

EXPLANATORY MEMORANDUM

CRIMINAL APPEALS AMENDMENT BILL 2021 (WA)

Overview of the Bill

The Criminal Appeals Amendment Bill 2021 (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, a convicted person has no further right to appeal even if fresh or new evidence later emerges that suggests that a substantial miscarriage of justice has occurred. Currently, where new evidence has the potential to exonerate a convicted person, their only recourse is to lodge a petition for the exercise of the Royal Prerogative of Mercy by the Governor, or petition the Attorney General to refer the case to the Court of Appeal. The Bill will not affect the continued use of these powers by the executive.

Part 2 of the Bill contains amendments to the Criminal Appeals Act requiring any appeal under Part 3A to be commenced by application for 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 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 2021*.

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 this Part
 - 35C. Term used: offender
 - 35D. Fresh, new and compelling evidence
- Division 2 – Rights of appeal
 - 35E. Second or subsequent appeal against conviction
- Division 3 – Commencing and deciding appeals
 - 35F. Leave to appeal required in all cases
 - 35G. Commencing appeal
 - 35H. Decision on appeal
- Division 4 – Fees and costs
 - 35I. No fees
 - 35J. Costs against appellant

Division 1 – Preliminary

35B Application of this Part

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 Fresh, new and compelling evidence

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

Proposed section 35D(1) sets out two categories of 'fresh' evidence. Under section 35D(1)(a), evidence will be 'fresh' if, despite the exercise of reasonable diligence, the evidence was not and could not have been tendered at the trial of the offence or any previous appeal. Under section 35D(1)(b), evidence will be 'fresh' where the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have

been so tendered, and the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender.

Proposed section 35D(2) provides that evidence will be 'new' if it was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal. *New* evidence is distinct from the second category of *fresh* evidence in that the latter is limited to the incompetence or negligence of the lawyer representing the offender.

Proposed section 35D(3) confirms that evidence that is considered 'fresh' under proposed section 35D(1)(b) is not 'new' evidence.

The 'fresh' evidence used in an 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 tendered at the trial or a previous appeal. Similarly, the 'new' evidence used in an 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 tendered at the trial or a previous appeal.

Proposed section 35D(4) provides that evidence will be 'compelling' if it is highly probative in the context of the issues in dispute at the trial of the offence. The requirement of evidence to be 'compelling' balances competing interests of finality and justice by imposing a threshold test upon any additional rights of appeal. Evidence will be highly probative if it has a real or material bearing on the determination of a fact in issue which, in turn, may rationally affect the ultimate outcome in a case.

Division 2 – Rights of appeal

35E Second or subsequent appeal against conviction

Proposed section 35E(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 35E(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

35F Leave to appeal required in all cases

Proposed section 35F(1) provides that under Part 3A, each ground of appeal requires the 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 leave to appeal on that particular ground.

Proposed section 35F(2) provides that the Court of Appeal must decide whether to give leave before the hearing of the appeal, except as provided in subsection (3).

Proposed section 35F(3) provides that if the Court of Appeal considers it necessary or desirable, it may give leave to appeal at the hearing of, or when giving judgment on, the appeal.

The intention of proposed section 35F(2), as read with proposed section 35F(3), is that the Court of Appeal deal expeditiously with non-meritorious applications for leave, and that only in special circumstances will leave be considered at the hearing of the appeal.

Proposed section 35F(4) provides that the Court of Appeal must not give 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 leave on that ground of appeal. Whether the ground has a reasonable prospect of succeeding does not involve consideration of whether, if the ground of appeal succeeds, the error in question has led to a substantial miscarriage of justice; that matter will be determined during the appeal.

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

The constitution of the Court of Appeal is explained at clause 13. Whether such an appeal can be heard by a single judge is dependent upon rules of court being made conferring jurisdiction on a single judge. Should that occur then the provisions in section 61 of the *Supreme Court Act 1935* will apply which includes the ability to apply to the Court of Appeal to set aside or vary the decision in the event that a single judge dismisses the leave application.

35G Commencing appeal

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

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

Proposed section 35G(4) gives the Court of Appeal the discretion to, at any time, order the appellant to serve a copy of the application for 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.

35H Decision on appeal

Proposed section 35H(1) requires the Court of Appeal to dismiss the appeal unless it has allowed it under proposed section 35H(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 application will differ depending on whether the appeal is based on fresh and compelling or new and compelling evidence.

Fresh and compelling evidence

Proposed section 35H(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 35H(2).

Proposed section 35H(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. The intent of this proviso is to ensure that technical errors do not unnecessarily result in appellate intervention but to allow second or subsequent appeals where the miscarriage of justice is so significant as to have the potential to materially affect the outcome of the previous decision.

New and compelling evidence

Proposed section 35H(4) requires the Court of Appeal to allow an appeal based on new and compelling evidence if it is satisfied on the balance of probabilities 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. Innocence is a positive concept that the offender must prove.

Proposed section 35H(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 35H(6) provides that if the Court of Appeal orders a new trial under proposed section 35H(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 35H(7) provides that if the Court of Appeal enters a judgment under proposed section 35H(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

35I No fees

Proposed section 35I 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.

35J Costs against appellant

Proposed section 35J(1) confirms that proposed section 35J only applies where an application for leave to appeal under Part 3A is dismissed under proposed section 35F(5).

Proposed section 35J(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 35J(3) applies where proposed section 35J(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 35J(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 2021* 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 leave under the Criminal Appeals Act).

Division 2 – *Criminal Procedure Act 2004* 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 three 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. In such circumstances the remaining judges may continue to hear and determine the appeal if not less than two judges remain and all parties to the appeal consent.

Clause 14 Section 58 amended

Clause 14 amends section 58(1)(f) to provide that the Court of Appeal is deemed to have, and to have always had, jurisdiction to hear and determine applications and appeals under proposed Part 3A.