

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

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

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

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. Once the Court of Appeal has heard and decided an appeal against conviction, the court has no jurisdiction to entertain a further appeal against the same conviction.

The Bill amends the Criminal Code to establish a right of subsequent appeal against conviction. The new statutory framework allows 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 on the grounds that there is fresh and compelling evidence or new and compelling evidence. For the purpose of a subsequent appeal, evidence is:

- *fresh* if it was not adduced in the proceedings in the court of trial and either could not with exercise of reasonable diligence by the defence have been adduced, or 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;
- *new* if it could with the exercise of reasonable diligence by the defence have been adduced in the proceedings in the court of trial but it was not adduced;
- *compelling* if it is reliable, substantial, and either is highly probative in the context of the issues in dispute in the proceedings in the court of trial, or would have substantially weakened the case against the appellant if it had been adduced in the trial.

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 may dismiss the subsequent appeal if it considers no substantial miscarriage of justice has occurred. If a subsequent appeal is allowed, the court must quash the conviction and direct a judgment and verdict of acquittal unless it considers the miscarriage of justice can be more adequately remedied by a new trial. 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 their detention.

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. If the subsequent appeal is allowed, the court must quash the conviction and direct a judgment and verdict of acquittal.

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, the court may deal with the appellant under section 668F of the Criminal Code as if the subsequent appeal were an original appeal against conviction under chapter division 2 of the Criminal Code.

Double jeopardy exception

‘Double jeopardy’ refers to the long-standing, foundational principle of the criminal law that a person cannot be retried for an offence for which they have already been convicted or acquitted. The rule against double jeopardy is reflected in sections 16 and 17 of the Criminal Code. The Criminal Code also provides exceptions to the double jeopardy rule that allow an acquitted person to be retried for certain offences in certain circumstances, and provides a stringent series of conditions that must be met before a person may be retried under the exceptions.

The Bill amends the Criminal Code to expand the fresh and compelling evidence double jeopardy exception to 10 prescribed offences in addition to murder. The Bill provides that the Court of Appeal may, on application from the Director of Public Prosecutions (DPP), 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 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 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; and
- *compelling* if it is reliable and substantial, and in the context of issues in dispute in the trial, it is highly probative of the case against the acquitted person.

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 they have been acquitted of murder and the prescribed offence is an offence of which they could have been convicted as an alternative to murder.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 HR Act)

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights relevant to the Bill are:

- freedom of expression (section 21);
- best interests of the child (section 26(2));
- right to liberty and security of person (section 29);
- right to a fair hearing (section 31);
- rights in criminal proceedings (section 32);
- right not to be tried or punished more than once (section 34); and
- retrospective criminal laws (section 35).

Subsequent appeal framework

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It guarantees that proceedings must be heard and decided by a competent, impartial, and independent court or tribunal after a fair and public hearing, and that all judgments or decisions are publicly available. Broadly, this right ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to the other party, and also embraces principles of unimpeded access to courts, and the open and transparent administration of justice. What constitutes a ‘fair’ hearing depends on the facts of the case and requires the weighing of a number of public interest factors including the rights of the parties. The right to a fair trial may be engaged by the referral procedure available to the Court of Appeal when considering a subsequent appeal. While the court may refer certain questions to a commissioner appointed by the court, I am satisfied that this procedure does not prejudice the rights of the parties as the ultimate determination of the subsequent appeal remains a matter for the Court of Appeal.

(a) the nature of the right

Rights in criminal proceedings

Rights in criminal proceedings protects a range of rights for persons charged with a criminal offence including a number of minimum guarantees, such as:

- to have adequate time and facilities to prepare the person’s defence and to communicate with a lawyer or advisor chosen by the person;
- to be tried without unreasonable delay;
- to be tried in person, and to defend themselves personally or through legal assistance chosen by the person or, if eligible, through legal aid;
- to have legal aid provided if the interests of justice require it, without any costs payable by the person if the person is eligible for free legal aid; and
- to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance.

A person convicted of a criminal offence also has the right to have the conviction and any sentence reviewed by a higher court in accordance with law.

Establishing a subsequent appeal framework will generally promote rights in criminal proceedings by providing a transparent mechanism for the Court of Appeal to consider any fresh and

compelling or new and compelling evidence that may indicate a person has been wrongfully convicted. However, the framework will also limit rights in criminal proceedings in relation to the guarantee to be heard in person, as the Bill provides that the appellant is not entitled to be present, without the leave of the court, for the hearing of the application for leave to make a subsequent appeal or any proceeding preliminary or incidental to the subsequent appeal, and also that the court may dismiss a subsequent appeal or application for leave to make a subsequent appeal summarily without calling any person to attend a hearing if it considers the subsequent appeal or application is frivolous or vexatious.

Right to liberty and security

The right to liberty and security protects people from arbitrary and unlawful interference with their physical liberty. The concept of arbitrariness carries a human rights meaning of capriciousness, unpredictability, and unreasonableness in the sense of not being proportionate to the legitimate aim sought. The concept of lawfulness in the context of the right to liberty means that no interference can take place except in cases envisaged by the law.

Establishing a subsequent appeal framework will generally promote the right to liberty and security of the person by creating a further opportunity for a person to be released from imprisonment after wrongful conviction. However, the framework will also limit the right to liberty and security in some circumstances as the framework includes warrant and remand powers.

Right not to be tried or punished more than once

The right not to be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law operates as part of the procedural protections afforded to criminal defendants and is a safeguard for the rule of law. The right is an expression of the rule against double jeopardy and provides fairness for accused persons and certainty in the criminal justice system by protecting accused persons from repeated prosecutions for the same offence and upholding the principle that there should be certainty and finality in criminal proceedings. The content of the right is informed by article 14 of the International Covenant on Civil and Political Rights, and the United Nations Human Rights Committee (UNHRC) has stated that the prohibition on a person being tried more than once for the same offence is not an issue if a higher court quashes a conviction and orders a retrial.¹

Clause 14 of the Bill will limit the right to not be tried more than once by allowing a person to be retried for an offence if a subsequent appeal is allowed and the Court of Appeal orders a new trial.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Rights in criminal proceedings

The purpose of the limitation on the rights in criminal proceedings, by providing that the appellant is not entitled to be present at every stage of the court's consideration of a subsequent appeal or application and that the court may summarily dismiss a subsequent appeal or application, is to balance the right to be present and heard in person against the practical challenges in appellants being present for each stage of the court's consideration of a subsequent appeal or application.

¹ United National Human Rights Committee, General Comment No 32 (2007) Article: 14 Right to equality before courts and tribunals and to a fair trial.

Right to liberty and security

The purpose of the limitation on the right to liberty and security, by providing that an order for a new trial is taken to be a warrant for the appellant's detention unless bail is granted, is to balance the interests of the appellant with the rights and interests of the community and public confidence in the criminal justice system.

Right not to be tried or punished more than once

The purpose of the limitation on the right not to be tried or punished more than once, by providing that the Court of Appeal may order a new trial, is to promote the right for a convicted person to have the conviction reviewed by a higher court in accordance with law and to balance the interests of the appellant with the rights and interests of the community and the integrity of the criminal justice system and public confidence in that system.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Rights in criminal proceedings

The limitation on the rights in criminal proceedings will achieve its purpose by providing that the Court of Appeal may grant leave for an appellant to be present at the hearing of an application for leave to make a subsequent appeal and any proceeding preliminary or incidental to the subsequent appeal, allowing the court to consider on a case-by-case basis the necessity or appropriateness for the appellant to be present at various stages of considering a subsequent appeal or application. Similarly, the circumstances in which the Court of Appeal may summarily dismiss a subsequent appeal or application are limited to those where the court considers the subsequent appeal or application, based on a notice and any supporting material prepared by the appellant, is frivolous or vexatious.

Right to liberty and security

The limitation on the right to liberty and security will achieve its purpose of balancing the appellant's right to liberty against the interests of the community and public confidence in the criminal justice system by providing that unless the Court of Appeal considers it appropriate to grant bail, the appellant may be remanded until the new trial is conducted.

Right not to be tried or punished more than once

The limitations on the right not to be tried or punished more than once will achieve its purpose by providing an appropriate mechanism for a convicted person to have the conviction reviewed by the Court of Appeal on the ground of fresh and compelling or new and compelling evidence, and a new trial ordered for a subsequent appeal allowed on the ground of fresh and compelling evidence only if the court considers that the miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The provisions in the Bill establishing the subsequent appeal framework are the least restrictive and reasonably available way to provide an appropriate mechanism for the Court of Appeal to consider a subsequent appeal against conviction after the convicted person's original right of appeal has been exhausted.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

In my opinion, the amendments in the Bill relating to establishing a subsequent appeal framework strike a balance between competing rights and interests that is reasonable and demonstrably justifiable in a free and democratic society.

Rights in criminal proceedings

The importance of the appellant's right to be present and heard in person must be balanced against the practical challenges in appellants being present for every stage of the court's consideration of a subsequent appeal or application. On balance, having regard to the extent of the limitation on rights in criminal proceedings, it is considered that the importance of achieving the purpose of the amendments outweighs the harm caused to the right.

Right to liberty and security

The importance of the right to liberty and security must be balanced against the interests of the community and public confidence in criminal justice system. On balance, having regard to the extent of the limitation on the right to liberty and security, it is considered that the importance of achieving the purpose of the amendments outweighs the harm caused to the right.

Right not to be tried or punished more than once

The importance of protecting the right of individuals not to be tried more than once for the same offence must be balanced against promoting the right for a convicted person to have their conviction reviewed by a higher court and the rights and interests of the community and the integrity of the criminal justice system and public confidence in that system. On balance, having regard to the extent of the limitation on the right not to be tried or punished more than once, it is considered that the importance of achieving the purpose of the amendments outweighs the harm caused to the right.

- (f) any other relevant factors

Nil.

Double jeopardy exception

The amendments in the Bill to expand the fresh and compelling evidence double jeopardy exception to 10 prescribed offences will operate retrospectively to the extent that the exceptions to the double jeopardy rule apply whether a person was acquitted of an offence before, on or after the commencement of the relevant provisions. However, it is my opinion that the Bill does not engage or limit section 35 of the HR Act. Section 35 prohibits the retrospective application of criminal liability, protecting people from being found guilty of an offence for an action that was not an offence at the time the action occurred, and from being unfairly penalised in situations where a penalty has increased after they committed an offence. The right does not, however, prevent retrospective changes that do not form part of the criminal liability, penalty, or punishment. The expansion of the offences to which the fresh and compelling evidence double jeopardy exception applies does not change criminal liability, rather the expansion changes the circumstances in which a person may be tried and convicted of an offence. Therefore, the Bill does not interfere with the right to be protected from the retrospective application of criminal liability.

(a) the nature of the right

Right to fair hearing

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It guarantees that proceedings must be heard and decided by a competent, impartial, and independent court or tribunal after a fair and public hearing, and that all judgments or decisions are publicly available. Broadly, this right ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to the other party, and also embraces principles of unimpeded access to courts, and the open and transparent administration of justice. What constitutes a ‘fair’ hearing depends on the facts of the case and requires the weighing of a number of public interest factors including the rights of the parties.

The operation of the double jeopardy exception framework will limit this right by prohibiting the publication, unless authorised by a court, 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.

Right not to be tried or punished more than once

The right not to be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law operates as part of the procedural protections afforded to criminal defendants and is a safeguard for the rule of law. The right is an expression of the rule against double jeopardy and provides fairness for accused persons and certainty in the criminal justice system by protecting accused persons from repeated prosecutions for the same offence and upholding the principle that there should be certainty and finality in criminal proceedings. The content of the right is informed by article 14 of the International Covenant on Civil and Political Rights, and the UNHRC has stated that the right does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence that was not available or known at the time of the acquittal.²

Clause 30 of the Bill will limit the right to not be tried more than once by allowing a person to be retried for a prescribed offence if there is fresh and compelling evidence and in all the circumstances it is in the interests of justice.

Best interests of the child

The best interests of the child is aimed at ensuring the full and effective enjoyment of all of the child’s human rights and their holistic development.³ The content of the right is informed by the Convention on the Rights of the Child, in which article 37(b) provides that, ‘the arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time’.⁴

Clause 30 of the Bill will limit the right of children to protection in their best interests to the extent the expansion of the double jeopardy exception to prescribed offences increases the risk that a child will be arrested and retried for a prescribed offence.

² United National Human Rights Committee, General Comment No 32 (2007) Article: 14 Right to equality before courts and tribunals and to a fair trial.

³ Committee on the Rights of the Child, General Comment No 19 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1).

⁴ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Freedom of expression

The right to freedom of expression protects the right of all persons to hold an opinion without interference and to seek, receive and express information and ideas orally, in writing, in print, by way of art, or in any other medium. The right to freedom of expression includes journalism and commentary on public affairs. A free, uncensored, and unhindered press is essential to ensure freedom of expression and the enjoyment of other human rights. The UNHRC has recognised that the right to freedom of expression is not absolute and may be restricted by law.⁵

The operation of the double jeopardy exception framework will limit the right to freedom of expression by prohibiting 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 will limit the news media and the general public's right to express information.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Right to fair hearing and freedom of expression

The purposes of the limitations on the right to a fair hearing and freedom of expression is to protect the acquitted person's right to privacy and rights in criminal proceedings, and to ensure investigations, proceedings, and the interests of justice relating to prescribed offences are not prejudiced.

Right not to be tried or punished more than once and best interests of the child

The purposes of the limitations on the right to not be tried more than once and the right of children to protection in their best interests are to ensure individuals acquitted of serious prescribed offences are able to be brought to justice where fresh and compelling evidence of guilt emerges and to preserve the integrity of the criminal justice system. The emergence of compelling new evidence of guilt after an acquittal undermines the legitimacy of the acquittal, and an absolute prohibition on retrial for prescribed offences undermines the integrity of the criminal justice system and public confidence in that system.

The scope of the limitations on the right to not be tried more than once and the right of children to protection in their best interests is tightly constrained, restricted to circumstances in which fresh and compelling evidence later emerges and to serious offences punishable by life imprisonment and that directly interfere with another person's life or sexual bodily integrity. The extent of the limitation is also restricted by a range of procedural safeguards, 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 with the consent of the DPP or if the DPP has advised the acquittal would not be a bar to retrial.

⁵ UN Human Rights Committee, General comment no. 34, Article 19: Freedoms of opinion and expression, 12 September 2011.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Right to fair hearing and freedom of expression

The limitations on the right to a fair hearing and freedom of expression will achieve their purposes of protecting the acquitted person's right to privacy and rights in criminal proceedings and ensure investigations, proceedings, and the interests of justice relating to prescribed offences are not prejudiced, by restricting the publication of matter that would identify the acquitted person while activities are being undertaken in relation to an investigation, and application and retrial proceedings.

Right not to be tried or punished more than once and the best interests of the child

The limitations on the right to not be tried more than once and the right of children to protection in their best interests will achieve their purposes of ensuring that serious offenders can be brought to justice and preserving the integrity of the criminal justice system by providing an appropriate mechanism for a person to be retried for a prescribed offence where fresh and compelling evidence subsequently emerges and it is in the interests of justice for the person to be retried.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The amendments to double jeopardy exceptions in the Bill are the least restrictive and reasonably available way to achieve the identified purposes. The amendments are reasonably adapted to ameliorate the impact on human rights as much as possible, including by a range of procedural safeguards, such as:

- a person may only be retried for a prescribed offence if the Court of Appeal makes an order for a retrial;
 - there must be a strong case for retrial – the fresh evidence must be reliable, substantial, and highly probative of the case against the acquitted person;
 - the prosecution is restricted to one retrial application;
 - the Court of Appeal must be satisfied that a retrial is in the interests of justice including that a fair retrial is likely;
 - police may only reinvestigate an offence in relation to a possible retrial with the consent of the DPP or if the DPP has advised the acquittal would not be a bar to retrial;
 - an application for a retrial must be made within 28 days of the person being charged or a warrant being issued (unless the Court of Appeal extends this period);
 - if the Court of Appeal makes an order for a retrial, an indictment for the retrial must be presented within two months (unless the Court of Appeal extends this period);
 - at the retrial, the prosecution may not refer to the Court of Appeal finding that there appears to be fresh and compelling evidence against the acquitted person;
 - there is a presumption in favour of bail for a person charged with an offence for which a retrial is sought until the application for the retrial has been dealt with by the Court of Appeal; and
 - the court may authorise the publication of matter identifying or having the effect of identifying an acquitted person if the court considers that it is in the interests of justice.
- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

In my opinion, the amendments to the fresh and compelling evidence double jeopardy exception in the Bill strike an appropriate balance between the importance of the purposes of the amendments and the importance of preserving those human rights which are limited.

Right to fair hearing and freedom of expression

The importance of protecting the right to a fair hearing and freedom of expression must be balanced against the right to privacy and ensuring that investigations, proceedings, and the interests of justice relating to prescribed offences are not prejudiced.

On balance, having regard to the extent of the limitation on the right to a fair hearing and freedom of expression, it is considered that the importance of achieving the purposes of the amendments outweighs the harm caused to the right to a fair hearing and freedom of expression.

Right not to be tried or punished more than once and best interests of the child

The importance of protecting the right of individuals not to be tried more than once for the same offence and the right of children to protection in their best interests must be balanced against the public interest in fair hearings and just outcomes, community safety, the integrity of the criminal justice system and public confidence in that system.

On balance, having regard to the extent of the limitation on the right of individuals not to be tried more than once for the same offence and the right of children to protection in their best interests, it is considered that the importance of achieving the purposes of the amendments outweighs the harm caused to the right of individuals not to be tried more than once for the same offence and the best interests of the child.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the Bill is compatible with human rights under the HR Act because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality, and freedom.

YVETTE D'ATH MP
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE AND
MINISTER FOR THE PREVENTION OF DOMESTIC AND FAMILY VIOLENCE

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