



Court of Appeal (Criminal) Amendment Rules 2005

Silvia Cartwright, Governor-General

Order in Council

At Wellington this 21st day of March 2005

Present:

Her Excellency the Governor-General in Council

Pursuant to section 51C of the Judicature Act 1908, section 409 of the Crimes Act 1961, section 73 of the Bail Act 2000, and section 107U of the Parole Act 2002, Her Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, and as far as the rules regulate the practice and procedure of the Court of Appeal in the exercise of its jurisdiction conferred by the Judicature Act 1908 and the Crimes Act 1961, with the concurrence of the Right Honourable the Chief Justice and at least 2 other members of the Rules Committee (of whom at least 1 was a Judge of the High Court) makes the following rules.

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Rules

1 Title

- (1) These rules are the Court of Appeal (Criminal) Amendment Rules 2005.
- (2) In these rules, the Court of Appeal (Criminal) Rules 2001¹ are called “the principal rules”.

¹ SR 2001/371

2 Commencement

These rules come into force on 1 May 2005.

3 Interpretation

- (1) Rule 3 of the principal rules is amended by inserting, after the definition of **bail appeal**, the following definition:
“**chief executive** means the chief executive of the Department of Corrections”.
- (2) Rule 3 of the principal rules is amended by inserting, after the definition of **exhibit**, the following definition:
“**extended supervision order appeal** means an appeal under section 107R of the Parole Act 2002 against a decision or order made by a sentencing court under section 107I, section 107M, or section 107N of that Act”.
- (3) Rule 3 of the principal rules is amended by revoking the definition of **general appeal**, and substituting the following definition:
“**general appeal**—
“(a) means—

- “(i) an appeal under section 383(1) of the Act against conviction or sentence or both; or
- “(ii) an appeal under section 384 of the Act against a finding of criminal contempt or a sentence for criminal contempt or both; but
- “(b) does not include an extended supervision order appeal”.
- (4) Rule 3 of the principal rules is amended by revoking the definitions of **prosecutor** and **prosecutor appeal**, and substituting the following definitions:
- “**prosecutor** means,—
- “(a) in the case of an extended supervision order appeal, the chief executive; or
- “(b) in the case of any other appeal or an application for leave to appeal, the Solicitor-General or a prosecutor
- “**prosecutor appeal** means an appeal or an application for leave to appeal, whether made under Part XIII of the Act or any other Act (except the Parole Act 2002)”.
- (5) Rule 3 of the principal rules is amended by adding to the definition of **summary proceedings appeal**, the words “; and includes an appeal under section 69(1)(p) of the Extradition Act 1999”.
- (6) Rule 3 of the principal rules is amended by adding the following definitions:
- “**victim**, in relation to an extended supervision order appeal, has the meaning given to it by section 4(1) of the Parole Act 2002
- “**working day** means a day that is not—
- “(a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign’s Birthday, or Waitangi Day; or
- “(b) a day in the period commencing on 25 December in one year and ending on 15 January in the next year.”
- (7) Rule 3 of the principal rules is amended by adding, as subclause (2), the following subclause:
- “(2) In any judgment, order, direction, or other document forming part of any proceeding, unless the context otherwise requires, **working day** has the meaning given by subclause (1).”

4 Application of rules

- (1) Rule 4(1) of the principal rules is amended by adding the word “; and” to paragraph (e) and also by adding the following paragraph:

“(f) extended supervision order appeals.”

- (2) Rule 4(3) of the principal rules is amended by omitting the words “, or shorten or extend any appointed period,”.

5 Form of notice of appeal and notice of application for leave to appeal

Rule 6 of the principal rules is amended by adding the following subclause:

- “(7) An extended supervision order appeal must,—

“(a) if made by the chief executive, be made in form 2 (which applies with all necessary modifications); or

“(b) if made by the offender to whom the extended supervision order relates, be made in form 8.”

6 Other applications may be included in notice of appeal or of application for leave to appeal

Rule 7 of the principal rules is amended by inserting, after the words “forms 1 to 6”, the expression “or 8”.

7 Persons required or authorised to sign notices and other documents

Rule 8 of the principal rules is amended by revoking subclause (5), and substituting the following subclause:

- “(5) A notice or other document required to be signed by—

“(a) the Solicitor-General may be signed on his or her behalf by Crown Counsel; or

“(b) the chief executive may be signed on his or her behalf by the chief executive’s delegate.”

8 Form must be treated as application for extension of time if notice given out of time

Rule 12 of the principal rules is amended by inserting, after the words “forms 1 to 6”, the expression “or 8”.

9 New rules 12A to 12C inserted

The principal rules are amended by inserting, after rule 12, the following rules:

“12A Complaint against trial counsel

- “(1) If a ground of appeal is that there was a miscarriage of justice because of the conduct of the appellant’s counsel at the trial or sentencing, particulars of the conduct concerned must be given in—
- “(a) the notice of appeal; or
 - “(b) a memorandum to be filed and served by the appellant within 30 working days of filing the notice of appeal.
- “(2) The appellant must, within 30 working days of filing notice of appeal,—
- “(a) provide to the prosecutor a written waiver of privilege addressed to the appellant’s counsel at the trial or sentencing; and
 - “(b) file and serve on the prosecutor any affidavits that relate to the ground of appeal.
- “(3) If the appellant considers that a waiver of privilege is inappropriate, the appellant may apply for an exemption from subclause (2)(a) and the Court, if it considers that an exemption is appropriate, may grant it.
- “(4) The prosecutor must file and serve any affidavit in reply within 15 working days after service of the appellant’s affidavit.
- “(5) A party who wishes to cross-examine a deponent who has sworn an affidavit on behalf of the other party must, within 15 working days of service of the affidavit, file and serve on the other party a notice of cross-examination specifying the deponent the party wishes to cross-examine.
- “(6) A party on whom a notice is served under subclause (5) must—
- “(a) immediately advise the deponent that he or she is required for cross-examination; and
 - “(b) advise the deponent of the hearing date of the appeal as soon as it is known; and
 - “(c) ensure that the deponent is present at the hearing for cross-examination.

“12B Fresh evidence

- “(1) If a ground of appeal is that there was a miscarriage of justice because further evidence has become available since the trial, particulars of the further evidence must be set out in—
- “(a) the notice of appeal; or
 - “(b) a memorandum to be filed and served by the appellant within 30 working days of filing the notice of appeal.
- “(2) The appellant must, within 30 working days of filing the notice of appeal, file and serve on the prosecutor any affidavits that relate to the ground of appeal.
- “(3) The affidavits must—
- “(a) set out the further evidence; and
 - “(b) explain why the further evidence was not available at the trial and why it could not, with reasonable diligence, have been called.
- “(4) The prosecutor must file and serve any affidavit in reply within 15 working days after service of the appellant’s affidavit.
- “(5) A party who wishes to cross-examine a deponent who has sworn an affidavit on behalf of the other party must, within 15 working days of service of the affidavit, file and serve on the other party a notice of cross-examination specifying the deponent the party wishes to cross-examine.
- “(6) A party on whom a notice is served under subclause (5) must—
- “(a) immediately advise the deponent that he or she is required for cross-examination; and
 - “(b) advise the deponent of the hearing date of the appeal as soon as it is known; and
 - “(c) ensure that the deponent is present at the hearing for cross-examination.

“12C Disparity of sentences

If a ground of appeal is that the sentence imposed on the appellant was not appropriate because of disparity with a sentence imposed on a co-offender, that ground of appeal must be stated in the notice of appeal.”

10 Documents required for general appeals

Rule 13 of the principal rules is amended by revoking subclause (2), and substituting the following subclauses:

- “(2) If a notice of appeal states in accordance with rule 12C that a ground of appeal is disparity of sentence, the Registrar must obtain, for the use of the Court, documents relevant to the sentence imposed on the appellant’s co-offender, including—
- “(a) the statement of facts or evidence on which the sentence imposed on the appellant’s co-offender was based;
 - “(b) information submitted to the Judge under section 21 of the Victims’ Rights Act 2002 for the sentencing of the appellant’s co-offender;
 - “(c) the pre-sentence report relating to the appellant’s co-offender (including the co-offender’s record of convictions);
 - “(d) the Judge’s sentencing remarks with respect to the appellant’s co-offender.
- “(3) The Registrar must include the material specified in subclause (4) in the preliminary case on appeal or, if the preliminary case on appeal has been prepared, in a supplementary case on appeal.
- “(4) The material is—
- “(a) material filed under rule 12A or 12B; or
 - “(b) material obtained under subclause (2)(a), (c), and (d) (but not material obtained under subclause (2)(b)).
- “(5) The preliminary case on appeal, together with any supplementary case on appeal, constitutes the final case on appeal for a general appeal.
- “(6) Counsel for the parties must ensure that all material relevant to the appeal has been included in the final case on appeal.”

11 Documents required for other appeals

Rule 14 of the principal rules is amended by omitting the words “forms 1, 2, 4, 5, or 6”, and substituting the words “forms 1, 2, 4, 5, 6, or 8”.

12 Timing of submissions on merits

- (1) Rule 27(3) of the principal rules is amended by omitting the words “14 days”, and substituting the words “15 working days”.

- (2) Rule 27(4) of the principal rules is amended by omitting the words “7 days”, and substituting the words “10 working days”.
- (3) Rule 27 of the principal rules is amended by inserting, after subclause (4), the following subclauses:
 - “(4A) In the case of an extended supervision order appeal to which this rule applies, a victim who wishes to make written submissions to the Court must provide them to the Court no less than 15 working days before the hearing date.
 - “(4B) If the victim also wishes to appear and make oral submissions at the hearing, he or she must, in accordance with subclause (4C), apply for the Court’s leave to appear and make oral submissions.
 - “(4C) The victim must apply for the Court’s leave in a separate letter that—
 - “(a) is provided to the Court at the same time as the written submissions referred to in subclause (4A); and
 - “(b) sets out the reasons why the Court should give leave.
 - “(4D) The Registrar must serve on the prosecutor and the offender to whom the appeal relates a copy of—
 - “(a) the written submissions referred to in subclause (4A); and
 - “(b) the letter referred to in subclause (4C).
 - “(4E) Subclause (4D) is subject to section 107W of the Parole Act 2002 and, accordingly, the Registrar must delete any information that discloses the current address or contact details of the victim from the copy of any documents to be served on the offender under that subclause.”

13 Period allowed for making written submissions on merits

- (1) Rule 29 of the principal rules is amended by revoking subclause (4), and substituting the following subclause:
 - “(4) The Registrar must appoint a period of no less than 20 working days within which submissions may be made—
 - “(a) by the appellant in support of the appeal (including further written submissions about the Court’s decision on the mode of hearing); and

- “(b) in the case of an extended supervision order appeal, by the victim.”
- (2) Rule 29 of the principal rules is amended by revoking subclause (6), and substituting the following subclauses:
- “(6) The Registrar must send to the respondent a copy of all written submissions received by the Court from the appellant and, if applicable, from the victim, within the appointed period, and the respondent may make written submissions within—
- “(a) 10 working days if the respondent is the Solicitor-General or the chief executive; or
- “(b) 20 working days in the case of any other respondent.
- “(6A) Subclause (6) is subject to section 107W of the Parole Act 2002 in so far as it relates to written submissions from the victim and, accordingly, the Registrar must delete any information that discloses the current address or contact details of the victim from the copy of those submissions to be served on the respondent under that subclause if the respondent is the offender.”
- (3) Rule 29(7)(a) of the principal rules is amended by omitting the words “14 days”, and substituting the words “10 working days”.
- (4) Rule 29 of the principal rules is amended by revoking subclause (9).

14 Notification of decisions

Rule 34(3) of the principal rules is amended by omitting the words “7 days”, and substituting the words “5 working days”.

15 New rule 36A inserted

The principal rules are amended by inserting, after rule 36, the following rule:

“36A Chief executive must notify victim about extended supervision order appeal

The chief executive must, in relation to an extended supervision order appeal,—

- “(a) notify every victim about any decision of the Court on the appeal, including any decision on an application for

- leave to appear and make oral submissions made by the victim under rule 27(4B); and
- “(b) notify every victim about when any submissions to the Court on the appeal must be made; and
 - “(c) notify every victim about the time and place fixed for the hearing of the appeal if the victim’s application for leave to appear and make oral submissions under rule 27(4B) is granted; and
 - “(d) ensure that copies of any submissions filed by or provided to the chief executive are forwarded to every victim as soon as practicable.”

16 New rules 45A and 45B inserted

The principal rules are amended by inserting, after rule 45, the following rules:

“45A Power to extend or shorten time appointed by rules or fixed by order

- “(1) The Court may extend or shorten the time appointed by these rules, or fixed by any order, for doing any act or taking any proceeding or any step in a proceeding on any terms that the Court thinks just.
- “(2) The Court may exercise a power conferred by subclause (1)—
 - “(a) whether on application by a party or on the Court’s own initiative; and
 - “(b) whether for reasons or urgency or for any other reason; and
 - “(c) in the case of an extension of the time referred to in that subclause, whether before or after that time has expired.

“45B Correction of accidental slip or omission

- “(1) This rule applies if—
 - “(a) any judgment or order or the reasons for any judgment or order contain a clerical mistake or an error arising from any accidental slip or omission (whether the mistake, error, slip, or omission was made by an officer of the Court or not); or
 - “(b) any judgment or order is so drawn up as not to express what was actually decided and intended.
- “(2) The Court or the Registrar may correct the judgment or order or the reasons for the judgment or order on—

- “(a) the Court’s or Registrar’s own initiative; or
“(b) an interlocutory application made for that purpose.
“(3) The Registrar may correct the judgment or order or the reasons for the judgment or order in accordance with subclause (2) only if the judgment or order in question was made by the Registrar.”

17 New form inserted

The Schedule of the principal rules is amended by adding the form 8 set out in the Schedule.

Schedule New form 8 added

r 17

Form 8

r 6(7)

Notice of appeal by offender relating to extended supervision order

Section 107R, Parole Act 2002

Name of appellant:

Decision being appealed:

[Describe the decision against which you are appealing. You may appeal against the sentencing court—

- *making an extended supervision order (section 107I of the Parole Act 2002); or*
- *declining to cancel an extended supervision order (section 107M of the Parole Act 2002); or*
- *ordering for a specified period that you not be permitted to apply for the cancellation of the extended supervision order to which you are subject (section 10M(6) of the Parole Act 2002); or*
- *extending a short extended supervision order (section 107N of the Parole Act 2002).]*

Date of decision:

Form 8—*continued***To the Registrar of the Court of Appeal**

I, the above-named appellant, give you notice under section 107R of the Parole Act 2002 that I wish to appeal to the Court of Appeal against the decision described above on the grounds set out below, and I give answers as follows to the following questions:

- 1 (a) Is any lawyer now acting for you?
- (b) If so, give his or her name and address and fax number:
- (c) Have you applied, or do you intend to apply, to the Legal Services Agency for a grant of legal aid?
- 2 If you are currently in a penal institution, which one?
- 3 If you do not currently have a lawyer, what is your current postal address and fax number (if any)?
- 4 (a) If you are in custody and are granted an oral hearing, do you wish to apply for leave to be present?
- (b) If so, what are your reasons for seeking leave to be present?
- 5 (a) Do you wish to apply for leave to call any witnesses on your appeal?
- (b) If so, then state—
 - (i) the name and address of the witness(es):
 - (ii) whether the witness(es) gave evidence at the trial:
 - (iii) if not, the reason why the witness(es) did not give evidence:
 - (iv) on what matters you wish the witness(es) to give evidence:
 - (v) briefly, what evidence you think the witness(es) can give.
- 6 You have 28 days from the date of the decision in which to file your notice of appeal with the Court of Appeal. The Court may extend this time. If your appeal is out of time, what are your reasons for saying that the Court should nevertheless extend the time and consider your appeal?
- 7 What are the grounds of your appeal?
- 8 Include in this notice of appeal anything that is relevant to the decision about whether your appeal should be considered at an oral hearing or be dealt with on the papers, such as—

Form 8—*continued*

- (a) whether you have been assisted by counsel in preparing your appeal:
- (b) whether you have been provided with copies of the relevant hearing documentation:
- (c) the gravity of the offence:
- (d) the nature and complexity of the issues raised by your appeal:
- (e) whether any evidence should be called:
- (f) any relevant cultural or personal factors.

Dated this [date] day of [month] [year].

.....
Signature of appellant

Note

Your appeal will be considered at an oral hearing (ie, a hearing at which oral submissions may be made) *unless* the Court or a Judge determines that the appeal can be fairly dealt with on the papers and either has no realistic prospect of success or clearly should be allowed. In that case, the appeal will be dealt with at a hearing on the papers. This is a hearing at which the Court makes its decision solely on the basis of the written material before it.

Rebecca Kitteridge,
Acting for Clerk of the Executive Council.

Explanatory note

This note is not part of the rules, but is intended to indicate their general effect.

These rules, which come into force on 1 May 2005, amend the Court of Appeal (Criminal) Rules 2001 (“the principal rules”).

In general terms, the amendments—

- insert several new provisions and a new form into the principal rules relating to appeals in respect of extended supervision orders under the Parole Act 2002 (which may be made against offenders who have been convicted of certain sexual offences

and who pose a real and ongoing risk of committing sexual offences against children or young persons):

- incorporate into the principal rules the procedures for appeals brought on the grounds of the conduct of trial counsel, fresh evidence, and disparity of sentences that are currently dealt with in Practice Notes issued by the Court;
- relocate the provision allowing the Court to extend or shorten any appointed period into a separate rule, as is the case in the Court of Appeal (Civil) Rules 2005;
- insert a new rule to correct clerical mistakes or errors arising from an accidental slip or omission in any judgment or order or the reasons for any judgment or order;
- make a number of other technical changes.

Rule 3 inserts a number of new definitions into the principal rules that are needed for the purposes of the new rules governing extended supervision order appeals under the Parole Act 2002 (see *new rules 4(1)(f), 6(7), 8(5), 27(4A) to (4E), 29(4), (6), and (6A), 36A, and new form 8*). An **extended supervision order appeal** is defined to mean an appeal under section 107R of the Parole Act 2002 against a decision or order made by a sentencing court under section 107I (making of an extended supervision order), section 107M (cancellation of an extended supervision order), or section 107N (extension of a short extended supervision order) of that Act.

Rule 3 also—

- amends several existing definitions in the principal rules in connection with extended supervision order appeals; and
- inserts a definition of **working day** (which is taken from the High Court Rules and is the same as the definition of that term in the Court of Appeal (Civil) Rules 2005).

Rule 4 provides that the principal rules apply to extended supervision order appeals. *Rule 4* also makes an amendment to rule 4(3) of the principal rules that is consequential on the amendment made by *new rule 45A* concerning the general power to extend or shorten appointed times.

Rule 5 provides that an extended supervision order appeal must, if made by the chief executive of the Department of Corrections (**chief executive**), be made in form 2 or, if made by the offender to whom the order relates, be made in form 8. The Schedule of these rules sets out *new form 8*, which is substantially the same as form 3 (notice of appeal by person convicted) of the principal rules.

Rules 6 and 8 make minor drafting amendments that are consequential on the amendments made to the principal rules in relation to extended supervision order appeals.

Rule 7 amends rule 8(5) of the principal rules to provide that a notice or other document required to be signed by the chief executive may be signed on his or her behalf by the chief executive's delegate.

Rule 9 inserts *new rules 12A to 12C* into the principal rules. *New rule 12A* deals with the procedure for appeals brought on the ground that there was a miscarriage of justice because of the conduct of the appellant's counsel at the trial or sentencing. *New rule 12B* deals with the procedure for appeals brought on the ground that there was a miscarriage of justice because further evidence has become available since the trial. *New rule 12C* deals with the procedure for appeals brought on the ground that the sentence imposed on the appellant was not appropriate because of the disparity between that sentence and the sentence imposed on a co-offender. The procedures set out in *new rules 12A to 12C* are currently provided for in Practice Notes issued by the Court, which are to be revoked.

Rule 10 makes an amendment to rule 13 (documents required for general appeals) of the principal rules that is related to *new rule 12C*. The amendment provides that, in an appeal brought on the ground of disparity of sentence, the Registrar must obtain, for the use of the Court, certain documents relevant to the sentence imposed on the appellant's co-offender (including, for example, the pre-sentence report on the co-offender).

Rule 11 makes a minor drafting amendment that is consequential on the amendments made to the principal rules in relation to extended supervision order appeals.

Rule 12 amends rule 27 (timing of submissions on merits in oral appeals) of the principal rules in 2 respects. First, it replaces the time specified in rule 27(3) and (4) within which, respectively, the appellant and the respondent must provide written submissions to the Court. Under the amendment, the appellant must now provide his or her written submissions no less than 15 working days before the hearing date, instead of 14 days before that date. The respondent, on the other hand, must now provide his or her submissions no less than 10 working days before the hearing date, instead of 7 days before that date. Secondly, *rule 12* inserts new provisions into rule 27 of the principal rules dealing with the timing of submissions from a victim who wishes to make written submissions to the Court on an

extended supervision order appeal or who wishes to appear and make oral submissions at the hearing of that appeal.

Rule 13 amends rule 29 (period allowed for making written submissions on merits in appeals on papers) of the principal rules in several respects. The principal amendments require the Registrar to—

- appoint a period within which the appellant and, in the case of an extended supervision order appeal, the victim may make written submissions to the Court; and
- send to the respondent all submissions received by the Court from the appellant and, if applicable, from the victim within the appointed period.

Rule 13 also makes a consequential amendment to rule 29 of the principal rules by omitting a provision that is no longer needed because of the addition of a general power to extend or shorten appointed times under *new rule 45A*.

Rule 14 amends rule 34(3) (notification of decisions) of the principal rules. Under the amendment, an application for review of a decision of the Court in cases where a party has the right to have that decision reviewed must now be filed within 5 working days after receipt of notification, instead of 7 days after that receipt.

Rule 15 inserts *new rule 36A* into the principal rules. *New rule 36A* imposes certain duties on the chief executive to notify victims about extended supervision order appeals. *New rule 36A* is consistent with the duty of the chief executive under section 107H(4) of the Parole Act 2002 to notify every victim of the offender concerned when any hearing of an appeal against an extended supervision order is to be held.

Rule 16 inserts *new rules 45A and 45B* into the principal rules. *New rule 45A* allows the Court to extend or shorten the time appointed by the principal rules, or fixed by an order, for doing any act or taking any proceeding or any step in a proceeding on any terms that the Court thinks just. This power, which replaces the provision in rule 4(3) of the principal rules concerning the extension or shortening of appointed periods, is expressed in the same terms as a corresponding power in respect of civil proceedings that is conferred on the Court by the Court of Appeal (Civil) Rules 2005. *New rule 45B* allows the Court or, in certain cases, the Registrar to correct any clerical mistakes or any errors arising from an accidental slip or omission in any judgment or order or the reasons for any judgment or order. This power is also expressed in the same terms as a corresponding power

in respect of civil proceedings that is conferred on the Court by the Court of Appeal (Civil) Rules 2005.

Rule 17 inserts a *new form 8* into the principal rules. *New form 8* relates to the notice of appeal by an offender in respect of an extended supervision order.

Issued under the authority of the Acts and Regulations Publication Act 1989.

Date of notification in *Gazette*: 24 March 2005.

These rules are administered in the Ministry of Justice.
