

Position Paper | No appeals and abandoned appeals

Version	1.0
Date	1 August 2021

Te Aronga | Purpose

1. This paper sets out, in broad terms, the approach the Criminal Cases Review Commission | Te Kāhui Tātari Ture (**Te Kāhui**) will take when dealing with applications where:
 - 1.1. the applicant has not exercised their rights of appeal; or
 - 1.2. the applicant has abandoned an appeal before it was heard.
2. The paper is designed to provide a summary of the key legal principles Te Kāhui will generally apply to applications that fall within the scope of this paper.

Te Tūranga | Position

Overview

3. Te Kāhui must consider if an applicant has exercised their rights of appeal. As a general rule, if they have not, and ordinary avenues of appeal remain open to the applicant, Te Kāhui will not accept an application. The right to appeal a conviction and sentence is a fundamental touchstone of our justice system, and is enshrined in statute.
4. In general, it would not be appropriate for Te Kāhui to prematurely intervene in the criminal justice process by reviewing a case where the right to appeal has not been exercised. However, Te Kāhui acknowledges the individuality of each case: where an applicant can provide clear and compelling reasons for not exercising their appeal rights, Te Kāhui retains a discretion to accept applications on a case-by-case basis.
5. While Te Kāhui will ordinarily expect an applicant to exhaust their right to a first appeal, Te Kāhui does not necessarily expect applicants to have sought a second or further appeal. Whether an applicant has sought a second or further appeal is a relevant consideration that will help guide decision making, but it is not an essential prerequisite for making an application.
6. If an appeal has been abandoned by the applicant before it has been determined by the court, Te Kāhui will make an assessment on the circumstances of the case as to whether it will treat that appeal as complete, or whether it will encourage the applicant to further seek to exercise their appeal rights (including by applying to reopen their appeal) prior to making an application to Te Kāhui.

Te Kāhui

7. The primary function of Te Kāhui is to investigate and review convictions and sentences to decide whether to refer them to an appeal court.¹
8. A conviction or sentence may only be referred to an appeal court if Te Kāhui considers that it is in the interests of justice to do so.²
9. To guide the decision making of Te Kāhui, the governing legislation (the Criminal Cases Review Commission Act 2019) identifies considerations that must be taken into account when determining if it is in the interests of justice to progress a case. The matters are:³
 - a. whether the eligible person has exercised their rights of appeal against the conviction or sentence;
 - b. the extent to which the application relates to argument, evidence, information, or a question of law raised or dealt with in proceedings relating to the conviction or sentence;
 - c. the prospects of the court allowing the appeal;
 - d. any other matter that Te Kāhui considers relevant.
10. Te Kāhui must consider if an applicant has exercised their rights of appeal against conviction or sentence when considering whether to refer an application.
11. If an applicant has not exercised their right of appeal, it would ordinarily be inappropriate for Te Kāhui to prematurely intervene in the criminal justice system as normal appeal rights are available.

The right of appeal

12. Any person convicted of an offence has a right to appeal their conviction or sentence to a higher court. This is a fundamental principle of the New Zealand criminal justice system enshrined in the New Zealand Bill of Rights Act 1990 (NZBORA).⁴
13. Section 229 of the Criminal Procedure Act 2011 (CPA) provides an automatic right of appeal against conviction for any person convicted of an offence. The equivalent automatic right of appeal in respect of sentence is found at section 244 of the CPA.⁵

¹ Criminal Cases Review Commission Act 2019, section 11.

² Section 17(1).

³ Section 17(2).

⁴ New Zealand Bill of Rights Act 1990, section 25(h).

⁵ The right to appeal against sentence is not unfettered; there is no ability to appeal a sentence that is fixed by law. For example, there is no automatic right to appeal a mandatory order for disqualification from driving.

14. Prior to the commencement of the CPA, the rights of appeal were governed by section 383 of the Crimes Act 1961⁶ and section 115 of the Summary Proceedings Act 1957.⁷
15. Once exercised, the right of appeal is spent. The right to challenge convictions or sentences does not extend to a right to appeal the decision of the appeal court to a second appeal court. Second or further appeals require leave of the higher court.
16. Section 231 of the CPA requires an appeal to be filed within 20 working days after the date of the conviction or sentence. The appeal court may however, at any time, extend this period.
17. *R v Knight* established that when considering whether to extend the period, the appeal court must consider the interest of justice in the finality of decisions, against the individual applicant's interest in appeal.⁸
18. Generally, an extension will more likely be granted where the delay is short (and explained). The longer the period since the conviction or sentence, the less likely an appeal court is to grant an extension, unless the applicant can justify the delay. In situations where many years have lapsed, only in very exceptional circumstance will an extension be granted.⁹
19. Justifiable delays may include but are not limited to:
 - a. the applicant is young¹⁰; or
 - b. reasonable difficulties in obtaining adequate, competent, and independent legal advice¹¹;
 - c. a legal issue did not become apparent until after proceedings¹²; or
 - d. where there had been a change in the judicial interpretation of a point of law in relation to the conviction or sentence.¹³

Further appeals

20. While the right of appeal is only restricted by the timeframes for filing a notice of appeal, the ability to bring a second or further appeal is not automatic. An appeal from a decision of an appellate court can only be brought if the second appeal court grants leave.
21. Leave to bring a second appeal to the High Court or Court of Appeal will only be granted if one of two criteria are met:¹⁴

⁶ For indictable offences.

⁷ For summary offences.

⁸ *R v Knight* [1998] 1 NZLR 583 (CA).

⁹ *Butcher v R* [2015] NZCA 102 at [7].

¹⁰ *Davis v R* [2011] NZCA 380 at [2].

¹¹ *R v Osborne* [2009] NZCA 168.

¹² *R v Smail* [2008] NZCA 6.

¹³ *R v Knight* [1998] 1 NZLR 583 (CA).

¹⁴ Criminal Procedure Act 2011, section 237.

- a. The appeal involves a matter of general or public importance; or
 - b. A miscarriage of justice may have occurred, or may occur, unless the appeal is heard.
22. Appeals to the Supreme Court are governed by the Senior Courts Act 2016. The criteria for leave to appeal is unique to the Supreme Court. Appeals are restricted to cases where the Supreme Court is satisfied that it is necessary in the interests of justice for the court to hear and determine the appeal.
23. While the NZBORA enshrines a right to have an appeal against conviction or sentence heard by a higher court, there is no equivalent NZBORA provision guaranteeing a right to have an appeal decision challenged in a higher court.
24. If an applicant has exercised their right of appeal (i.e. their first appeal), Te Kāhui will not require an applicant to have applied for leave to bring a second appeal.

Applications from applicants who have not exercised their right of appeal

25. Te Kāhui exists as an exceptional remedy for those who believe they have suffered a miscarriage of justice. Generally, Te Kāhui considers it is not appropriate to accept or review applications where the right to appeal has not been exercised.
26. Where there remains the possibility of resolving matters through the ordinary appeal process, Te Kāhui considers those ordinary processes should be followed. Assessing applications that have not had the benefit of appellate consideration would be a premature intervention in the criminal justice system.
27. As a general rule, Te Kāhui will not accept applications where there remains a right of appeal. This position applies equally for applications to review conviction(s) and applications to review sentence(s). For example, if an applicant has exercised their right of appeal in respect of their conviction and not sentence, Te Kāhui will accept the application for review of conviction, but not their application for review of sentence.
28. While the general rule is that Te Kāhui will not accept applications where there have been no appeals, we acknowledge that each application is unique; in exceptional circumstances an applicant will be able to demonstrate good reasons for not having followed normal appeal procedures. These circumstances will be assessed on a case-by-case basis.

Outstanding appeals

29. For similar reasons, Te Kāhui will not accept an application for review if an appeal has been filed, but not yet determined. In those circumstances, there would be no purpose served in Te Kāhui deciding to refer a case for an appeal.
30. If an applicant has active proceedings relating to their conviction or sentence, Te Kāhui will, as a general rule, not accept their application.

Abandoned appeals

31. Where a notice of abandonment is filed an appeal is, ordinarily, finally terminated. However, there are narrow circumstances where the court may allow the abandonment to be withdrawn and the appeal resurrected.

32. The two circumstances where a notice of abandonment may be withdrawn were confirmed in the Court of Appeal decision of *R v Cramp*.¹⁵ While this decision pre-dated the introduction of the CPA, it has been followed with approval in a number of subsequent decisions.¹⁶
33. An application to withdraw a notice of abandonment may only be granted if:
 - a. The abandonment is properly viewed as a nullity rather than the result of a deliberate and informed decision; or
 - b. Exceptional circumstances exist so that it is in the interests of justice that the abandonment be withdrawn.
34. When considering whether exceptional circumstances exist the court must have regard to:¹⁷
 - a. the importance of finality in criminal cases;
 - b. the circumstances in which the abandonment was made; and
 - c. the necessity for an applicant for such an order to satisfy the court that the reasons for the application are of an exceptional nature.
35. When considering an application to withdraw a notice of abandonment under the exceptional circumstances ground, if satisfied of the matters set out above, the Court should make a provisional assessment of the likely merits of any appeal before exercising its discretion.¹⁸
36. Generally, Te Kāhui will encourage an applicant who abandoned their appeal to seek to reopen it, along the lines set out above. However, this will be assessed on a case-by-case basis.

Assistance with preparing an application

37. Applications may be submitted by an applicant or their representative (such as a lawyer or support person).
38. If a potential applicant or their representative requires any assistance in preparing an application, or have any questions, Te Kāhui staff are available to help. The applicant and/or representative can contact Te Kāhui by:
 - Calling – 0800 33 77 88 (this is a freephone call, please call Monday to Friday, 9am-5pm)
 - Email – info@ccrc.nz
39. While an applicant does not need a lawyer to apply to Te Kāhui, they may wish to engage a lawyer to assist them with preparing their application. Legal Aid may be available to an applicant who wishes to engage a lawyer when applying to Te Kāhui. Applicants who wish to access Legal Aid should call the Ministry of Justice on 0800 2 LEGAL AID (253 425) for assistance with making an application for Legal Aid.

¹⁵ *R v Cramp* [2009] NZCA 90

¹⁶ *Russell v R* [2020] NZCA 265 at [3], *Paul v R* [2018] NZCA 383 at [8], *Gurran v R* [2015] NZCA 64 at [13].

¹⁷ *R v Bridgeman* CA 87/04 [10 November 2005], at [9].

¹⁸ *Hawkins v R* [2015] NZCA 340, at [15].