

EXPLANATORY MEMORANDUM

CRIMINAL APPEALS AMENDMENT BILL 2019 (WA)

Overview of the Bill

The Criminal Appeals Amendment Bill 2019 (WA) (the Bill) will amend the *Criminal Appeals Act 2004 (WA)* (the Criminal Appeals Act), introducing a new statutory right for an offender convicted of an offence on indictment to bring a second or subsequent appeal to the Court of Appeal against conviction, if there is either fresh and compelling, or new and compelling, evidence relating to the offence.

This Bill creates a pathway for a second and subsequent appeal directly to the Court of Appeal, where currently, after all appeals are exhausted, an offender can only appeal again on the recommendation after petition, of the Executive by virtue of the Royal Prerogative of Mercy under Part 19 of the *Sentencing Act 1995 (WA)* or petition for a pardon under the Governor's Royal Prerogative powers.

Part 2 of the Bill contains amendments to the Criminal Appeals Act requiring any appeal under Part 3A to be commenced by application for special leave to appeal to the Court of Appeal. Part 2 also sets out the powers of the Court of Appeal in hearing both applications for special leave to appeal and appeals, providing for the allowance or dismissal of the appeal, and a range of options that may be utilised at the discretion of the Court of Appeal when an appeal has been allowed.

Part 3 of the Bill contains consequential amendments to the *Criminal Procedure Act 2004 (WA)*, the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)*, the *Sentencing Act 1995 (WA)* and the *Supreme Court Act 1935 (WA)*. All consequential amendments insert a reference to appeals under the new Part 3A, where appropriate, in provisions which currently reference appeals under Part 2 or Part 3 of the Criminal Appeals Act.

Part 3 of the Bill also amends section 15A(2)(c) of the *Bail Act 1982 (WA)* and inserts proposed new section 15A(2)(d) to clarify that there is a right of appeal from a single judge of appeal to the Court of Appeal in relation to questions of bail pending appeal.

Part 1 - Preliminary

This Part deals with preliminary and commencement matters.

Clause 1 Short Title

Clause 1 provides that the Bill, once enacted, will be known as the *Criminal Appeals Amendment Act 2019*.

Clause 2 Commencement

Clause 2 provides for the commencement of the Act.

Part 1 will come into operation on the day the Act receives Royal Assent. The rest of the Act will come into operation on a day fixed by proclamation. Different days may be fixed for different provisions of the Act. This is to ensure that rules of court can be put in place before the substantive provisions commence.

Part 2 – *Criminal Appeals Act 2004* amended

This Part deals with amendments to the Criminal Appeals Act.

Clause 3 Act amended

Clause 3 provides that the Act will amend the Criminal Appeals Act.

Clause 4 Part 3A inserted

Clause 4 inserts new 'Part 3A – Further appeals against conviction' into the Criminal Appeals Act.

Proposed Part 3A contains the following new divisions and provisions:

- Division 1 – Preliminary
 - 35B. Application of Part 3A
 - 35C. Term used: offender
 - 35D. Meaning of fresh and compelling evidence
 - 35E. Meaning of new and compelling evidence
- Division 2 – Rights of appeal
 - 35F. Second or subsequent appeal against conviction
- Division 3 – Commencing and deciding appeals
 - 35G. Special leave to appeal required in all cases
 - 35H. Commencing appeal
 - 35I. Decision on appeal
- Division 4 – Fees and costs
 - 35J. No fees
 - 35K. Costs against appellant

Division 1 – Preliminary

35B Application of Part 3A

Proposed section 35B provides that Part 3A has both current and retrospective application to an offender; that is, it applies whether the offender was convicted of the offence to which an appeal under Part 3A relates, before or after the Act came into operation.

35C Term used: offender

Proposed section 35C provides that in Part 3A, the term *offender* has the meaning given in section 22 of the Criminal Appeals Act.

Section 22 of the Criminal Appeals Act defines *offender* as “a person who has been convicted of an offence”. This definition already applies to appeals from superior courts under Part 3 of the Criminal Appeals Act.

35D Meaning of fresh and compelling evidence

Proposed section 35D provides, for the purposes of Part 3A, the definitions of ‘fresh’ and ‘compelling’ in respect of evidence relating to the offence against which an offender was convicted.

Evidence will be ‘fresh’ if, despite the exercise of reasonable diligence, it was not and could not have been made available at the trial of the offence or any previous appeal.

The ‘fresh’ evidence used in a second appeal under Part 3A cannot be resubmitted as ‘fresh’ evidence in a subsequent appeal. Each subsequent appeal may only be brought on ‘fresh’ evidence that was not and could not have been adduced at a previous appeal.

Evidence will be ‘compelling’ if it is highly probative in the context of the issues in dispute at the trial of the offence.

35E Meaning of new and compelling evidence

Proposed section 35E provides, for the purposes of Part 3A, the definitions of ‘new’ and ‘compelling’ in respect of evidence relating to the offence against which an offender was convicted.

Evidence will be ‘new’ if it was not adduced at the trial of the offence but, with the exercise of reasonable diligence, could have been adduced at the trial of the offence or any previous appeal.

The ‘new’ evidence used in a second appeal under Part 3A cannot be resubmitted as ‘new’ evidence in a subsequent appeal. Each subsequent appeal may only be brought on ‘new’ evidence that was not adduced at a previous appeal.

Evidence will be ‘compelling’ if it is highly probative in the context of the issues in dispute at the trial of the offence.

Division 2 – Rights of appeal

35F Second or subsequent appeal against conviction

Proposed section 35F(1) provides that subject to Part 3A, an offender convicted of an offence on indictment may bring a second or subsequent appeal to the Court of Appeal against conviction if there is either fresh and compelling or new and compelling evidence relating to the offence.

The effect of this amendment is that an offender who was convicted on indictment in either the District Court or the Supreme Court, and who has already used their singular appeal to the Court of Appeal, is given the right to a second or subsequent appeal

against their conviction, where fresh and compelling or new and compelling evidence comes to light after the exhaustion of the original appeal process.

Proposed section 35F(2) provides that evidence is not excluded from being admissible on an appeal brought under Part 3A just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

Division 3 – Commencing and deciding appeals

35G Special leave to appeal required in all cases

Proposed section 35G(1) provides that under Part 3A, each ground of appeal requires the special leave of the Court of Appeal.

The effect of this amendment is that every ground of appeal will be assessed individually as to whether or not to grant special leave to appeal on that particular ground.

Proposed section 35G(2) provides that when deciding whether or not to give special leave to appeal, the Court of Appeal may make that decision with or without written or oral submissions from the parties to the appeal, and may decide whether to give special leave, except as provided in subsection (3), before the hearing of the appeal.

The practical effect of this amendment is twofold. Firstly, it provides that applications for special leave may be assessed on the papers, and secondly, a decision on whether or not special leave is given may be made prior to the hearing of the appeal unless the Court of Appeal is satisfied, under subsection (3), that there are special circumstances, in which case it may be expressed contemporaneously with the judgment on the appeal itself.

Proposed section 35G(3) provides that if the Court of Appeal is satisfied that there are special circumstances, it may give special leave to appeal at the hearing of, or when giving judgment on, the appeal. The intention of this provision, as read with 35G(2)(b), is that the Court of Appeal deal expeditiously with non-meritorious applications for special leave, and that only in special circumstances will special leave be considered at the hearing of the appeal.

Proposed section 35G(4) provides that the Court of Appeal must not give special leave to appeal on a ground of appeal unless it is satisfied that the ground of appeal meets the requirements of a two-step test. Firstly, that the ground identifies fresh and compelling evidence or new and compelling evidence that should, in the interests of justice, be considered on an appeal. Secondly, if the ground identifies fresh and compelling or new and compelling evidence, the Court of Appeal must also be satisfied that the ground has a reasonable prospect of succeeding, in order to give special leave on that ground of appeal.

Proposed section 35G(5) provides that unless the Court of Appeal gives special leave to appeal on at least one ground of appeal, the appeal is taken to have been dismissed.

Proposed section 35G(6) provides that the decision of either the Court of Appeal, or a single judge of appeal exercising the jurisdiction and powers of the Court of Appeal, in respect of a special leave application, is not appealable. This does not affect the right of appeal to the High Court of Australia under section 73 of the Australian Constitution.

35H Commencing appeal

Proposed section 35H(1) provides that where an appeal is commenced under Part 3A, it must be commenced and conducted in accordance with Part 3A and the rules of the Supreme Court.

Proposed section 35H(2) sets out that an appeal under Part 3A can only be commenced by the lodgement of an application for special leave to appeal, to the Court of Appeal. The application for special leave to appeal must set out each ground of appeal.

Proposed section 35H(3) requires that, on the commencement of an appeal under Part 3A, the appellant must serve a copy of the application for special leave to appeal on the other party or parties to the proceedings before the trial court.

Proposed section 35H(4) gives the Court of Appeal the discretion to, at any time, order the appellant to serve a copy of the application for special leave to appeal on any other person that the court thinks fit. This other person does not have to be a party to the appeal.

35I Decision on appeal

Proposed section 35I(1) requires the Court of Appeal to dismiss the appeal unless it has allowed it under proposed section 35I(2) or (4); the Court of Appeal will not have jurisdiction to make any other order.

The requirements that need to be met for a successful appeal differ depending on whether the appeal is based on fresh and compelling or new and compelling evidence.

Fresh and compelling evidence

Proposed section 35I(2) requires the Court of Appeal to allow an appeal based on fresh and compelling evidence if it is satisfied that there has been a miscarriage of justice. The assessment of whether there has been a miscarriage of justice is currently conducted by appeal courts under common law principles which will also be applied to the court's consideration of this issue under section 35I(2).

Proposed section 35I(3) provides that the Court of Appeal may dismiss the appeal, even where one or more grounds of appeal might have been decided in favour of the offender, on the basis that no substantial miscarriage of justice has occurred. This provides discretion to the Court of Appeal to consider the extent of any miscarriage of justice that may have been proven in order to determine whether the appeal ought to succeed.

New and compelling evidence

Proposed section 35I(4) requires the Court of Appeal to allow an appeal based on new and compelling evidence if it is satisfied that, in light of all the evidence, the evidence establishes that the offender is innocent. The effect of this provision is that in considering the new and compelling evidence in combination with the evidence previously adduced at trial, the Court of Appeal must allow the appeal if it is satisfied that the offender is innocent on the total evidence presented.

Proposed section 35I(5) outlines the options the Court of Appeal has at its disposal if it allows an appeal under Part 3A. The options are the same as the options provided for an appeal allowed under existing Part 3; specifically section 30(5)(b) to (e) of the Criminal Appeals Act. The Court of Appeal may either:

- order a new trial; or
- enter a judgment of acquittal; or
- enter a judgment of conviction of a substitute offence if the conviction can be supported on the facts and impose a sentence for the substitute offence; or
- enter a judgment of acquittal on account of unsoundness of mind and deal with the offender under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) in respect of the original offence or the substitute offence.

Proposed section 35I(6) provides that if the Court of Appeal orders a new trial under proposed section 35I(5)(a), section 34 of the Criminal Appeals Act applies, with any necessary modifications, as if the appeal had been brought under Part 3. Section 34 provides for fixing the time and place for parties to appear in the trial court and for the issuing of warrants of arrest.

Proposed section 35I(7) provides that if the Court of Appeal enters a judgment under proposed section 35I(5)(b), section 30(6) of the Criminal Appeals Act applies, with any necessary modifications, as if the appeal had been brought under Part 3. This provision allows the Court of Appeal to vary any sentence where a judgment of acquittal, or a judgment of conviction of a substitute offence has been made.

Division 4 – Fees and costs

35J No fees

Proposed section 35J prohibits a party to an appeal under Part 3A from being charged a fee by a court for or in respect of any act or proceeding that relates to the appeal or its commencement.

35K Costs against appellant

Proposed section 35K(1) confirms that proposed section 35K only applies where an application for special leave to appeal under Part 3A is dismissed under proposed section 35G(4).

Proposed section 35K(2) gives the Court of Appeal the ability to order the appellant in an appeal to pay another party's costs of, or relating to, that appeal. This is a

discretionary power given to the Court of Appeal to help deter vexatious, frivolous or spurious applications.

Proposed section 35K(3) applies where proposed section 35K(2) has been engaged. It provides for the application of section 21 of the Criminal Appeals Act to the enforcement of a costs order under proposed section 35K(2).

Clause 5 Section 53 inserted

Clause 5 inserts a new section 53, which requires the Minister to review the operation and effectiveness of the amendments made to the Criminal Appeals Act by the Criminal Appeals Amendment Act 2019 as soon as practicable after the expiry of 5 years after the date on which section 4 of the Act comes into operation.

The Minister must also, as soon as practicable, prepare a report based on the review and cause a copy of the report to be laid before each House of Parliament.

Part 3 – Consequential amendments to other Acts

This Part deals with consequential amendments made to other Acts.

Division 1 – *Bail Act 1982* amended

Clause 6 Act amended

Clause 6 provides that Division 1 will amend the *Bail Act 1982* (WA) (the Bail Act).

Clause 7 Section 15A amended

Clause 7 amends section 15A(2)(c) of the Bail Act and inserts new section 15A(2)(d), to clarify that there is a right of appeal from a single judge of appeal to the Court of Appeal in relation to questions of bail pending appeal.

The Court of Appeal's jurisdiction and powers may be exercised by a single judge of appeal as provided for under section 61(1) of the *Supreme Court Act 1935* (WA) (the Supreme Court Act). Section 61(3) of the Supreme Court Act provides that a person who is dissatisfied with a decision or order made by a single judge of appeal may apply to the Court of Appeal to set aside or vary the decision or order.

Section 58(1a) of the Supreme Court Act envisages that jurisdiction for appeals against bail decisions made by a judge will be determined under the provisions of the Bail Act.

For consistency and clarity the amendment to section 15A(2) of the Bail Act confirms the jurisdiction of the Court of Appeal to hear an appeal on a bail decision made by a single judge of appeal (who, as set out in Schedule 1, Part A, Clause 4(1) of the Bail Act, has jurisdiction to make a bail decision when considering an application for special leave under the Criminal Appeals Act).

Division 2 – *Criminal Procedure Act 2004* amended

Clause 8 Act amended

Clause 8 provides that Division 2 will amend the *Criminal Procedure Act 2004* (WA).

Clause 9 Section 121 amended

Clause 9 amends section 121(2) and (4) to allow an application for a stay order to be made to the superior court at any time after a person becomes a convicted person and before an appeal under the proposed Part 3A of the Act is commenced.

Division 3 – *Fines, Penalties and Infringement Notices Enforcement Act 1994* amended

Clause 10 Act amended

Clause 10 provides that Division 3 will amend the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).

Clause 11 Section 101B amended

Clause 11 amends section 101B(1)(b) to provide that where a person is granted leave to appeal under the proposed Part 3A of the Act against a fine, or a decision giving rise to a fine, the enforcement of that fine is suspended on appeal.

Division 4 – *Supreme Court Act 1935* amended

Clause 12 Act amended

Clause 12 provides that Division 4 will amend the *Supreme Court Act*.

Clause 13 Section 57 amended

Clause 13 amends section 57(2) to provide for the constitution of the Court of Appeal when hearing and determining an application or appeal under Part 3A of the Act, being an uneven number of judges of appeal not less than 3, except where a single judge of appeal is exercising the jurisdiction and power of the Court of Appeal as set out in section 61 of the *Supreme Court Act*.

Clause 13 also amends section 57(4)(a) to exclude Part 3A appeals from the application of section 57(4), mirroring the treatment of Part 3 appeals in that regard. Section 57(4) currently applies where the Court of Appeal is constituted by 3 or more judges of appeal to hear and determine a Part 2 appeal or a Part 3 appeal related solely to a sentence imposed for an offence, and one or more of the judges for any reason becomes unable to continue as a member of the court for the purpose of hearing and determining the appeal, the remaining judges may continue to hear and determine the appeal if not less than 2 judges remain and all parties to the appeal consent.

Clause 14 Section 58 amended

Clause 14 amends section 58(1)(f) to allow the Court of Appeal to have, and be deemed since the coming into operation of the Criminal Appeals Act always to have had, jurisdiction to hear and determine applications and appeals under proposed Part 3A.