

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

SUPREME COURT AMENDMENT BILL 2016

EXPLANATORY STATEMENT

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Supreme Court Amendment Bill 2016

Introduction

This explanatory statement relates to the Supreme Court Amendment Bill 2016 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill.

Outline

The Rule of double jeopardy in Australia and the ACT

The rule of double jeopardy can be found in common law as early as the sixteenth century.¹ It prohibits: prosecution for the same or substantially similar offence more than once; and abuse of process.² The common law double jeopardy rule is largely captured by section 24 of the ACT *Human Rights Act 2004* which states that: No-one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

The underlying rationales for the rule of double jeopardy include:

- the societal and individual value of finality;
- investigative and prosecutorial diligence;
- risk of wrongful convictions; and
- to limit abuse of State power.³

Double jeopardy law reform

In 2001 the High Court in *R v Carroll* (2002)⁴ held that the rule of double jeopardy applies even if an acquittal was obtained as a direct result of perjury. In that case it was found that a previously acquitted person could not be prosecuted for an administration of justice offence that called into question their acquittal. In that case, the conviction of Carroll for perjury, where the alleged perjury was Carroll's denial on oath that he had killed the victim, was in direct conflict with the determination of the Court of Criminal Appeal in acquitting Carroll on the charge of murder, and based on common law rules the trial judge should have stayed the perjury charge as an abuse of process.

¹ Sigler, Jay, *A History of Double Jeopardy*, American Journal of Legal History Vol. 7(4) (1963), p293

² Edgely, Michelle *Truth or justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy*, Vol 7, No 1 (2007), pp116-121

³ *Ibid*, pp 121-127

⁴ 213 CLR 635

After the decision in *Carroll*, there was national concern that such a strict operation of the double jeopardy rule meant court processes could be compromised at the cost of the community and victims of crime.

Following the decision, the Standing Committee of Attorneys General referred the issue of double jeopardy to the Model Criminal Code Officers Committee (MCCOC).

A November 2003 MCCOC Discussion Paper⁵ made a number of recommendations for reform to the laws on double jeopardy and prosecution appeals against acquittals.

In July 2006, the Council of Australian Governments (COAG) agreed that reform of the rule against double jeopardy was an important criminal law policy reform that merited nationally consistent treatment. COAG also agreed to progress this reform through a Senior Officials working group on the basis of recommendations made by MCCOC.

In April 2007, the Double Jeopardy COAG Law Reform Working Group presented its recommendations on double jeopardy law reform, prosecution appeals against acquittals and prosecution appeals against sentence to COAG. COAG agreed that jurisdictions would implement the Working Group's recommendations. The recommendations included the following:

1. allowing the retrial of an acquitted person where there was 'fresh and compelling evidence' that later became available, for example, DNA evidence;
2. allowing a retrial where an acquittal had been given due to the trial being 'tainted' (for example, a witness committed perjury or a juror had been bribed); and
3. allowing prosecution of an administration of justice offence committed during a trial where such prosecution directly conflicts with the acquittal at that original trial.

The ACT and Victoria reserved their positions on the recommendations, and subsequently in late 2007 the former Chief Minister, Mr Jon Stanhope, announced that the Government would review the law in the ACT in relation to the double jeopardy rule.

Other jurisdictions, both in Australia and overseas, take a range of approaches to the rule of double jeopardy. Most other Australian jurisdictions include a number of exceptions to double jeopardy to allow retrials in limited circumstances where new evidence is available that could not have been available at the trial, or where the acquittal was obtained through fraudulent or underhanded means.

The United Kingdom has allowed retrials to be ordered for 'tainted acquittals' since 1996, and introduced further exceptions to the rule of double jeopardy in 2003. New Zealand also has a range of exceptions to the rule of double jeopardy, enacted in 2008.

In late 2010 the ACT Director of Public Prosecutions (DPP) wrote to the Justice and Community Safety Directorate setting out proposals in a discussion paper for reform of double jeopardy laws in the ACT.

⁵ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals*, November 2003 Discussion Paper

The Directorate wrote to a selection of criminal justice stakeholders seeking their views on the discussion paper. Six submissions were received.⁶

Following this and further consultation the Government has taken the view that limited reforms to the rule against double jeopardy are warranted. While cases falling within these exceptions are expected to be extremely rare in the ACT, it is important to have a mechanism to address such an injustice if and when it does occur.

This Bill amends the rule of double jeopardy in the ACT by providing the following exceptions.

1. A retrial will be allowed where there is fresh and compelling evidence (for example, DNA evidence or a confession) that a previously acquitted person committed a very serious offence (punishable by life imprisonment).
2. A retrial will be allowed where a trial has been tainted (for example, a witness has committed perjury or the jury has been interfered with) resulting in an acquittal for a serious offence (punishable by 15 years imprisonment or more). The acquittal is tainted if it is more likely than not that, but for the commission of the perjury/jury interference or other administration of justice offence the accused would have been convicted in the original trial.

The Bill provides a third exception where an administration of justice offence has allegedly occurred during a trial and the accused is acquitted. Currently the accused cannot be prosecuted for the administration of justice offence where doing so would conflict directly with the acquittal (for example, proving that the accused committed perjury when she said ‘I did not kill the victim’). The prosecution will now be able to apply to prosecute the accused for an administration of justice offence in that circumstance.

Human Rights Considerations

The Bill engages and limits section 24 of the *Human Rights Act 2004* (the HRA) which states that no-one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

Section 28 of the HRA states that

- (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
 - a. the nature of the right affected;
 - b. the importance of the purpose of the limitation;

⁶ Those submissions, together with the original DPP discussion paper for reform can be accessed online at http://www.justice.act.gov.au/criminal_and_civil_justice/law_reform/laws_under_review.

- c. the nature and extent of the limitation;
- d. the relationship between the limitation and its purpose;
- e. any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The Bill limits the right at section 24 of the HRA by providing that the prosecution has a right to apply for a re-trial of an acquitted person in two discreet circumstances:

1. where there is fresh and compelling evidence that the offence was committed by the acquitted person; and
2. where the original trial at which the person was acquitted was tainted.

The Bill also limits the right at section 24 of the HRA by providing that a person may be tried for an administration of justice offence which calls into question an earlier acquittal.

This Statement will discuss the right at section 24 generally and the examine each of these specific limitations.

The right not to be tried or punished more than once

The three limitations on the right at section 24 of the HRA, as outlined above, are reasonable. The Bill will only allow re-trial of an acquitted person in the most extreme and limited circumstances in order to allow serious and clear injustices to be rectified.

The right provided for at section 24 of the HRA has an equivalent right at Article 14(7) of the International Covenant on Civil and Political Rights (the ICCPR). The Human Rights Committee stated in General Comment No. 32 that the prohibition of Article 14(7) “does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.”⁷

Article 14 of the ICCPR is not included in the list of non-derogable rights of Article 4(2) of the ICCPR.

Fresh and Compelling Evidence

The fresh and compelling evidence exception, which engages and limits section 24 of the HRA is important as it will allow a re-trial where a person has been acquitted and after the acquittal fresh and compelling evidence comes to light that indicates the person has in fact committed the offence.

Such cases would be rare. However, where such evidence arises it undermines the integrity and therefore the legitimacy of the acquittal. This, in turn, undermines the validity of the criminal justice system and public confidence in that system. For example, currently in the ACT an acquitted person could publicly state that they had committed the crime for which they had been acquitted and yet the acquittal could not be challenged despite that statement.

⁷ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32(2007)

Similarly, new forensic evidence could come to light which points clearly to the acquitted person as the offender, yet such evidence could not be used to challenge the acquittal and seek a retrial.

The right at section 24 is limited as the Bill provides that the prosecution has a right to apply for a re-trial of an acquitted person where there is fresh and compelling evidence that the offence was committed by the acquitted person. However, the limitation on the right is restricted by the fact that in order to be ‘fresh’ the evidence must not have been tendered in the original trial and could not have been tendered in that proceeding in the course of an exercise of reasonable diligence. Further, in order to be ‘compelling’ the evidence must be reliable, substantial and 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.

The extent of this limitation on the right at section 24 is further restricted by a range of provisions in the Bill. The safeguards which apply are outlined below.

Safeguards

1. The prosecution is limited to one retrial application.
2. The appeal right is limited to the most serious offences on the ACT statute book – those punishable by life imprisonment: including murder and serious drug offences involving large commercial quantities of the substance (*Criminal Code 2002*, sections 603, 607, 616, 619, 622 and 624).
3. The court must be satisfied that it is in the interests of justice to order a retrial. The Bill specifies that the following circumstances must be taken into account in determining this question: whether an acquitted person is likely to receive a fair trial, the period since the offence was committed, and whether a police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to the application for an order. The court may take any other relevant circumstances into account in determining whether ordering a retrial is in the interests of justice.
4. The Director of Public Prosecutions (DPP) must give approval before reinvestigation by ACT Policing so that an acquitted person will not be subject to reinvestigation unless the DPP has specifically considered whether it is warranted for the purposes of appealing an acquittal on the basis of fresh and compelling evidence.
5. An application for a retrial may not be made later than 28 days after the acquitted person is charged with the offence or a warrant has been issued for the person’s arrest in connection with the offence.
6. At the retrial of the acquitted person the prosecution may not refer to the court finding that there appears to be fresh and compelling evidence against the acquitted person.

It is also important to note that the Bill will only have prospective application in relation to this exception so an acquitted person can only be re-tried where the acquittal occurs after the Bill is enacted.

Evidence is not precluded from being ‘fresh and compelling’ merely because it would have been inadmissible in the earlier proceedings against an acquitted person. However, the Bill provides that evidence which was in the possession of the prosecution at the time of the acquittal but could not be tendered because it was inadmissible cannot be considered ‘fresh’ evidence merely because it is now admissible due to a change in evidence law.

There are no less restrictive means reasonably available to achieve the purpose the limitation on the right at section 24 seeks to achieve. The following further safeguards will also apply to ensure the least human rights restrictive means of achieving the purpose of the reform.

Further safeguards

1. The Bill provides a presumption in favour of bail, awaiting determination of the DPP’s application for retrial.
2. The Bill provides a prohibition on publication in relation to:
 - a. authorisation by the DPP for the police to reinvestigate a matter for which a person had previously been acquitted;
 - b. any application to the Court of Appeal seeking an order that an acquitted person be retried; and
 - c. any resulting retrial.

This second further safeguard will mean that a jury will not know the grounds on which a retrial is being held. Even if the media and the jury members realise the person is being tried again, they won’t know why. If the jury knew that the Court of Appeal had found there is ‘fresh and compelling evidence’ they may be influenced by this knowledge.

Tainted trial

The tainted trial exception, which engages and limits section 24 of the HRA is important as it will allow a retrial where the trial at which the acquitted person was acquitted was ‘tainted’. That is, where a serious administration of justice offence, such as perjury, corruption of jurors or witnesses or the destruction of evidence was committed. Only convictions for serious (punishable by imprisonment for 5 years or more) administration of justice offences at Chapter 7 of the *Criminal Code 2002* will apply for the purposes of this exception to the double jeopardy rule.

The exception will only apply where 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.

An acquittal procured by fraud is generally considered less deserving of the double jeopardy protection. The Scottish Law Commission stated that:

The more general kind of tainted acquittal will result from cases in which the process has allegedly been subverted or perverted by someone bribing or threatening witnesses, jurors or, in extreme cases, the judge. Such an interference with the trial process raises the question of whether there has been a valid trial at all. An acquittal which has been obtained through some criminal act directed at the proper functioning of the judicial system can scarcely attract the protection of the double jeopardy rule.⁸

Despite the fact that these circumstances arise very rarely, such an amendment is justified as public confidence in the justice system would be seriously undermined in the case of serious offences where it is clear that a person has been acquitted because of a trial that has been marred by a serious administration of justice offence.

The right at section 24 is limited as the Bill provides that the prosecution has a right to apply for a re-trial of an acquitted person where there has been a tainted trial. The extent of this limitation on the right at section 24 is very restricted. The safeguards which apply are outlined below.

Safeguards

1. The prosecution is limited to one retrial application.
2. The appeal right is limited to serious offences which are punishable by a maximum penalty of 15 years imprisonment or more.
3. The court must be satisfied that it is in the interests of justice to order a retrial. The Bill specifies that the following circumstances must be taken into account in determining this question: whether an acquitted person is likely to receive a fair trial, the period since the offence was committed, and whether a police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to the application for an order. The court may take any other relevant circumstances into account in determining whether ordering a retrial is in the interests of justice.
4. The DPP must give approval before reinvestigation by ACT Policing so that an acquitted person will not be subject to reinvestigation unless the DPP has specifically considered whether it is warranted for the purposes of appealing an acquittal on the basis of a tainted trial.
7. An application for a retrial may not be made later than 28 days after the acquitted person is charged with the offence or a warrant has been issued for the person's arrest in connection with the offence.

⁸ Scottish Law Commission, *Discussion Paper on Double Jeopardy* 141, January 2009, p141.

8. At the retrial of the acquitted person the prosecution may not refer to the court finding that the court found that it is more likely than not that the acquitted person would have been convicted but for the commission of the administration of justice offence.

There are no less restrictive means reasonably available to achieve the purpose the limitation on the right at section 24 seeks to achieve. The following further safeguards will also apply to ensure the least human rights restrictive means of achieving the purpose of the reform.

Further safeguards

1. The Bill provides a presumption in favour of bail, awaiting determination of the DPP's application for retrial.
2. The Bill provides a prohibition on publication in relation to:
 - a. authorisation by the DPP for the police to reinvestigate a matter for which a person had previously been acquitted;
 - b. any application to the Court of Appeal seeking an order that an acquitted person be retried; and
 - c. any resulting retrial.

This second further safeguard will mean that a jury will not know the grounds on which a retrial is being held. Even if the media and the jury members realise the person is being tried again, they won't know why. If the jury knew that the Court of Appeal had found there is a tainted trial they might be influenced by this knowledge.

This exception will apply retrospectively. This is justified as such proceedings can be categorised as the reopening of a defective proceeding. The United Nations Human Rights Committee have drawn a distinction between the "resumption" of criminal proceedings and a "re-trial", stating that it is only the latter that is prohibited under Article 14(7) of the ICCPR.⁹

This exception will apply to a trial tainted by the actions of the acquitted person or a third party. The justification for this approach is outlined by the New Zealand Law Commission, even if the Commission does not ultimately take this approach:

There is a substantial argument in favour of that course – that the public interest in purity of the trial process is such that an acquittal secured because of, or perhaps simply following, breach of such interest should be susceptible of review at a further trial.¹⁰

Administration of Justice offence that directly contradicts acquittal

This provision, allows a person who is acquitted of an original offence to be prosecuted for an administration of justice offence allegedly committed during the trial for the original offence where such prosecution would directly contradict the acquittal.

⁹ Law Commission for England and Wales, *Double Jeopardy: Consultation Paper 156* (HMSO, London, 1999), p.18.

¹⁰ NZ Law Commission, *Report 70 Acquittal following perversion of the course of justice*, 2001, para 30

The proposal for this amendment arose out of the decision by the High Court in *R v Carroll* (2002)¹¹ in which the Court held that an administration of justice offence cannot be prosecuted where such prosecution is in direct conflict with the acquittal.

The circumstances of that case were that the accused, Carroll, who was on trial for murder, denied killing the victim. The only evidence linking Carroll with the murder was odontological evidence which was unreliable. He was acquitted of the murder. Thirteen years later, Carroll was indicted for perjury. The charge alleged that at his earlier trial he gave false testimony because his sworn denial of killing the victim was a lie. New evidence had since come to light. The jury convicted and Carroll appealed to the High Court.

The Court held that the conviction of Carroll for perjury, where the alleged perjury was Carroll's denial on oath that he had killed the victim, was in direct conflict with the determination of the Court of Criminal Appeal in acquitting Carroll on the charge of murder, and on common law principles that the trial judge should have stayed the perjury charge as an abuse of process.

Despite the fact that this issue would only arise very rarely such an amendment is important as public confidence in the justice system would be seriously undermined if an administration of justice offence couldn't be prosecuted because the evidence tendered would challenge an acquittal for an original offence. It is unjust for a person to avoid prosecution merely because the evidence to be tendered for that prosecution is contrary to evidence relied on by that person for acquittal in another trial.

This amendment will apply retrospectively in the sense that it will apply to an acquittal for the original offence which occurred prior to this legislation commencing. This is appropriate as the relevant administration of justice offence is an entirely new offence for which the accused faces trial for the first time.

The least restrictive means have been taken to achieve the fairness sought by this amendment, as outlined below.

Safeguards

1. The Bill ensures that the acquitted person cannot be subject to 'triple jeopardy'. That is, the prosecution cannot charge the accused with both the original offence and the administration of justice offence.
2. There must be fresh evidence of the administration of justice offence (that is, evidence that was not tendered in the proceeding in which the person was acquitted and could not have been obtained at the time of the original proceeding by someone exercising reasonable diligence).
3. The prosecution is limited to one application under this exception.

¹¹ 213 CLR 635

4. The DPP must give approval before investigation by ACT Policing so that an acquitted person will not be subject to investigation unless the DPP has specifically considered whether it is warranted for the purposes of prosecuting the acquitted person for an administration of justice offence.
5. This prosecution right is limited to acquittals for indictable offences only. An indictable offence in the ACT is an offence with a maximum penalty of imprisonment of 5 years or more.
6. An application for a retrial may not be made later than 28 days after the acquitted person is charged with the offence or a warrant has been issued for the person's arrest in connection with the offence.
7. The court must be satisfied that it is in the interests of justice to allow the prosecution. The Bill specifies that the following circumstances must be taken into account in determining this question: whether an acquitted person is likely to receive a fair trial, the period since the offence was committed, and whether a police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to the application for an order. The court may take any other relevant circumstances into account in determining whether ordering a retrial is in the interests of justice.
8. At the trial for the administration of justice offence the prosecution must not mention before the jury that the court has found that it appears there is fresh evidence against the acquitted person.

Further safeguards

1. The Bill provides a presumption in favour of bail, awaiting determination of the DPP's application for retrial.
2. The Bill provides a prohibition on publication in relation to:
 - a. authorisation by the DPP for the police to investigate the administration of justice offence;
 - b. any application to the Court of Appeal seeking an order that an acquitted person be tried for a related administration of justice offence; and
 - c. any resulting trial.
3. There is a presumption in favour of bail, pending determination of the application for the administration of justice offence to be heard.

Supreme Court Amendment Bill 2016

Detail

Clause 1 – Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Supreme Court Amendment Act 2016*.

Clause 2 – Commencement

This clause provides that the Act commences on the day after it is notified on the ACT Legislation Register.

Clause 3 – Legislation amendment

This clause identifies the legislation amended by the Act.

Clause 4 – Appellate jurisdiction, New section 37E(2)(d)

This clause provides that the Court of Appeal may hear applications under part 8AA (Acquittals).

Clause 5 - New part 8AA

Part 8AA Acquittals

Division 8AA.1 Application – pt 8AA

This clause inserts a new part 8AA in the *Supreme Court Act 1933*.

Section 68H Application – pt 8AA

Section 68H provides that where double jeopardy law in the ACT would operate as a bar to prevent retrial or prosecution for an administration of justice offence of an acquitted person in the exceptional circumstances provided for by this Bill that bar is removed. This means that despite the rule of double jeopardy, in these exceptional circumstances the prosecution has a right of appeal against an acquittal and a retrial or a trial for an administration of justice offence will be permitted.

Section 68H(2) provides that the exceptions to the double jeopardy rule provided by the Bill will apply to a person acquitted in another jurisdiction if that jurisdiction provides the same exceptions in its law.

Section 68H(4) provides a broad definition of ‘double jeopardy law’.

Division 8AA.2 Important concepts

Section 68I Definitions – part 8AA

Section 68I defines administration of justice offence (if the offence is committed in the ACT) with the effect that only indictable administration of justice offences, as stated at Chapter 7 of the *Criminal Code 2002* are captured. This means that an acquitted person can only be:

(a) retried under new section 68N (court may order retrial due to tainted trial) where the trial has been tainted by the commission of a serious administration of justice offence by the acquitted person themselves or someone else; or

(b) prosecuted for a related administration of justice offence related to the original trial under new section 68O, in relation to the following administration of justice offences.

- Perjury and aggravated perjury
- Making or using false evidence
- Destroying or concealing evidence
- Corruption in relation to legal proceedings
- Deceiving witness, interpreter or juror
- Threatening etc witness, interpreter or juror
- Threatening etc participant in criminal investigation
- Preventing attendance etc of witness, interpreter or juror
- Preventing production of thing in evidence
- Reprisal against person involved in proceeding
- Perverting the course of justice
- Publication that could cause miscarriage of justice
- False accusation of offence
- Compounding of offence
- Accessory after the fact

All these offences are punishable by 5 years imprisonment or more. Additionally, for the ‘tainted trial’ exception it must also be the case that it is more likely than not that but for the commission of the administration of justice offence the acquitted person would have been convicted.

Only offences that are equal or greater in seriousness to perjury, interfering with a witness or perverting the course of justice are included. This has been determined on the basis of the maximum penalty for each offence. As perjury (7 years imprisonment), threatening a witness (5 years imprisonment) and perverting the course of justice (7 years imprisonment) are considered to be core administration of justice offences, these have been used as a starting point. Each of these offences carries a maximum penalty of 5 or 7 years imprisonment. Therefore a decision was made to include all administration of justice offences in the Criminal Code which carry a maximum penalty of 5 years imprisonment or more.

Section 68J Meaning of *acquittal* – pt 8AA

Section 68J defines ‘acquittal’ for the purposes of new part 8AA.

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

Section 68K defines the terms ‘fresh’ and ‘compelling’ for the purposes of this exception to the rule of double jeopardy.

In order for evidence to be considered ‘fresh’ it must not have been tendered in a proceeding in which the person was acquitted of the offence and it must be the case that it could not have been tendered in the proceeding in the course of an exercise of reasonable diligence.

As recommended by the MCCOC Discussion Paper,¹² this Bill adopts the higher threshold of ‘fresh’ evidence which requires that it could not have been presented at the original proceedings despite competent police and/or prosecution work.

For evidence to be ‘compelling’ it must be reliable, substantial and 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.

The section also provides at subsection (2) that evidence cannot be ‘fresh’ where it was or was considered to be inadmissible under evidence law at the time of the original trial but would now be admissible due to a change in evidence law. However, evidence is not precluded from being ‘fresh’ merely because it would likely have been inadmissible in the earlier proceedings against the acquitted person.

Section 68L Meaning of *tainted* acquittal – pt 8AA

Section 68L defines the term ‘tainted’ for the purposes of this particular exception to the rule of double jeopardy.

A trial is tainted if the person acquitted of the offence or another person has been convicted of an administration of justice offence that is relevant to the original trial in which the acquittal occurred. It must also be more likely than not that, but for the commission of the administration of justice offence, the acquitted person would have been convicted of the original offence.

This section provides that while the administration of justice offence which is the basis of the tainted trial exception is subject to an appeal (for which leave is not required) the trial cannot be considered tainted. Once the administration of justice offence is no longer subject to appeal the trial can be considered tainted if all necessary criteria are met.

Division 8AA.3 Retrial etc of acquitted person

Section 68M Court may order retrial – category A offence

¹² Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals*, November 2003 Discussion Paper, p109

Section 68M provides that the court may order a retrial of an acquitted person where there is fresh and compelling evidence against that person in the following circumstances:

- the person has been acquitted of an offence after the commencement of this Act;
- the retrial is for a category A offence (punishable by imprisonment for life); and
- it is in the interest of justice for the retrial to be ordered.

This provision provides an exception to the rule of double jeopardy which prohibits prosecution for the same or substantially similar offence more than once; and abuse of process.¹³ The exception is justified as where such evidence arises in the case of very serious offences it undermines the integrity and therefore the legitimacy of the acquittal and the criminal justice system as a whole. The reasons for this amendment and safeguards are discussed in detail above at ‘Human Rights Considerations’.

A ‘Category A’ offence is one that is punishable by life imprisonment. This means that only the most serious offences can be re-tried under this exception. This restriction applies to the re-trial only and not to the acquittal offence. This means that the accused person may have been acquitted of a lesser offence, such as manslaughter, but the prosecution can still apply for a re-trial for murder. Both trials would apply to the same factual circumstances but the original trial is for a lesser offence.

The purpose of this approach is to ensure that where fresh and compelling evidence of, for example, murder arises but the acquitted person was previously tried only for manslaughter, the person can be re-tried for the more serious offence. This does not engage and limit section 25 of the HRA (retrospective criminal laws) which provides that:

(1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.

(2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

Allowing a person acquitted of a lesser offence to be retried in exceptional circumstances for murder (as opposed to allowing a person acquitted of murder to be retried in exceptional circumstances for murder) does not engage and limit this right. The Bill does not make a particular act or omission an offence where it was otherwise not an offence at the time it was committed. The Bill also does not punish a person more severely than they could have been punished for the offence at the time it was committed.

Section 68M only applies prospectively. An acquitted person can only be re-tried on the basis of fresh and compelling evidence where the acquittal occurred after the Bill is enacted.

Section 68N Court may order retrial – category B offence

¹³ Edgely, loc.cit.

Section 68N provides that the court may order a retrial of an acquitted person where the acquittal was tainted in the following circumstances:

- the retrial is for a category B offence (punishable by imprisonment for 15 years or more); and
- it is in the interest of justice for the retrial to be ordered.

This provision provides an exception to the rule of double jeopardy which prohibits prosecution for the same or substantially similar offence more than once; and abuse of process.¹⁴

Such an amendment is necessary as public confidence in the justice system would be seriously undermined in the case of serious offences where it is clear that a person has been acquitted because of a trial that has been marred by a serious administration of justice offence. The reasons for this amendment and safeguards are further discussed above at ‘Human Rights Considerations’.

A ‘Category B’ offence is one that is punishable by imprisonment for 15 years or more. This means that only serious offences can be re-tried under this exception. This restriction applies to the re-trial only and not to the acquittal offence. This means that the accused person may have been acquitted of a lesser offence, such as assault, but the prosecution can still apply for a re-trial for intentionally inflicting grievous bodily harm. Both trials would apply to the same factual circumstances but the original trial is for a lesser offence.

The purpose of this approach is to ensure that where a trial of, for example, assault, has been tainted the acquitted person can be re-tried for the more serious offence of, for example, intentionally inflicting grievous bodily harm if the evidence allows. It is foreseeable that where, for example, the acquitted person threatened an important witness in the course of the original trial, the prosecution may only have been able to prosecute a lesser offence due to losing this key witness when in fact their evidence shows the acquitted person committed a more serious crime.

This does not engage and limit section 25 of the HRA (retrospective criminal laws) which provides that:

- (1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.
- (2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

Allowing a person acquitted of a lesser offence to be retried in exceptional circumstances for a more serious offence (as opposed to allowing a person acquitted of a more serious offence

¹⁴ Edgely, loc.cit.

to be retried in exceptional circumstances for the more serious offence) does not engage and limit this right. The Bill does not making a particular act or omission an offence where it was not an offence at the time it was committed. The Bill also does not seek to punish a person more severely than they could have been punished for the offence at the time it was committed.

This exception will apply retrospectively and applies where the acquitted person or another person has been convicted of a relevant administration of justice offence. See above at 'Human Rights Considerations' for a discussion of the justification for this approach.

Section 68O Court may order trial – administration of justice offence

Section 68O provides that a person acquitted of an original offence may face trial for an administration of justice offence in connection with that original offence even where the prosecution of the administration of justice offence would otherwise be prevented by the rule against double jeopardy.

This provision addresses the decision of the High Court in *R v Carroll* [2002] HCA 55 in the ACT as it may be unjust for a person to avoid prosecution merely because the evidence to be adduced for that prosecution is contrary to evidence relied on by that person for acquittal in another trial. However, the Bill is consistent with the recommendations of the MCCOC Discussion Paper in that it provides appropriate limitations to protect against prosecutorial abuse.¹⁵ The implementation of this exception would not overturn the decision in *Carroll* as there was no fresh evidence in that case. However, it would in future allow for an acquitted person to be tried for perjury in the *Carroll* situation.

Section 68O provides that the court may only order a trial in these circumstances where the following three protections exist.

1. The court is satisfied that there is fresh evidence against the acquitted person in relation to the administration of justice offence.
2. The prosecution cannot prosecute the acquitted person under the section 68O exception *and* seek a retrial of the original offence under section 68M or 68N. This is provided at section 68T(3) of the Bill.
3. The court is satisfied that it is in the interests of justice for the order to allow the trial to be made.

This exception will apply retrospectively. The reasons for this amendment and safeguards are discussed in detail above at 'Human Rights Considerations'.

Section 68P Interests of justice

¹⁵ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals*, November 2003 Discussion Paper, p91

Section 68P provides that in determining whether an order under section 68M (fresh and compelling evidence exception), section 68N (tainted trial exception) or section 68O (administration of justice offence exception) is in the interests of justice, the court *must* take into account the following:

- Whether the acquitted person is likely to receive a fair trial;
- The period since the offence, for which the acquitted person would be retried, was committed; and
- Whether a police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to the application for the order.

The court can also take any other relevant matter into consideration in determining whether an order under sections 68P, 68M or 68N is in the interests of justice.

Division 8AA.4 Procedure

Subdivision 8AA.4.1 Applications under pt 8AA

Section 68Q Conditions for retrial application

Section 68Q provides a number of safeguards in relation to the ordering of a retrial under section 68M (fresh and compelling evidence exception) and section 68N (tainted trial exception). These are outlined below.

- The retrial of the acquitted person must not be made unless the acquitted person has been charged with the offence for which the retrial is sought or a warrant has been issued in relation to the offence for which the retrial is sought.
- The application must be made within 28 days of the acquitted person being charged or the warrant being issued.

Section 68R Limitations on retrial application

Section 68R provides a number of safeguards in relation to the ordering of a retrial under section 68M (fresh and compelling evidence exception) and section 68N (tainted trial exception). These are outlined below.

- Only 1 application in relation to the same acquittal may be made under part 8AA for the retrial of an acquitted person.
- No further application may be made under section 68M in relation to the acquittal but a further application may be made under section 68N as it is foreseeable that the retrial could be ‘tainted’ too and therefore a further application would be appropriate.

Section 68S Conditions for justice offence trial application

Section 68S provides a number of safeguards in relation to the ordering of a trial under section 68O (administration of justice offence exception). These are outlined below.

- The acquitted person must have been charged with the administration of justice offence for which the trial is sought or a warrant must have been issued for their arrest for that offence.
- The application must be made within 28 days of the acquitted person being charged or the warrant being issued.

Subdivision 8AA.4.2 Presentation of indictment

Section 68T Limitations on indictment

Section 68T(1) provides that if an acquitted person is liable to be retried for a category A or B offence the Director of Public Prosecutions must not present an indictment against that person for an offence that had not been created at the time the person is alleged to have engaged in the conduct constituting the offence for which the person was acquitted. The purpose of this provision is to prevent the risk that the person may be found guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in (section 25 (1), *Human Rights Act 2004*).

Section 68T(3) provides that an acquitted person must not be placed in ‘triple jeopardy’. That is, if the person is tried for an administration of justice offence that directly controverts the acquittal at the original trial the prosecution, the person cannot also be retried under the Bill. The prosecution must choose whether to use the fresh evidence they have to pursue an application for a retrial *or* to seek a prosecution of the person for an administration of justice offence that directly controverts the acquittal. The prosecution cannot pursue both.

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

Section 68U provides that in relation to a retrial ordered under sections 68M or 68N an indictment for a retrial of a category A offence (punishable by imprisonment for life) or category B offence (punishable by imprisonment for 15 years or more) must be presented against the accused person within 2 months after the day the order for the retrial was made.

The court may give leave to extend this period in certain circumstances.

If a retrial order is set aside the prosecution cannot make a further application under part 8AA for the retrial of the acquitted person in relation to the offence mentioned in the retrial order.

Section 68V Indictment for trial of justice offence

Section 68V provides that in relation to a trial ordered under section 68O (administration of justice offence exception) an indictment must be presented against the accused person within 2 months after the day the order for the trial was made.

The court may give leave to extend this period in certain circumstances.

If a trial order is set aside the prosecution cannot make a further application under part 8AA for the trial of the acquitted person in relation to the offence mentioned in the trial order.

Division 8AA.5 Conduct of proceeding for retrial etc

Section 68W Prosecution must not refer to certain matters before jury

Section 68W provides that at a retrial ordered under section 68M (fresh and compelling evidence exception) or section 68N (tainted trial exception) 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 acquitted person; or (b) more likely than not, but for the commission of an administration of justice offence, the accused person would have been convicted of an offence.

Subsection 68W (2) provides at a trial ordered under section 68O (administration of justice offence exception) the prosecution must not mention before the jury that the court has found that it appears there is fresh evidence against the acquitted person.

These provisions are a safeguard to support a fair trial for the accused person.

Division 8AA.6 Miscellaneous

Section 68X Entitlement to bail

Section 68X provides that the *Bail Act* 1992, section 9A applies to a person charged with an offence for which a retrial, or a trial, is sought under this part. This means that the person is entitled to be granted bail unless the court or authorised officer is satisfied that refusal is justified after considering the criteria for granting bail.

Section 68Y Single course of action for each proceeding

Section 68Y provides that a person acquitted of an offence must not, in a single proceeding, be retried for the original offence and tried for an administration of justice offence related to the principal offence.

Section 68Z Restrictions on publication

Section 68Z provides a number of restrictions on the publication of information about an acquitted person who is being or may be retried or prosecuted under Part 8AA. These restrictions prohibit publication of any matter that identifies or is capable of identifying an acquitted person:

- who is being retried under sections 68M (fresh and compelling evidence exception), 68N (tainted trial exception) 68N or tried under section 68O (administration of justice offence exception); or
- who is the subject of a police investigation or application for a police investigation under section 68W; or
- who is the subject of an application or order for a retrial or trial under Part 8AA.

The Bill engages and limits the right to freedom of expression (section 16 of the *Human Rights Act 2004*). The purpose of this limitation is to support the acquitted person's right to a fair trial where they are subject to a re-trial in exceptional circumstances or a trial for an administration of justice offence under section 68O. The right to a fair trial is supported as the non-publication of material relating to the exceptional circumstances of the case (that is, a finding that there is fresh and compelling evidence or a tainted trial) makes it more likely that a juror will not be prejudiced when considering whether the accused person is guilty or not in the retrial.

Section 68ZA Maximum penalty for retrial offence

Section 68ZA provides that where an acquitted person is retried for a category A or B offence and is found guilty, they may not be sentenced to a punishment that is more severe than that which applied at the time the person is alleged to have engaged in conduct that constituted the offence for which the person was acquitted. The purpose of this provision is to prevent the person from receiving a penalty that is heavier than the penalty that applied to the offence when it was committed (section 25 (2), *Human Rights Act 2004*).

Section 68ZB Indemnification for costs

Section 68ZA provides that where an application is made by the prosecution under sections 68M (fresh and compelling evidence exception), 68N (tainted trial exception) or section 68O (administration of justice offence exception) and it is in the interests of justice to do so, the court may grant a costs indemnification order in relation to the acquitted person's costs.

Clause 6 – Dictionary, note 2

Clause 6 inserts relevant terms to note 2 of the Dictionary in the *Supreme Court Act 1933*.

Clause 7 – Dictionary, new definitions

Clause 6 inserts relevant new definitions into the *Supreme Court Act 1933*.

Clause 8 Dictionary, definition of *court*

Clause 8 substitutes a new definition of court in the *Supreme Court Act 1933*.

Clause 9 Dictionary, new definitions

Clause 10 provides new definitions in the *Supreme Court Act 1933*.

Clause 10 Crimes Act 1900

New division 10.8 Investigations relating to acquittals

Section 252L Authorisation of police investigations – acquitted person

Section 252L provides a number of restrictions on police investigations for an offence suspected to have been committed by an acquitted person who may be retried or prosecuted under Part 8AA. These restrictions include:

- The police must have written approval from the Director of Public Prosecutions (the DPP) before carrying out a police investigation (except in exceptional circumstances as outlined at subsection 252L(5)).
- The chief police officer may only apply for a police investigation if satisfied the evidence for an application has been obtained or is reasonably likely to be obtained as a result of the investigation.
- The DPP may only consent to the investigation if there is or is likely as a result of the investigation to be new evidence to warrant the conduct of the investigation and it is in the public interest for the investigation to proceed.

The Bill may engage and limit the right to privacy, freedom of movement and the right to liberty (sections 12, 13 and 18 of the *Human Rights Act 2004*) in the same way that these rights are limited by any ordinary police investigation. The difference is that the investigation can occur for a second time even where the suspect has been previously acquitted for the same offence. To recognise the fact that the Bill may effectively place the suspect in ‘double jeopardy’ in relation to a police investigation, the Bill provides the safeguards outlined above. In particular, an investigation cannot go ahead without the approval of the Director of Public Prosecutions who must be satisfied that there is or is likely to be new evidence to warrant the conduct of the investigation; and it is in the public interest for the investigation to proceed.