Crimes (Criminal Appeals) Amendment Bill

Government Bill

As reported from the Government Administration Committee

Commentary

Recommendation

The Government Administration Committee has examined the Crimes (Criminal Appeals) Amendment Bill (the bill) and recommends that it be passed with the amendments shown.

Introduction

The bill aims to reform and clarify the case management procedures for dealing with criminal appeals in the Court of Appeal. At present there are some ambiguities in the legislation governing the procedure for dealing with criminal appeals on the papers (that is, where there is no oral hearing and the appeal is decided solely on the basis of the written material before the Court). Flow charts showing the previous and proposed procedures for criminal appeals are attached at Appendix B.

Before the bill was introduced, claims relating to a total of 13 appellants were filed challenging the Court of Appeal's procedures for dealing with appeals on the papers. As a result, these procedures need to be clarified to ensure certainty around them. Part 2 of the bill contains a retrospective validation provision. This provides that no determination of the Court of Appeal in respect of these types of appeals is invalid 'only' because of failures to comply with procedural matters. Two exceptions have been made to this to take account

of the cases noted above. These cases are currently before the Privy Council.

In addition to this, changes implemented by the Legal Services Act 2000 will remove the processing of legal aid applications from the Court of Appeal. This will change the way cases are handled by the Court.

Clause 6: Distinction made between hearing on the papers and oral hearing

The bill makes it clear the Court of Appeal may dispose of every appeal or application for leave to appeal by either a hearing on the papers (that is, on the basis of written material alone) or a hearing involving oral submissions (new section 392A). The relevant provisions of the Crimes Act 1961 (the Act), as currently worded, do not explicitly provide for the Court to do this. New section 392B sets out the powers and jurisdiction of the Court when hearing an appeal on the papers.

The main points are that, while neither the parties nor their representatives may appear before the Court or make oral submissions at a hearing on the papers, written submissions can be made. This can include any relevant written material and responses to submissions made by the other party. The appeal or application is then determined solely on the basis of the written material before the Court.

All the submissions we received oppose this change. Submitters object to the removal of an appellant's alleged right to an oral hearing. As currently worded, section 388(1) of the Act gives an appellant the choice of presenting their case in writing instead of by oral argument if so desired. The proposed change would remove this provision.

The majority view of submitters is that the bill sets up two classes of criminal appeal—one for the rich, and one for the poor. Submitters consider this process may operate to the disadvantage of Maori and Pacific peoples, or individuals who are poorly educated or illiterate. The view of submitters is the law should be drafted so as to favour an oral hearing.

Under the previous system, all individuals who were declined legal aid had their appeals dealt with on the papers. This will no longer occur under the bill. Instead decisions about whether a case is to be heard on the papers will be made on the basis of an assessment of the case and any other relevant matters. It is the intention that there will

no longer be a distinction between individuals who can afford a lawyer, and those who cannot.

Availability of legal aid: outside the scope of this bill

Submitters suggest the proposed change will have a particular impact on those persons in custody who are refused legal aid. The Council of Civil Liberties (the Council) told us the vast majority of accused facing serious charges require legal aid in order to conduct their defence.

A number of witnesses suggest legal aid should be universally available to appellants and legal aid should also be available to help offenders prepare their notice of appeal and grounds for appeal.

The issue of the availability of legal aid is outside the scope of this bill. The issues before us in considering this bill are ones of process and procedure in the Court of Appeal which, as a result of the Legal Services Act 2000, are no longer related to legal aid decisions.

Grant of legal aid to prepare appeals

A number of submitters described what they consider as a typical scenario in which a convicted person in custody is denied legal aid, and is then faced with the prospect of filling out a notice of appeal without the benefit of professional assistance. We note that a grant of legal aid is available automatically to assist individuals, who have been granted legal aid for their trial, to prepare their notice and grounds of appeal. However, we note it is more likely that legal aid will be granted to a person who faces serious criminal charges before a jury trial. We understand this grant—currently one hour—is likely to be increased under the Legal Services Act 2000.

We are surprised that knowledge about this grant is not more widespread. It seems many members of both the New Zealand Law Society and the Criminal Bar Association are unaware of the grant. We believe the Ministry of Justice or the Legal Services Agency should liase with these organisations in particular to help them inform their members of the existence of the grant. Widespread use of the grant would, in our opinion, ensure that individuals who are in prison are able to get legal assistance to prepare their grounds for appeal.

Not all hearings need to be in person

Submitters in general propose the bill is redrafted to impose a presumption in favour of a hearing involving oral submissions. In addition to this, the Council submits criteria be established for when an oral hearing is to be granted. Submitters also argue for rules to be established to ensure appellants are provided with adequate information on the process for their appeal and their right to make representations to the Court. The Auckland Council of Civil Liberties recommends the addition of a section in the notice of appeal form advising appellants of their legal position and rights in terms of the process for appeals. We believe some of these suggestions have merit.

Another submission suggests oral hearings are culturally appropriate for Maori who wish to address the Court directly upon being refused legal aid. The submission refers to the concept of kanohi ki te kanohi (face to face interaction) in support of this suggestion.

In addition to these views, six submissions suggest hearings on the papers are illegal, and constitute a breach of the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights (the ICCPR).

Breach of New Zealand Bill of Rights Act 1990

We considered this issue at some length and sought advice from several sources. The Legislative Counsel in the Office of the Clerk of the House of Representatives advised us the process of dealing with criminal appeals on the papers does not constitute a breach of the New Zealand Bill of Rights Act 1990 or the ICCPR. We were given examples of cases where the United Nations Human Rights Committee has held that hearings on the papers are consistent with the obligations of States under the ICCPR. We understand the practice of hearing appeals on the papers is followed in Scotland, England and Australia (Victoria).

We conclude that some appeals can be fairly dealt with on the papers. Examples of these might be where straightforward questions of law are being argued before the Court, or where an appellant or the Crown raise issues of fact that do not require oral submissions. There are, of course, some cases where oral hearings are necessary. Examples are where the law is complex or unsettled, or where the application of the law to the facts is not straightforward.

Therefore, after careful consideration, we are satisfied the practice of hearing appeals on the papers is consistent with New Zealand's

domestic and international legal obligations. Other countries with similar legal systems also hear criminal appeals on the papers. We note that international legal obligations focus largely on ensuring that people have the 'right' to appeal. The process for this is up to the individual State parties to determine 'according to law'.

However, in our view the bill as introduced does not provide sufficient safeguards for appellants who are not granted an oral hearing. We agree that where an appeal is set down for a hearing on the papers, additional safeguards are required to ensure the appellants receive a fair and proper hearing in every case.

More information available to appellants

We think the bill should contain guidance for the Court when it decides if a case should be set down on the papers, and we also think the Court should provide reasons for its decision. Including such matters in the Act itself would also aid appellants in making submissions to the Court about the allocation of a case.

One factor for consideration is that the Court should take into account cultural issues when allocating a case to an oral hearing or a hearing on the papers. Such an approach would be consistent with section 16 of the Criminal Justice Act 1985, which allows an offender, as part of the sentencing process, to request the court to hear from any person on cultural matters. We understand this proposal is consistent with the current practice of the Court.

We note the bill includes in new section 392A a requirement on the Court, when allocating a case to an oral hearing or a hearing on the papers, to have regard to the interests of justice in the circumstances of the particular case. In considering what these interests are we recommend the Court or Judge have regard to the following factors:

- Whether a decision on the merits of the appeal requires the Court to call for evidence, consider oral submissions, written submissions, or both from the appellant and the Crown.
- The nature and complexity of the appeal or application.
- The gravity of the offence.
- Any cultural issues or personal factors raised by the appellant or the Crown.

Right to be informed about mode of hearing

We agree more information should be available advising appellants of the process that is used for determining appeals and their rights in relation to this. We particularly favour the proposal that appellants should be informed when their case is set down for a hearing on the papers, the reasons for this, that they are entitled to make submissions on this matter to the Court, and that the mode of hearing will be decided on the basis of all written material before the Judge or the Court.

Right to make further written submissions on mode of hearing

We agree with submitters who argue that the decision to allocate an appeal to a hearing on the papers should be reviewable by the Court. The bill provides for an initial or preliminary allocation to be made by a Judge acting alone. We think there should be a safeguard here to protect an appellant against an incorrect allocation. Therefore we recommend sections 392A(3) and (4) are amended so that no Judge acting alone can reverse a decision on the mode (or type) of hearing that has been made by the Court. We agree the Court should be able to change the type of hearing (that is, from written to oral and vice versa) on the basis of any submissions made to it by any of the parties.

Clause 5: Preparation of papers for a case on appeal

The Act provides that the Registrar must prepare all the relevant papers for the Court for an appeal. In addition, the Court of Appeal (Criminal) Rules 1997 require the Registrar to prepare a 'case on appeal' for the appeal. This is usually the trial transcript and any other relevant material. However, the practice that has developed in the Court of Appeal is that the case on appeal is only prepared if the appeal is set down for an oral hearing.

The bill provides that at a hearing on the papers the appeal or application must be determined by the Court on the basis of the written material before it. A major concern for some submitters is what constitutes 'the written material'. Submitters suggest this might result in the Court determining appeals based solely on the notice of appeal. We share this concern.

We agree that a case on appeal should be produced for every appeal and it must be available to the parties and to the new Legal Services Agency on request. This should include the trial transcript, the trial

Judge's summing up (if relevant to the appeal), and any other relevant trial documentation. While we note this recommendation imposes a requirement on the Court that has resource implications, we believe it will strengthen the process by ensuring the parties have available all the relevant material for the appeal. We agree also that it would considerably assist appellants in making submissions to the Court.

To strengthen this process further for the appellant, we agree that when the Registrar notifies parties about the type of hearing, the Registrar must also provide additional information informing the parties of their right of reply and the timeframes for doing this (clause 5(3) refers). For a hearing on the papers, parties will now be told that written material can be submitted to the Court on the appeal itself as well as on the type of hearing.

We do not agree with submitters who suggest the bill set out the papers the Court 'must' consider for a hearing on the papers. The nature of the appeal process is that the Court only considers specific points of appeal that have been raised. The submissions that are made by the parties to the appeal determine the documents the Court has to consider for the appeal. In any case our recommendation concerning the preparation of the case on appeal will ensure the proper material is available to all the parties and the Court.

Clause 3 : Time for appealing

Some witnesses suggest the time for appealing set out in section 388(1) of the Act should be increased from 10 days to 28 days, to enable individuals who have been convicted more time to file their notice and grounds for appeal in the Court. We believe this proposal has merit. We think increasing the time for appealing is likely to result in appellants being able to properly consult a lawyer, obtain any documents, and compile effective grounds for appeal. It will also enable the Court to make a decision on the case on the basis of the best information that is available. We note the time limit for appealing against summary conviction in the District Court is 28 days. This was increased from 10 days in 1976. We recommend section 388(1) of the Act is amended to allow 28 days for notices of appeal to be filed in the Court of Appeal.

Clause 4: Duty of Solicitor-General to appear

Section 390 of the Act requires that the Solicitor-General is bound to 'appear' at all hearings. In practice, however, this only happens if there is an oral hearing. The bill aims to clarify this situation by stating that the Solicitor-General is required to attend only at those hearings involving oral submissions. The intent behind this amendment is to remove the possibility that the Solicitor-General might appear at a hearing on the papers and make an oral submission. This would be unfair as the appellant or his or her lawyer would not have the same right.

Submitters suggest if the Solicitor-General's duty to 'appear' at appeals on the papers is removed, then the Solicitor-General no longer has a duty to argue points favourable to the appellant at these types of appeal. We do not agree. The Solicitor-General's duty in this respect is a requirement, not of the Act, but of the New Zealand Law Society's *Rules of Professional Conduct for Barristers and Solicitors*. Under Rule 8.01, all lawyers involved in criminal proceedings have an obligation when conducting a case to put all relevant matters before the Court whether they support the practitioner's case or not. In addition, Rule 9.01 provides that a prosecuting counsel has a duty to advise both the defence and the Court of any facts that may aid the defence's case.

Although we are satisfied the bill as introduced does not alter the Solicitor-General's duty to point out issues that favour the defence, we agree the bill should be amended to make this clearer. We recommend the inclusion of an additional provision in the Act stating that it is the duty of the Solicitor-General to represent the Crown on every appeal against conviction and sentence (section 390(1)(a) refers).

Clauses 8 and 9: Transitional provisions

The changes we recommend to the bill, if agreed, will necessitate consequential changes to the Court of Appeal (Criminal) Rules 1997. We agree provision needs to be made for a transitional period between the commencement of the relevant sections of the bill and the new Rules coming into force. We recommend a provision validating the continued application of the Rules until they can be updated. In the meantime the procedure for deciding modes of hearing and for conducting hearings on the papers should be as is set out in the practice notes of the President of the Court of Appeal.

In practice therefore, any appeals or applications for appeal received by the Court when the bill comes into force will be dealt with under the new procedures. The only exception to this is an appeal or application for an appeal for which a fixture has been set for an oral hearing (new clause 9A refers).

In updating the Rules, we recommend the inclusion of an information note in both Forms one and three. This note explains to appeal applicants the difference between the two types of hearings, and the factors that are taken into consideration when the Court decides which type of hearing to hold. The note also advises applicants of the importance of including any material they consider relevant in their application (clause 9(2) to (7) refers).

Clause 10: Retrospective validation of previous decisions

A major area of concern for submitters is the provision in the bill that validates the procedures the Court has used to date in making determinations on criminal appeals. The clause provides for two exceptions to this. Submissions unanimously oppose the inclusion of the clause in the bill, and suggest it should be either removed or modified. Of principal concern for submitters is the potential the clause has to deny the right of those who may have grounds for an appeal to do so. Some submitters also suggest the clause may breach obligations under the ICCPR and the New Zealand Bill of Rights Act 1990.

The two exceptions to the validation clause are the *Taito* and *Bennett* [1] cases. Both these cases involve a hearing on the papers where legal aid was denied. Both challenge the validity of Court of Appeal decisions to dismiss these appeals on the papers. Counsel for the appellants argue the dismissals were wrong because of the failure of the Court on procedural grounds. These cases are exempt from the proposed clause as they are currently before the Courts. Submitters argue any decision on validation should await the outcome of these proceedings. If the proceedings are not successful, it is argued, the Court's practices will be vindicated and there will be no need for this legislation. If, however, the cases succeed people may be denied a right to appeal as a result.

[1] (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)

An application for special leave for *Fa'afete Taito, James Bennett and 11 others*, and *Malcolm Rewa* to appeal to the Judicial Committee of the Privy Council was considered on 7 February 2001. Leave was granted on 8 February 2001 in respect of all but one of the applicants, who was declined leave because defects in this appeal procedure had subsequently been resolved by the Court of Appeal. A fixture for the appeal has not been set down at this time. However, it is possible that the appeal will be heard in November or December 2001. Should the Privy Council find in favour of the appellants, the decision has the potential to affect around 1500 appeals. A precise figure is not possible as the Court of Appeal records are only available from 1997.

We are concerned about the intention to validate criminal appeal determinations retrospectively. This is an important constitutional principle and is particularly so given the nature of criminal law where people can be fined or imprisoned, and the liberty of a person put at stake. The idea of retrospective legislation in relation to the Court of Appeal is also of concern as, for most people, this is the final appellate tribunal in New Zealand.

Balanced against this, however, is the concern to ensure there is both certainty and public confidence in the criminal appeals system and in the decisions that have already been made by the Court of Appeal. In the interests of natural justice and good administrative practice, it would seem to us that any defects in something as important as the criminal justice system must be addressed as a matter of priority.

Breach of domestic and international legal obligations

We sought independent advice on whether this validation procedure was a possible breach of New Zealand's legal obligations. We are advised that in order to conclusively determine whether the provision constitutes a violation of the New Zealand Bill of Rights Act 1990 or the ICCPR, it would be necessary to examine every case that is being validated by the clause. In doing so, a complainant would need to satisfy all of the following elements before it could be concluded that a breach had occurred:

- That an individual in a particular case had been denied one or more of the rights conferred by the ICCPR or the New Zealand Bill of Rights Act 1990.
- That this denial of rights was not justifiable in terms of section 5 of the New Zealand Bill of Rights Act 1990, which provides

that the rights and freedoms conferred by the New Zealand Bill of Rights Act 1990 are subject to reasonable limits as can be demonstrably justified in a free and democratic society.

- Or, in terms of corresponding exceptions in relation to ICCPR rights, that there had been a miscarriage of justice that went beyond a mere technicality and that that outcome would not have resulted if the case had gone to the Court of Appeal.
- That there was no avenue through which the person could correct that miscarriage of justice.

We note clause 10 has been specifically worded to ensure individuals retain their right to appeal to either the Governor-General or the Privy Council on substantive issues of fact and law. The clause provides that no determination is invalid 'only' because of failures to comply with procedural matters. Clause 10 will not affect the rights of appellants to appeal where, for example, fresh evidence comes to light or where a mistake of law has been made at trial.

Notwithstanding this, we are not comfortable with the assertion from the Ministry of Justice and the Solicitor-General that it is unlikely the procedures employed by the Court of Appeal, during this time, have of themselves resulted in a miscarriage of justice, or have otherwise resulted in prejudice to individual appellants. While this might be so, there is no way of knowing unless each case is reconsidered.

Explicit prerogative of mercy and leave for a rehearing

While we note the exercise of the Royal prerogative of mercy is currently available to people who consider they have grounds for an appeal, we believe this should be explicitly stated in the bill. We recommend an additional subclause is added to clause 10 to explicitly confirm that nothing in this clause affects the right of any person to apply for the exercise of the prerogative of mercy.

In addition to this, we believe there needs to be a specific judicial process established for those who were denied legal aid and subsequently had their appeals dismissed on the papers. We see this as an additional safeguard. We believe it is desirable in terms of public confidence in the criminal justice system that a mechanism is developed so these cases can be reheard, subject to the leave of the Court.

The advantage of this option is that an additional mechanism would be in place through which miscarriages of justice arising from the processes in question could be addressed. The provision of a 'leave to rehear' process would be consistent with the rule of law, as cases would be dealt with by the courts in a manner consistent with the role of the judiciary.

We do not recommend that the application for leave for a rehearing provision should apply automatically. We are conscious of the number of potentially unmeritorious applications that may result. We also suggest there be a time limit. We recommend the Governor-General, by Order in Council, set a closing date by which applications for leave for a rehearing must be received by the Court. We recommend that the Order in Council not be made until at least one year after the Privy Council has handed down its decision in the *Taito* and *Bennett* cases.

We recommend the addition of three new clauses in the bill setting out the process for an application for leave for a rehearing. New clause 11 sets out the eligibility criteria for such an application. This is any person who was denied legal aid and subsequently had their appeal dismissed on the papers. In making an application for leave, however, the applicant must be able to show a procedural error occurred in relation to their case, and that there is an arguable case a miscarriage of justice occurred. New clause 12 provides for applications for leave to be determined by a single Judge. In line with our other recommended changes we agree the Registrar must provide an applicant, on request, with any documents that form part of the Court record that the Registrar considers necessary for the proper determination of the application. We also agree the Judge, in making a decision on an application, should have available these same documents as well as any written material provided by the applicant, any submissions made by the respondent, and any submissions from the applicant made in response to material provided by the respondent. New clause 13 provides that if an application for leave to a rehearing is granted it must be conducted as if it is an original appeal.

Conclusion

We believe the amendments we recommend to the bill provide an appellant whose appeal is set down for a hearing on papers with substantial safeguards that will ensure a fair and proper hearing. Our recommended changes include ensuring that all the relevant material

from the trial is available to the parties when the initial decision is made on whether there will be an oral hearing or not. We have also recommended safeguards that will see an appellant advised of the mode of hearing and then given time to make a submission on this decision. We believe these changes are significant and will ensure there is no serious disadvantage to an appellant who is heard on the papers.

We have taken a similar approach with the validation provision. While we note the assurances we have been given on this—that no miscarriage of justice is likely to have occurred by the use of these procedures by the Court of Appeal—we are not convinced this statement can be made with any real certainty. Instead our preferred approach is to explicitly confirm the rights of individuals to apply for exercise of the Royal prerogative of mercy as well as to establish a specific judicial process whereby people are able to seek redress if they can in fact demonstrate that a miscarriage of justice has occurred alongside defects in the procedures used by the Court of Appeal.

Appendix A

Committee process

The Crimes (Criminal Appeals) Amendment Bill was referred to the committee on 9 November 2000. We invited submissions from a number of interested groups and individuals. We received 13 submissions and heard nine orally. We are grateful to those individuals and organisations that were able to meet our deadline for making a submission. We are particularly grateful to the President and Justices of the Court of Appeal who gave evidence to us on the procedures for hearing appeals. In accordance with the convention that applies when members of the Judiciary appear before select committees, we agreed to hear this evidence in private. Hearing evidence took just over five hours and consideration took eight hours and 53 minutes.

We received advice from the Ministry of Justice and Legislative Counsel in the Office of the Clerk of the House of Representatives.

Committee membership

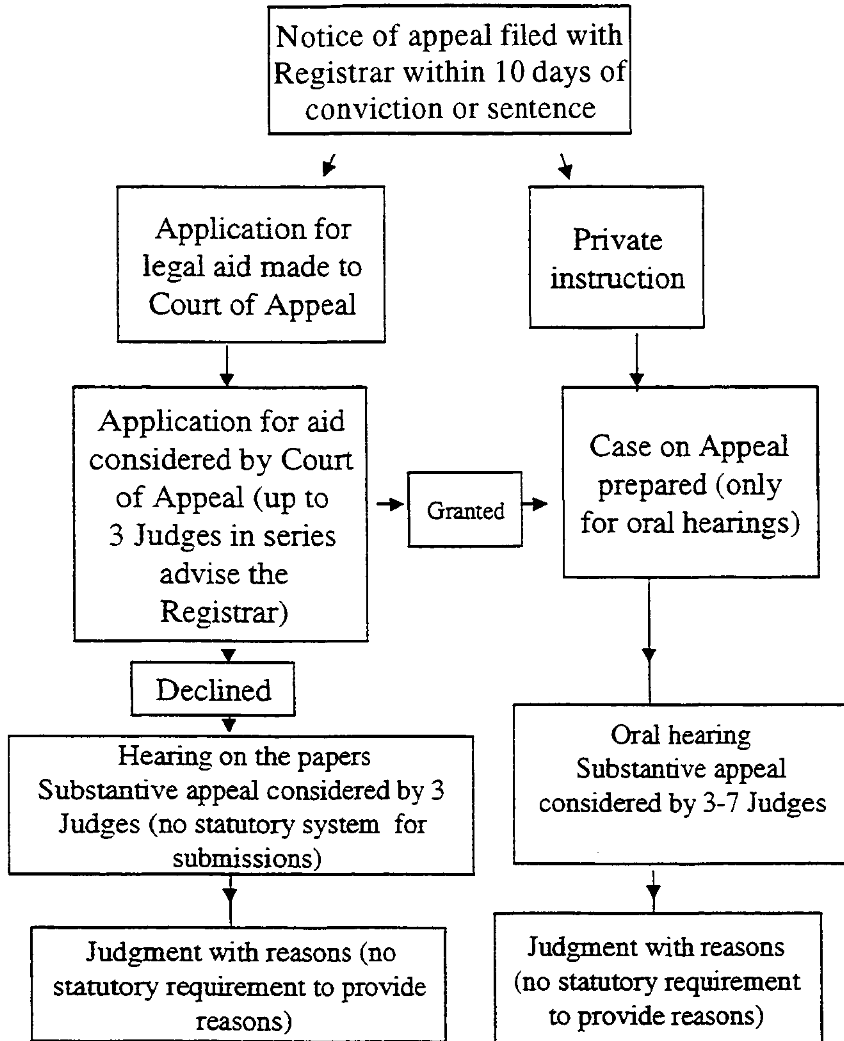
Dianne Yates (Chairperson)
Grant Gillon (Deputy Chairperson)
Arthur Anae
Tim Barnett
Hon David Carter
Luamanuvao Winnie Laban
Lindsay Tisch
Anne Tolley

Kevin Campbell replaced Grant Gillon for this item of business.

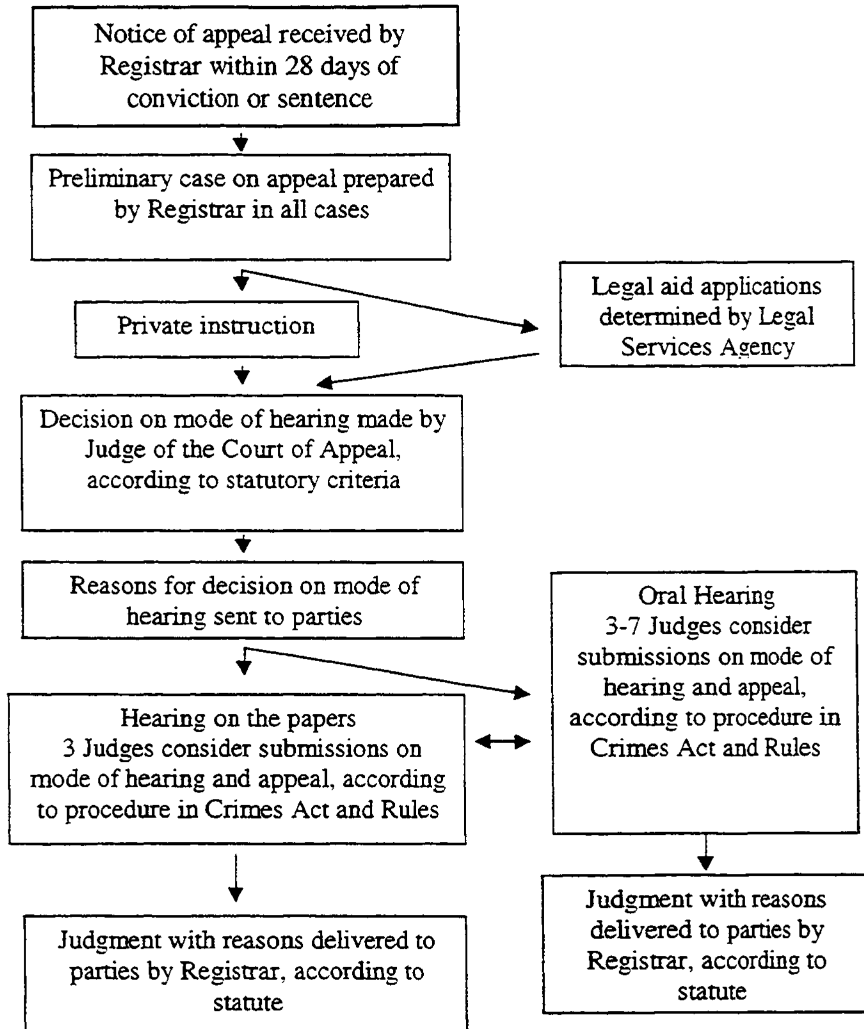
Tony Steel replaced Hon David Carter from 14 February 2001.

Appendix B

Procedure for criminal appeals in the Court of Appeal prior to Legal Services Act 2000



Proposed procedure for criminal appeals in the Court of Appeal



Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous)

Symbol	Meaning
Subject to this Act, (in heavy bracket box)	Text struck out unanimously

New (unanimous)

Symbol	Meaning
Subject to this Act, (in light bracket box)	Text inserted unanimously
(*Subject to this Act,*)	Words struck out unanimously
Subject to this Act, (underlined)	Words inserted unanimously

Hon Phil Goff

Crimes (Criminal Appeals) Amendment Bill

Government Bill

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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 1961[1] is called "the principal Act". 5

[1] 1961 No 43

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

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 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. 5

"(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 10 application.

"(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 15 appeal that are disposed of by the Court of Appeal by way of a hearing on the papers.

"(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 20 whatever manner the Court thinks fit.

"(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. 25

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

New (unanimous)

"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 30

"(b) a hearing involving oral submissions.

New (unanimous)

"(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— 5

"(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

"(d) whether the appeal can be fairly dealt with on the papers, or whether oral submissions should be heard; and 10

"(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. 15

"(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.

"(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. 20

"(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. 25

"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. 30

"(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 35

"(b) responses to any submissions made by the other party.

New (unanimous)

"(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.

"(5) Consideration of the written material may be undertaken in whatever manner the Court thinks fit. 5

"(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** 10 **attendance**".

(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 15 appeal or application, the appellant may be represented by counsel.

"(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 20 be present; or

"(b) the Court of Appeal gives leave for him or her to be present."

8 Judgment of Court of Appeal

Section 398 of the principal Act is amended by adding, as 25 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."

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,".

(2) Section 409 of the principal Act is amended by repealing subsection (2), and substituting the following subsections: 5

"(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. 10

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

Struck out (unanimous)

9 Consequential amendments to Court of Appeal (Criminal) Rules 1997 15

(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:

"(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." 20

(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 25

(b) omitting from form 3 all the words appearing in parentheses after item 7.

New (unanimous)

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**

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:

"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.

(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:

"**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."

New (unanimous)

(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 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—

New (unanimous)

(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.

(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.

Part 2
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:

(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 this Act):

(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:
   (a) *Fa'afete Taito* v *The Queen* (petition for special leave to appeal, CA 4/96): 5
   (b) *James McLeod Bennett and 11 Others* v *Attorney-General and 2 Others* (CP 108/00).

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 10

(1) This section applies to any person—
   (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 15
   (c) whose appeal or application was determined without oral submissions being heard; and
   (d) whose appeal or application was dismissed. 20

(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**. 25

(3) An application for a rehearing must—
   (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. 30

(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 35 which the following cases before the Judicial Committee of the Privy Council are finally determined:

New (unanimous)

(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— 5
  (a) written material provided by the applicant in his or her application; and
  (b) any submissions made by the respondent; and
  (c) any submissions provided by the applicant in response to submissions made by the respondent; and 10
  (d) any documents that form part of the Court record that the Judge considers necessary for the proper determination of the application.

(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. 15

(3) The Judge must grant leave for a rehearing if he or she is satisfied that— 20
  (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. 25

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. 30

Legislative history

6 November 2000	Introduction (Bill 76–1)
9 November 2000	First reading and referral to Government Administration Committee.

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