



**Te Tari Ture  
o te Karauna**  
Crown Law

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## Appeals

## Ngā pira

*As at 1 January 2025*

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## Summary | Te whakarāpopotanga

1. Prosecutors should come to appeals with an open mind. If there is a responsible basis for defending a decision, the prosecutor should do so.
2. The Solicitor-General's consent is required for a prosecution appeal. The ultimate question for the Solicitor General will be whether the proposed appeal is in the public interest. The factors relevant to that question will depend on the decision the prosecutor seeks to appeal.
3. The appendices to this guideline contain process guidance for prosecuting agencies and Crown Solicitors when requesting consent for an appeal.

## Introduction | Ngā kupu whakataki

4. Defendants have a right of appeal against various judicial decisions in criminal proceedings, as well as against their conviction and/or sentence. The prosecutor has a more limited right of appeal against certain decisions.

## Scope | Te korahi

5. This guideline sets out the Solicitor-General's expectations of prosecutors when responding to criminal appeals. It also provides substantive and procedural guidance for bringing criminal appeals.
6. This guideline does not cover other challenges to decisions where there is no jurisdiction to appeal or an appeal is otherwise not appropriate. If a prosecuting agency continues to have significant concerns about the impact of such a decision, prosecuting agencies may wish to contact Crown Law to discuss the possibility of an application for judicial review or use of the Solicitor-General's reference procedure.<sup>1</sup>

## Glossary | Kuputaka

7. In this guideline:
  - 7.1 A *decision* is a decision of a court, tribunal or jury, including a verdict, which is either under appeal or sought to be appealed.
  - 7.2 The *prosecutor* is the lawyer acting on the appeal for the prosecuting agency (in respect of appeals against decisions made in non-Crown prosecutions) or the Solicitor-General (in respect of appeals in Crown prosecutions).
  - 7.3 A *defence appeal* is an appeal brought by the defendant.
  - 7.4 A *prosecution appeal* is an appeal brought by the prosecutor.
  - 7.5 A *specified offence* is an offence specified in s 29 of the Victims' Rights Act 2002.

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<sup>1</sup> Criminal Procedure Act 2011, s 313.

## Guideline | Te aratohu

### Representation

8. In a non-Crown prosecution, if the prosecuting agency is the New Zealand Police or a government department:
  - 8.1 In both prosecution and defence appeals to the District Court, the prosecuting agency may choose to conduct the appeal itself or to instruct the local Crown Solicitor at the agency's cost.
  - 8.2 Defence appeals, and appeals brought by Police, to the High Court are conducted by the local Crown Solicitor, and funded by Crown Law from the Crown Solicitor's annual fee.
  - 8.3 Prosecution appeals to the High Court, other than those brought by Police, are conducted by the local Crown Solicitor, on instructions from the prosecuting agency and at the agency's cost.<sup>2</sup>
9. If the prosecuting agency in a non-Crown prosecution is not Police or a government department, the prosecuting agency is responsible for arranging and funding representation for the appeal.
10. All defence and prosecution appeals against decisions made in Crown prosecutions are conducted and funded by Crown Law.

### Defence appeals

11. The starting point is the decision under appeal. The appeal prosecutor (whether or not they were the trial prosecutor) should assess each decision with an open mind. If there is a responsible basis for defending a decision, the prosecutor should usually put that case before the court in the public interest. In some cases, it will be necessary to acknowledge or articulate arguments against the decision, while still defending the result. The fact an appeal is subsequently allowed does not necessarily mean it should not have been opposed. The court benefits from hearing competing arguments when making decisions.

### *Victims and trial prosecutors*

12. Prosecutors should be mindful of the rights and interests of victims and their whānau. They should also bear in mind that trial prosecutors will be interested in the progress of appeals and may be able to provide relevant information. Nevertheless, prosecutors should exercise independent judgement when conducting appeals.

### *Concessions*

13. Prosecutors should review decisions as early as possible to assess the merits of the appeal. They should test the issue: what can properly be said in answer to it? How significant is the issue in the context of the appeal as a whole?

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<sup>2</sup> The applicable fees are set out in the Terms of Office for Crown Solicitors.

14. Whether to allow an appeal is a matter for the appeal court's independent judgement, applying the applicable statutory criteria. Concessions, like other submissions, do not and cannot bind a court when determining an appeal. While prosecutors should endeavour to advance all available arguments in support of the challenged decision, there will be occasions where a prosecutor does not consider it possible to responsibly defend a legal or factual conclusion reached by the court below, or the challenged decision itself. It is appropriate for the prosecutor to acknowledge that when the situation arises. Prosecutors should only make such concessions after careful consideration and a comprehensive analysis of the case, and after:
  - 14.1 consulting with the prosecuting agency and trial prosecutor on the proposed concession, unless there is a good reason not to do so; and
  - 14.2 notifying any victim(s) of a specified offence, preferably before the proposed concession is communicated to the court, if the concession is significant in the context of an appeal against conviction or sentence.
15. Prosecutors should consult Crown Law about a proposed concession (whether on the appeal itself or a legal or factual issue in the appeal) if it may have precedential value or is high-profile and likely to attract media attention.

#### ***Appeal points not raised by the appellant***

16. It is not the prosecutor's responsibility to identify every possible point on a defence appeal. However, if the appellant has failed to raise an argument that plainly requires the court's attention, the prosecutor should address the point (and rebut it, if appropriate) both as a matter of fairness and to guard against a further appeal on that ground.

#### ***Procedural applications***

17. Defence appeals regularly raise procedural issues, such as applications for extensions of time and to admit fresh evidence. Prosecutors should respond to such applications on their merits and not oppose applications by default.

#### **Prosecution appeals**

##### ***Solicitor General's consent***

18. Section 246 of the Criminal Procedure Act 2011 requires that the Solicitor-General give consent before any prosecutor<sup>3</sup> can bring an appeal against sentence.
19. The Cabinet Directions for the Conduct of Crown Legal Business require that the Solicitor-General's consent is obtained before Police or a government department may bring any criminal appeal. This guideline extends that requirement to all public prosecutors.
20. The process for seeking consent is set out in Appendix 1 (for non-Crown prosecutions) and Appendix 2 (for Crown prosecutions).

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<sup>3</sup> Including private prosecutors.

21. Despite the above, the Solicitor-General has authorised:
  - 21.1 Crown Solicitors to give consent for appeals to the High Court against decisions concerning bail and name suppression, given the need for urgent decisions in such cases; and
  - 21.2 Police to bring appeals, other than sentence appeals,<sup>4</sup> to the District Court against decisions of Community Magistrates or Justices of the Peace. The decision to bring an appeal should be approved by the National Legal Counsel of the Police Prosecution Service.

### *Appeals against pre-trial rulings*

22. If a prosecutor wishes to appeal against a pre-trial decision, they should begin the process of seeking consent from the Solicitor-General as a matter of priority to minimise the potential for delay to the prosecution. If the trial date is imminent, the prosecutor should not seek consent unless they will seek an adjournment of the trial to enable the appeal to be heard. Prosecutors should consider the impact of an adjournment, particularly on any victims and their whānau, before deciding to pursue an appeal.
23. The factors that will be relevant to whether a pre-trial decision should be appealed will depend on the nature of the pre-trial ruling. In deciding whether to pursue an appeal against a pre-trial ruling, prosecutors should consider the following:
  - 23.1 Whether and how an appeal is in the public interest.
  - 23.2 The likelihood of the appeal being successful.
  - 23.3 The impact of the decision on the prosecution's case.

#### *Commentary*

Where the decision will significantly impact the presentation of the prosecution case, this tends to favour an appeal. For instance, the Solicitor-General is more likely to consent to an appeal against a decision excluding significant prosecution evidence, rather than evidence that is incidental or simply supports other admissible evidence.

- 23.4 The impact the appeal is likely to have on the trial date and whether there are any reasons why the trial should not be adjourned.

#### *Commentary*

Factors that may weigh against a prosecution appeal include where a victim is opposed to the trial being postponed, or a prosecution witness would not be available if the trial is postponed.

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<sup>4</sup> Section 246 of the Criminal Procedure Act 2011 requires the Solicitor-General to give consent for any sentence appeal brought by a prosecutor.

## *Appeals against sentence*

24. Sentencing is a discretionary exercise. That means an appeal will only succeed where the sentence is manifestly inadequate, or where it is wrong in principle. The high threshold for a prosecution appeal is reflected in the statutory requirement for the Solicitor-General's consent to be obtained before an appeal can be filed. The Solicitor-General will only give consent where this threshold is clearly met and the public interest requires an appeal.

### *Commentary*

There will usually be multiple outcomes that are within the proper range for the sentencing judge in a particular case. It can be a difficult judgement call whether a sentence warrants consideration by a higher court.

25. A prosecution appeal against sentence may be appropriate where:
- 25.1 There are reasonable prospects of persuading the appeal court that the sentence is manifestly inadequate.
  - 25.2 The sentence appears to have been based on an error of principle or law. The error must be clearly identifiable, and it must either:
    - 25.2.1 apply beyond the facts of the instant case; or
    - 25.2.2 have resulted in a sentence which is unfair having regard to sentences imposed on co-offenders or is manifestly inadequate having regard to similar cases.

### *Commentary*

An error of principle may occur where the sentencing judge incorrectly applies, or fails to apply, established sentencing methodology to arrive at the sentence, for example, by not applying a guideline judgment. Even so, the end sentence must generally also be manifestly inadequate to justify an appeal.

- 25.3 It is desirable to improve consistency of sentences imposed for offences of the same or similar type.

### *Commentary*

The Solicitor-General may consent to a prosecution appeal against sentence to establish or modify a guideline judgment, or to clarify the law and achieve greater consistency of approach.

- 25.4 There is some other distinct public interest consideration that justifies a prosecution appeal.
26. Prosecutors should be aware that any successful appeal against sentence will only increase the sentence to the lower end of the available range. Courts are also reluctant to substitute a custodial sentence where the original sentence was non-custodial. Appeals against non-custodial sentences should therefore only be considered where imprisonment was the only available sentence.

### ***Appeals on questions of law***

27. Prosecution appeals on a question of law should meet the following criteria:
  - 27.1 the ruling is concerned with a point of law, rather than whether the evidence was sufficient in the case;
  - 27.2 the question of law was a point that clearly arose in the proceeding and relates to an issue that was a significant factor in the decision; and
  - 27.3 the answer to the question of law will likely have an impact on the outcome of the proceeding or will have significance for other cases.
28. Consent to appeal will only be given if an appeal is in the public interest.
29. Factors that are relevant to assessing the public interest include:
  - 29.1 Whether resolving the question of law will be relevant to other cases, or is limited to the instant case;
  - 29.2 The seriousness of the offending and circumstances of the defendant; and
  - 29.3 Whether there are conflicting judicial decisions on the question and it is desirable to have it authoritatively decided.

### ***Appeals against bail decisions***

30. A prosecutor should only appeal a bail decision if they reasonably believe:
  - 30.1 it is in the public interest to appeal; and
  - 30.2 it is likely that the appeal will be successful.
31. In terms of the public interest, public safety is the key factor for prosecutors to consider when assessing the risk of reoffending under the Bail Act 2000. This involves assessing the nature of potential offending and particularly whether it involves potential physical or sexual violence to any person, such as risk to the safety of the victim(s) and/or their whānau, or the public at large. An appeal will not be appropriate if this risk is theoretical or generalised, rather than tied to a specific risk factor posed by the individual defendant.
32. Prosecutors should seek the views of the investigator and any victims of specified offences when considering whether to appeal against the granting of bail, or against decisions about bail conditions.

### ***Appeals against name suppression***

33. A prosecutor should only appeal a name suppression decision if they reasonably believe:
  - 33.1 it is in the public interest to appeal; and
  - 33.2 it is likely that the appeal will be successful.
34. Prosecutors should seek the views of any victims of specified offences when considering whether to appeal against name suppression.

### **After the appeal is determined**

35. Prosecutors should promptly notify the prosecuting agency of the outcome of an appeal, so that they can notify the victim(s), if any, and consider whether further action is necessary. This is particularly important if the appeal court has ordered a retrial. In that situation it is helpful for prosecutors to provide the prosecuting agency with their views as to whether a retrial should proceed, in light of the reasoning in the judgment.

## **Other relevant guidelines | Ētahi atu aratohu e whai pānga ana**

Decisions to prosecute | Te whakatau ki te aru

Sentencing | Te whiu

Bail | Peira

Making unbiased decisions | Te whakatau rītaha-kore

Victims | Ngā pārurenga



## Appendix 1: How to request an appeal from a decision made in a non-Crown prosecution

1. All appeals by prosecuting agencies require the consent of the Solicitor-General. This appendix sets out the process for prosecuting agencies to follow when seeking consent to an appeal in a non-Crown prosecution. In Crown prosecutions the Crown Solicitor should submit the request for consent (outlined in Appendix 2).
2. In practice, the authority to consent to an appeal is exercised by the Deputy Solicitor-General (Criminal). The Criminal Team at Crown Law receives and analyses all requests for the Deputy Solicitor-General. The timeframes for filing appeals are generally short, so it is important that requests are sent as soon as possible; are sent to the right place; and contain the necessary information.
3. The procedures are different depending on the type of appeal sought. Prosecuting agencies will need to know:
  - 3.1 the kind of appeal sought (for example, pre-trial appeal, sentence appeal, or appeal on a question of law);
  - 3.2 the date of the decision sought to be appealed (even if reasons have not yet been given), which will determine the applicable timeframe; and
  - 3.3 the court to which any appeal will lie.

### Where to send the request

4. All appeal requests should be sent electronically to [criminal@crownlaw.govt.nz](mailto:criminal@crownlaw.govt.nz).
5. The exception is requests to appeal District Court decisions concerning bail and name suppression to the High Court. These requests should be sent to the local Crown Solicitor in whose warrant area the decision sought to be appealed was made.

### When to send the request

6. Send the request as soon as possible. Appeals must usually be filed within 20 working days from the date the decision was made, not the date the written decision was sent to the parties or the date on which reasons were given. Prosecutors should ask the court in which the decision was made to transcribe and provide the written decision as soon as possible so that an appeal can be considered.
7. Crown Law expects that requests will be sent within seven working days of the decision.

## The process

8. The following steps generally take place before an appeal is filed:
  - 8.1 The prosecuting agency makes the decision to request an appeal (in accordance with whatever internal processes the agency may have in place).
  - 8.2 The matter is referred to the Criminal Team at Crown Law.
  - 8.3 Counsel in the Criminal Team is allocated, reviews the file, and prepares a detailed opinion as to the merits of an appeal.
  - 8.4 A second opinion is prepared by another more senior member of the Criminal Team.
  - 8.5 Both opinions are provided to the Deputy Solicitor-General for their review and final decision.
  - 8.6 The outcome is communicated to the prosecuting agency.
  - 8.7 If consent has been given, appeal documentation is prepared for filing. Crown Law will only do this for appeals from Crown prosecutions and appeals to the Court of Appeal or Supreme Court. For other appeals, the prosecuting agency will need time to instruct the relevant Crown Solicitor (or other prosecutor if not required to instruct Crown Solicitors) to prepare this documentation and file it in the correct court. For an appeal against sentence Crown Law will provide a signed Notice of Consent. The Criminal Procedure Act requires the Notice to be filed together with the Notice of Appeal.<sup>5</sup>
9. It is critical that prosecuting agencies do not wait until a judge's written decision is issued before requesting consent to an appeal, unless the reasons are expected to be released within a week of the decision.
10. Prosecuting agencies should have internal processes to ensure appeal requests are approved by a senior manager before being referred to Crown Law.

## What information to include with your request

### *Cover letter*

11. The cover letter should set out:
  - 11.1 The type of appeal sought.
  - 11.2 The date and place of the decision.
  - 11.3 The day on which the appeal period will expire.
  - 11.4 The statutory provision under which an appeal would be brought.

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<sup>5</sup> Criminal Procedure Act 2011, s 248(3).

- 11.5 If applicable, the trial date (if not yet heard) and/or the date of the next court appearance (for example, callover date).
12. The letter should set out why the prosecuting agency thinks an appeal is warranted. It is not necessary to include a lengthy recitation of the facts or submissions made at first instance.
13. If the proposed appeal is on a question of law, the letter should set out the proposed question(s).
14. If the written reasons for the decision are not yet available, do not wait to receive them unless they are expected to be provided within a week of the decision. Instead, the letter should include as much information as possible about the decision from the prosecutor who appeared. If the request is for an appeal against sentence, and the sentencing notes are not yet available, Crown Law will need to know:
  - 14.1 The starting point adopted by the judge.
  - 14.2 The precise details of any increases or discounts from the starting point for the aggravating and mitigating features of the offending and the offender.
  - 14.3 The details of any other adjustments to the sentence (such as for totality).
  - 14.4 Whether the offender pleaded guilty, and any discount afforded for the guilty plea.
  - 14.5 Whether the offender spent time in custody or on restrictive bail conditions (such as EM bail or a 24 hour curfew) prior to sentencing.
  - 14.6 Any other orders that were made, such as orders for reparation, forfeiture etc.
  - 14.7 The final sentence that was imposed.

### ***Enclosures***

15. The following documents should be attached to the cover letter:
  - 15.1 The decision the prosecuting agency wishes to appeal against (if available).
  - 15.2 Copies of the charges and summary of facts.
  - 15.3 Any written submissions filed by both parties at first instance.
16. Any other relevant material (for example, defendant's criminal history, victim impact statements and pre-sentence reports for proposed sentence appeals; copy of the disputed evidence for proposed pre-trial appeals).

## Appendix 2: How to request an appeal from a decision made in a Crown prosecution

1. All appeals require the consent of the Solicitor-General. This appendix sets out the process for Crown Solicitors to follow when seeking consent to an appeal in a Crown prosecution. In non-Crown prosecutions, the prosecuting agency will submit the request for consent (outlined in Appendix 1), although they may seek a Crown Solicitor's assistance in doing so.
2. In practice, the authority to consent to an appeal is exercised by the Deputy Solicitor-General (Criminal). The Criminal Team at Crown Law receives and analyses all requests for the Deputy Solicitor-General. The timeframes for filing appeals are generally short so it is important that requests are sent as soon as possible; are sent to the right place; and contain the necessary information.
3. The Criminal Team at Crown Law is responsible for all appeals from Crown prosecutions, except for appeals to the High Court concerning bail or name suppression. The procedures are different depending on the type of appeal sought. Crown Solicitors will need to know:
  - 3.1 the kind of appeal sought (for example, pre-trial appeal, sentence appeal or appeal on a question of law);
  - 3.2 the date of the decision sought to be appealed, which will determine the applicable timeframe; and
  - 3.3 the court to which any appeal will lie.

### Where to send the request

4. All appeal requests should be sent electronically to [criminal@crownlaw.govt.nz](mailto:criminal@crownlaw.govt.nz).
5. Crown Solicitors do not need to send requests to appeal a District Court decision on bail or name suppression to the High Court. Requests for appeals to the Court of Appeal in respect of bail or name suppression should be submitted in accordance with this guideline.

### When to send the request

6. Send in the request as soon as possible. Appeals must usually be filed within 20 working days from the date the decision was made, not the date the written decision was sent to the parties or the date on which reasons were given.
7. Crown Law expects that requests will be sent within seven working days of the decision.

## The process

8. The following steps generally take place before an appeal is filed:
  - 8.1 The Crown Solicitor, or partner in the Crown Solicitor firm, makes the decision to request an appeal.
  - 8.2 The matter is referred to the Criminal Team at Crown Law.
  - 8.3 Counsel in the Criminal Team is allocated, reviews the file and prepares a detailed opinion as to the merits of an appeal.
  - 8.4 A second opinion is prepared by another more senior member of the Criminal Team.
  - 8.5 Both opinions are provided to the Deputy Solicitor-General for their review and final decision.
  - 8.6 The outcome is communicated to the Crown Solicitor.
  - 8.7 Appeal documentation is prepared for filing, if the decision is that an appeal should be filed.
9. It is critical that Crown Solicitors do not wait until the judge's written decision is issued before requesting an appeal, unless the reasons are expected to be provided within a week of the decision. The Crown Solicitor (or a partner in the firm) should personally review the matter and approve the seeking of consent.

## What information to include with your request

### *Cover letter*

10. The cover letter should set out:
  - 10.1 The type of appeal sought.
  - 10.2 The date and place of the decision.
  - 10.3 The last day for filing an appeal.
  - 10.4 The statutory provision under which an appeal would be brought.
  - 10.5 If applicable, the trial date (if not yet heard) and/or the date of the next court appearance (for example, callover date).
11. The letter should set out why the Crown Solicitor thinks an appeal is warranted. It is not necessary to include a lengthy recitation of the facts or submissions made at first instance.
12. If the proposed appeal is on a question of law, the letter should set out the proposed question(s).

13. If the written reasons for the decision are not yet available, do not wait to receive them unless they are expected to be provided within a week of the decision. Instead, the letter should include as much information as possible about the decision from the prosecutor who appeared. If the request is for an appeal against sentence, and the sentencing notes are not yet available, Crown Law will need to know:
  - 13.1 The starting point adopted by the judge.
  - 13.2 The precise details of any increases or discounts from the starting point for the aggravating and mitigating features of the offending and the offender.
  - 13.3 The details of any other adjustments to the sentence (such as for totality).
  - 13.4 Whether the offender pleaded guilty, and the discount afforded for any guilty plea.
  - 13.5 Whether the offender spent time in custody or on restrictive bail conditions (such as EM bail or a 24-hour curfew) prior to sentencing.
  - 13.6 Any other orders that were made such as orders for reparation, forfeiture etc.
  - 13.7 The final sentence that was imposed.

### **Enclosures**

14. The following documents should be attached to your cover letter:
  - 14.1 The decision the Crown Solicitor wishes to appeal against (if available).
  - 14.2 Copies of the charges and summary of facts.
  - 14.3 Any written submissions filed by both parties at first instance.
15. Any other relevant material (for example, defendant's criminal history, victim impact statements and pre-sentence reports for proposed sentence appeals; copy of the disputed evidence for proposed pre-trial appeals).

### **Procedure where appeal is filed**

16. If the Deputy Solicitor-General decides to bring an appeal, the appeal will be filed and the Criminal Team at Crown Law will be responsible for it. The Crown Solicitor will need to send the complete file, and the Police file, to Crown Law to enable counsel to prepare for the appeal.