

# Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023

## Explanatory Notes

### Short title

The short title of the Bill is the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023.

### Policy objectives and the reasons for them

The objectives of the Bill are to enhance criminal justice system responses to possible wrongful convictions and unjust acquittals by:

- establishing a statutory framework to allow a person convicted on indictment or of a summary offence under section 651 of the Criminal Code to make, with the leave of the Court of Appeal, a subsequent appeal against the conviction; and
- expanding the fresh and compelling evidence double jeopardy exception to 10 prescribed offences in addition to murder.

### Subsequent appeal framework

Appeals serve a vital function in protecting against erroneous outcomes in the criminal justice system. They also serve important functions in relation to remedying violations of the right to a fair trial, providing legal consistency by resolving conflicting interpretations of the law and correcting anomalous application of the law, and enabling the development of doctrines relating to criminal justice.

The Criminal Code provides for appeals against convictions to be made to the Court of Appeal following a trial on indictment, or after conviction of a summary offence under section 651 of the Criminal Code. The Court of Appeal's jurisdiction to hear criminal appeals is statutory, created by section 668D of the Criminal Code. Once the Court of Appeal has heard and decided an appeal against a conviction, the court has no jurisdiction to entertain a further appeal against the same conviction. If an appeal to the Court of Appeal is unsuccessful, the convicted person may make an application to the High Court of Australia (HCA) for special leave to appeal, however there is no automatic right to have an appeal heard and the HCA has no jurisdiction to receive fresh evidence.

A convicted person's right of appeal is exhausted once they have been afforded an opportunity to have their appeal considered on the merits, irrespective of whether or not all of the appellant's submissions were heard or determined.<sup>1</sup> After exhausting the right of appeal, the only remaining avenue available to a convicted person is to petition the Governor for a pardon. A person cannot make a subsequent appeal against the conviction to the Court of Appeal even if evidence later emerges indicating the person is innocent.

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<sup>1</sup> *R v Dendle* [2020] QCA 160; *R v MAM* [2005] QCA 323.

All other Australian states and territories, except the Northern Territory, have a subsequent appeal or review framework.

The Bill contains amendments to enhance the ability of the criminal justice system to respond to possible wrongful convictions by introducing a framework for subsequent appeals against conviction.

### **Double jeopardy exception**

‘Double jeopardy’ refers to the principle that a person cannot be retried for an offence for which they have already been convicted or acquitted. The rule against double jeopardy is a long-standing, foundational tenet of the criminal law. Principles underpinning the rule include that a person should not be harassed by multiple prosecutions about the same issue, the need for finality in proceedings, the sanctity of a jury verdict, the prevention of wrongful convictions, and the need to encourage investigators and prosecutors to be efficient and exacting and to put forward their best case.

The rule against double jeopardy is reflected in sections 16 and 17 of the Criminal Code. However, the Criminal Code also provides exceptions to the rule that allow an acquitted person to be retried for certain offences in certain circumstances.

The fresh and compelling evidence double jeopardy exception allows a person acquitted of murder or a lesser offence to be retried for murder if there is fresh and compelling evidence against the person and it is in the interests of justice. For the purpose of the exception, evidence is:

- *fresh* if it was not adduced in the proceeding in which the person was acquitted, and it could not have been adduced with the exercise of reasonable diligence; and
- *compelling* if it is reliable and substantial, and in the context of the issues in dispute in the proceeding in which the person was acquitted, it is highly probative of the case against the acquitted person.

The Criminal Code sets out a stringent series of conditions that must be met before a person may be retried for an offence, providing safeguards in the operation of the double jeopardy exception framework, and recognising the presumption that the original verdict was a true verdict and the retrial of an acquitted person is an extraordinary proceeding.

All other Australian jurisdictions, except the Northern Territory, have a fresh and compelling evidence double jeopardy exception that applies to a range of offences in addition to murder.

The Bill contains amendments to enhance the ability of the criminal justice system to respond to possible unjust acquittals by expanding the offences to which the fresh and compelling evidence double jeopardy exception applies.

### **Achievement of policy objectives**

The Bill will achieve its policy objectives by amending the Criminal Code to:

- establish a subsequent appeal against conviction framework; and
- expand the offences to which the fresh and compelling evidence double jeopardy exception applies.

Consequential amendments are also made to the *Appeals Costs Fund Act 1973* to give effect to these policy objectives.

The Bill also makes minor and technical amendments to the Criminal Code and *Criminal Code Act 1899*.

### **Subsequent appeal framework**

The Bill amends chapter 67 of the Criminal Code to establish a statutory framework to allow a person convicted on indictment, or of a summary offence under section 651 of the Criminal Code, to make, with the leave of the Court of Appeal, a subsequent appeal against the conviction.

The Bill establishes a right of subsequent appeal for convicted persons who made an original appeal against the conviction or applied for leave to appeal the conviction where the Court of Appeal dismissed the original appeal in whole or in part, determined the appeal subject to the special provisions under section 668F, or refused to grant leave to appeal. A person may make a further subsequent appeal, with the leave of the Court of Appeal, if the court dismissed an earlier subsequent appeal in whole or in part or refused to grant an earlier application for leave to make a subsequent appeal. There is no limit on the number of subsequent appeals a convicted person may make under the new subsequent appeal framework.

The requirement in the Bill to obtain the leave of the Court of Appeal in order to make a subsequent appeal, acts as a filter to vexatious or untenable appeals. The Court of Appeal must be satisfied that the ground of the subsequent appeal has a reasonable prospect of success to grant permission for the convicted person to make a subsequent appeal. Additionally, if an application for leave to make a subsequent appeal or a subsequent appeal does not show any substantial ground the registrar may refer it to the Court of Appeal for summary determination. If the Court of Appeal considers that a subsequent appeal or application is frivolous or vexatious, the court may dismiss it summarily without calling any person to attend a hearing.

The Bill provides that the right of subsequent appeal applies retrospectively to convictions and original appeals and applications for leave to appeal occurring prior to the commencement of the new subsequent appeal framework.

#### *Grounds of subsequent appeal*

The Bill provides that a person may make a subsequent appeal against the conviction on the ground that there is fresh and compelling evidence or new and compelling evidence.

There are two categories of *fresh* evidence in the subsequent appeal framework. Under the first category, evidence is fresh if it was not adduced in the proceedings in the court of trial and it could not with the exercise of reasonable diligence by the defence have been adduced in the court of trial. This category relates to evidence that did not exist at the time of the trial or could not have been discovered with the exercise of reasonable diligence by the defence. Evidence that was not adduced in the proceedings in the court of trial will be fresh if it could not have been adduced with the exercise of reasonable diligence by the defence even if it could have been adduced with the exercise of reasonable diligence by the prosecution. Under the second category, evidence is fresh if it was not adduced in the proceedings in the court of trial and it could with the exercise of reasonable diligence by the defence have been adduced but was not because of the incompetence or negligence of a lawyer acting for the appellant in the trial.

Acknowledging that the defence should be entitled to assume that the prosecution has complied with disclosure obligations, the Bill clarifies that if the prosecution fails to comply with its disclosure obligations the defence will be taken not to have failed to exercise reasonable diligence only because it did not discover the evidence that was not disclosed.

Fresh evidence could include forensic evidence that has become available because of advancements in science or technology, evidence discrediting expert evidence relied on at trial, new information about a person's capacity to engage and understand criminal proceedings, or a new piece of evidence that undermines a circumstantial case and strongly suggests the convicted person could not have committed the offence.

Evidence is defined to be *new* if it was not adduced in the proceedings in the court of trial, and it could with the exercise of reasonable diligence by the defence have been adduced.

The Bill provides that if evidence is both fresh and new, the evidence is taken to be fresh evidence.

Under the subsequent appeal framework there are two bases on which fresh or new evidence may be *compelling*. Firstly, evidence will be compelling if it is reliable, substantial, and highly probative in the context of the issues that were in dispute in the proceedings in the court of trial. Evidence will be highly probative if it has a real or material bearing on the determination of a fact in issue that in turn may rationally affect what is to be proved in the case. Secondly, evidence will be compelling if it is reliable, substantial, and would have substantially weakened the case for the prosecution in the proceedings in the court of trial. This base acknowledges that fresh or new evidence may disclose an issue or a line of defence that was not apparent at the time of the trial, and may not have been in dispute in the proceedings, but that bears on the outcome of the case and substantially weakens the case against the appellant.

Whether evidence is considered to be fresh and compelling or new and compelling will be decided by the Court of Appeal on a case-by-case basis considering a range of factors, including whether the evidence existed or was reasonably discoverable by the defence in the circumstances leading up to and at the time of the proceedings in the court of trial, whether the evidence is credible and provides a trustworthy basis for fact finding, and whether the evidence is of real significance or importance in relation to a matter to be proved on the appeal or proof of the appellant's guilt.

The Bill clarifies that evidence is not precluded from being fresh and compelling evidence or new and compelling evidence merely because it would have been inadmissible in the proceedings in the court of trial or in earlier proceedings for an appeal or subsequent appeal against the conviction. Evidence is also not inadmissible in proceedings for leave to make a subsequent appeal or a subsequent appeal merely because it would have been inadmissible in the proceedings in the court of trial or in earlier proceedings for an appeal or subsequent appeal.

#### *Determination of subsequent appeal*

The threshold required for a subsequent appeal to be successful differs depending on whether the ground of the subsequent appeal is fresh and compelling evidence or new and compelling evidence.

For a subsequent appeal on the ground of fresh and compelling evidence, the Bill provides that the Court of Appeal must allow the subsequent appeal if it is of the opinion that there was a miscarriage of justice. However, the Court of Appeal may dismiss a subsequent appeal made

on this ground, if it considers that no substantial miscarriage of justice has occurred. This proviso ensures that technical errors that would have had no significance in determining the verdict in the proceedings in the court of trial do not unnecessarily result in appellate intervention.

The Bill provides that if the Court of Appeal allows a subsequent appeal on the ground of fresh and compelling evidence, the court must quash the conviction and direct a judgment and verdict of acquittal be entered unless the court considers that the miscarriage of justice can be more adequately remedied by an order for a new trial, in which case the court may order a new trial in the way it considers appropriate. If an order for a new trial is made and the appellant is not granted bail, the order is taken to be a warrant for the appellant's detention under the *Corrective Services Act 2006*.

The Bill provides that if the Court of Appeal allows a subsequent appeal and orders a new trial, the appellant is entitled to be paid, from the appeal costs fund, costs that the board considers were thrown away or partly thrown away in the proceedings, including costs that were reasonably incurred but were wasted when the conviction is quashed.

For a subsequent appeal on the ground of new and compelling evidence, the Bill provides that the Court of Appeal must allow the subsequent appeal if, on the balance of probabilities, it is of the opinion that considering all of the evidence the appellant was not guilty of the offence. The threshold for allowing a subsequent appeal on the ground of new and compelling evidence is higher than for fresh and compelling evidence, acknowledging that the new evidence could have been adduced in the proceedings in the court of trial. If the Court of Appeal allows a subsequent appeal on the ground of new and compelling evidence, the court must quash the conviction and direct a judgment and verdict of acquittal be entered.

The Bill also provides that if the Court of Appeal considers that a subsequent appeal on either ground, fresh and compelling evidence or new and compelling evidence, is a special case under section 668F of the Criminal Code, the court may deal with the appellant under section 668F as if the subsequent appeal were an original appeal against conviction under chapter division 2 of the Criminal Code.

### **Double jeopardy exceptions**

The Bill amends chapter 68 of the Criminal Code to expand the fresh and compelling evidence double jeopardy exception to 10 prescribed offences in addition to murder. The prescribed offences are all serious offences punishable by life imprisonment and involving direct interference with another person's life or sexual bodily integrity.

The Bill defines a prescribed offence as an offence, punishable by life imprisonment, under:

- section 215(1) (engaging in penile intercourse with a child under 16), in circumstances where the child is:
  - under the age of 12 (section 215(3));
  - under the age of 16 and is not the lineal descendant of the offender but the offender is the guardian or has the child under their care (section 215(4)), or the child is a person with an impairment of the mind (section 215(4A));
- section 216(1) (abuse of persons with an impairment of the mind) in circumstances where the person is not the lineal descendant of the offender but the offender is the guardian or has the person under their care (section 216(3)(a) or (b));
- section 222(1) (incest);

- section 229B (repeated sexual conduct with a child);
- section 303 (manslaughter);
- section 306 (attempted murder);
- section 313 (killing an unborn child);
- section 314A (unlawful striking causing death);
- section 349 (rape);
- section 352(1) (sexual assaults) in circumstances where:
  - immediately before, during, or after the offence, the offender is, or pretends to be, armed with a dangerous or offensive weapon, or is in company with another person (section 352(3)(a));
  - the offence is an indecent assault that includes the assaulted person penetrating the offender's vagina, vulva or anus with a thing or a part of the assaulted person's body other than their penis (section 352(3)(b)); or
  - the offender procures another person to commit an act of gross indecency that includes the procured person penetrating their own vagina, vulva or anus, or the vagina, vulva or anus of another person, with a thing or a part of the procured person's body other than their penis (section 352(3)(c)).

The Bill provides that the Court of Appeal may order an acquitted person to be retried for a prescribed offence if it is satisfied there is fresh and compelling evidence against the acquitted person in relation to the offence and it is in the interests of justice for the order to be made. A person may be retried for a prescribed offence if:

- they were previously acquitted of that prescribed offence;
- the prescribed offence is an offence they could have been convicted of as an alternative to a different prescribed offence of which they have been acquitted; or
- the prescribed offence is an offence of which they could have been convicted as an alternative to murder.

The Bill also clarifies that for the purpose of the double jeopardy exception evidence is defined to be fresh if it was not adduced in the proceedings in which the person was acquitted and could not have been adduced in those proceedings with the exercise of reasonable diligence by a police officer in relation to the investigation of the commission of the offence or a prosecutor in relation to the prosecution of the offence.

## **Alternative ways of achieving policy objectives**

There are no alternative ways of achieving the policy objectives other than by legislative amendment.

## **Estimated cost for government implementation**

Establishing a subsequent appeal framework may result in some additional administrative and operational costs for government, particularly for the Queensland Courts, Office of the Director of Public Prosecutions, and Legal Aid Queensland, in relation to considering applications for leave to make a subsequent appeal, preparing for and appearing in hearings, determining subsequent appeals, and conducting any trials that may be ordered as a result of successful subsequent appeals. The amendments will also mean that additional persons will be entitled to seek payment from the appeal costs fund for costs that were thrown away or partly thrown away in the proceedings.

The expansion of the fresh and compelling evidence double jeopardy exception to 10 prescribed offences may also result in some additional administrative and operational costs for government, particularly for police and prosecution agencies and the Queensland Courts, in relation to the re-investigation of offences, applications for retrial orders, and retrials.

It is not possible to fully estimate or assess the impacts of establishing a subsequent appeal framework as the number of matters in which convicted persons may seek to make a subsequent appeal, the grounds of any subsequent appeal, and how subsequent appeals will be considered and determined, cannot be predicted. It is similarly not possible to fully estimate or assess the impacts of expanding the double jeopardy exception as the number of cases in which fresh evidence may be discovered that justifies reinvestigation of prescribed offences, consideration of retrial order applications, and possible retrials cannot be predicted.

Based on the information available regarding the experience in other jurisdictions, establishing a subsequent appeal framework and expanding the double jeopardy exception to additional offences are not expected to present significant additional costs for government and any costs are expected to be funded from within existing resources.

## **Consistency with fundamental legislative principles**

The Bill has been drafted having regard to the fundamental legislative principles (FLPs) in the *Legislative Standards Act 1992* (LSA). Potential breaches of FLPs associated with the Bill are addressed below.

### **Legislation should have sufficient regard to the right and liberties of individuals – section 4(2)(a) of the LSA**

The right of individuals to exercise freedom of speech is relevant to the consideration of whether legislation has sufficient regard to the rights and liberties of individuals.

The operation of the double jeopardy exception framework prohibits the publication of any matter for the purpose of identifying or having the effect of identifying an acquitted person who is being retried for a prescribed offence, or who is the subject of an application for a police investigation, a police investigation, an application for a retrial, or an order for a retrial in relation to a prescribed offence. This may be a departure from the FLPs in relation to freedom of speech as it may limit the news media and the general public's right to express information. The departure is justified as restricting the publication protects the acquitted person's right to privacy and rights in criminal proceedings and ensures investigations, proceedings, and the interests of justice relating to prescribed offences are not prejudiced.

### **Legislation should have sufficient regard to the institution of Parliament – section 4(2)(b) of the LSA**

Section 4(4)(a) and (b) of the LSA provide that whether a Bill has sufficient regard to the institution of Parliament may depend on whether the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons and sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

The Bill provides that a copy of a record or part of the record of proceedings before the court of trial, and of earlier proceedings for an appeal or subsequent appeal against the appellant's conviction may be furnished to any party interested in accordance with the *Criminal Practice*

*Rules 1999*, and that the *Criminal Practice Rules 1999* may prescribe a range of matters including who is a ‘party interested’, charges for a copy of the record, and circumstances in which charges may be varied or waived. The amendment may raise the FLP that legislation should have sufficient regard to the institution of Parliament.

The delegation of power is considered necessary and appropriate to ensure the legislation is sufficiently flexible in relation to procedural aspects of court proceedings.

### **Legislation should be consistent with the principles of natural justice – section 4(3)(b) of the LSA**

Section 4(3)(b) of the LSA provides that whether legislation has sufficient regard to the rights and liberties of individuals may depend on whether legislation is consistent with principles of natural justice. The principles of natural justice encompasses the right to be heard.

Under the subsequent appeal framework, the appellant is entitled to be present on the hearing of the subsequent appeal, but is not entitled, except with leave of the Court of Appeal, to be present for an application for leave to make a subsequent appeal or any proceedings preliminary or incidental to the subsequent appeal. Allowing the Court of Appeal to decide an application for leave or to consider matters in preliminary or incidental proceedings in the absence of the appellant may be a departure from FLPs in relation to the right to be heard and to make representations.

The departure is considered justified given the balancing of the right to be heard against the practical challenges in appellants being present for each stage of the court’s consideration of a subsequent appeal or application. The court will consider on a case-by-case basis the necessity or appropriateness for the appellant to be present at various stages of a subsequent appeal or application. For example, in preliminary proceedings the court may grant leave for a self-represented appellant to be present, but not grant leave if the appellant has legal representation who can appropriately represent the appellant in the proceeding.

Additionally, the Court of Appeal may summarily dismiss a subsequent appeal or application without calling any person to attend a hearing if the court considers the subsequent appeal is frivolous or vexatious. Allowing the Court of Appeal to decide the matter based solely on the notice of subsequent appeal or notice of application for leave to make a subsequent appeal may be a departure from FLPs in relation to the right to be heard and to make representations.

The departure is considered justified as the decision of the Court of Appeal is based on a notice, and any supporting material, prepared by the appellant and the appellant has the opportunity to put forward all relevant matters to support the subsequent appeal or application. The appellant may also make a further application for leave to make a subsequent appeal if a previous subsequent appeal or application is summarily dismissed.

### **Legislation should have sufficient regard to the rights and liberties of individuals – section 4(3)(g) of the LSA**

Section 4(3)(g) of the LSA provides that whether legislation has sufficient regard to the rights and liberties of individuals may depend on whether legislation adversely affect rights and liberties, or imposes obligations, retrospectively.

The amendments in the Bill establishing a subsequent appeal framework include a transitional provision which provides that a person may apply for leave to make a subsequent appeal

irrespective of whether the original appeal or application for leave to appeal under section 668D of the Criminal Code was determined before or after the commencement of the subsequent appeal framework. While the provision has retrospective effect, the departure from FLPs is justified as it is beneficial in nature.

The amendments in the Bill to expand the fresh and compelling evidence double jeopardy exception to prescribed offences will operate retrospectively to the extent that the exceptions to the double jeopardy rule apply whether a person was acquitted of the prescribed offence before, on or after the commencement of the relevant provisions. While the Bill does not retrospectively change criminal liability as the action must have been an offence at the time it occurred, it does retrospectively change the circumstances in which a person may be tried and convicted of an offence.

The departure from FLPs is considered to be justified as the prescribed offences to which the exception applies are limited to serious offences punishable by life imprisonment and involving direct interference with another person's life or sexual bodily integrity and there is a strong public interest in pursuing convictions for these offences. Without retrospectivity an arbitrary distinction would be drawn based on the date of acquittal, and it is considered that where fresh and compelling evidence is obtained that would under the framework justify an order for retrial being made a person should not be protected by such an arbitrary distinction. All of the existing procedural safeguards under chapter 68, including that a retrial must be in the interests of justice, only one application for a retrial may be made, and the police may only reinvestigate an offence in relation to a possible retrial if authorised by the Director of Public Prosecutions, will apply to the prescribed offences.

## **Consultation**

The amendments in the Bill to establish a subsequent appeal framework and expand the offences to which the fresh and compelling evidence double jeopardy exception applies were informed by targeted consultation with key legal stakeholders. Consultation during drafting of the amendments was also undertaken with legal stakeholders, victim support services, First Nations stakeholders, and other interested stakeholders. Feedback received during the consultation process was taken into account in finalising the amendments in the Bill.

The Chief Justice, Chief Judge, Chief Magistrate, President of the Court of Appeal were also consulted during the drafting of the amendments and feedback received taken into account in finalising the Bill.

## **Consistency with legislation of other jurisdictions**

The amendments in the Bill are specific to the legislative framework of the State of Queensland.

The introduction of a statutory framework for subsequent appeals against conviction will broadly align with the laws in most other Australian jurisdictions. All states and territories, except the Northern Territory, have a subsequent appeal or review framework. The majority of jurisdictions have a judicial framework where a subsequent appeal is determined by the court, however New South Wales has an inquiry framework where an application is made for an inquiry to be held into the conviction.

All other Australian jurisdictions, except the Northern Territory, have a fresh and compelling evidence double jeopardy exception. The expansion of the offences to which the fresh and

compelling evidence double jeopardy exception applies is broadly consistent with the laws in other states and territories.

# Notes on provisions

## Part 1 Preliminary

*Clause 1* states that, when enacted, the Bill may be cited as the *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2023*.

*Clause 2* provides that the Bill commences on a day to be fixed by proclamation.

## Part 2 Amendment of Appeal Costs Fund Act 1973

*Clause 3* provides that this part amends the *Appeal Costs Fund Act 1973*.

*Clause 4* amends section 22 (Abortive proceedings and new trials after proceedings discontinued) to insert a new subsection (2)(ba) in relation to a subsequent appeal and to amend subsection (6) to insert a definition of *subsequent appeal*.

## Part 3 Amendment of Criminal Code

*Clause 5* provides that this part amends the Criminal Code.

*Clause 6* amends section 1 (Definitions) to insert definitions for *25 year offence*, *acquittal*, *administration of justice offence*, *appellant*, *Court*, *court of trial*, *fresh and compelling evidence*, *interests of justice*, *new and compelling evidence*, *prescribed offence*, *registrar*, *sentence*, *subsequent appeal*, and *tainted acquittal*.

*Clause 7* replaces the note in section 17 (Former conviction or acquittal). The new note includes a reference to new section 678BA.

*Clause 8* replaces the heading ‘Chapter 67 Appeal—pardon’ with the heading ‘Chapter 67 Appeals, subsequent appeals and pardons’.

*Clause 9* inserts a new chapter division heading; Chapter division 1 Preliminary.

*Clause 10* amends section 668 (Definitions) to replace the heading ‘Definitions’ with the heading ‘Definitions for chapter’, to insert a definition for *subsequent appeal*, and to amend the definitions of *appellant* and *court of trial*.

*Clause 11* inserts a new chapter division heading; Chapter division 2 References, reservations and appeals. *Clause 11* also inserts new section 668AA which provides that the chapter division does not apply to a subsequent appeal.

*Clause 12* amends section 688E to insert new subsection (4) which provides that for subsection (1) if an appellant has been convicted of an offence in the court of trial by a judge sitting without a jury, a reference to the jury is taken to be a reference to the judge.

*Clause 13* amends section 688F to insert new subsection (5) which provides that for subsection (2) if an appellant has been convicted of an offence in the court of trial by a judge sitting without a jury, a reference to the jury is taken to be a reference to the judge.

*Clause 14* inserts new Chapter division 3 Subsequent appeals.

New section 671AA (Definitions for chapter division) defines *fresh and compelling evidence* and *new and compelling evidence* for the chapter division.

New section 671AB (Fresh and compelling evidence and new and compelling evidence—meanings) provides meanings of fresh and compelling evidence and new and compelling evidence.

Subsection (1) provides that the section applies for the purpose of deciding, under the chapter division, whether there is fresh and compelling evidence or new and compelling evidence.

Subsection (2) provides that evidence is *fresh* if the evidence was not adduced in the proceedings in the court of trial before which the appellant was convicted and either:

- the evidence could not have been adduced in the proceedings in the court of trial with the exercise of reasonable diligence by the defence; or
- the evidence could have been adduced in the proceedings in the court of trial with the exercise of reasonable diligence by the defence but was not because of the incompetence or negligence of a lawyer acting for the appellant in those proceedings.

Subsection (3) provides that for subsection (2)(b)(i) the defence is taken not to have failed to exercise reasonable diligence in relation to the evidence if the prosecution failed to comply with the prosecution's obligation mentioned in section 590AB(1) in relation to the evidence and the defence did not discover the evidence only because of the failure to comply with that obligation.

Subsection (4) provides that evidence is *new* if the evidence was not adduced in the proceedings in the court of trial before which the appellant was convicted and the evidence could have been adduced in the proceedings in the court of trial with the exercise of reasonable diligence by the defence.

Subsection (5) provides that, under the chapter division, evidence that is both fresh evidence and new evidence is taken to only be fresh evidence.

Subsection (6) provides that evidence is *compelling* if it is reliable and substantial and either:

- is highly probative in the context of the issues that were in dispute in the proceedings in the court of trial before which the appellant was convicted; or
- would have substantially weakened the case for the prosecution in the proceedings in the court of trial.

Subsection (7) provides that evidence that would be admissible under the chapter division is not precluded from being fresh and compelling evidence or new and compelling evidence merely because it would have been inadmissible in the proceedings in the court of trial before which the appellant was convicted or in earlier proceedings in the Court for an appeal or subsequent appeal against the appellant's conviction.

Subsection (8) provides that in section 671AB the *defence* is the appellant or a lawyer acting for the appellant in proceedings in the court of trial before which the appellant was convicted.

New section 671AC (Right of subsequent appeal) creates a right of subsequent appeal.

Subsection (1) provides that the section applies if a person appealed or applied for leave to appeal against a conviction of the person under section 668D and the Court, under chapter

division 2, refused to grant leave to appeal, dismissed the appeal in whole or in part, or determined the appeal and dealt with the person under section 668F.

Subsection (2) provides that the person may make a subsequent appeal to the Court, with the leave of the Court, against the person's conviction on a ground that there is fresh and compelling evidence or new and compelling evidence.

Subsection (3) provides that the person may make a further subsequent appeal to the Court under subsection (2) if the Court has under chapter division 3 refused to grant an earlier application for leave to make a subsequent appeal or has dismissed an earlier subsequent appeal in whole or in part.

Subsection (4) provides that the Court may give its leave to make a subsequent appeal at any time it considers necessary or desirable.

New section 671AD (Evidence in proceedings for subsequent appeal) provides that in relation to proceedings in the Court for a subsequent appeal or leave to make a subsequent appeal against the appellant's conviction, evidence is not inadmissible merely because it would have been inadmissible in the proceedings in the court of trial before which the appellant was convicted or in earlier proceedings in the Court for an appeal or subsequent appeal against the appellant's conviction.

New section 671AE (Determination of subsequent appeal) provides for the determination of a subsequent appeal by the Court.

Subsection (1) provides that the Court must allow a subsequent appeal against an appellant's conviction on a ground of fresh and compelling evidence if the Court is of the opinion that there was a miscarriage of justice.

Subsection (2) provides that even if the Court is of the opinion that the point or points raised by a subsequent appeal on a ground of fresh and compelling evidence might be decided in favour of the appellant, the Court may dismiss the subsequent appeal if it considers that no substantial miscarriage of justice has actually occurred.

Subsection (3) provides that the Court must allow a subsequent appeal against an appellant's conviction on a ground of new and compelling evidence if, on the balance of probabilities, the Court is of the opinion that in considering all of the evidence the appellant was not guilty of the offence of which they were convicted.

Subsection (4) provides that if the Court considers a subsequent appeal to be a special case under section 668F the Court may, despite section 668AA, deal with the appellant under section 668F as if the subsequent appeal were an appeal against conviction under chapter division 2.

Subsection (5) provides that the Court must, if a subsequent appeal is not determined under subsection (1), (3) or (4), dismiss the subsequent appeal.

New section 671AF (Directions, orders etc. on allowed subsequent appeal) provides for the directions, orders etc of the Court on subsequent appeals that are allowed by the Court.

Subsection (1) provides that the Court must, if it allows a subsequent appeal under section 671AE, quash the appellant's conviction and direct a judgment and verdict of acquittal to be entered.

Subsection (2) provides that if the Court allows a subsequent appeal under section 671AE(1) and considers that there is a miscarriage of justice that can be more adequately remedied by an order for a new trial than by any other order, then the Court may order a new trial in the way it considers appropriate.

Subsection (3) provides that if the Court makes an order for a new trial and the appellant is not granted bail, the order is taken to be a warrant for the appellant's detention under section 9(1)(a) of the *Corrective Services Act 2006*.

Clause 14 also inserts a new chapter division 4 heading; Chapter division 4 Other provisions for appeals and subsequent appeals.

*Clause 15* amends section 671A to provide that the section does not apply to a subsequent appeal.

*Clause 16* amends section 671B (Supplemental powers) to ensure the powers apply to subsequent appeals by amending subsection (1)(a) to clarify that the paragraph applies to any document, exhibit or other thing connected with the proceedings of the Court, and subsection (1)(d) to include reference to a subsequent appeal. Clause 16 also amends section 671B(1) to provide that the Court may:

- receive any other evidence;
- order the appellant or Crown Law Officer to give further particulars for a ground of the appeal or subsequent appeal;
- strike out a ground of the appeal or subsequent appeal for which the Court considers the particulars are inadequate and not consider the matters in relation to the ground for the proceedings; and
- amend or add a ground of appeal or subsequent appeal against a conviction.

*Clause 17* amends section 671D (Right of appellant to be present) to capture subsequent appeals.

Subsection (1) is amended to provide that an appellant, if they desire it, is entitled to be present on the hearing of the subsequent appeal, notwithstanding that they are in custody.

New subsection (1A) provides that an appellant is not entitled without the leave of the Court, to be present at an appeal on some ground involving a question of law alone, an application for leave to appeal or leave to make a subsequent appeal, and any proceedings preliminary or incidental to an appeal or subsequent appeal.

*Clause 18* amends section 671E (Appeals permitted in writing) to provide that the section also applies to subsequent appeals.

*Clause 19* amends section 671F (Costs of appeal) to provide that the section also applies to subsequent appeals.

*Clause 20* amends section 671G (Grant of bail to appellant and custody when attending Court) to provide that the section also applies to subsequent appeals.

*Clause 21* replaces section 671H (Duties of registrar).

New subsection (1) provides that if notice is given to the registrar, the registrar must take all necessary steps for obtaining a hearing of any appeal, subsequent appeal, or application.

New subsection (2) provides that the registrar must obtain and give to the Court, in the appropriate form, all documents exhibits and other things relating to the proceedings in the court of trial that appear necessary for the proper determination of the appeal, subsequent appeal or application.

New subsection (3) provides that for a subsequent appeal or application for leave to make a subsequent appeal, the registrar must:

- obtain and give the Court the judge's notes and report under section 671A that relate to the proceedings in the court of trial that were given to the registrar in relation to any appeal or application for leave to appeal against the appellant's conviction; and
- obtain and give the Court, in the appropriate form, all documents, exhibits and other things relating to proceedings in the Court for an appeal application for leave to appeal, subsequent appeal, or application for leave to make a subsequent appeal against the appellant's conviction.

New subsection (4) provides that if it appears to the registrar that a notice of appeal, subsequent appeal, or application does not show any substantial ground of appeal or subsequent appeal, the registrar may refer the appeal, subsequent appeal, or application to the Court for summary determination.

New subsection (5) provides that if the Court considers that an appeal, subsequent appeal, or application is frivolous or vexatious, the Court may dismiss the appeal, subsequent appeal, or application summarily without calling any person to attend a hearing.

New subsection (6) provides that the registrar must give forms and instructions in relation to notices of appeals, subsequent appeals, or applications to any person who asks for the forms and instructions, officers of courts, the chief executive (corrective services), and any other officers or persons as the registrar considers appropriate.

New subsection (7) provides that the chief executive (corrective services) must cause the forms and instruction in relation to notices of appeals, subsequent appeals, or applications to be placed at the disposal of prisoners desiring to appeal, to make a subsequent appeal, or to make an application.

New subsection (8) provides that the chief executive (corrective services) must cause any notice given by a prisoner for whom the chief executive (corrective services) has responsibility to be forwarded for the prisoner to the registrar.

*Clause 22* amends section 671J (Documents, exhibits etc.) to provide that the section does not apply to a subsequent appeal.

*Clause 23* amends section 671K (Recording of trial proceedings) to replace the heading 'Recording of trial proceedings' with the heading 'Records of proceedings', to replace subsection (1), and to amend subsection (3).

New subsection (1) provides that a record or part of the record of proceedings before the court of trial and, for a subsequent appeal, a record or part of a record of earlier proceedings of an appeal or subsequent appeal against the appellant's convictions must be given to the registrar

for the use of the Court or a judge of the Court, if the registrar directs the record or part of the record be given in relation to any notice of appeal, subsequent appeal or application. A note is also included for subsection (1) referring to section 5 of the *Recording of Evidence Act 1962*, which provides for the recording of all relevant matter in legal proceedings.

Subsection (3) is also amended to provide that the matters that may be prescribed in the *Criminal Practice Rules 1999* may relate to a trial, an appeal, or a subsequent appeal.

*Clause 24* amends section 671L (Powers exercisable by a judge) to provide that the powers of the Court to give leave to make a subsequent appeal may be exercised by any judge of the Court in the same manner as they may be exercised by the Court, and subject to the same provisions; but if the judge refuses an application on the part of the appellant to exercise any such power in the appellant's favour, the appellant shall be entitled to have the application determined by the Court.

*Clause 25* amends section 672 (Appeals for decision of the Court) to provide that the section also applies to subsequent appeals.

*Clause 26* inserts a new chapter division heading; Chapter division 5 Pardons.

*Clause 27* amends section 678 (Definitions) to replace the heading 'Definitions' with the heading 'Definitions for chapter', and to insert a definition of *prescribed offence*. *Prescribed offence* is defined to mean an offence, punishable by imprisonment for life, defined in—

- (a) section 215(1) to which section 215(3), (4) or (4A) applies;
- (b) section 216(1) to which section 216(3)(a) or (b) applies;
- (c) section 222(1);
- (d) section 229B;
- (e) section 303;
- (f) section 306;
- (g) section 313;
- (h) section 314A;
- (i) section 349; or
- (j) section 352(1) to which section 352(3)(a), (b), or (c) applies.

*Clause 28* amends section 678A (Application of ch 68) to provide that chapter 68 does not apply if, in relation to a charge of an offence, a person was acquitted of the offence as charged and convicted instead of another offence of which the person might have been convicted as an alternative to the offence as charged. Subsection (2) is also amended to insert an additional example of where the chapter does not apply.

*Clause 29* amends section 678B (Court may order retrial for murder—fresh and compelling evidence) to replace the term 'lesser offence' in subsection (2) with 'lesser offence relating to the unlawful killing of another person'.

*Clause 30* inserts new section 678BA (Court may order retrial for prescribed offences—fresh and compelling evidence).

New subsection (1) provides that the Court may, on the application of the director of public prosecutions, order an acquitted person to be retried for a prescribed offence if satisfied that

there is fresh and compelling evidence against the acquitted person in relation to the prescribed offence and in all the circumstances it is in the interests of justice for the order to be made.

New subsection (2) provides that the Court may order a person to be retried for a prescribed offence even if the person had been charged with and acquitted of another prescribed offence and the person might have been convicted of the prescribed offence as an alternative to the other prescribed offence.

New subsection (3) provides that the Court may also order a person to be retried for a prescribed offence even if the person had been charged with and acquitted of the offence of murder and the prescribed offence is an offence of which the person might have been convicted as an alternative to the offence of murder.

New subsection (4) provides that if the Court orders an acquitted person to be retried for the prescribed offence, the Court must quash the person's acquittal or remove the acquittal as a bar to the person being retried.

New subsection (5) provides that on the retrial, section 17 does not apply in relation to the charge of the prescribed offence.

*Clause 31* amends section 678C (Court may order retrial for 25 year offence—tainted acquittal) to replace the term 'a lesser offence' in subsection (2) with 'another offence of which the person might have been convicted as an alternative to the 25 year offence'.

*Clause 32* amends section 678D (Fresh and compelling evidence—meaning).

Subsection (1) is amended to provide that section 678D applies for the purpose of deciding under chapter 68 whether there is fresh and compelling evidence against an acquitted person in relation to a prescribed offence.

Subsection (2) is amended to provide that evidence is fresh if it was not adduced in the proceedings in which the person was acquitted and it could not have been adduced in those proceedings with the exercise of reasonable diligence by a police officer in relation to the investigation of the commission of the offence or a prosecutor in relation to the prosecution of the offence.

*Clause 33* amends section 678G (Application for retrial—procedure) to include reference to new section 678BA in subsection (2)(a).

*Clause 34* amends section 678H (Retrial) to provide that if an order for retrial is set aside, a further application may not be made under chapter 68 for the retrial of the accused person in relation to both the offence concerned and another offence of which the person might have been convicted as an alternative to the offence concerned.

*Clause 35* inserts new Chapter 110 (Transitional Provision for Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2023) in part 9. New section 764 (Subsequent appeals—appeals or applications for leave to appeal before the commencement) provides that if, a person appealed, or applied for leave to appeal, against a conviction under section 668D before commencement, the person may apply for leave to make a subsequent appeal under section 671AC whether the person's appeal or application for leave to appeal was determined before or after the commencement.

## Part 4 Other amendments

*Clause 36* provides that schedule 1 amends the legislation it mentions.

### Schedule 1 Other amendments

#### ***Criminal Code Act 1899***

*Clause 1* amends section 5 to replace the reference to ‘Her Majesty’s’ with ‘the Sovereign’s’.

#### **Criminal Code**

*Clause 1* amends sections 1, definition *person* and *owner*, 60(3), 398, punishment in special cases, item 5, 450I(1) and (2), 566(14), 641(1), 647(2), 672A, 675(1) and 677 to replace the references to ‘Her Majesty’ with ‘the Sovereign’.

*Clause 2* amends sections 44(c), (d) and (e), 45(c) and (d), 230(b), and 642, to replace the references to ‘Her Majesty’s’ with ‘the Sovereign’s’.

*Clause 3* amends section 45(a) to replace the reference to ‘Her counsels’ with ‘the Sovereign’s counsels’.

*Clause 4* amends section 668B(2) to adopt gender neutral language by replacing ‘render himself or herself in execution’ with ‘attend in execution of’.

*Clause 5* amends section 670(3) to adopt gender neutral language by replacing ‘by himself, herself or the person’s counsel or solicitor appear’ with ‘appear in person, or by the person’s counsel or solicitor’.

*Clause 6* amends section 672(3) to adopt gender neutral language by replacing ‘deeming himself or herself’ with ‘who considers they were’.