

A guide to indictable appeals

Understanding the appeals
process and how to apply
for legal aid



What is an indictable appeal?

If you are tried or sentenced **in either the District or Supreme Courts** and you appeal, it is called an 'indictable appeal' (because you have been dealt with 'on indictment'). If the Crown appeals the sentence imposed on you in the District or Supreme Court, this is also an indictable appeal.

Indictable appeals go to the Court of Criminal Appeal. This brochure is about indictable appeals and if you want to make this type of appeal then this brochure will give you the information you need.

If you are found guilty and sentenced **in the Local Court** and you want to appeal then, normally, you appeal to the District Court, which is easier than appealing to the Court of Criminal Appeal. For more information about District Court appeals, see Legal Aid NSW's brochure *Appealing to the District Court*.

If you were convicted and sentenced by the Local Court in your absence and you think you have a good excuse for why you didn't attend court, then you should look at Legal Aid NSW's brochure *Reviewing Local Court decisions*.

If you appealed to the District Court from the Local Court and are unhappy with the District Court's decision, you can't appeal to the Court of Criminal Appeal.

Who can appeal?

Anyone who has been convicted or sentenced in the District or Supreme Court can appeal their conviction or sentence. Technically, for most indictable appeals, you need the permission of the Court of Criminal Appeal to appeal. The court refers to this permission as 'leave to appeal'.

However, if your appeal is lodged in time and has merit, then generally the court will grant you that permission.

What are the different types of appeals?

If you pleaded not guilty but you were found guilty after a trial, you can appeal the verdict of the jury (or judge). This is called a **conviction appeal**. To win a conviction appeal you must either show that your trial was seriously unfair or that the outcome is a miscarriage of justice.

If you pleaded guilty, it is not normally possible to challenge your conviction – even if you are really innocent. In rare circumstances it is possible – for example if you only pleaded guilty because of a fundamental misunderstanding about the case. It is usually very difficult to prove this.

If you agree (or don't want to challenge) that you are guilty but you are unhappy with the sentence you got, you can appeal your sentence. This is called a **sentence appeal**. To win a sentence appeal you must do two things. First you must show that the judge made an important mistake or mistakes

when they sentenced you. Second, you must also show that you deserve or are entitled to get a lesser sentence. If the Court of Criminal Appeal finds a mistake, you may be able to show the court new evidence of any relevant events in your life that have occurred since you were sentenced. The court will then take this into account in deciding whether or not your existing sentence should be reduced. If the court finds a mistake has been made but that a lower sentence is not justified it will simply dismiss your appeal.

Sometimes you may want to appeal both your conviction and your sentence. This is called an **all grounds appeal**.

Sometimes, the prosecution will appeal if they think that the sentence you got was not tough enough. This is called a **Crown appeal**. The Crown should only appeal (and can only win an appeal) where the sentence you got is much too low, not just a little bit too low. Even then, a Crown appeal can be dismissed for discretionary reasons. For example if the prosecution was slow to appeal, or you were released from gaol and you succeeded in restarting your life, it could be argued that it is too unfair to send you back to gaol even though the original sentence you got was much too low.

There is no fixed time limit within which the Crown can lodge an appeal but generally they should do so soon after you are sentenced.

What happens if you win your appeal?

If you win a **conviction appeal**, your conviction will be quashed and then one of two things can happen: a re-trial can be ordered or you can be acquitted.

Mostly conviction appeals are won because things happened (usually mistakes made during the trial) that mean you didn't get a fair trial. Where you win in this type of case, you will normally get a re-trial.

Less commonly, conviction appeals are won because the court finds you should not have been convicted at all. In this type of case, the court will likely acquit you – which means find you not guilty of the offence. If you are acquitted, you will be released unless you are serving another sentence or have bail refused for another matter.

If you win a **sentence appeal**, the court will reduce your sentence. You cannot get a worse result if the Court of Criminal Appeal reconsiders your sentence as part of your sentence appeal.

If the prosecution wins a **Crown appeal**, the court will re-sentence you and increase your sentence. Again, you will have the chance to show new evidence (limited to the period after you were sentenced by the lower court) to the Court of Criminal Appeal before it decides whether to increase your sentence or dismiss the appeal.

What happens if you lose your appeal?

If you appeal your conviction or your sentence or both and lose, nothing happens. Everything remains the same. While the court has the power to increase your sentence, in practice they never do so. If they did decide to do so, they would have to warn you and allow you to withdraw your appeal. There are some circumstances where a component of a sentence could be increased, for technical reasons, **but your overall sentence will not be increased except on a Crown appeal.**

What is the process for appealing?

Appeals can take a long time, usually at least six months, and can take more than a year from beginning to end.

Lodging a Notice of Intention to Appeal (NIA)

The first step in the process is that you must lodge a Notice of Intention to Appeal (NIA) with the Court of Criminal Appeal. You do this by filling out an NIA form and sending it to the Court of Criminal Appeal Registry in Sydney. The Registry now receives most NIAs via email. The email address is: niacourtofcriminalappeal@justice.nsw.gov.au. In gaol, if Correctional staff cannot email a scanned PDF of the NIA to the Registry for you they can fax it to them on 02 9230 8271 or post it to the Court of Criminal Appeal Registry, GPO Box 3, Sydney NSW 2001.

You must lodge your NIA within 28 days of being sentenced. If you miss the 28 day time limit, you can still lodge your NIA but you will need to explain the reasons for the delay on a separate form (called an 'Application for Extension of Time to Give Notice of Intention to Appeal' form). Provided your explanation is reasonable and the delay is not too long, there should not be a problem. Both the NIA (Form 4) and Notice of Extension (Form 5) are on the Supreme Court's website: www.supremecourt.justice.nsw.gov.au under the 'Forms' tab.

If you want to appeal your conviction, you do not have to wait until you are sentenced. You should lodge the NIA for a conviction appeal straight away and, if you want to appeal the sentence later as well, you can do this too by lodging another NIA for a sentence appeal.

The effect of lodging your NIA is that you tell the court you are thinking about appealing and then the court gives you 12 more months to actually lodge an appeal. If it turns out you need more than 12 months for the appeal to be made then you can lodge an Application for Extension of Time (Form 9) with the court at the time of filing the appeal explaining the delay. If Legal Aid NSW or other lawyers are representing you, they will do this for you.

Lodging your NIA does **not** mean you have actually started an appeal. You will never get a court date for your appeal until an appeal is actually lodged.

Applying for a grant of aid

The next step is to apply for a grant of legal aid if you want one. This is a separate step to lodging the NIA. Fill out a **legal aid application form** and send it, together with a copy of your NIA, to Indictable Appeals, Legal Aid NSW, PO Box K847, Haymarket NSW 1238. The form and NIA can also be sent as scanned PDFs to Indictable Appeals via email:

indictable.appeals@legalaid.nsw.gov.au

If you need help with your NIA or legal aid application form, make an appointment to see a lawyer from the Prisoners Legal Service. They can help you fill out your NIA and legal aid application form and lodge them for you.

While you can nominate a private lawyer you would prefer to represent you, normally Legal Aid NSW will allocate your case to a Legal Aid NSW appeals lawyer.

In some cases, for example where Legal Aid NSW has a conflict of interest, Legal Aid NSW will assign your case to a private lawyer. If you have nominated a preferred lawyer, Legal Aid NSW will take your preference into account.

In deciding whether to grant you legal aid, Legal Aid NSW will assess both:

- how much money (assets and income) you have and
- how strong your appeal case is.

Depending on your financial situation, you may be asked to pay a contribution, get legal aid for free or not qualify for legal aid at all.

Getting a merit assessment

To assess how strong your appeal case is, your lawyer will first get and then review the evidence and transcript from your case. Often this takes a long time.

In particular it can take a long time to get the transcript of what was said at your court case because usually the transcript does not exist at the time it is requested and the court has to send away audio tapes to transcription services to create the transcript. There is a backlog of requests and sometimes months can pass just waiting to get the transcript and evidence.

Once the lawyer has the materials they need, they will then review them very carefully looking for any possible mistakes that have happened. The lawyer will also talk to you to find out what things you are most concerned about or think were problems with your case. Often the lawyer will get a 'merit advice' (a written opinion about your appeal chances) from a barrister.

Once these processes are complete, Legal Aid NSW will decide whether or not to give you a grant of aid and pay for your appeal. Legal Aid NSW will grant you aid if they think your appeal has a reasonable chance of success. Otherwise they will refuse you legal aid.

Lodging the appeal

If you are granted legal aid then your lawyer will quickly prepare and lodge with the court your appeal documents. The appeal documents are a Notice of Appeal, Grounds of Appeal, submissions (a longer written

document prepared by a barrister setting out in detail the reasons you are appealing) plus another document telling the court where they can get the transcript and all the evidence from the case (a Certification document annexed to the Notice of Appeal).

Within 14 days of the filing of your appeal your case will be mentioned at a 'call over' in the Court of Criminal Appeal and be allocated a hearing date. The hearing date is often several months later.

Preparing affidavit evidence

Before your appeal gets to court, your lawyer will talk to you and, especially if you are appealing your sentence, may work with you to prepare one or more sworn statements (called 'affidavits') that they can give to the court.

Hearing of the appeal

An appeal in the Court of Criminal Appeal is normally heard in Sydney, usually by three Supreme Court judges.

You have the option of appearing via Audio Visual Link ('AVL') if you are in custody. If you are not in custody you can appear in person, however, if you are in custody you only have the option of appearing in person if there are special circumstances. The court will arrange for an interpreter to be present if you need one.

Judgment

Normally, after the hearing of the appeal the court will 'reserve' its judgment. This means

the judges will take some time to think about the case and then to write up an explanation of the reasons for their decision. Typically you will have to wait weeks or months before the court 'delivers' its judgment.

Normally the court will give just one or two days' notice before delivering judgment. Delivery of judgment is very brief with the judges just coming into court and announcing the result. A copy of the reasons for their decision is issued at the same time. If you have a lawyer, the court will contact your lawyer and the lawyer will receive a copy of the court's reasons. Then the lawyer will contact you to explain the result. If you are unrepresented, the court will simply send you a written copy.

What can I do if legal aid is refused?

If you apply for a grant of legal aid but are refused aid, you are entitled to appeal to the Legal Aid Review Committee (LARC) if you disagree with the decision. If Legal Aid NSW refuses your grant of aid they will write and tell you. Attached to the letter they send you will be a form that you can fill out if you want to appeal to LARC. On the form you should explain the reasons that you disagree with the decision to refuse you legal aid.

A **time limit of 28 days** applies to appealing to LARC against a decision to refuse you legal aid. However, if you miss this time limit you can still appeal and explain the

reasons for your delay and LARC may still consider your appeal against the decision to refuse aid.

What if I lose my appeal?

If you lose your appeal to the Court of Criminal Appeal there is not a lot more you can do except serve your sentence.

It is possible to apply for 'special leave' to appeal to the High Court, but the High Court is only able to hear a limited number of cases each year and it is very difficult to get 'special leave'. There is no right to appeal to the High Court. If your lawyer thinks there is any reason for appealing to the High Court they should discuss this option with you.

Can I get bail pending the appeal?

Bail is rarely granted pending appeal to the Court of Criminal Appeal and then only in exceptional circumstances. Normally it will not be possible even to apply for bail until you have first put in your appeal. Bail may be granted if either your appeal is bound to succeed (which is rare) or if you will have served most of your sentence in gaol before your appeal will be heard by the court.

If I appeal, will it affect my gaol security classification?

If you are in gaol, lodging an NIA or appeal should not affect your classification and you can progress to the lowest security classification. However, it can affect your chances of getting into transitional accommodation (like Bolwara or Parramatta Transitional Centre).

Where can I get legal help?

Legal Aid NSW

Legal Aid NSW helps people with their legal problems. We can help in most areas of criminal law, family law and civil law. You can find out more at www.legalaid.nsw.gov.au or call LawAccess NSW on **1300 888 529**.

Prisoners Legal Service (PLS)

Prisoners Legal Service (PLS) is a service of Legal Aid NSW. PLS lawyers regularly visit prisons or see prisoners by video link across NSW. PLS can give you general advice about your case, appeals and other legal problems.

To make an appointment to see a PLS lawyer you can:

- submit a request at the prison to have your name added to the Legal Aid NSW waitlist, or
- contact Legal Aid NSW as a free call by pressing **#2** on the prison Common Auto Dial List (CADL) system and ask for Prisoners Legal Service.

This publication is a general guide to the law. You should not rely on it as legal advice, and we recommend that you talk to a lawyer about your situation.

The information is correct at the time of printing, however it may change. For more information contact LawAccess NSW on **1300 888 529**.



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For more information, visit:

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Do you need help to contact us?



If you need an interpreter, call the Translating and Interpreting Service (TIS National) on **131 450** (9am–5pm) and ask for LawAccess NSW.

Do you find it hard to hear or speak?



If you are deaf, or have a hearing or speech impairment, contact us through the National Relay Service (NRS). Ask for LawAccess NSW on **1300 888 529**.