreme Court Rules 2004.
PN13 – Practice note on police questioning (s 30(6) Evidence Act 2006)	Retain	Statutorily required.

PN14 – Pre-trial applications in criminal jury cases	Revoke (but check for matters to preserve in rules)	
PN15 – District Court criminal jury trials	Revoke (but check for matters to preserve in rules)	
PN16 – Supreme Court pre-trial appeals	Write to Chief Justice and discuss with Ministry	
PN17 – Committal in District Court	Revoke	
PN18 – Committal in the Youth Court	Revoke	
PN19 – Counsel dress in District Court jury trials	Refer to Chief District Court Judge	David Jones QC: May need to retain. Still some confusion about when gowns to be worn.
PN – Preliminary Hearings	Refer to Chief District Court Judge	
PN – Domestic Violence Prosecutions	Refer to Chief District Court Judge	

5. Areas for expansion of the rules

The Committee reviewed a paper on areas into which the rules might expand by reference to the criminal rules in England and South Australia. The paragraph numbers in the list below are references to paragraphs of the discussion document.

(a) [11] Formal designation of case officers
Agreed: unnecessary as registry staff assign themselves.

(b) [13] Obligations on prison managers to pass on documents
UK rules require mail to be promptly forwarded to prisoner. No explicit obligation to deliver past prison manager in NZ.

Young J: this is a common issue. David Jones QC: takes up to 1 week for prisoners to receive a letter. Particular issue with Serco remand prison in Auckland. Also problems because visiting time restricted to afternoon only, resulting in a logjam of lawyers and meetings of only 10 to 15 minutes.

Action: Matt Dodd to examine Corrections Regulations and Act. David Jones QC to email Young J detailing issues. Young J to raise issue with Criminal Practice Committee.

(c) [17] Access to transcripts and FTR recordings by parties

Action: flagged for work in future. Matt Dodd to investigate case law.

(d) [23] Inclusion of media guidelines in rules

Young J: Asher J and In-Court Media Coverage group are reviewing.

Action: Sub-Committee to await outcome of review. Asher J should be advised of this issue.

(e) [27] matters for inclusion in bail applications and opposition forms

Action: flagged for work in future.

(f) [33] rules for young persons who self-represent outside Youth Court
UK rules deal with this matter. New Zealand rules do not.

Action: Young J to refer to Judge Becroft.

(g) [41] expert evidence in criminal proceedings

Action: flagged for work in future.

(h) [55] contempt

Winkelmann J: Law Commission review of contempt in progress.

Agreed: Sub-Committee to await outcome of review.

(i) [67] AVL and private communications with counsel
The South Australian rules mandate the availability of a private telephone link for counsel to obtain further instructions from the defendant if necessary. New Zealand rules do not.

Action: *Matt Dodd to investigate whether adequately covered by Evidence Act.*

(j) [69] nominated solicitor on record

Agreed: not necessary in New Zealand.

(k) [73] sensitive evidence
South Australian rules prescribe strict procedures for dealing with child pornography evidence. New Zealand rules do not.

Judge Davidson: commonly causes problems when defence want to view material. Winkelmann J: also need to look at rules for sensitive state security evidence and evidence relating to assistance to authorities.

Action: flagged for work in future. Matt Dodd to investigate Evidence Regulations.

(l) [79] payment for photocopying of court documents

Action: flagged for work in future.

(m) [82] rules dealing with use of electronic communication devices in court

Agreed: Sub-Committee to await outcome of In-Court Media Guidelines review.

6. General Business

(a) Who is responsible for drafting new rules?

Winkelmann J: should go directly to PCO with drafting instructions. Young J: should then approach Rules Committee with draft rule and rationale to approve.

Action: discuss direct contact with PCO with Chair of Rules Committee.

(b) Publicity

David Jones QC: have not formally sought input from Criminal Bar Association because of decision not to publicise at last meeting.

Action: David Jones QC to contact Criminal Bar Association. Young J to contact New Zealand Law Society re publicity for the Committee and feedback.

(c) Length of meetings

Agreed: meetings should last a maximum of two hours.

(d) Feedback from profession collected by David Jones QC

(i) Time between first and second appearance too short.
(ii) Judges failing to review memoranda before callover.
(iii) Auckland District Court no longer providing firm trial dates, nor prioritising sex cases.

Winkelmann J: Act's theoretical underpinnings are that early pleas important. If guilty, you know you are, so can plead. David Jones QC: potential issue with guilty plea discounts where plea not entered at first or second appearance because of inadequate information. Judge Davidson: issue does not arise in Wellington. If defendant has not entered plea by third appearance, deem as not guilty, and note on file that full credit for plea should still be available.

Action: David Jones QC to email feedback to Matt Dodd so Young J can raise with the Criminal Practice Committee.

(e) Wording of s 88 of the CP Act

Judge Davidson: section 88(2)(d) requires defence to include "the number of witnesses proposed to be called" in callover memoranda. Should amend to reflect no obligation to disclose who witnesses will be. David Jones QC: appropriate to include the number of witnesses only, for scheduling purposes, but not their identities.

Meeting closed at 11.05 am.