



Australian Capital Territory

Supreme Court Amendment Act 2016

A2016-36

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Legislation amended	2
4 Appellate jurisdiction New section 37E (2) (d)	2
5 New part 8AA	2
6 Dictionary, note 2	18
7 Dictionary, new definitions	19
8 Dictionary, definition of <i>court</i>	19
9 Dictionary, new definitions	19
10 Crimes Act 1900 New division 10.8	20

J2015-408

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au



Australian Capital Territory

Supreme Court Amendment Act 2016

A2016-36

An Act to amend the *Supreme Court Act 1933*, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 Name of Act

This Act is the *Supreme Court Amendment Act 2016*.

2 Commencement

This Act commences on the day after its notification day.

Note The naming and commencement provisions automatically commence on the notification day (see [Legislation Act](#), s 75 (1)).

3 Legislation amended

This Act amends the *Supreme Court Act 1933*.

Note This Act also amends the *Crimes Act 1900* (see s 10).

**4 Appellate jurisdiction
New section 37E (2) (d)**

insert

(d) applications under part 8AA (Acquittals).

5 New part 8AA

before part 8A, insert

Part 8AA Acquittals

Division 8AA.1 Application—pt 8AA

68H Application—pt 8AA

(1) This part applies if—

(a) a person has been acquitted of an offence (a *principal offence*);
and

- (b) a double jeopardy law of the Territory would, but for this part, prevent the person from being retried for the principal offence, or from being tried for another offence, in a proceeding in the ACT.
- (2) A reference to a person acquitted of a principal offence includes a person acquitted of a principal offence in a proceeding in another jurisdiction if a law of the jurisdiction provides for the retrial of the person for the offence, or the trial of the person for another offence.
- (3) This part abrogates the doctrine of double jeopardy, however expressed in a double jeopardy law, to the extent necessary for the operation of this part and—
 - (a) confers on the Crown a right of appeal against an acquittal in a criminal proceeding; and
 - (b) permits the retrial of a person acquitted of an offence (the *acquittal offence*), and the trial of the person for another offence.

Note A reference to a territory law includes a reference to an Act and the common law (see [Legislation Act](#), dict, pt 1, def *territory law*).

- (4) In this section:

double jeopardy law means a territory law that gives effect to a rule of double jeopardy in a criminal proceeding.

Example—law that gives effect to a rule of double jeopardy

a law that does any of the following in relation to a criminal proceeding:

- (a) makes available the plea of *autrefois acquit* or *autrefois convict*;
- (b) gives effect to the principle that a person should not be punished more than once for the same matter;
- (c) gives effect to the principle of finality of an acquittal;

- (d) prevents an abuse of process brought about by repeated prosecution for an offence when the repeated prosecution is based on facts that are manifestly inconsistent with a previous acquittal or previous conviction

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

Division 8AA.2 Important concepts

68I Definitions—pt 8AA

In this part:

acquittal—see section 68J.

administration of justice offence means—

- (a) if the offence is committed in the ACT—an offence under the [Criminal Code](#), chapter 7 (Administration of justice offences) other than part 7.3 (a *chapter 7 offence*); or
- (b) if the offence is committed in a jurisdiction other than the ACT—a corresponding offence to a chapter 7 offence.

another jurisdiction means a jurisdiction other than the ACT and includes a jurisdiction outside Australia.

category A offence means an offence punishable by imprisonment for life.

category B offence means an offence punishable by imprisonment for life or imprisonment for 15 years or longer.

compelling, evidence—see section 68K.

court means the Court of Appeal.

fresh, evidence—see section 68K.

tainted, acquittal—see section 68L.

68J Meaning of *acquittal*—pt 8AA

- (1) For this part an *acquittal* in a criminal proceeding includes—
 - (a) an order of an appellate court that quashes a conviction or finding of guilt for an offence; and
 - (b) a verdict, returned or entered, of not guilty of an offence.
- (2) However, for this part, an *acquittal* in a criminal proceeding does not include a special verdict of not guilty of an offence because of mental impairment, returned or entered, under the *Crimes Act 1900*, division 13.3 or the *Criminal Code*, section 28 (7).
- (3) In this section:
finding of guilt, for an offence, means—
 - (a) an order made for the offence under the *Crimes (Sentencing) Act 2005*, section 17 (Non-conviction orders—general); and
 - (b) a decision by a court to take the offence into account under the *Crimes (Sentencing) Act 2005*, section 57 (Outstanding additional offences taken into account in sentencing).

68K Meaning of *fresh* and *compelling* evidence—pt 8AA

- (1) For this part, evidence against a person acquitted of an offence is *fresh* if the evidence—
 - (a) was not tendered in the proceeding in which the person was acquitted of the offence; and
 - (b) could not, in the course of an exercise of reasonable diligence, have been tendered in the proceeding.
- (2) However, for this part, evidence against a person acquitted of an offence is not *fresh* if the evidence—
 - (a) was, or was considered to be, inadmissible in the proceeding in which the person was acquitted of the offence; and

- (b) would, as a result of a change in the law on or after the person was acquitted of the offence, be admissible in a proceeding in which the person is retried for the offence.
- (3) For this part, evidence against a person acquitted of an offence is ***compelling*** if the evidence is—
 - (a) reliable; and
 - (b) substantial; and
 - (c) highly probative of the guilt of the acquitted person in the context of the issues in dispute in the proceeding in which the person was acquitted.

68L Meaning of *tainted* acquittal—pt 8AA

- (1) For this part, an acquittal is ***tainted*** if—
 - (a) the person acquitted of an offence (the ***acquittal offence***), or someone else, has been convicted of an administration of justice offence that is relevant to the proceeding in which the acquittal happened; and
 - (b) it is more likely than not that, but for the commission of the administration of justice offence, the acquitted person would have been convicted of the acquittal offence.
- (2) However, an acquittal is not ***tainted*** if the conviction for the administration of justice offence is subject to an appeal for which leave is not required.

Division 8AA.3 Retrial etc of acquitted person

68M Court may order retrial—category A offence

- (1) The court may, on application by the director of public prosecutions, order a person acquitted of an offence (an *acquitted person*) to be retried for a category A offence if satisfied that—
 - (a) there is fresh and compelling evidence against the acquitted person in relation to the offence; and
 - (b) it is in the interests of justice for the order to be made.
- (2) If the court orders the acquitted person to be retried, the court must quash the person's acquittal and remove the acquittal as a bar to the person being retried for a category A offence.
- (3) The court may, under this section, order the acquitted person to be retried for a category A offence even if the person was acquitted of a lesser offence.
- (4) The acquitted person is entitled to appear at the hearing of an application under this section and may be represented by a legal practitioner.
- (5) This section applies only if the acquittal that is the subject of the application happened on or after the commencement of the *Supreme Court Amendment Act 2016*, section 3.

68N Court may order retrial—category B offence

- (1) The court may, on application by the director of public prosecutions, order a person acquitted of an offence (an *acquitted person*) to be retried for a category B offence if satisfied that—
 - (a) the person's acquittal is tainted; and
 - (b) it is in the interests of justice for the order to be made.

- (2) If the court orders the acquitted person to be retried, the court must quash the person's acquittal and remove the acquittal as a bar to the person being retried for a category B offence.
- (3) The court may, under this section, order the acquitted person to be retried for a category B offence even if the person was acquitted of a lesser offence.
- (4) If the court makes an order under this section for an acquitted person to be retried, based on the person's conviction for an administration of justice offence (the *justice offence*), and the conviction for the justice offence is quashed after the order is made, the acquitted person may apply to the court to set aside the order and—
 - (a) restore the acquittal that was quashed; or
 - (b) restore the acquittal as a bar to the acquitted person being retried for an offence.
- (5) The acquitted person is entitled to appear at the hearing of an application under this section and may be represented by a legal practitioner.
- (6) This section applies whether the acquittal that is the subject of the application happened before or after the commencement of the *Supreme Court Amendment Act 2016*, section 3.

680 Court may order trial—administration of justice offence

- (1) The court may, on application by the director of public prosecutions, order a person who has been acquitted of an indictable offence (an *acquitted person*) to be tried for an administration of justice offence that is related to the proceeding for the indictable offence, if satisfied that—
 - (a) there is fresh evidence against the acquitted person; and

- (b) the evidence is relevant to the administration of justice offence;
and
 - (c) it is in the interests of justice for the order to be made.
- (2) If the court orders the acquitted person to be tried for the administration of justice offence, the court must quash the person's acquittal for the indictable offence and remove the acquittal for the indictable offence as a bar to the person being tried for the administration of justice offence.
 - (3) The acquitted person is entitled to appear at the hearing of an application under this section and may be represented by a legal practitioner.
 - (4) This section applies whether the acquittal that is the subject of the application happened before or after the commencement of the *Supreme Court Amendment Act 2016*, section 3.

68P Interests of justice

When determining whether an order under section 68M (Court may order retrial—category A offence), section 68N (Court may order retrial—category B offence) or section 68O (an *order*) is in the interests of justice, the court must take into account the following:

- (a) whether an acquitted person to whom the order would relate is, in the circumstances, likely to receive a fair trial;
- (b) the period since the offence, for which an acquitted person would be tried or retried as a result of an order, was committed;
- (c) whether a police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to the application for an order.

Division 8AA.4 Procedure

Subdivision 8AA.4.1 Applications under pt 8AA

68Q Conditions for retrial application

- (1) An application under section 68M (Court may order retrial—category A offence) or section 68N (Court may order retrial—category B offence) for the retrial of an acquitted person must not be made unless—
 - (a) the acquitted person has been charged with the offence for which the retrial is sought (the *retrial offence*); or
 - (b) a warrant has been issued for the person’s arrest in relation to the retrial offence.
- (2) The application must be made not later than 28 days after the person is charged with the retrial offence or the warrant is issued for the person’s arrest in relation to the retrial offence.
- (3) The court may extend the period mentioned in subsection (2).

68R Limitations on retrial application

- (1) Not more than 1 application in relation to the same acquittal may be made under this part for the retrial of an acquitted person.
- (2) For an acquittal that happens in a retrial ordered under this part—
 - (a) no further application may be made under section 68M (Court may order retrial—category A offence) in relation to the acquittal; but
 - (b) a further application may be made under section 68N (Court may order retrial—category B offence) in relation to the acquittal.

68S Conditions for justice offence trial application

- (1) An application under section 68O (Court may order trial—administration of justice offence) for the trial of an acquitted person must not be made unless—
 - (a) the person has been charged with the administration of justice offence for which the trial is sought (the *justice offence*); or
 - (b) a warrant has been issued for the person's arrest for the justice offence.
- (2) The application must be made not later than 28 days after the person is charged with the justice offence or the warrant is issued for the person's arrest in relation to the justice offence.
- (3) The Court may extend the period mentioned in subsection (2).

Subdivision 8AA.4.2 Presentation of indictment**68T Limitations on indictment**

- (1) If an acquitted person is, by an order under division 8AA.3, liable to be retried for a category A offence or a category B offence, the director of public prosecutions must not, in a proceeding allowed by the order, present an indictment against the person for an offence that was not enacted at the time the person is alleged to have engaged in conduct constituting the offence for which the person was acquitted and that was the subject of the application for the order.
- (2) Subsection (3) applies if an acquitted person is, by an order under division 8AA.3, liable to be—
 - (a) retried for a category A offence or a category B offence (a *retrial offence*); and

- (b) tried for an administration of justice offence (a *justice offence*), in relation to the proceeding for which the person was acquitted (the *original proceeding*) and that was the subject of the application for the order that the person be retried for the category A or category B offence.
- (3) The director of public prosecutions may, in a proceeding allowed by the order, present an indictment against the person for—
 - (a) if the justice offence does not directly controvert the person’s acquittal in the original proceeding—both the retrial offence and the justice offence; or
 - (b) if the justice offence directly controverts the person’s acquittal in the original proceeding—either the retrial offence or the justice offence, but not both.

68U Indictment for retrial of category A or category B offences

- (1) An indictment against a person liable under this part to be retried of a category A or category B offence must be presented against the person within 2 months after the day the order for the retrial was made (the *indictment period*) under section 68M (Court may order retrial—category A offence) or section 68N (Court may order retrial—category B offence) (a *retrial order*).
- (2) However, the court may give leave to present the indictment after the end of the indictment period if it is satisfied that in the circumstances—
 - (a) the prosecutor has acted reasonably expeditiously to present the indictment; and
 - (b) that presenting the indictment will not cause an injustice to the person.

- (3) An indictment presented in accordance with this section may be amended or replaced at any time if the court is satisfied that amending or replacing the indictment will not cause an injustice to the person.
- (4) If, after the end of the indictment period, an indictment for the retrial has not been presented or has been withdrawn or quashed, the person may apply to the court for any of the following:
 - (a) an order setting aside the retrial order;
 - (b) an order restoring the acquittal quashed by the retrial order;
 - (c) an order restoring the bar to the person being tried for the offence.
- (5) If the retrial order is set aside, a further application may not be made under this part for the retrial of the person in relation to the offence mentioned in the retrial order.

68V Indictment for trial of justice offence

- (1) An indictment against a person liable under this part to be tried for an administration of justice offence must be presented against the person within 2 months after the day the order for the trial was made (the *indictment period*) under section 68O (Court may order trial—administration of justice offence) (a *trial order*).
- (2) However, the court may give leave to present the indictment after the end of the indictment period if it is satisfied that in the circumstances—
 - (a) the prosecutor has acted reasonably expeditiously to present the indictment; and
 - (b) that presenting the indictment will not cause an injustice to the person.

- (3) An indictment presented in accordance with this section may be amended or replaced at any time if the court is satisfied that amending or replacing the indictment will not cause an injustice to the person.
- (4) If, after the end of the indictment period, an indictment for the trial has not been presented or has been withdrawn or quashed, the person may apply to the court for any of the following:
 - (a) an order setting aside the trial order;
 - (b) an order restoring the acquittal quashed by the trial order;
 - (c) an order restoring the bar to the person being tried for the offence.
- (5) If the trial order is set aside, a further application may not be made under section 68O for the trial of the person in relation to the offence mentioned in the trial order.

Division 8AA.5 Conduct of proceeding for retrial etc

68W Prosecution must not refer to certain matters before jury

- (1) At the retrial of a person in accordance with an order under section 68M (Court may order retrial—category A offence) or section 68N (Court may order retrial—category B offence) the prosecution must not mention before the jury that the court has found that it appears that—
 - (a) there is fresh and compelling evidence against the person; or
 - (b) more likely than not, but for the commission of an administration of justice offence, the person would have been convicted of an offence.

- (2) At the trial of a person in accordance with an order under section 68O (Court may order trial—administration of justice offence) the prosecution must not mention before the jury that the court has found that it appears that there is fresh evidence against the person.

Division 8AA.6 Miscellaneous

68X Entitlement to bail

The *Bail Act 1992*, section 9A (Entitlement to bail—offences other than minor offences), applies to a person charged with an offence for which a retrial, or a trial, is sought under this part.

68Y Single course of action for each proceeding

A person acquitted of an offence must not in a single proceeding—

- (a) be retried for the offence (the *principal offence*) under this part; and
- (b) be tried for an administration of justice offence related to the principal offence.

68Z Restrictions on publication

- (1) A person must not publish any matter that identifies or is capable of identifying an acquitted person—
- (a) who is being retried for an offence as a result of an order under section 68M (Court may order retrial—category A offence) or section 68N (Court may order retrial—category B offence); or
 - (b) who is being tried for an administration of justice offence as a result of an order under section 68O (Court may order trial—administration of justice offence); or

- (c) who is the subject of—
- (i) a police investigation, or an application for a police investigation, under the *Crimes Act 1900*, section 252L (Authorisation of police investigations—acquitted person); or

Note Procedure for a police investigation of an offence suspected to have been committed by a person acquitted of the offence are set out under the *Crimes Act 1900*, s 252L.

- (ii) an application for a retrial, or trial for an administration of justice offence, or an order for retrial, or trial for an administration of justice offence, under this part.
- (2) However, subsection (1) does not apply if the publication is authorised by order of—
- (a) the court; or
 - (b) a court before which the acquitted person is being retried, or tried for the administration of justice offence.
- (3) The relevant court may at any time vary or revoke an order under this section.
- (4) The prohibition on publication under this section ceases to have effect, subject to any order under this section, when whichever of the following happens first:
- (a) there is no longer any step that could be taken which would lead to the acquitted person being retried, or tried for the administration of justice offence, under this part;
 - (b) if the acquitted person is retried, or tried for an administration of justice offence, under this part—the trial ends.
- (5) Nothing in this section affects any prohibition of the publication of any matter under any other law in force in the Territory.
- (6) A contravention of this section is punishable as contempt of the Supreme Court.

68ZA Maximum penalty for retrial offence

- (1) This section applies if an acquitted person is—
 - (a) retried for a category A offence or a category B offence as a result of an order under division 8AA.3; and
 - (b) found guilty of the offence.
- (2) When imposing a sentence on the person for the offence, the court must not exceed the maximum penalty for the offence that applied at the time the person is alleged to have engaged in conduct that constituted the offence for which the person was acquitted and that was the subject of the application for the order.

68ZB Indemnification for costs

- (1) This section applies if—
 - (a) an application is made to the court by the director of public prosecutions for an order under division 8AA.3 in relation to—
 - (i) the retrial of an acquitted person under section 68M (Court may order retrial—category A offence); or
 - (ii) the retrial of an acquitted person under section 68N (Court may order retrial—category B offence); or
 - (iii) the trial of an acquitted person for an administration of justice offence under section 68O (Court may order trial—administration of justice offence); and
 - (b) the acquitted person (the *applicant*) applies to the court for indemnification of the applicant's costs incurred as a result of—
 - (i) an application for an order mentioned in paragraph (a); or
 - (ii) if the order is granted—a proceeding resulting from the order.

- (2) The court may make an order, subject to any conditions the court thinks appropriate, that the applicant is entitled to be indemnified for the costs mentioned in subsection (1) (b) (an *indemnification order*) if the court is satisfied that the order is in the interests of justice.
- (3) When deciding whether it is in the interests of justice to make an indemnification order the court may take into account the following:
 - (a) whether the court makes an order mentioned in subsection (1) (a);
 - (b) whether the applicant's acquittal, that is the subject of the application for an order mentioned in subsection (1) (a), was attributable to the act, neglect or fault of the applicant;
 - (c) any other matter that the court considers relevant.
- (4) If the court makes an indemnification order in the applicant's favour the applicant must be indemnified by the Territory, in relation to the costs mentioned in the order, for an amount assessed as reasonably incurred.

Note If a form is approved under the [Court Procedures Act 2004](#), s 8 for an application, the form must be used.

6 Dictionary, note 2

insert

- Criminal Code
- indictable offence (see s 190)

7 Dictionary, new definitions

insert

acquittal, for part 8AA (Acquittals)—see section 68J.

administration of justice offence, for part 8AA (Acquittals)—see section 68I.

another jurisdiction, for part 8AA (Acquittals)—see section 68I.

category A offence, for part 8AA (Acquittals)—see section 68I.

category B offence, for part 8AA (Acquittals)—see section 68I.

compelling, evidence, for part 8AA (Acquittals)—see section 68K.

8 Dictionary, definition of court

substitute

court—

- (a) for this Act generally—means the Supreme Court; and
- (b) for part 8AA (Acquittals)—see section 68I.

9 Dictionary, new definitions

insert

fresh, evidence, for part 8AA (Acquittals)—see section 68K.

tainted, acquittal, for part 8AA (Acquittals)—see section 68L.

10 Crimes Act 1900
New division 10.8

insert

Division 10.8 Investigations relating to acquittals

252L Authorisation of police investigations—acquitted person

- (1) This section applies to a proposed police investigation of an offence for which, under the *Supreme Court Act 1933*, part 8AA, an acquitted person may be retried or tried.

Note The *Supreme Court Act 1933*, pt 8AA, allows the Supreme Court to order the retrial of a person acquitted of an offence, or the trial of the person for another offence, despite the rule against double jeopardy.

- (2) The chief police officer, or a deputy chief police officer, may apply to the director of public prosecutions for the director's agreement to the police investigation only if satisfied that relevant evidence for an application for a retrial or trial under the *Supreme Court Act 1933*, part 8AA—
- (a) has been obtained; or
 - (b) is reasonably likely to be obtained if the investigation is carried out.
- (3) A police officer may carry out, or authorise another police officer to carry out, an investigation of the offence only if the director of public prosecutions—
- (a) has advised that, in the director's opinion, the acquitted person's acquittal would not be a bar to the retrial of the acquitted person in the ACT for the offence or the trial of the acquitted person for another offence; and
 - (b) agrees, by written notice, to the conduct of the investigation.

- (4) The director of public prosecutions may agree to the investigation only if satisfied that—
 - (a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation; and
 - (b) it is in the public interest for the investigation to be carried out.
- (5) However, a police officer may carry out, or authorise the carrying out of, a police investigation to which this section applies, without the advice and written agreement of the director of public prosecutions if the police officer reasonably believes that—
 - (a) urgent investigative action is needed to prevent substantial and irrevocable prejudice to the investigation; and
 - (b) it is not reasonably practicable in the circumstances to obtain the advice and agreement of the director of public prosecutions before taking the action.
- (6) The chief police officer, or a deputy chief police officer, must tell the director of public prosecutions, in writing, as soon as practicable, about action taken under subsection (5) and the investigation must not proceed further without the advice and written agreement of the director of public prosecutions.
- (7) Despite any other territory law, the functions of the chief police officer or a deputy chief police officer under this section must not be delegated to any other police officer or an AFP employee.

(8) In this section:

AFP employee—see the *Australian Federal Police Act 1979* (Cwlth), section 4.

police investigation means an investigation that involves, whether with or without the consent of the acquitted person—

- (a) any arrest, questioning or search of the acquitted person; or
- (b) the issue of a warrant for the arrest of the person; or
- (c) any forensic procedure carried out on the person; or
- (d) any search or seizure of premises or property of or occupied by the person.

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 5 May 2016.

2 Notification

Notified under the [Legislation Act](#) on 22 June 2016.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

I certify that the above is a true copy of the Supreme Court Amendment Bill 2016, which was passed by the Legislative Assembly on 9 June 2016.

Clerk of the Legislative Assembly

© Australian Capital Territory 2016