



Western Australia

Criminal Appeals Amendment Act 2022

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Western Australia

Criminal Appeals Amendment Act 2022

No. 18 of 2022

An Act to amend the *Criminal Appeals Act 2004* to introduce rights of further appeal against conviction, and to make consequential amendments to —

- **the *Bail Act 1982*; and**
- **the *Criminal Procedure Act 2004*; and**
- **the *Fines, Penalties and Infringement Notices Enforcement Act 1994*; and**
- **the *Supreme Court Act 1935*.**

[Assented to 24 June 2022]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Criminal Appeals Amendment Act 2022*.

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

Part 2 — *Criminal Appeals Act 2004* amended

3. Act amended

This Part amends the *Criminal Appeals Act 2004*.

4. Part 3A inserted

After section 35A insert:

Part 3A — Further appeals against conviction

Division 1 — Preliminary

35B. Application of this Part

This Part applies to an offender whether the offender was convicted of the offence to which an appeal under this Part relates before or after the *Criminal Appeals Amendment Act 2022* came into operation.

35C. Term used: offender

In this Part —

offender has the meaning given in section 22.

35D. Fresh, new and compelling evidence

- (1) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is *fresh* —
 - (a) 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; or
 - (b) if —
 - (i) 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 tendered at the trial of the offence or any previous appeal; and

- (ii) the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender.
- (2) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is *new* if 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 tendered at the trial of the offence or any previous appeal.
 - (3) Despite subsection (2), evidence is not new evidence if it is fresh evidence under subsection (1)(b).
 - (4) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is *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

35E. Second or subsequent appeal against conviction

- (1) Subject to this Part, an offender convicted of an offence on indictment may bring a 2nd or subsequent appeal to the Court of Appeal against conviction if —
 - (a) there is fresh and compelling evidence relating to the offence; or
 - (b) there is new and compelling evidence relating to the offence.

- (2) Evidence is not precluded from being admissible on an appeal brought under this Part 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

- (1) Leave of the Court of Appeal is required for each ground of appeal in an appeal brought under this Part.
- (2) Except as provided in subsection (3), the Court of Appeal must decide whether to give leave to appeal on a ground of the appeal before the hearing of the appeal.
- (3) 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.
- (4) After an appeal has commenced, the Court of Appeal must not give leave to appeal on a ground of appeal unless it is satisfied —
 - (a) the ground identifies fresh and compelling evidence or new and compelling evidence that should, in the interests of justice, be considered on an appeal; and
 - (b) the ground has a reasonable prospect of succeeding.
- (5) Unless the Court of Appeal gives leave to appeal on at least 1 ground of appeal, the appeal is taken to have been dismissed.

35G. Commencing appeal

- (1) An appeal under this Part must be commenced and conducted in accordance with this Part and rules of court.

- (2) An appeal under this Part must be commenced by lodging with the Court of Appeal an application for leave to appeal that sets out the grounds for appeal.
- (3) On commencing an appeal, 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.
- (4) The Court of Appeal may 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.

35H. Decision on appeal

- (1) Unless, under subsection (2) or (4), the Court of Appeal allows an appeal, it must dismiss the appeal.
- (2) The Court of Appeal must allow an appeal based on fresh and compelling evidence if it is satisfied there was a miscarriage of justice.
- (3) Despite subsection (2), even if 1 or more grounds might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.
- (4) The Court of Appeal must 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.
- (5) If the Court of Appeal allows the appeal, it must set aside the conviction of the offence and must —
 - (a) order a new trial; or
 - (b) enter a judgment, and deal with the offender in a manner, referred to in section 30(5)(b) to (e).

- (6) If the Court of Appeal orders a new trial under subsection (5)(a), section 34 applies, with any necessary modifications, as if the appeal had been brought under Part 3.
- (7) If the Court of Appeal enters a judgment under subsection (5)(b), section 30(6) applies, with any necessary modifications, as if the appeal had been brought under Part 3.

Division 4 — Fees and costs

35I. No fees

A party to an appeal under this Part must not be 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

- (1) This section applies if an application for leave to appeal under this Part is dismissed under section 35F(5).
- (2) The Court of Appeal may order the appellant to pay another party's costs of, or relating to, the appeal.
- (3) If the Court of Appeal orders the appellant to pay any costs under subsection (2), section 21 applies, with any necessary modifications, as if the order were made under Part 2.

5. Section 53 inserted

After section 52 insert:

53. Review of amendments made by *Criminal Appeals Amendment Act 2022*

- (1) The Minister must review the operation and effectiveness of the amendments made to this Act by the *Criminal Appeals Amendment Act 2022*, and prepare a report based on the review, as soon as practicable after the 5th anniversary of the day on which the *Criminal Appeals Amendment Act 2022* section 4 comes into operation.
- (2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 5th anniversary.

Part 3 — Consequential amendments to other Acts

Division 1 — *Bail Act 1982* amended

6. Act amended

This Division amends the *Bail Act 1982*.

7. Section 15A amended

In section 15A(2):

- (a) in paragraph (c) delete “Supreme Court.” and insert:

Supreme Court; or

- (b) after paragraph (c) insert:

(d) a single judge of appeal.

Division 2 — *Criminal Procedure Act 2004* amended

8. Act amended

This Division amends the *Criminal Procedure Act 2004*.

9. Section 121 amended

In section 121(2) and (4)(a) delete “Part 3” and insert:

Part 3 or 3A

Criminal Appeals Amendment Act 2022

Part 3 Consequential amendments to other Acts

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

s. 10

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

10. Act amended

This Division amends the *Fines, Penalties and Infringement
Notices Enforcement Act 1994*.

11. Section 101B amended

In section 101B(1)(b) delete “Part 2 or 3” and insert:

Part 2, 3 or 3A

Division 4 — *Supreme Court Act 1935* amended

12. Act amended

This Division amends the *Supreme Court Act 1935*.

13. Section 57 amended

In section 57(2) and (4)(a) delete “Part 3” and insert:

Part 3 or 3A

14. Section 58 amended

In section 58(1)(f) delete “Part 3” and insert:

Part 3 or 3A

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