

Supreme Court (Court of Appeal) Amendment Rules (No. 2) 2022

SL 2022/209

Made by the judges of the Supreme Court.

1. Citation

These rules are the *Supreme Court (Court of Appeal) Amendment Rules (No. 2) 2022*.

2. Commencement

These rules come into operation as follows —

- (a) rules 1 and 2 — on the day on which these rules are published in the *Gazette*;
- (b) the rest of the rules — on the day on which the *Criminal Appeals Amendment Act 2022* section 4 comes into operation.

3. Rules amended

These rules amend the *Supreme Court (Court of Appeal) Rules 2005*.

4. Rule 3 amended

- (1) In rule 3(1) in the definition of *appeal notice* delete “Form 1 or 2,” and insert:

Form 1, 1A or 2,

- (2) In rule 3(1) in the definition of *criminal appeal* delete “Division 3 or Part 3;” and insert:

Division 3, Part 3 or 3A;

5. Rule 7 amended

In rule 7(2) delete “on the basis of the documents filed without requiring the parties to attend a hearing,” and insert:

in the exercise of jurisdiction under subrule (1)(b) or (c),

6. Rule 23 amended

In rule 23(2) after “1,” insert:

1A,

7. Rule 24 amended

In rule 24(1) after “1,” insert:

1A,

8. Rule 26B inserted

At the beginning of Part 5 Division 2 insert:

26B. Term used: alleged evidence

In this Division —

alleged evidence means evidence that is alleged to be —

- (a) fresh and compelling; or
- (b) new and compelling.

9. Rule 27 replaced

Delete rule 27 and insert:

27. When appeal is commenced

An appeal is not commenced until an appeal notice (with any other document required by rule 28, 28A or 29) has been —

- (a) filed in accordance with rule 28, 28A or 29, as the case requires; and
- (b) served in accordance with rule 29A.

10. Rule 28 amended

(1) Delete rule 28(1) and insert:

- (1) To commence an appeal, or to apply for an extension of time within which to commence an appeal, under the *Criminal Appeals Act 2004* Part 2 Division 3 or Part 3 the appellant must file —

- (a) a Form 1; and
- (b) any document required by subrule (2).

(2) In rule 28(5):

- (a) delete “In a criminal appeal the appellant, when” and insert:

When

- (b) delete “appellant’s case” and insert:

“Appellant’s case”

- (c) after “32,” insert:

the appellant

(3) Delete rule 28(6) and (7).

Note: The heading to amended rule 28 is to read:

**Commencing appeal under *Criminal Appeals Act 2004* Part 2
Division 3 or Part 3**

11. Rule 28A inserted

After rule 28 insert:

28A. Commencing appeal under *Criminal Appeals Act 2004* Part 3A

- (1) To commence an appeal under the *Criminal Appeals Act 2004* Part 3A the appellant must file —

- (a) a Form 1A; and
- (b) an affidavit containing the information set out in subrule (2); and
- (c) the “Appellant’s case” in accordance with rule 32.

- (2) For the purposes of subrule (1)(b), the information is as follows —

- (a) details of all previous appeals against the conviction;
- (b) a statement of the issues in dispute at the trial, with reference to that part of the trial transcript which shows those issues to be in dispute;
- (c) the alleged evidence relating to the offence the subject of the conviction that is to be relied on in the appeal;

- (d) whether the evidence set out in accordance with paragraph (c) is alleged to be fresh and compelling, or new and compelling;
 - (e) an explanation as to why the alleged evidence that is to be relied on in the appeal was not tendered during the trial or during any previous appeal;
 - (f) when the appellant, and any legal practitioner representing the appellant, became aware of the alleged evidence that is to be relied on in the appeal;
 - (g) if the evidence is alleged to be fresh and compelling — details, if any, of alleged negligence or incompetence of the legal practitioner representing the appellant at the trial;
 - (h) a statement of information or belief as to whether, with the exercise of reasonable diligence, the alleged evidence could have been tendered at the trial.
- (3) A Form 1A may be filed together with an application, made in accordance with rule 44, for an interim order.
 - (4) For the purposes of the *Criminal Appeals Act 2004* section 35G(2), a Form 1A filed in accordance with this rule is taken to be an application for leave to appeal.

12. Rule 29 amended

- (1) Delete rule 29(1) and insert:
 - (1) To commence a civil appeal, or to apply for an extension of time within which to commence a civil appeal, the appellant must file —
 - (a) a Form 2; and
 - (b) any document required by subrule (2).
- (2) Delete rule 29(4) and (5).

Note: The heading to amended rule 29 is to read:

Commencing civil appeal

13. Rule 29A inserted

After rule 29 insert:

29A. Service of appeal documents

- (1) Any document filed under rule 28, 28A or 29 —
 - (a) must be served on the respondent personally; or
 - (b) if the appellant is in custody — may be served on the respondent by post, fax or email.
- (2) As soon as practicable after serving the respondent the appellant must file a Form 3 (Service certificate).

14. Rule 31B inserted

After rule 31A insert:

31B. Time within which to file “Appellant’s case”

- (1) This rule applies to an appeal commenced under rule 28 or 29.
- (2) After an appeal notice is filed, the appellant must file the “Appellant’s case” in accordance with rule 32 within a period of —
 - (a) in the case of an appeal under the *Criminal Appeals Act 2004* Part 2 Division 3 or Part 3 — 56 days after the day on which the appeal notice is filed, unless a single judge or registrar orders otherwise; or
 - (b) in the case of a civil appeal, unless a single judge or registrar orders otherwise —
 - (i) 35 days after the day on which the appeal notice is filed; or
 - (ii) if the appeal is an interlocutory civil appeal — 14 days after the day on which the appeal notice is filed.

15. Rule 32 amended

- (1) Delete rule 32(1) and (2).
- (2) In rule 32(3) delete “appellant’s case” and insert:

“Appellant’s case”

(3) In rule 32(4):

(a) delete paragraph (b) and insert:

(b) must state the grounds, and concise particulars of them, succinctly in numbered paragraphs;
and

(b) in paragraph (c) delete “must state, for each ground,” and insert:

must, for any ground that alleges an error by the primary court, state

(c) in paragraph (d) delete “must identify,” and insert:

must, for any ground that alleges an error by the primary court, identify

(d) in paragraph (e) delete “law.” and insert:

law; and

(e) after paragraph (e) insert:

(f) must, for any ground that alleges a miscarriage of justice, state the basis on which the miscarriage of justice is alleged to arise.

(4) After rule 32(4) insert:

(4A) For the purposes of subrule (4)(b), the grounds and their particulars must not merely allege —

(a) that the primary court erred in fact or in law; or

(b) that the decision of the primary court —

(i) is against the evidence or the weight of evidence; or

(ii) is unreasonable and cannot be supported having regard to the evidence; or

(iii) is unsafe or unsatisfactory;

or

(c) in the case of an appeal against a sentence — that the sentence is excessive or inadequate; or

(d) in the case of an appeal against conviction —

(i) that the verdict of guilty for which the conviction is based is unreasonable and

cannot be supported having regard to the evidence; or

- (ii) that the judge made the wrong decision on a question of law; or
- (iii) that there was a miscarriage of justice.

(5) In rule 32(5):

- (a) in paragraph (c)(iii) delete “ground;” and insert:

ground; and

- (b) after paragraph (c)(iii) insert:

- (iv) in the case of an appeal under the *Criminal Appeals Act 2004* Part 3A — each passage in the alleged evidence on which the appellant relies in support of the ground;

16. Rule 33 amended

- (1) In rule 33(2) delete “appellant’s case,” and insert:

“Appellant’s case”,

- (2) In rule 33(3) and (4) delete “respondent’s answer” and insert:

“Respondent’s answer”

- (3) In rule 33(5):

- (a) in paragraph (b)(iii) delete “relies.” and insert:

relies; and

- (b) after paragraph (b)(iii) insert:

- (iv) in the case of an appeal under the *Criminal Appeals Act 2004* Part 3A — each passage in the appellant’s alleged evidence on which the respondent relies.

17. Rule 34 amended

In rule 34(1) delete “respondent’s answer” and insert:

“Respondent’s answer”

Note: The heading to amended rule 34 is to read:

When “Appellant’s reply to respondent’s notice of contention” is required

18. Rule 36 amended

In rule 36(1) delete “respondent’s answer,” and insert:

“Respondent’s answer”,

19. Rule 38 amended

(1) In rule 38(2):

- (a) in paragraph (g) delete “appellant’s case filed under” and insert:

“Appellant’s case” filed in accordance with

- (b) in paragraph (h) delete “respondent’s answer” and insert:

“Respondent’s answer”

- (c) in paragraph (j)(i) delete “appellant’s case; and” and insert:

“Appellant’s case”; and

- (d) in paragraph (j)(ii) delete “respondent’s answer;” and insert:

“Respondent’s answer”;

- (e) after paragraph (j) insert:

(ja) any affidavits filed with the appeal notice;

(2) In rule 38(3):

- (a) in paragraph (h) delete “included.” and insert:

included;

- (b) after paragraph (h) insert:

- (i) in the case of an appeal under the *Criminal Appeals Act 2004* Part 3A —
 - (i) the Court of Appeal’s formal decision in each previous appeal; and
 - (ii) the Court of Appeal’s written reasons for its decision in each previous appeal; and
 - (iii) any document filed in a previous appeal that a registrar orders to be included.

- (3) In rule 38(4):
 - (a) after paragraph (c) insert:
 - (ca) in the case of an appeal under the *Criminal Appeals Act 2004* Part 3A — an electronic version of each appeal hearing transcript;

 - (b) in paragraphs (d) and (f) after “court” insert:

and, if applicable, the Court of Appeal,

- (4) In rule 38(4A):
 - (a) delete “(4)(c)” and insert:

(4)(c), (ca)

 - (b) delete paragraphs (a) and (b) and insert:
 - (a) the “Appellant’s case”; or
 - (b) the “Respondent’s answer”; or

- (5) Delete rule 38(5) and insert:
 - (5) The documentary exhibits must be arranged in the Green Appeal Book in the order in which they are lettered or numbered as exhibits in the primary court or the Court of Appeal, as the case may be, unless a registrar orders otherwise.

Note: The heading to amended rule 38 is to read:

Contents of appeal book

20. Rule 42A amended

In rule 42A(c) delete “the issue” and insert:

in the case of a civil appeal — the issue

21. Rule 43 amended

After rule 43(2)(fa)(i) insert:

- (ia) the appellant has not filed the required documents under rule 28, 28A or 29, as the case may be; or

22. Rule 54 replaced

Delete rule 54 and insert:

54. Orders made under *Criminal Appeals Act 2004*

- (1) In an appeal under the *Criminal Appeals Act 2004* Part 3A the Court of Appeal may refuse to make an order under section 40(1) of that Act that may result in the production of evidence if the Court of Appeal is not satisfied that making the order will result in the production of evidence that —
 - (a) is likely to be relevant and probative; and
 - (b) may assist the Court of Appeal to determine the issue of whether to give leave to appeal.
- (2) The *Criminal Procedure Act 2004* Part 5 Division 7 and Schedule 4, and the *Criminal Procedure Rules 2005*, apply for the purposes of an order made by the Court of Appeal under the *Criminal Appeals Act 2004* section 40(1) requiring —
 - (a) a person to produce to the Court of Appeal any record or thing; or
 - (b) a witness to attend before the Court of Appeal or before an examiner appointed by the Court of Appeal.
- (3) Unless the Court of Appeal orders otherwise, a witness summons issued for the purposes of the *Criminal Appeals Act 2004* section 40(1) must be served —
 - (a) by the party that applied for the order under section 40(1) of that Act; and
 - (b) in accordance with the *Criminal Procedure Act 2004* section 162.

23. Rule 59 amended

After rule 59(1A) insert:

- (1B) Subject to subrule (2), the appeal is deemed to be dismissed on filing a Form 16.

24. Schedule 1 Form 1 amended

In Schedule 1 Form 1:

- (a) delete “(criminal)” and insert:

(Criminal Appeals Act 2004 Pt. 2 Div. 3 and Pt. 3)

- (b) in note 3 delete “parol” and insert:

parole

Note: The heading to amended Schedule 1 Form 1 is to read:

**Appeal notice (Criminal Appeals Act 2004 Pt. 2 Div. 3 and Pt. 3)
(r. 28)**

25. Schedule 1 Form 1A inserted

After Schedule 1 Form 1 insert:

**1A. Appeal notice (Criminal Appeals Act 2004 Pt. 3A)
(r. 28A)**

Supreme Court of Western Australia Court of Appeal		No:
		Appeal notice (Criminal Appeals Act 2004 Pt. 3A)
Parties to the appeal	Appellant Respondent	
Offender	Full name:	Date of birth:
Primary court’s decision		
Primary court	at	
Indictment No.		
Date of decision		
Judicial officer		
Decision details		
Conviction recorded ¹		
Previous appeal details		
Date appeal(s) dismissed		
Matter number(s)		
Appeal details		
Notice of appeal	The appellant applies to the Court of Appeal for leave to appeal against the above conviction.	
Notice to the respondent	If you want to take part in this appeal you must file a Form 4 under the <i>Supreme Court (Court of Appeal) Rules 2005</i> within 7 days after you are served with this notice and serve it on the appellant.	
Legal representation	Is the appellant legally represented in this appeal? Yes/No Is the appellant applying for legal aid? Yes/No	
Appellant’s details for service ²		

Name Street address Telephone Email address Reference No.	Fax No.	
Signature of appellant or legal practitioner	Appellant/Appellant's legal practitioner	Date:

Notes to Form 1A —

1. Describe the offence, e.g. dangerous driving causing death. If there is more than 1 conviction, state the details of the other convictions.
2. If the appellant is represented by a legal practitioner, the appellant's details below must be the legal practitioner's. If the appellant is self-represented, the details must be the appellant's personal details.

26. Schedule 1 Form 3 amended

In Schedule 1 Form 3 in the note delete “rule 28(1)(d) (for a criminal appeal) or 29(1)(d)” and insert:

rule 28(1)(b) (for an appeal under the *Criminal Appeals Act 2004* Pt. 2 Div. 3 or Pt. 3) or 29(1)(b)

Note: The heading to amended Schedule 1 Form 3 is to read:

Service certificate (r. 29A(2))

Date: 12 December 2022.

The Hon. Chief Justice Peter Quinlan
Chief Justice of Western Australia
Supreme Court of Western Australia.