

## DRAFT SECOND READING SPEECH

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### *Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Bill 2015*

*\*check Hansard for delivery\**

Madam Speaker, it is with pleasure that I introduce the *Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Bill 2015* to provide a convicted person the right to bring an appeal against their conviction in the event that 'fresh and compelling' evidence comes to light after the usual right of appeal has been exhausted.

This amendment will apply to persons who have been convicted of serious crimes as defined in Appendix D of the Criminal Code and include –

- crimes involving serious violence such as murder, manslaughter, grievous bodily harm, wounding, and armed robbery;
- serious sexual crimes such as rape, sexual offences involving children, incest, production and distribution of child exploitation material, and aggravated sexual assault; and
- other serious crimes such as kidnapping, aggravated burglary, crimes relating to trafficable quantities of controlled substances and arson.

That is, those persons who have been convicted of these types of crimes will have a further right to appeal their conviction if fresh and compelling evidence becomes available.

South Australia made similar amendments in 2013 and those amendments have formed the basis of this Bill. The present appeal provisions in Tasmania and most of Australia allow only one right of appeal and do not provide for a further right of appeal against conviction after that right has been exhausted.

In Tasmania, that right is contained in section 401 of the Criminal Code which provides broad grounds for appeal to the Court of Criminal Appeal. An appellant aggrieved by an unfavourable decision of the Court of Criminal Appeal has a further avenue of appeal to the High Court of Australia.

Even where the original appeal jurisdiction is exhausted, a further avenue for redress for a convicted person is to make a petition seeking the exercise of the royal prerogative of mercy. Upon receipt of a petition, the Criminal Code allows the Attorney-General to refer the whole case to the Court of Criminal Appeal for hearing and determination or seek assistance from the Supreme Court on a point arising in the case.

Except where the Attorney-General refers the case to the Court of Criminal Appeal to be determined judicially, the petition is determined by the Governor acting on advice

from the Premier, that is, the petition is determined by the Executive. This process is open to criticism as lacking transparency, accountability and independence.

The Bill provides a new ground for appeal and amends the Criminal Code to provide that a person convicted of a serious crime may seek leave to appeal on a new ground of 'fresh and compelling' evidence. It is proposed that this amendment will apply to all person convicted of a serious crime regardless of when that conviction occurred. That is, the existing time limits related to criminal appeals will not apply.

This Bill allows a convicted person who believes that there is 'fresh and compelling' evidence in relation to their case to seek leave of the court to bring an appeal to the Court of Criminal Appeal for the matter to be heard.

If the Court of Criminal Appeal determines that the evidence is 'fresh and compelling' and there has been a substantial miscarriage of justice, the new provisions will allow the Court to quash the original conviction and to either direct a judgment and verdict of acquittal to be entered or to order a new trial.

The terms 'fresh' and 'compelling' evidence are defined in the Bill and the definitions mirror current case law. Specifically, evidence will be considered 'fresh' if it was not presented at the original trial of the convicted person and was not discoverable by the convicted person or his or her legal representative exercising due diligence. For evidence to be considered 'compelling' the evidence must be reliable, substantial, and in the context of issues in dispute at the trial highly probative of innocence. Reliability, substantiality and probative value of evidence are legal concepts that have been frequently debated and determined by the courts.

If the evidence meets that threshold test, the Court of Criminal Appeal must then consider the impact of the new evidence to determine whether there has been a substantial miscarriage of justice. That is, whether there is a significant possibility that a jury acting reasonably would have acquitted the convicted person had the evidence been known and available at the time of the original trial.

It is intended that the provisions of the Bill will apply to all persons convicted of a serious offence in Tasmania regardless of whether they were convicted before or after commencement of the new provisions.

There is a strong public interest in closure and finality in criminal cases. To allow convictions to be appealed numerous times on the same or similar grounds as provided in section 401 of the Criminal Code would potentially erode the finality of justice principle for the community, witnesses and most importantly for victims and their families. Allowing endless untenable efforts to reopen old convictions would diminish the effectiveness of the criminal justice system

In 2008, the Criminal Code was amended to allow the Director of Public Prosecutions to apply to the Court of Criminal Appeal for an order for re-trial of a person previously acquitted for a serious offence if 'fresh and compelling' evidence comes to light. This Bill provides an equivalent right to a convicted person and adopts the corresponding definitions of 'fresh' and 'compelling' currently utilised in the Criminal Code.

The Government has consulted extensively on the Bill and received submissions from the judiciary, Director of Public Prosecutions, the legal profession, interest groups, law reform bodies and victims' rights groups. In the Government's view, it strikes the right balance between the competing interests of convicted persons and victims of crime. The Bill allows for genuine and meritorious applications but appropriately deters, and provides measures to restrict, vexatious or unsupportable applications.

While Tasmania has a fair and robust criminal justice system, it is acknowledged that no system of justice is infallible. The Bill represents a significant advancement in the rights of a convicted person beyond that existing in any other jurisdiction except South Australia where similar amendments were enacted in 2013 and from which these amendments have been modelled.

The Bill provides a sensible and balanced approach to providing an avenue for genuine applications to be brought by convicted persons and the strong public interest in finality in criminal litigation.

I commend the Bill to the House.