

APPEALS – POLICY

Policy No notice of appeal, or application for leave to appeal or cross-appeal on behalf of any Crown Law client shall be filed without the following authorisation:

Tribunal and District Court appeals to the High Court	Team Managers in consultation with Deputy Solicitors-General
Case stated appeals to High Court, applications for review under s 26P Judicature Act 1908	Deputy Solicitors-General
Appeals to Court of Appeal	Deputy Solicitors-General
Appeals to Supreme Court	Solicitor-General (original authority)

Criminal Appeals are managed in accordance with the Prosecution Guidelines and not this policy.

References [Cabinet Directions for the Conduct of Crown Legal Business 2016](#)

- Commentary**
- From time to time, counsel must consider whether or not to appeal a decision of a court or tribunal, or whether or not to apply to review a decision of an Associate Judge of the High Court.¹ For the purpose of this policy “appeal” refers to appeals, cross-appeals, applications for review of an Associate Judge and applications for leave to appeal.
 - Paragraph 29 of the Cabinet Directions states:

No Minister or government department may initiate any appeal from the decision of a court or tribunal, or an application for judicial review, without the approval of the Solicitor-General, which maybe general or specific.
 - Accordingly, prior to filing any notice of appeal, counsel must obtain the approval of the Solicitor-General or his delegate. This includes all requests to appeal, including those requests that come from clients but with which counsel disagree.
 - For some purposes, the Solicitor-General has delegated his authority under the Cabinet Directions in respect of some appeals to Deputy Solicitors-General and Team Managers, as the policy reflects.
 - There is an important qualification, however. As will be obvious, these delegated authorities are based on the court hierarchy. Of course, the court hierarchy is not always a good measure of the importance of a case. There may be occasions (likely to be rare) where an appeal from, say, a decision of the District Court will raise issues with important consequences for the Crown or cause public or political controversy.

¹ Applications for judicial review under the Judicature Amendment Act are covered by the policy on filing proceedings [document [710514](#)].

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- Counsel and those with delegated authority should be sensitive to such cases. Where they occur, the Solicitor-General, or a Deputy, should be involved in the decision-making despite the delegated authority.

‘Protective’ Appeals

- Appeal times are usually short. Counsel should ensure that sufficient time is allowed for the approval process. Filing appeals on a ‘protective’ basis is discouraged.
- Filing appeals for the purpose of keeping the Crown’s options open is incompatible with the model litigant approach. We should bear in mind that there is another party to the litigation who does not appreciate that the Crown has filed its appeal on a ‘protective’ basis. Furthermore, filing pro-forma appeals tends to suggest a degree of disorganisation on the Crown’s part.
- In exceptional circumstances where this course of action is unavoidable and a protective appeal application for leave has been filed, formal approval must still be sought to maintain the appeal. The same template should be used with the necessary modifications.
- In these circumstances it is important that the client understands that, notwithstanding the filing of a notice of appeal or application for leave, the decision whether to proceed is subject to the Solicitor-General’s approval. If approval is not given the notice of appeal will be withdrawn.

Supporting a decision on other grounds

If, in an appeal, Counsel intends supporting the judgment on other grounds, consultation with a Team Manager is required where Counsel intends to pursue a different argument from that made in the lower court.

Procedure

- Counsel responsible for the file must prepare a memorandum containing a recommendation to the Solicitor-General, or the appropriate delegate, whether or not to approve an appeal. A [precedent memorandum](#) is included in the Precedents (Non Court Documents) Worksite page.
- The memorandum must:
 - Be addressed to the person whose approval is sought and directed via counsel’s Team Manager and the relevant Deputy Solicitor-General, who will note whether they agree or not with the recommendation.
 - State the subject matter which the memorandum addresses and highlight the last day by which a decision is sought.
 - State which parts of the judgment it is sought to appeal.
 - Provide a succinct history of the case.
 - State reasons why an appeal or review is proposed.
 - State the significance of the issues, including the client’s views and the consequences if an appeal or review is not brought.

- Assess the prospects of success of an appeal.
- Assess whether other means of attaining the client’s objective are available and, if so, whether they are preferable to an appeal.
- For civil matters, attach:
 - a draft notice of appeal/notice of application for leave to appeal;
 - a copy of the memorandum as to representation for the intended appeal or application for leave as required by the representation policy.
- Where the nature of the appeal requires the memorandum to be reviewed by a Team Manager and, as the case may be, a Deputy Solicitor-General, each must make an independent, objective assessment whether the Crown should appeal a decision. Input from Senior Crown Counsel may also be sought.
- The decision whether or not to approve an appeal, is to be made by the person with the authority to make that decision. It follows that a Team Manager who disagrees with a recommendation that counsel has made should not decide to withhold the memorandum from a Deputy Solicitor-General if the decision to be made is properly for the Deputy Solicitor-General.
- Likewise, in the case of a matter requiring the Solicitor-General’s attention, the Team Manager’s and Deputy Solicitor-General’s consensus is not a pre-condition for forwarding the memorandum to the Solicitor-General.

**Policy
Information**

Policy Owner – Convenor, Professional Standards Committee
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