

Crimes (Criminal Appeals) Amendment Bill

Government Bill

As reported from the committee of the whole House

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

New (unanimous)

Subject to this Act,

Text inserted unanimously

(Subject to this Act,)

Words struck out unanimously

Subject to this Act,

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Hon Phil Goff

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The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the Crimes (Criminal Appeals) Amendment Act **2000**.
- (2) In this Act, the Crimes Act 1961¹ is called “the principal Act”.

¹ 1961 No 43

2 Commencement

This Act comes into force on ((the day after the date on which it receives the Royal assent)) a date to be appointed by the Governor-General by Order in Council.

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Part 1 Amendments to principal Act

New (unanimous)

2A Interpretation

Section 379 of the principal Act is amended by adding to the definition of **rules of Court** the words “and section 51C of the Judicature Act 1908”. 5

2B Revesting and restitution of property on conviction

Section 387(1) of the principal Act is amended by repealing paragraphs (a) and (b), and substituting the following paragraphs: 10

“(a) in any case, until the expiration of any period within which an appeal against conviction or sentence may be lodged; and

“(b) if an appeal against conviction or sentence is lodged, until the determination of the appeal, unless otherwise ordered by the Court,—”. 15

3 Time for appealing

New (unanimous)

(1) Section 388(1) of the principal Act is amended by omitting the words “10 days” in both places where they occur, and substituting in each case the words “28 days”. 20

(2) Section 388(1) of the principal Act is amended by omitting the second and third sentences.

4 New section 390 substituted

The principal Act is amended by repealing section 390, and substituting the following section: 25

Struck out (unanimous)**“390 Duty of Solicitor-General**

“(1) It is the duty of the Solicitor-General to appear at every hearing involving oral submissions on an appeal or application for leave to appeal under this Part.

“(2) The Solicitor-General’s duty under **subsection (1)** may be performed by any other counsel employed or engaged by the Crown. 5

“(3) The rules of Court must provide for the transmission to the Solicitor-General of all relevant documents, exhibits, and other things connected with the proceedings. 10

“(4) **Subsections (1) and (3)** do not apply in the case of a private prosecution.”

New (unanimous)**“390 Duty of Solicitor-General**

“(1) It is the duty of the Solicitor-General to—

“(a) represent the Crown on every appeal against conviction or sentence; and 15

“(b) appear at every hearing involving oral submissions on an appeal or application for leave to appeal under this Part.

“(2) The Solicitor-General’s duties under **subsection (1)**— 20

“(a) may be performed by any other counsel employed or engaged by the Crown; and

“(b) do not apply in the case of a private prosecution.”

5 Duties of Registrar with respect to notices of appeal, etc**New (unanimous)**

(1) Section 392 of the principal Act is amended by inserting, after subsection (1), the following subsections: 25

“(1A) For every appeal against conviction or sentence, the Registrar must prepare a preliminary case on appeal comprising—

“(a) the trial transcript; and

New (unanimous)

- “(b) the trial Judge’s summing up to the jury, if the Registrar considers it relevant to the grounds of appeal; and
- “(c) any other documents, exhibits, or other things connected with the proceedings that the Registrar considers are relevant to the grounds of appeal and appropriate for inclusion in the preliminary case on appeal. 5
- “(1B) A preliminary case on appeal prepared under **subsection (1A)** must be given to—
- “(a) the Court or Judge deciding the mode of hearing; and
- “(b) the parties to the appeal; and 10
- “(c) the Legal Services Agency, on request by the Agency.”

- (2) Section 392(2) of the principal Act is repealed.

New (unanimous)

- (3) Section 392 of the principal Act is amended by adding the following subsections:
- “(6) When notifying parties about the decision on the mode of hearing, the Registrar must also advise parties of the procedure and time frames required by the rules of Court relating to— 15
- “(a) making written submissions on the mode of hearing; and 20
- “(b) in the case of a hearing on the papers, making written submissions on the appeal or application, for consideration at the hearing; and
- “(c) in the case of an oral hearing, providing written material to the Court and the other party; and 25
- “(d) in all cases, exercising the right of reply.
- “(7) After an appeal or application is determined by the Court, the Registrar must send a copy of the decision to the parties as soon as is reasonably practicable.”

- 6 New sections 392A and 392B inserted 30**
- The principal Act is amended by inserting, immediately before section 393, the following sections:

Struck out (unanimous)**“392A Mode of disposition of appeals and applications**

“(1) Every appeal or application for leave to appeal under this Part must be disposed of by the Court of Appeal by way of—

“(a) a hearing on the papers; or

“(b) a hearing involving oral submissions.

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“(2) The initial decision about the mode of disposition of a particular appeal or application may be made by a Judge of the Court of Appeal acting alone.

“(3) Despite **subsection (2)**, the Court of Appeal may at any time change the mode of disposition of a particular appeal or application.

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“(4) Every decision about how an appeal or application is to be disposed of must be made as the interests of justice require.

“392B Hearings on the papers

“(1) This section applies to appeals and applications for leave to appeal that are disposed of by the Court of Appeal by way of a hearing on the papers.

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“(2) The appeal or application must be determined by the Court on the basis of the written material before it.

“(3) Consideration of the written material may be undertaken in whatever manner the Court thinks fit.

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“(4) Neither the parties, nor their representatives, may appear before the Court.

“(5) The parties to the appeal or application may make written, but not oral, submissions to the Court.

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“(6) Paragraphs (b), (c), (d), and (e) of section 389 do not apply.”

New (unanimous)

Struck out

“392A Decision about mode of hearing

- “(1) Every appeal or application for leave to appeal under this Part must be disposed of by the Court of Appeal by way of—
- “(a) a hearing on the papers; or 5
 - “(b) a hearing involving oral submissions.
- “(2) Every decision on the mode of hearing an appeal or application must be made as the interests of justice require in the particular case.
- “(3) In considering what the interests of justice require in a particular case, the Court or Judge must have regard to— 10
- “(a) the nature and complexity of the issues raised by the appeal or application; and
 - “(b) the gravity of the offence; and
 - “(c) whether evidence should be called; and 15
 - “(d) whether the appeal can be fairly dealt with on the papers, or whether oral submissions should be heard; and
 - “(e) any relevant cultural or personal factors; and
 - “(f) any other matter that the Court or Judge considers relevant to the proper determination of the appeal. 20
- “(4) A Judge of the Court of Appeal, acting alone, may make a decision about the mode of hearing a particular appeal or application, but no Judge acting alone may reverse a decision on mode that has been made by the Court. 25
- “(5) The Court of Appeal may at any time, either on its own initiative or on the application of any party, change the mode of hearing a particular appeal or application, having regard to any submissions made by the parties concerning the mode of hearing. 30
- “(6) Every decision about the mode of hearing an appeal or application must be in writing, be accompanied by reasons, and be provided by the Registrar to the parties.
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New (unanimous)

New

“392A Decision about mode of hearing

- “(1) An appeal or application for leave to appeal must be dealt with by way of a hearing involving oral submissions unless the Judge or Court making the decision on the mode of hearing determines, on the basis of the information contained in the notice of appeal, notice of application, or other written material provided by the parties, that the appeal or application—
 - “(a) can be fairly dealt with on the papers; and
 - “(b) either has no realistic prospect of success or clearly should be allowed.
- “(2) In determining whether an appeal or application can be fairly dealt with on the papers, the Judge or Court may consider any matters relevant to the decision on the mode of hearing, including such matters as—
 - “(a) whether the appellant has been assisted by counsel in preparing the appeal or application:
 - “(b) whether the appellant has been provided with copies of the relevant trial documentation:
 - “(c) the gravity of the offence:
 - “(d) the nature and complexity of the issues raised by the appeal or application:
 - “(e) whether evidence should be called:
 - “(f) any relevant cultural or personal factors.
- “(3) A Judge of the Court of Appeal, acting alone, may make a decision about the mode of hearing a particular appeal or application, but no Judge acting alone may reverse a decision on mode that has been made by the Court.
- “(4) The Court of Appeal may, at any time, either on its own initiative or on the application of any party, change the mode of hearing a particular appeal or application to an oral hearing, having regard to any written submissions made by the parties concerning the mode of hearing.
- “(5) The Court or Judge making the decision on the mode of hearing must apply **section 392B(2) to (5)** (with all necessary

New (unanimous)**New**

modifications) in the same way as the Court would apply them in determining an appeal or application for leave to appeal.

- “(6) Every decision about the mode of hearing an appeal or application must be in writing, be accompanied by reasons (unless the decision is that the hearing will be an oral hearing), and be provided by the Registrar to the parties. 5

“392B Hearings on the papers

- “(1) This section applies to appeals and applications for leave to appeal that are disposed of by the Court of Appeal by way of a hearing on the papers. 10
- “(2) The parties to the appeal or application may make written, but not oral, submissions to the Court, and may include in their submissions—
- “(a) additional relevant written material; and 15
- “(b) responses to any submissions made by the other party.
- “(3) Neither the parties nor their representatives may appear before the Court.
- “(4) The appeal or application must be determined by the Court on the basis of the written material before it. 20
- “(5) Consideration of the written material may be undertaken in whatever manner the Court thinks fit.
- “(6) Paragraphs (b), (c), (d), and (e) of section 389 do not apply.”

7 Right of appellant to be represented

- (1) The heading to section 395 of the principal Act is amended by adding the words (“*and be present*”) “, and restriction on attendance”. 25
- (2) Section 395 of the principal Act is amended by repealing subsection (1), and substituting the following subsections:
- “(1) At the hearing of an appeal, or an application for leave to appeal, or on any proceedings preliminary or incidental to an appeal or application, the appellant may be represented by counsel. 30

“(1A) If an appellant is in custody, he or she is not entitled to be present at a hearing involving oral submissions unless—

- “(a) the rules of Court provide that he or she has the right to be present; or
- “(b) the Court of Appeal gives leave for him or her to be present.”

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8 Judgment of Court of Appeal

Section 398 of the principal Act is amended by adding, as subsection (2), the following subsection:

“(2) Every judgment of the Court of Appeal on an appeal or application under this Part (other than one relating to a preliminary or incidental matter) must be accompanied by reasons.”

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New (unanimous)

8A Rules of Court

(1) Section 409(1) of the principal Act is amended by inserting, after the words “High Court”, the words “, the Court of Appeal,”.

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(2) Section 409 of the principal Act is amended by repealing subsection (2), and substituting the following subsections:

“(2) Until such rules are made, and so far as they do not extend, the existing practice and procedure of the High Court and the Court of Appeal remain and are in force in those Courts as far as they are not altered by or inconsistent with the provisions of this Act.

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“(3) The practice and procedure of the High Court must be followed by all District Courts in proceedings on indictment.”

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Struck out (unanimous)

9 Consequential amendments to Court of Appeal (Criminal) Rules 1997

(1) Rule 10 of the Court of Appeal (Criminal) Rules 1997 (SR 1997/168) is amended by revoking subclause (1), and substituting the following subclause:

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Struck out (unanimous)

- “(1) The Registrar must, for each appeal, allocate a fixture date and, if the hearing is to involve oral submissions, prepare a case on appeal.”
- (2) The Schedule of the Court of Appeal (Criminal) Rules 1997 is amended by—
- (a) omitting from form 1 all the words appearing in parentheses after item 5; and
 - (b) omitting from form 3 all the words appearing in parentheses after item 7.

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Struck out**New (unanimous)**

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9 Amendments to Court of Appeal (Criminal) Rules 1997

- (1) The Court of Appeal (Criminal) Rules 1997 (SR 1997/168) are amended by revoking rule 10, and substituting the following rule:

“10 Registrar to allocate fixture

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The Registrar must allocate a fixture for every hearing involving oral submissions.”

- (2) The Schedule of the Court of Appeal (Criminal) Rules 1997 is amended by inserting in form 1, after question 2, the following question:

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“2A Do you wish this application to be considered by the Court at an oral hearing or at a hearing on the papers? Give reasons for your choice (see the note at the end of this form for further explanation).”

- (3) The Schedule of the Court of Appeal (Criminal) Rules 1997 is amended by omitting from form 1 all the words appearing in parentheses after question 5.

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- (4) The Schedule of the Court of Appeal (Criminal) Rules 1997 is amended by adding, after the space for the signature of the appellant, the following note:

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Struck out

New (unanimous)

Note: The Court will consider this application either at an oral hearing (which is a hearing at which oral submissions may be made) or at a hearing on the papers (which is a hearing at which the Court makes its decision solely on the basis of the written material before it). The decision about which type of hearing to hold will be made as the interests of justice require. This involves considering matters such as: the nature and complexity of the issues raised by your application; the gravity of the offence; whether new evidence should be called; whether the appeal can be fairly dealt with on the papers, or whether oral submissions should be heard; and any relevant cultural or personal factors. It is important that you include in this application anything that is relevant to any of these matters, and that you state the grounds of your application as fully as you can. Attach additional sheets of paper to this form if necessary.”

- (5) The Schedule of the Court of Appeal (Criminal) Rules 1997 is amended by inserting in form 3, after question 3, the following question:

“3A Do you wish this application to be considered by the Court at an oral hearing or at a hearing on the papers? Give reasons for your choice (see the note at the end of this form for further explanation).”

- (6) The Schedule of the Court of Appeal (Criminal) Rules 1997 is amended by omitting from form 3 all the words appearing in parentheses after question 7.

- (7) The Schedule of the Court of Appeal (Criminal) Rules 1997 is amended by adding, after the space for the signature of the appellant, the following note:

Note: The Court will consider this appeal or application either at an oral hearing (which is a hearing at which oral submissions may be made) or at a hearing on the papers (which is a hearing at which the Court makes its decision solely on the basis of the written material before it). The

Struck out**New (unanimous)**

decision about which type of hearing to hold will be made as the interests of justice require. This involves considering matters such as: the nature and complexity of the issues raised by your application; the gravity of the offence; whether new evidence should be called; whether the appeal can be fairly dealt with on the papers, or whether oral submissions should be heard; and any relevant cultural or personal factors. It is important that you include in this appeal or application anything that is relevant to any of these matters, and that you state the grounds of your appeal or application as fully as you can. Attach additional sheets of paper to this form if necessary.”

9A Transitional provisions

- (1) In this section, the **transition period** is the period starting on the commencement of this section, and ending with the close of the day before the day on which rules of Court come into force that prescribe the procedure (including time frames and the rights of parties) relating to—
- (a) decisions about the mode of hearing appeals and applications for leave to appeal; and
 - (b) hearings on the papers.
- (2) During the transition period, the Court of Appeal (Criminal) Rules 1997 apply with any necessary modification to appeals and applications for leave to appeal, but—
- (a) the procedure relating to decisions about the mode of hearing appeals and applications, and to hearings on the papers, is as set out in practice notes issued by the President of the Court of Appeal; and
 - (b) references in the principal Act to rules of Court relating to decisions about the mode of hearing, and to hearings on the papers, are references to the relevant practice notes issued by the President.

Struck out**New (unanimous)**

- (3) The principal Act applies to appeals and applications that were received by the Court before the transition period and for which, on the date of commencement of this section, no fixture for a hearing involving oral submissions has been set down. 5

New**9 Transitional provisions**

- (1) If, before the commencement of this Act, a fixture for a hearing involving oral submissions has been set down for an appeal or application, then the principal Act and the Court of Appeal (Criminal) Rules 1997 (as the Act and those rules read immediately before the commencement of this Act) continue to apply to the appeal or application. 10
- (2) Any other appeal or application made before the commencement of this Act must be dealt with as if it had been made after the commencement of this Act, and the principal Act and the Court of Appeal (Criminal) Rules 1997 (as the Act and those rules (or any replacement of them) read immediately after the commencement of this Act) apply to the appeal or application. 15

Part 2 20**Validation of determinations****10 Validation of determinations made before Act commences**

- (1) No determination of an appeal or application for leave to appeal that was made under Part XIII of *(the Crimes Act 1961)* the principal Act before the date on which this Act commences is invalid by reason only of any 1 or more of the following: 25

- (a) a failure to comply with Part XIII of *(the Crimes Act 1961)* the principal Act or the Court of Appeal (Criminal) Rules 1997 (as the Act and Rules were at any time before ~~*(their amendment by)*~~ the commencement of this Act): 5
- (b) a failure to comply with the Criminal Appeal Rules 1946:
- (c) a failure to give reasons for the determination or judgment.
- (2) **Subsection (1)** does not apply to any determination of the Court of Appeal that is the subject, as at **6 November 2000**, of either of the following proceedings: 10
- (a) *Fa'afete Taito v The Queen* (petition for special leave to appeal, CA 4/96):
- (b) *James McLeod Bennett and 11 Others v Attorney-General and 2 Others* (CP 108/00). 15

New (unanimous)

- (3) Nothing in this section affects the right of any person to apply for the exercise of the prerogative of mercy.

11 Application for leave for rehearing

- (1) This section applies to any person— 20
- (a) who appealed, or applied for leave to appeal, under Part XIII of the principal Act before the date of commencement of this section; and
- (b) who applied for legal aid in respect of the appeal or application, but was not granted legal aid in respect of it; and 25
- (c) whose appeal or application was determined without oral submissions being heard; and
- (d) whose appeal or application was dismissed.
- (2) An applicant to whom this section applies may, at any time before the closing date set by Order in Council made under **subsection (4)**, apply to the Court of Appeal for leave to have his or her original appeal or application reheard under **section 13**. 30
- (3) An application for a rehearing must— 35

New (unanimous)

- (a) identify a failure of the sort described in any of **paragraphs (a), (b), or (c) of section 10(1)** that occurred in relation to the original appeal or application; and
- (b) set out the grounds on which the applicant claims that a miscarriage of justice has occurred. 5
- (4) The Governor-General may, by Order in Council, set the closing date by which applications for leave for a rehearing must be received by the Court of Appeal. The Order in Council may not be made until at least 1 year after the date on which the following cases before the Judicial Committee of the Privy Council are finally determined: 10
- (a) *Fa'afete Taito v The Queen*;
- (b) *James McLeod Bennett and 11 Others v The Queen*.

12 Decision on application for leave for rehearing

- (1) The decision on an application for leave for a rehearing must be made by a Judge of the Court of Appeal, acting alone, on the basis of— 15
- (a) written material provided by the applicant in his or her application; and
- (b) any written submissions made by the respondent; and 20
- (c) any written submissions provided by the applicant in response to written submissions made by the respondent; and
- (d) any documents that form part of the Court record that the Judge considers necessary for the proper determination of the application. 25

New

- (1A) Neither the parties nor their representatives may appear before a Judge on an application for leave for a rehearing.
- (2) The Registrar must, upon request, supply an applicant or prospective applicant with any documents that form part of the Court record that the Registrar considers necessary for the proper determination of the application. 30

New (unanimous)

- (3) The Judge must grant leave for a rehearing if he or she is satisfied that—
- (a) a failure of the sort described in any of **paragraphs (a), (b), or (c) of section 10(1)** occurred in relation to the original appeal or application; and
 - (b) there is an arguable case that a miscarriage of justice has occurred.

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13 Rehearing of appeals and applications

- (1) The Court of Appeal may rehear any appeal, or application for leave to appeal, for which leave has been granted under **section 12**.
- (2) The rehearing of an appeal or application for leave to appeal must be conducted as if it were an original appeal or application, and Part XIII of the principal Act and the rules of Court apply accordingly.

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Legislative history

6 November 2000	Introduction (Bill 76-1)
9 November 2000	First reading and referral to Government Administration Committee
22 February 2001	Reported from Government Administration Committee (Bill 76-2)
1 March 2001	Second reading
12 June 2001	Referred to Justice and Electoral Committee
21 September 2001	Reported from Justice and Electoral Committee
30, 31 October, 1, 6 November 2001	Committee of the whole House (Bill 76-3)