

# Supreme Court (Criminal Appeal) Rules 2021

[2021-194]



New South Wales

## Status Information

### Currency of version

Historical version for 27 April 2021 to 1 May 2021 (accessed 2 July 2024 at 23:21)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
Rule 1.2(2) of these Rules (rule 1.2(2) repeals rules 6.3 and 6.4 on 2.5.2021)

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 1 May 2021

# Supreme Court (Criminal Appeal) Rules 2021



New South Wales

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# Supreme Court (Criminal Appeal) Rules 2021



New South Wales

## Part 1 Preliminary

### 1.1 Name of Rules

These Rules are the *Supreme Court (Criminal Appeal) Rules 2021*.

### 1.2 Commencement and repeals

- (1) These Rules commence on 1 May 2021.
- (2) Rules 6.3 and 6.4 are repealed on 2 May 2021.

### 1.3 Interpretation

- (1) The Dictionary in Schedule 1 defines words used in these Rules.

**Note—**

The *Interpretation Act 1987* contains definitions and other provisions affecting the interpretation and application of these Rules.

- (2) Words used in these Rules defined for the 1912 Act have the same meanings as in the 1912 Act, except to the extent they are defined differently in these Rules or the context or subject-matter indicates or requires a different meaning.

### 1.4 Court may dispense with Rules in particular cases

- (1) The Court may, by order, dispense with a requirement of these Rules in relation to particular proceedings in the Court if satisfied it is appropriate to do so in the circumstances of the case.
- (2) The Court may dispense with compliance with a requirement either before or after the occasion for the compliance arises.

### 1.5 Court may give directions in circumstances not covered by Rules

The Court may give directions in relation to particular proceedings in the Court concerning an aspect of practice or procedure for which these Rules does not provide.

## **Part 2 Documentation, evidence and representation**

### **Division 2.1 Forms**

#### **2.1 Approval of forms**

- (1) The Chief Justice may approve forms from time to time for documents to be used in connection with proceedings or proposed proceedings in the Court.
- (2) Copies of the approved forms are to be made available for inspection at the registry of the Court and on the Court's website.

#### **2.2 Use of approved forms**

Subject to these Rules, a document filed with or issued by the Court for which there is an approved form is to be in the approved form.

**Note—**

See the [Interpretation Act 1987](#), section 80 about compliance with approved forms.

### **Division 2.2 Filing**

#### **2.3 Filing generally**

- (1) A person may lodge a document for filing in relation to proceedings or proposed proceedings in the Court by—
  - (a) delivering it to a Registry officer, or
  - (b) sending it by post to the Registry's business address, or
  - (c) using another method approved by the Registrar for documents of the kind concerned.
- (2) Without limiting subrule (1), each of the following documents may be lodged for filing by sending the document by electronic communication to the email address of the Registry—
  - (a) a notice of intention to appeal,
  - (b) an application to extend the time for filing a notice of intention to appeal.
- (3) A document lodged for filing must be in hard copy unless—
  - (a) the document is permitted or required under these Rules to be sent by electronic communication to the email address of the Registry, or
  - (b) the Court or the Registrar orders differently.
- (4) A person may lodge a document with a Registry officer for filing in relation to



proceedings or proposed proceedings in the Court.

- (5) Unless acceptance of the document is subsequently refused by the Court or by a Registry officer, a document is taken to have been filed when it is lodged for filing.
- (6) A document sent by post to the Registry's business address is taken to have been lodged for filing—
  - (a) for a document provided for posting to an officer of the place of detention by an inmate—on the day specified by the officer on the document as the day it was provided to the officer for posting, or
  - (b) for another document—when it is received by the Registry.
- (7) A document sent by electronic communication to the business email of the Registry is taken to have been lodged for filing—
  - (a) if sent on or before 5 pm on a business day—on the day it is sent, or
  - (b) if sent after 5 pm on a business day or on a non-business day—on the next business day.
- (8) A Registry officer may refuse to accept a document for filing if—
  - (a) the required number of copies of the document have not been lodged, or
  - (b) the document is incomplete, or
  - (c) the document has not been completed in accordance with the requirements specified in the approved form for the document.
- (9) The Court or a Registry officer may refuse to accept a document for filing regardless of whether or not a Registry officer has previously accepted the document for filing.

#### **2.4 Filed documents to be entered in record system**

The Registrar is to cause filed documents to be entered in the Court's computerised record system.

### **Division 2.3 Service**

#### **2.5 Service of documents**

- (1) Subject to these Rules, a document may be served on a person (the **recipient**)—
  - (a) by personal service, or
  - (b) by posting a copy of the document, addressed to the recipient, to the recipient's business or residential address, or

- (c) by leaving a copy of the document, addressed to the recipient, with a person who is apparently of or above the age of 16 years and apparently employed or residing at the recipient's business or residential address, or
  - (d) by transmitting an electronic copy of the document, addressed to the recipient, to the recipient's email address, if the method of service has been consented to by the recipient, or
  - (e) for service on a corporation—by serving the document on the corporation in a way in which service of the document may, by law, be served on the corporation.
- (2) For a recipient who is represented by an Australian legal practitioner in the proceedings, service of a document on the recipient may also be effected—
- (a) by serving the document personally on the Australian legal practitioner, or
  - (b) by posting a copy of the document, addressed to the Australian legal practitioner, to the Australian legal practitioner's business address, or
  - (c) by leaving a copy of the document, addressed to the Australian legal practitioner, in the Australian legal practitioner's DX box at the address or in another DX box for transmission to the DX box, unless the notice of appearance or notice of appointment does not include a DX address, or
  - (d) by transmitting an electronic copy of the document to the Australian legal practitioner's email address, unless the notice of appearance or notice of appointment does not include an email address.
- (3) Despite subrule (1), a document to be served on a protected confider must be served on—
- (a) if the confider is represented by an Australian legal practitioner—the legal practitioner, or
  - (b) if the confider is not represented by an Australian legal practitioner—the Legal Aid Commission.
- (4) Despite the other provisions of this rule, a document may be served under this rule by electronic means without consent if the Court so orders.
- (5) In this rule—

**protected confider** means a person who is, or claims to be, a protected confider within the meaning of the *Criminal Procedure Act 1986*, Chapter 6, Part 5, Division 2 in relation to a document or evidence in the proceedings.

## 2.6 Service by Registrar for unrepresented persons

The Registrar is to arrange for the service of a document on behalf of a person if the

person is not represented by an Australian legal practitioner.

### **2.7 How personal service is effected generally**

- (1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.
- (2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person to deliver a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to the other person.
- (3) Service in accordance with subrule (2) is taken to constitute personal service.

### **2.8 Personal service on corporation**

- (1) Personal service of a document on a corporation is effected—
  - (a) by personally serving the document on a principal officer of the corporation, or
  - (b) by serving the document on the corporation in any other way in which service of the document may, by law, be served on the corporation.
- (2) In this rule—

***principal officer***, in relation to a corporation, means—

  - (a) the chairman or president, however described, of the governing body of the corporation, or
  - (b) the general manager, chief executive officer or other person, however described, having general management of the affairs of the corporation, or
  - (c) the secretary, treasurer or other person, however described, having the general function of accepting correspondence on behalf of the corporation.

### **2.9 Personal service on inmate of place of detention**

Personal service of a document on an inmate of a place of detention is effected by leaving a copy of the document with the manager of the place of detention at which the inmate is held in custody.

### **2.10 Substituted service of documents**

- (1) On the application of a party, the Registrar may, by order, direct service of a document issued in proceedings to be effected differently than a way specified by this Division.

- (2) An application for an order for substituted service may be made—
  - (a) orally, or
  - (b) in the approved form.

### **2.11 Proof of service**

- (1) A person seeking to prove a document has been served by the person in relation to proceedings must complete a statement as to service of the document served.
- (2) The statement must include the following matters—
  - (a) the date service was effected,
  - (b) the method of service,
  - (c) the name, address and occupation of the person serving the document,
  - (d) if the document was served personally, the person to whom it was delivered,
  - (e) if the document was served by post—
    - (i) the information, and the source of the information, the person relied on in obtaining the address to which it was posted, and
    - (ii) the time and place of posting,
  - (f) if the document was served by electronic communication to an email address—
    - (i) the information, and the source of the information, the person relied on in obtaining the email address to which it was sent, and
    - (ii) the date on which the email was sent.
- (3) A copy of the document served must be attached to the statement or the statement must clearly identify the document.
- (4) The statement must be signed by the person serving the document and a witness to the signature.
- (5) For a document served by a police officer or a public officer, the statement is not required to be signed.
- (6) If service is effected by electronic communication to an email address, the party relying on service must produce to the Court, if requested to do so by the Court, evidence of the date the document was dispatched.
- (7) If service is effected by post by a person other than a Registry officer, the party relying on service is, in the absence of evidence to the contrary, taken to have

effected service if the person produces evidence of—

- (a) an acknowledgement of receipt of the document by the person to whom it was directed, or
- (b) the address appearing on the document being the address provided by the person served for service of documents in the proceedings, or
- (c) the address appearing on the document being the address of the person served on a current driver licence, or
- (d) the address appearing on the document being the address of the person served as shown on registration records.

(8) In this rule—

**driver licence** means a driver licence within the meaning of—

- (a) the [Road Transport Act 2013](#), or
- (b) a corresponding law of another State or a Territory.

**registration records** means—

- (a) records kept by Transport for NSW under the [Road Transport Act 2013](#) of the current registration of motor vehicles or trailers, or
- (b) records kept by an authority under a corresponding law of another State or a Territory.

## 2.12 Doubtful service

If a document issued in proceedings is not served personally, the Court may, on the application of a party or of its own motion, do the following if satisfied there is a doubt as to whether the document came to the party's notice within a reasonable time—

- (a) stay the proceedings,
- (b) adjourn the proceedings,
- (c) set aside an order made in the proceedings.

## 2.13 Time of service for a document sent by DX

Unless the contrary is proved, a document left in a DX box in accordance with this Division is taken to have been served at the end of the second day following the day on which the copy is so left.

**Note—**

See the [Electronic Transactions Act 2000](#), Schedule 1, clause 13 as to when an electronic copy of a document is taken to have been delivered to an electronic mail address.

## **Division 2.4 Appointment and removal of representatives**

### **2.14 Appointment of practitioner**

- (1) A party who, after proceedings are commenced, appoints an Australian legal practitioner to act on the party's behalf must file notice of the appointment.
- (2) A copy of the notice of appointment, as filed, must be served on all other parties if the Australian legal practitioner intends to file or serve documents electronically.

### **2.15 Change of practitioner**

- (1) A party for whom there is an Australian legal practitioner on the record in proceedings may change Australian legal practitioners.
- (2) A copy of the notice of change, as filed, must be served on all other parties and, if practicable, on the former Australian legal practitioner.

### **2.16 Removal of practitioner**

- (1) A party who, after proceedings are commenced, terminates the authority of an Australian legal practitioner to act on the party's behalf must file notice of the termination.
- (2) A copy of the notice of termination, as filed, must be served on all other parties and, if practicable, on the former Australian legal practitioner.
- (3) Filing and service of the notice of termination on the other parties may be effected by the former Australian legal practitioner.
- (4) This rule does not apply to a change of Australian legal practitioner referred to in rule 2.15.

### **2.17 Withdrawal of practitioner**

An Australian legal practitioner who, after proceedings are commenced, ceases to act for a party in proceedings must file notice of the change and serve the notice on the parties.

### **2.18 Effect of change**

A change for which notice is required or permitted to be given under this Division does not take effect—

- (a) for the Court—until the notice is filed, and
- (b) for a person on whom it is required or permitted to be served—until a copy of the notice, as filed, is served on the person.

## **Division 2.5 Access to trial evidence, exhibits and transcripts**

### **2.19 Orders concerning trial court file**

A trial court may, for the purpose of preserving the trial court file for use in an appeal to the Court, make orders the trial court considers necessary for—

- (a) the safe custody of exhibits, documents or other things forming part of the trial court file, and
- (b) the production, return or disposal of the exhibits, documents or things.

### **2.20 Access to trial court transcripts and file**

- (1) This rule applies if a trial court registrar receives a copy of a notice to appeal or a notice of intention to appeal to the Court.
- (2) At the request of a party to the appeal or proposed appeal to the Court, the trial court registrar is to provide the party with—
  - (a) subject to rule 2.21, a copy of the trial court transcript, including the transcript of a judgment of the trial judge, and
  - (b) copies of documents forming part of the trial court file, including exhibits that are documents, and
  - (c) access to things forming part of the trial court file that are not documents, including exhibits that are not documents.
- (3) For a trial court transcript for a court other than the Supreme Court, a request under subrule (2) for a copy of the transcript is to be made to the transcription agency rather than the trial court registrar.
- (4) The trial court registrar is not required to provide a copy of, or access to, an exhibit, document or other thing, or to a part of an exhibit, document or thing, if to do so would result in a contravention of an order of the trial court or a legislative provision preventing disclosure.
- (5) Subrules (3) and (4) do not prevent the trial court registrar from providing a copy of, or access to, only a part of an exhibit, document or thing to the extent doing so would not result in a contravention of an order of the trial court or a legislative provision preventing disclosure.
- (6) A party who has been denied access to the trial court file, or a part of the trial court file, by the trial court registrar because of an order of the trial court may apply for access to the file or the part of the file—
  - (a) if only a notice of intention to appeal has been filed—to the trial court, or

(b) if a notice of appeal has been filed—the Registrar.

(7) The Registrar is to refer an application under subrule (6)(b) to the Court for determination.

(8) The power of the Court under subrule (7) is prescribed for the 1912 Act, section 22(1)(l) as a power of the Court that may be exercised by a designated Judge.

### **2.21 Transcript of judgment of trial judge**

(1) The trial court registrar or transcription agency is not to provide a copy of the transcript of the judgment of the trial judge unless the trial court registrar or agency is satisfied—

(a) a draft transcript has been provided to the trial judge, and

(b) the trial judge has approved the transcript, whether with or without revision.

(2) A party to an appeal or proposed appeal to the Court who has requested, but not been provided with, a transcript of the judgment of the trial judge may apply to the Registrar for access to be given to the draft transcript.

(3) The Registrar may refer an application for access to the draft transcript for the consideration of the head of the trial court or transcription agency, as the case requires, if satisfied the transcript has not been provided within a reasonable time.

(4) In this rule—

**head** of the trial court means the chief judicial officer, however named, of the court.

### **2.22 Access to exhibits, documents or other things no longer in custody of trial court**

(1) This rule applies if—

(a) the appellant was the defendant in the trial court, and

(b) the appellant is seeking access to an exhibit, document or other thing forming part of the trial court file in circumstances where it is no longer in the custody of the trial court.

(2) The prosecutor in the trial court is to provide the appellant with reasonable assistance to obtain access to the exhibit, document or thing.

## **Division 2.6 Certificates of conviction**

### **2.23 Certificates of conviction**

(1) A certificate of conviction issued by a trial judge is to include a note to the effect that—



- (a) if a notice of appeal or notice of intention to appeal against the conviction has not been filed—an appeal against the conviction may be made within 3 months after the conviction or within an extended time as the Court may allow, or
  - (b) if a notice of appeal or notice of intention to appeal against the conviction has been filed—an appeal or notice of intention to appeal has been filed.
- (2) A failure to include the note in a certificate of conviction does not invalidate the certificate.
  - (3) This rule does not apply to a quashed conviction.

## **Part 3 Commencement of proceedings**

### **Division 3.1 Appeals**

#### **Subdivision 1 Notices of intention to appeal**

**Note—**

The Dictionary in Schedule 1 defines **notice of intention to appeal** to include a notice of intention to apply for leave to appeal.

##### **3.1 Notice of intention to appeal**

- (1) A notice of intention to appeal is to be given by filing a notice in the approved form.
- (2) The notice must be signed by the appellant or an Australian legal practitioner representing the appellant.
- (3) A notice of intention to appeal has effect for a period of 12 months after the day it is filed.

##### **3.2 Application for extension of time**

- (1) An application for extension of the time to give a notice of intention to appeal is to be made by filing an application in the approved form.
- (2) The application must be signed by the appellant or an Australian legal practitioner representing the appellant.
- (3) The Registrar may exercise the power of the Court under the 1912 Act, section 10(1)(b) to extend the time to give a notice of intention to appeal.

**Note—**

Rule 6.1 enables an applicant or respondent to an application for an exercise of this power to request that the application be referred to the Court for review if the application is granted or refused by the Registrar.

##### **3.3 Amended notice of intention to appeal**

- (1) This rule applies if—

- (a) a notice of intention to appeal a conviction or sentence, but not both, has been filed, and
  - (b) the appellant intends subsequently to appeal both the conviction and sentence.
- (2) The appellant must file—
- (a) an amended notice of intention to appeal in the approved form, and
  - (b) if required, an application for an extension of time.
- (3) The amended notice of intention to appeal—
- (a) replaces the original notice of intention to appeal, and
  - (b) has effect for the balance of the period the original notice of intention to appeal would have had effect.

#### **3.4 Registrar to forward notices of intention to appeal**

The Registrar is to send a copy of a notice of intention to appeal, as filed, to each of the following as appropriate—

- (a) the respondent,
- (b) the trial court registrar,
- (c) the transcription agency.

### **Subdivision 2 Notices of appeal**

#### **Note—**

The Dictionary in Schedule 1 defines **notice of appeal** to include a notice of application to apply for leave to appeal.

#### **3.5 Notice of appeal**

- (1) An appellant must file—
- (a) a notice of appeal in the approved form, and
  - (b) if the notice of appeal is filed after the expiry of the applicable period for filing—a notice in the approved form of an application for leave to be granted by the Court under subrule (5).
- (2) The applicable period for a defendant to file a notice of appeal against a conviction or sentence is—
- (a) if a notice of intention to appeal has been given concerning the conviction or sentence—the period during which the notice of intention to appeal has effect, or
  - (b) if a notice of intention to appeal has not been given concerning the conviction or

sentence—the period of 3 months after the conviction or sentence.

- (3) The applicable period for a prosecutor to file a notice of appeal against a sentence under the 1912 Act, section 5D is the period of 28 days after the sentence.
- (4) The applicable period for an appellant to file a notice of appeal against an interlocutory judgment or order under the 1912 Act, section 5F is 14 days after the judgment or order is given or made.
- (5) If a notice of appeal is filed after the expiry of the applicable period for filing, the appeal or application for leave to appeal to which the notice relates may be made only with the leave of the Court.

### **3.6 Effect of incomplete notice of appeal or application of leave to appeal**

A notice of appeal against a conviction or sentence not accompanied by all the documents required by the approved form has effect as a notice of intention to appeal.

### **3.7 Service of notices of appeal**

- (1) A notice of appeal, as filed, must be served on—
  - (a) the respondent, and
  - (b) for an appeal under the 1912 Act, section 5D or 5DA—
    - (i) the Legal Aid Commission, and
    - (ii) the last known Australian legal practitioner representing the respondent.
- (2) Service of a notice of appeal filed by a prosecutor must be effected by personal service if—
  - (a) the appeal is under the 1912 Act, section 5D or 5DA, or
  - (b) the defendant does not have legal representation.
- (3) The Registrar is also, within 3 days of a notice of appeal being filed under this Division, to send a copy of the notice to the trial court registrar.
- (4) This rule extends to a notice, as filed, of an application for leave to be granted by the Court under rule 3.5(5).

## **Division 3.2 Stated cases**

### **3.8 Submission of questions of law**

A question of law submitted to the Court under the 1912 Act, section 5A, 5B or 5C (a **stated case**) is to be—

- (a) in writing, and
- (b) signed by the trial judge concerned.

### **3.9 Copy of submission to be forwarded to parties and their representatives**

The Registrar is to send a copy of a stated case to the parties named in the stated case or the Australian legal practitioner representing them.

### **3.10 Determination of Court to be notified by Registrar**

The Registrar is to notify the trial judge and the trial court registrar of the determination by the Court of a stated case and orders made by the Court concerning it.

## **Division 3.3 Matters under [Crimes \(Appeal and Review\) Act 2001](#)**

### **3.11 Application**

This Division applies to the following (a **Part 7 matter**)—

- (a) a reference to the Court under the [Crimes \(Appeal and Review\) Act 2001](#), section 77(1)(b),
- (b) a reference to the Court under the [Crimes \(Appeal and Review\) Act 2001](#), section 79(1)(b),
- (c) a reference to the Court under the [Crimes \(Appeal and Review\) Act 2001](#), section 82(2),
- (d) an application to the Court under the [Crimes \(Appeal and Review\) Act 2001](#), section 84.

### **3.12 Rules to apply to Part 7 matter**

These Rules apply to a Part 7 matter with the following modifications—

- (a) a reference to an appeal is to be read as a reference to proceedings concerning the matter,
- (b) a reference to an appellant is to be read as a reference to a convicted person,
- (c) the Court is taken to have given leave for anything requiring its leave,
- (d) other necessary modifications.

## **Division 3.4 Guideline judgments**

### **3.13 Application for guideline judgment**

An application for a guideline judgment under the [Crimes \(Sentencing Procedure\) Act 1999](#), section 37 may be made by filing an application in the approved form.

### **3.14 Discontinuance of application for guideline judgement**

- (1) The Attorney General may discontinue an application for a guideline judgment under the *Crimes (Sentencing Procedure) Act 1999*, section 37 by filing a notice in the approved form.
- (2) The discontinuance of an application under this rule does not prevent the Attorney General from bringing a fresh application seeking the same guideline judgment.

## **Division 3.5 Other applications to the Court**

### **3.15 Applications to be in approved form**

An application to the Court not required to be filed is to be made in the approved form, if any, for the application.

**Note—**

See also rule 2.2, which provides a document required to be filed must be in the approved form if there is an approved form.

## **Division 3.6 Functions of Registrar**

### **3.16 Registrar to forward copies of originating process**

As soon as practicable after an originating process is filed, the Registrar is to send a copy of the process to each of the following—

- (a) the trial judge for the proceedings to which the process relates,
- (b) the trial court registrar,
- (c) the prosecutor in the trial court,
- (d) the transcription agency.

### **3.17 DPP to provide particulars**

The Director of Public Prosecution for New South Wales or the Commonwealth, as the case requires, must provide particulars in the approved form of the trial, conviction and sentence under appeal if requested to do so by the Registrar.

### **3.18 Inmate to be informed of hearing date**

If a party to an appeal is an inmate of a place of detention, the Registrar is to inform the manager in charge of the place of the hearing date for the appeal.

## **Division 3.7 Penalties or other monetary orders pending appeals**

### **3.19 Suspension of certain monetary orders pending appeal**

- (1) An appellant who has been ordered by a trial court to pay a monetary sum by way of

a fine, compensation, restitution or costs may apply to the trial court for an order suspending payment pending the determination by the Court of the appeal or application for leave to appeal.

- (2) The trial court may make an order suspending payment on terms the trial court considers just.

## **Part 4 Conduct of proceedings**

### **Division 4.1 Case management**

#### **4.1 Court may give directions concerning case management**

- (1) The Court may give directions by way of case management for the timely and efficient conduct of proceedings before the Court.
- (2) The power of the Court under subrule (1) is prescribed for the 1912 Act, section 22(1)(l) as a power of the Court that may be exercised by a designated Judge.

### **Division 4.2 Witnesses**

#### **4.2 Definitions**

In this Division—

**expert witness** means an expert engaged—

- (a) to provide a report as to the expert's opinion for use as evidence in proceedings or proposed proceedings, or
- (b) to give an opinion evidence in proceedings or proposed proceedings.

**the code** means the expert witness code of conduct in the [Uniform Civil Procedure Rules 2005](#), Schedule 7.

#### **4.3 Orders for witnesses to attend or produce documents**

- (1) This rule applies to an order by the Court (a **witness order**) for a person (a **witness**)—
  - (a) to attend and be examined before the Court or an examiner, commissioner or assessor, or
  - (b) to produce a document or thing to the Court or an examiner, commissioner or assessor.
- (2) A party seeking a witness order must file an application for a witness order in the approved form.
- (3) A witness order requiring a witness to attend and be examined before the Court or an

examiner, commissioner or assessor must specify—

(a) if attendance is required before an examiner, commissioner or assessor—the name of the examiner, commissioner or assessor, and

(b) the date, time and place for attendance.

(4) A copy of a witness order is to be served on—

(a) the witness to whom the order applies, and

(b) each party other than the party who sought the order.

#### **4.4 Witness expenses**

(1) A witness who is required by a witness order to attend and be examined by the Court or an examiner, commissioner or assessor is entitled to be paid witness expenses in accordance with the Scale of Allowances Paid to Witnesses published in Government Gazette No 57 of 27 June 2014, at pages 2338 to 2339.

(2) The application for the payment of witness expenses is to be lodged with the registry of the trial court by—

(a) for an order to attend and be examined by the Court—the party who applied for the order, or

(b) for an order to attend and be examined by an examiner, commissioner or assessor—the Registrar.

#### **4.5 Evidence given by expert witnesses in Court**

(1) Unless the Court orders differently—

(a) at or as soon as practicable after the engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert must inform the expert of the code, and

(b) unless an expert witness's report contains an acknowledgment by the expert witness that the witness has read the code and agrees to be bound by it—

(i) service of the report by the party who engaged the expert witness is not valid service for these Rules or an order or practice note, and

(ii) the report is not to be admitted into evidence, and

(c) oral evidence is not to be received from an expert witness unless—

(i) the witness has acknowledged in writing, whether in a report relating to the proposed evidence or differently in relation to the proceedings, that the witness has read the code and agrees to be bound by it, and

- (ii) a copy of the acknowledgment has been served on all parties affected by the evidence.
- (2) If an expert witness provides the engaging party with a supplementary report, including a report indicating that the opinion of the expert witness has changed on a material matter expressed in an earlier report by the expert witness—
- (a) the engaging party must immediately serve the supplementary report on all parties on whom the engaging party has served the earlier report, and
  - (b) the earlier report must not be used in the proceedings by the engaging party, or by a party in the same interest as the engaging party on the question to which the earlier report relates, unless paragraph (a) is complied with.

#### **4.6 Conference between experts**

- (1) The Court may do one or more of the following—
- (a) direct expert witnesses to confer, whether before or during proceedings before the Court,
  - (b) specify the matters on which they are to confer,
  - (c) direct they provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for a non agreement,
  - (d) direct the conference be held with or without the attendance of the Australian legal practitioners,
  - (e) give additional directions as may be considered necessary.
- (2) An expert who is the subject of an order made under subrule (1) may apply to the Court for further directions.
- (3) The content of the conference between the expert witnesses is not to be referred to at a hearing unless the parties affected agree.
- (4) The parties may agree, at any time, to be bound by agreement on a specified matter.
- (5) If the parties agree as referred to in subrule (4), the joint report may be tendered as evidence of the matter agreed.
- (6) If the parties do not agree as referred to in subrule (4), the joint report may be used or tendered only in accordance with the rules of evidence.
- (7) If, for this rule, expert witnesses have conferred and have provided a joint report agreeing on a matter, a party affected may not, without leave of the Court, adduce expert evidence inconsistent with the matter agreed.



## Division 4.3 Powers of Judge of Court and Registrar

### 4.7 Exercise of powers by Judge

- (1) If a designated Judge determines an application to exercise a power of the Court under the 1912 Act, section 22(1), the Registrar is—
  - (a) to notify the parties to the proceedings of the determination, and
  - (b) if the application is refused—to notify the applicant of the applicant’s entitlement under the 1912 Act, section 22(2) to have the application determined by the Court.
- (2) An applicant who wishes to have an application determined by the Court under the 1912 Act, section 22(2) must file an application in the approved form (a **referred application**) within 14 days of receiving the Registrar’s notification.
- (3) The Court may determine a referred application on the papers.

### 4.8 Registrar may exercise certain powers of Court

The Registrar may exercise the following powers of the Court—

- (a) the power to give directions by way of case management for the timely and efficient conduct of proceedings before the Court,
- (b) the power to give a direction for an appellant to appear physically before the Court under the *Evidence (Audio and Audio Visual Links) Act 1998*, section 5BB,
- (c) the power to order the production of a document, exhibit or other thing concerned with proceedings,
- (d) the power to order a witness to attend and be examined before the Court.

#### Note—

Rule 6.1 enables an applicant or respondent to an application for an exercise of one of these powers to request that the application be referred to the Court for review if the application is granted or refused by the Registrar.

## Division 4.4 Examiners, commissioners and assessors

### 4.9 Application

This Division applies when the Court makes one or more of the following orders (a **relevant order**) under the 1912 Act, section 12—

- (a) an order for a witness before a trial court to be examined before an examiner,
- (b) an order for a question to be referred to a commissioner for inquiry or report,
- (c) an order for an assessor to be appointed.

#### **4.10 Content of relevant order**

A relevant order must specify—

- (a) the examiner, commissioner or assessor appointed, and
- (b) the witness, question or assessment to which the order relates.

#### **4.11 Power of Court concerning reference to commissioner**

- (1) The Court may, in a relevant order or from time to time, do one or more of the following—
  - (a) give directions concerning whether the appellant or respondent may be present or represented at an examination, investigation or assessment to which the order relates, or at any stage of the examination, investigation or assessment,
  - (b) if the appellant is an inmate of a place of detention who the Court considers should be present—give directions to the manager of the place to enable the appellant to be present,
  - (c) specify the powers the examiner, commissioner or assessor has in the examination, investigation or assessment,
  - (d) for an investigation by a commissioner—
    - (i) require the commissioner to make interim reports, or
    - (ii) give directions to the Registrar concerning whether copies of a report of the commissioner are to be provided to the appellant and respondent or to another person on their behalf,
  - (e) give other directions the Court considers necessary to give to effect to the relevant order.

#### **4.12 Evidence to be given on oath**

- (1) A witness before an examiner, commissioner or assessor must give evidence on oath.
- (2) The oath is to be administered by or on behalf of the examiner, commissioner or assessor.
- (3) The evidence of the witness is to be transcribed.
- (4) A copy of a certification of the transcription in the approved form is to be attached to the transcript.

## **Division 4.5 Addition or abandonment of grounds of appeal**

### **4.13 Additional grounds of appeal**

- (1) An appellant intending to rely on a ground of appeal not stated in the notice of appeal must file an application in the approved form for the leave of the Court to rely on the additional ground.
- (2) On an application, the Court may—
  - (a) refuse leave, or
  - (b) grant leave on terms the Court considers appropriate.

### **4.14 Abandonment of ground of appeal**

An appellant intending to abandon a ground of appeal stated in the notice of appeal, or relied on with the leave of the Court, must file a notice in the approved form abandoning the ground.

## **Division 4.6 Exclusion of certain grounds of appeal**

### **4.15 Exclusion of certain matters as grounds for appeal without leave**

No direction, omission to direct, or decision as to the admission or rejection of evidence, given by a trial judge may, without the leave of the Court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the appellant or applicant for leave.

## **Part 5 Resolution of proceedings**

### **Division 5.1 Abandoning proceedings**

#### **5.1 Abandoning proceedings**

- (1) An appellant may abandon an appeal or application for leave to appeal by filing a notice in the approved form.
- (2) On the receipt of the notice—
  - (a) for an appeal—the appeal is taken to have been dismissed by the Court, or
  - (b) for an application for leave to appeal—the application is taken to have been refused by the Court.

### **Division 5.2 Determining appeals**

#### **5.2 Determination of appeal or application**

An appeal or application for leave to appeal is determined on the making of orders

disposing of the appeal or application.

### **5.3 Entry of order disposing of appeal or application**

- (1) An order of the Court is to be entered.
- (2) Unless the Court orders differently, an order is taken to be entered when it is recorded in the Court's computerised record system.

### **5.4 Power to set aside or vary order**

- (1) The Court may set aside or vary an order if an application for the setting aside or variation is made before entry of the order.
- (2) An application to set aside or vary an order may only be made with the leave of the Court.
- (3) The Court may determine both whether to grant leave and the application on the papers.
- (4) If an application for the setting aside or variation of an order is made within 14 days after the order is entered, the Court may determine the matter, and, if appropriate, set aside or vary the order under subrule (1), as if the order had not been entered.
- (5) Within 14 days after an order is entered, the Court may of its own motion set aside or vary the order as if the order had not been entered.
- (6) The Court may not extend the time limited by subrule (4) or (5).
- (7) Nothing in this rule affects other powers of the Court to set aside or vary an order, including a power to correct clerical mistakes or errors arising from accidental slips or omissions.

### **5.5 Notice of determination of appeal or incidental applications**

The Registrar is to send a notice of the determination of an appeal or application incidental to the determination of the appeal—

- (a) if the appellant was not present when the matter was not determined, but is not in custody—to the appellant, and
- (b) to the trial court registrar, and
- (c) if the appellant is an inmate of a place detention centre—
  - (i) for an inmate detained in a detention centre—to Juvenile Justice, or
  - (ii) for any other inmate—to Corrective Services NSW.

## 5.6 Provision of certified copies of determinations and reasons

The Registrar is, if requested to do so by a party to an appeal or application for leave to appeal, to provide a certified copy to the party of the Court's determination of the appeal or application and the reasons for judgment.

## Division 5.3 Failure to appear at hearing of appeal

### 5.7 Failure of appellant to appear at hearing

- (1) If an appellant does not, without reasonable excuse, appear at the hearing of the appeal or application for leave to appeal in accordance with a bail acknowledgement, the Court may—
  - (a) summarily dismiss the appeal or application, or
  - (b) decline to hear the appeal or application, or
  - (c) consider the appeal or application in the absence of the appellant.
- (2) Without limiting subrule (1), the Court may also—
  - (a) issue a warrant for the apprehension of the appellant, or
  - (b) make other orders it thinks fit.
- (3) A warrant under this rule may be issued under the hand of the Registrar.
- (4) The onus of proof of a reasonable excuse for subrule (1) lies with the appellant.

## Division 5.4 Consequential matters

### 5.8 Refund of penalty or costs paid

Unless the Court orders differently, a person who is successful in an appeal is entitled to be repaid money the person has been ordered by the trial court to pay as penalty or costs.

### 5.9 Orders of restitution by trial court

- (1) This rule applies if the trial court has made one of the following orders (a **property order**)—
  - (a) an order for the restitution of property,
  - (b) an order affecting property.
- (2) Each of the following persons is entitled to be heard by the Court before it makes an order confirming, setting aside or varying a property order—
  - (a) the person in whose favour the property order was made,

- (b) the person against whom the property order was made,
- (c) with the leave of the Court, any other interested person.

#### **5.10 Continued detention of appellant in custody in certain cases**

- (1) This rule applies if the Court in an appeal against a conviction or sentence by an appellant in custody—
  - (a) orders a new trial of the appellant, or
  - (b) orders the appellant to be re-sentenced by the trial court.
- (2) The appellant is, subject to the *Bail Act 2013*, to be detained in custody until the fresh trial or re-sentencing has concluded.

### **Part 6 Miscellaneous**

#### **6.1 Review of certain decisions of Registrar**

- (1) This rule applies if—
  - (a) a provision of these Rules provides the Registrar may exercise a specified power of the Court, and
  - (b) an application is made to the Registrar to exercise the power (a **registrar application**), and
  - (c) the Registrar grants or refuses the application.
- (2) The Registrar is to refer a registrar application to the Court for review at the request of a relevant party.
- (3) A request to refer a registrar application to the Court for review must be made within 21 days after the Registrar grants or refuses the registrar application, but no later than 7 days before the hearing of the proceedings in which the application is made.
- (4) On a review of a registrar application, the Court may—
  - (a) confirm the decision of the Registrar to grant or refuse the application, or
  - (b) if the Registrar has refused the application—exercise the power sought in the application, or
  - (c) if the Registrar has granted the application—
    - (i) set aside the Registrar’s decision, or
    - (ii) set aside the Registrar’s decision and make another decision in substitution for the Registrar’s decision.

- (5) The Court may determine a review of a registrar application on the papers.
- (6) The power of the Court to conduct a review under this rule is prescribed for the 1912 Act, section 22(1)(l) as a power of the Court that may be exercised by a designated Judge.
- (7) In this rule—  
**relevant party**, in relation to a registrar application, means—
  - (a) a party to the application, or
  - (b) a party to the proceedings in which the application is made.

## 6.2 Savings and transitional provisions

- (1) An act, matter or thing that, immediately before the repeal of the *Criminal Appeal Rules*, had effect under those Rules is taken to have effect under these Rules.
- (2) Without limiting subrule (1), rule 3.1(3) extends to a notice of intention to appeal in effect immediately before the repeal of the *Criminal Appeal Rules*.

## 6.3 Repeal of *Criminal Appeal Rules*

The *Criminal Appeal Rules* are repealed.

## 6.4 Amendment of *Supreme Court Rules 1970*

- (1) **Part 75 Criminal proceedings** Omit “(except clause (d) of that Schedule)” wherever occurring in rules 2, 3(1), (4), and (6), 3B(1) and 3M(1).

- (2) **Part 75, rule 1 Application** Insert at the end of the rule—

- (2) Despite the other provisions of this Part, the rules do not apply to proceedings in the Court of Criminal Appeal, including proceedings specified in the Act, Third Schedule, clause (d).

### **Note—**

The *Supreme Court (Criminal Appeal) Rules 2021* provide for the practice and procedure for proceedings in the Court of Criminal Appeal.

- (3) **Part 75, rule 1A Criminal Appeal Rules** Omit the rule.

## Dictionary

rule 1.3

**appellant** includes—

- (a) an applicant for leave to appeal, and

(b) a person who files a notice of intention to appeal.

**approved form**, in relation to a document, means a form approved under rule 2.1 for the document.

**assessor** means a person appointed by the Court under the 1912 Act, section 12(1)(e) to act as an assessor in a case.

**business day** means a day that is not a Saturday, Sunday or public holiday.

**commissioner** means a person to whom the Court has, under the 1912 Act, section 12(1)(d), referred a question arising in an appeal for inquiry and report.

**Court** means the Court of Criminal Appeal.

**defendant**, in relation to an appeal or proposed appeal to the Court, means the person prosecuted in the trial court for the offence concerned.

**designated Judge**, in relation to a power of the Court, means a Judge of the Supreme Court designated by the Chief Justice under the 1912 Act, section 22 to exercise the power.

**detention centre** has the same meaning as in the [Children \(Detention Centres\) Act 1987](#).

**examiner** means a person appointed by the Court under the 1912 Act, section 12(1)(b) to conduct an examination of a witness.

**exhibit** includes—

(a) a document or thing tendered in the trial court, and

(b) a document or thing not formally marked as an exhibit but made available to a jury or the trial judge and kept on the court file.

**expert witness**, for Division 4.2—see rule 4.2.

**inmate** of a place of detention means a person imprisoned or detained in some other way in the place.

**judgment** of a trial judge includes a summing up or remarks on sentence of the trial judge.

**non-business day** is a day that is not a business day.

**notice of appeal** includes a notice of application for leave to appeal.

**notice of intention to appeal** includes a notice of intention to apply for leave to appeal.

**originating process** means a notice of appeal or other document commencing proceedings in the Court, but not including a notice of intention to appeal.

**Part 7 matter**, for Division 3.3—see rule 3.11.

**party**, in relation to an appeal or proposed appeal to the Court, means an appellant or respondent.

**place of detention** means—



- (a) a correctional centre, correctional complex or residential facility within the meaning of the *Crimes (Administration of Sentences) Act 1999*, or
- (b) a detention centre.

**proposed appeal** to the Court includes—

- (a) a proposed appeal for which a notice of intention to appeal has been filed, and
- (b) a proposed appeal for which an application for leave to appeal has been filed.

**prosecutor** in a trial court means the person responsible for the conduct of the prosecution in the proceedings before the trial court.

**public officer** means each of the following persons, but only when acting in an official capacity—

- (a) an employee in the Public Service or the NSW Police Force,
- (b) an officer or employee of a statutory body representing the Crown,
- (c) an employee of a council within the meaning of the *Local Government Act 1993*,
- (d) a member of staff of Local Land Services,
- (e) the Director of Public Prosecutions, Deputy Director of Public Prosecutions or Solicitor for Public Prosecutions.

**Registrar** means the Registrar of the Court.

**Registry** means the Registry of the Court.

**Registry officer** means—

- (a) the Registrar, and
- (b) another officer of the Supreme Court.

**relevant order**, for Division 4.4—see rule 4.9.

**respondent** includes—

- (a) a respondent to an application for leave to appeal, and
- (b) if only a notice of intention to appeal has been filed—a person who would be a respondent to the proposed appeal.

**stated case**, for Division 3.2—see rule 3.8.

**the 1912 Act** means the *Criminal Appeal Act 1912*.

**the code**, for Division 4.2—see rule 4.2.

**transcription agency**, in relation to a trial court transcript, means the agency responsible for the production of the transcript.

**trial court** has the same meaning as **court of trial** has in the 1912 Act.

**trial court file**, in relation to an appeal or proposed appeal to the Court, means all the exhibits, documents or other things relating to the proceedings in the trial court in the court's custody, but not including the trial court transcript or transcript of the judgment of the trial judge.

**trial court registrar**, in relation to an appeal or proposed appeal to the Court, means the officer of the trial court who has custody of the trial court's records.

**trial court transcript**, in relation to an appeal or proposed appeal to the Court, means the transcript of the proceedings before the trial court.

**trial judge**, in relation to an appeal or proposed appeal to the Court, means the judicial officer who presided over the trial court.