

Criminal Appeals Amendment (Double Jeopardy) Bill 2011

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Western Australia

LEGISLATIVE COUNCIL

(As amended in Committee)

**Criminal Appeals Amendment (Double
Jeopardy) Bill 2011**

A Bill for

**An Act to amend the *Criminal Appeals Act 2004* and, as a
consequence, various other Acts, and for related matters.**

The Parliament of Western Australia enacts as follows:

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Part 1 — Preliminary matters

1. Short title

This is the *Criminal Appeals Amendment (Double Jeopardy) Act 2011*.

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

1 **Part 2 — *Criminal Appeals Act 2004* amended**

2 **3. Act amended**

3 This Part amends the *Criminal Appeals Act 2004*.

4 **4. Part 5A inserted**

5 After Part 4 insert:
6

7 **Part 5A — Prosecuting acquitted accused**

8 **46A. Terms used**

9 (1) In this Part, unless the contrary intention appears —
10 ***acquitted accused*** has the meaning given in
11 section 46B(1);

12 ***AOJ offence*** means —

- 13 (a) an administration of justice offence listed in
14 subsection (2); or
15 (b) an offence under the law of a place outside this
16 State that is substantially similar to an
17 administration of justice offence listed in
18 subsection (2);

19 ***authorised officer*** means —

- 20 (a) the Attorney General; or
21 (b) the Solicitor-General; or
22 (c) the State Solicitor; or
23 (d) the DPP; or
24 (e) the Director of Public Prosecutions appointed
25 under the *Director of Public Prosecutions*
26 *Act 1983* (Commonwealth);

27 ***charge A***, in relation to an acquitted accused, has the
28 meaning given in section 46B(1);

s. 4

- 1 **leave application** means an application for leave made
2 under section 46E;
- 3 **new charge**, in relation to an acquitted accused, has the
4 meaning given in section 46E(1);
- 5 **offence A**, in relation to an acquitted accused, has the
6 meaning given in section 46B(1);
- 7 **serious offence** means an indictable offence the
8 statutory penalty for which is —
- 9 (a) life imprisonment; or
- 10 (b) imprisonment for 14 years or more;
- 11 **trial A**, in relation to an acquitted accused, has the
12 meaning given in section 46B(1).
- 13 (2) For the purposes of this Part, an offence under a section
14 of *The Criminal Code* listed in the Table is an
15 administration of justice offence.

Table

Section	Description of offence
s. 82	Bribery of public officer
s. 121	Judicial corruption
s. 122	Official corruption not judicial but relating to offences
s. 123	Corrupting or threatening jurors
s. 124	Perjury
s. 129	Fabricating evidence
s. 130	Corruption of witnesses
s. 131	Deceiving witnesses
s. 132	Destroying evidence
s. 133	Preventing witnesses from attending
s. 135	Conspiring to defeat justice
s. 136	Compounding or concealing offences
s. 143	Attempting to pervert course of justice

- 1 **46B. Term used: acquitted accused**
- 2 (1) For the purposes of this Part a person is an ***acquitted***
3 ***accused*** if the person, in this State or elsewhere —
- 4 (a) is tried on a charge (***charge A***) of a serious
5 offence (***offence A***); and
- 6 (b) at the trial (***trial A***), or on appeal from a
7 conviction in trial A, is acquitted, other than on
8 account of unsoundness of mind, of —
- 9 (i) charge A; and
- 10 (ii) any other offence of which, on
11 charge A, the acquitted accused might
12 have been convicted instead of
13 offence A.
- 14 (2) For the purposes of subsection (1) it does not matter if
15 the acquittal occurred before or after the
16 commencement of this Part.

- 17 **46C. Criminal investigations of acquitted accused that**
18 **need authorised officer’s authority**
- 19 (1) In this section —
- 20 ***investigate***, an offence, includes to exercise any power
21 under the common law, a written law or a law of the
22 Commonwealth for the purposes of obtaining evidence
23 as to the commission of the offence;
- 24 ***law enforcement officer*** means —
- 25 (a) a police officer; or
- 26 (b) a person, other than a police officer, appointed
27 under a written law to an office on which the
28 common law, a written law or a law of the
29 Commonwealth confers powers to investigate
30 offences;

s. 4

- 1 **relevant offence** means a serious offence, or an AOJ
2 offence, a charge of which may be subject to —
- 3 (a) a defence under *The Criminal Code* section 17
4 on the ground that the accused has been
5 acquitted as described in that section, other than
6 on account of unsoundness of mind; or
- 7 (b) a requirement at law to permanently stay it
8 because it would be an abuse of process.
- 9 (2) A law enforcement officer, whether with or without an
10 acquitted accused's consent, must not investigate or
11 authorise another person to investigate whether the
12 acquitted accused may have committed a relevant
13 offence unless —
- 14 (a) under subsection (4), an authorised officer, in
15 writing, has authorised the investigation; or
- 16 (b) the law enforcement officer believes on
17 reasonable grounds —
- 18 (i) the investigation needs to be done
19 urgently in order to prevent it from
20 being substantially and irrevocably
21 prejudiced; and
- 22 (ii) it is not reasonably practicable in the
23 circumstances to obtain an authorised
24 officer's authorisation before doing the
25 investigation.
- 26 (3) If a law enforcement officer acts under
27 subsection (2)(b) —
- 28 (a) the officer, as soon as it is practicable to do so,
29 must inform an authorised officer of —
- 30 (i) the grounds for acting under that
31 provision; and
- 32 (ii) the action taken;
- 33 and

- 1 (b) the investigation of the relevant offence must
2 not continue unless, under subsection (4), an
3 authorised officer, in writing, has authorised the
4 investigation.
- 5 (4) An authorised officer must not authorise the
6 investigation of a relevant offence unless —
- 7 (a) the officer is satisfied a charge of the offence
8 would not be subject to —
- 9 (i) a defence under *The Criminal Code*
10 section 17 on the ground that the
11 accused has been acquitted as described
12 in that section, other than on account of
13 unsoundness of mind; or
- 14 (ii) a requirement at law to permanently
15 stay it because it would be an abuse of
16 process;
- 17 or
- 18 (b) the officer is satisfied —
- 19 (i) there is, or the investigation is likely to
20 obtain, evidence to justify making an
21 application under this Part for leave to
22 charge the acquitted accused with the
23 relevant offence; and
- 24 (ii) it is in the public interest to investigate
25 the relevant offence.

26 **46D. Charges against acquitted accused that need leave**

27 A person cannot charge an acquitted accused with any
28 of these charges without the leave of the Court of
29 Appeal given under this Part —

- 30 (a) a charge of a serious offence the details of
31 which are the same or substantially the same as
32 those in charge A;

s. 4

- 1 (b) a charge of some other serious offence of
2 which, at trial A, the acquitted accused might
3 have been convicted instead of offence A;
- 4 (c) a charge of an AOJ offence allegedly
5 committed in or in connection with trial A.
- 6 **46E. Applying for leave for new charge**
- 7 (1) An authorised officer may apply to the Court of Appeal
8 for leave to charge an acquitted accused with a new
9 charge (the *new charge*) being one of these —
- 10 (a) a charge of a serious offence the details of
11 which are the same or substantially the same as
12 those in charge A;
- 13 (b) a charge of some other serious offence of
14 which, at trial A, the acquitted accused might
15 have been convicted instead of offence A;
- 16 (c) a charge of an AOJ offence allegedly
17 committed in or in connection with trial A.
- 18 (2) An application cannot be made under subsection (1)
19 if —
- 20 (a) the acquittal in trial A (as described in
21 section 46B(1)(b)) of the acquitted accused
22 occurred on a charge for which leave had been
23 given under this Part; and
- 24 (b) that leave was given because, under
25 section 46H(2)(c)(i), the Court of Appeal was
26 satisfied that fresh and compelling evidence
27 (within the meaning given by section 46I)
28 existed against the acquitted accused in relation
29 to the charge.
- 30 (3) An application made under subsection (1) may relate to
31 2 or more new charges.
- 32 (4) An application permitted by subsection (1) must be
33 made in accordance with this Part and rules of court.

- 1 (5) An application made under subsection (1) may be
2 made without giving notice of it to the acquitted
3 accused.

4 **46F. Procedure on leave applications**

- 5 (1) As soon as practicable after a leave application is
6 made, the Court of Appeal, unless it is satisfied the
7 application is an abuse of process, must —
8 (a) issue a summons that requires the acquitted
9 accused to appear before the court; or
10 (b) issue an arrest warrant to have the acquitted
11 accused brought before the court.
- 12 (2) If the acquitted accused does not obey a summons
13 issued under subsection (1), the court must issue an
14 arrest warrant to have the accused brought before the
15 court.
- 16 (3) On being served with the summons or arrested (as the
17 case may be), the acquitted accused must be given a
18 copy of the leave application.
- 19 (4) When the acquitted accused appears or is brought
20 before the Court of Appeal, the court —
21 (a) may make any order necessary in relation to
22 hearing the leave application; and
23 (b) subject to the *Bail Act 1982*, may order that the
24 accused be kept in custody until the hearing.

25 **46G. Hearing leave applications**

- 26 (1) The acquitted accused is entitled to be heard at the
27 hearing of a leave application.
- 28 (2) For the purpose of dealing with a leave application —
29 (a) the Court of Appeal may exercise any power in
30 section 40 as if the application were an appeal;
31 and

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- 1 (b) if the acquitted accused is in custody,
2 section 43 applies, with any necessary changes,
3 as if the application were an appeal.
- 4 (3) The Court of Appeal may deal with 2 or more leave
5 applications at one hearing if the new charges for
6 which leave is sought will or may be tried together.
- 7 (4) If the Court of Appeal is satisfied the acquitted accused
8 has received adequate notice of the hearing, the court
9 may hear a leave application in the absence of the
10 acquitted accused.

11 **46H. Deciding leave applications**

- 12 (1) On a leave application, the Court of Appeal may give
13 or refuse to give the applicant leave to charge the
14 acquitted accused with the new charge.
- 15 (2) If the new charge to which a leave application relates
16 is —
- 17 (a) a charge of a serious offence the details of
18 which are the same or substantially the same as
19 those in charge A; or
- 20 (b) a charge of some other serious offence of
21 which, at trial A, the acquitted accused might
22 have been convicted instead of offence A,
- 23 but not a charge of an AOJ offence allegedly
24 committed in or in connection with trial A, the Court of
25 Appeal must not give leave unless —
- 26 (c) the Court of Appeal is satisfied on the balance
27 of probabilities —
- 28 (i) there is fresh and compelling evidence
29 (within the meaning given by
30 section 46I) against the acquitted
31 accused in relation to the new charge; or

- 1 (ii) the acquittal in trial A is a tainted
2 acquittal (within the meaning given by
3 section 46J);
4 and
5 (d) the Court of Appeal is satisfied on the balance
6 of probabilities that charging the acquitted
7 accused with the new charge is in the interests
8 of justice having regard to section 46K.
- 9 (3) If the new charge to which a leave application relates is
10 a charge of an AOJ offence allegedly committed in or
11 in connection with trial A, the Court of Appeal must
12 not give leave unless it is satisfied on the balance of
13 probabilities that charging the acquitted accused with
14 the AOJ offence is in the interests of justice having
15 regard to section 46K.
- 16 (4) If the acquitted accused is an acquitted accused for the
17 purposes of this Part because, in a place outside this
18 State, he or she was charged with and acquitted of an
19 offence under the law of that place —
20 (a) leave cannot be given under subsection (2) if
21 the law of that place does not permit the person
22 to be tried —
23 (i) on another charge of offence A the
24 details of which are the same or
25 substantially the same as those in
26 charge A; or
27 (ii) on a charge of some other offence of
28 which, on charge A, the acquitted
29 accused might have been convicted
30 instead of offence A;
31 and
32 (b) leave cannot be given under subsection (3) if
33 the law of that place does not permit the person
34 to be tried on a charge of an AOJ offence

1 context of the issues in dispute in trial A, it is highly
2 probative of the new charge.

3 (3) For the purposes of this section, it is irrelevant whether
4 the evidence being considered by the Court of Appeal
5 would have been admissible in trial A against the
6 acquitted accused.

7 **46J. Meaning of tainted acquittal**

8 For the purposes of section 46H, the acquittal in trial A
9 is tainted if —

- 10 (a) the acquitted accused or another person has
11 been convicted in this State or elsewhere of an
12 AOJ offence committed in or in connection
13 with trial A; and
- 14 (b) but for the commission of that AOJ offence, it
15 is more likely than not that the acquitted
16 accused would have been found guilty of, or
17 would have been acquitted on account of
18 unsoundness of mind of —
- 19 (i) offence A; or
- 20 (ii) some other offence of which, on
21 charge A, the acquitted accused might
22 have been convicted instead of
23 offence A.

24 **46K. Interests of justice, matters to be considered**

- 25 (1) This section applies for the purposes of section 46H.
- 26 (2) Charging the acquitted accused with the new charge is
27 not in the interests of justice if the Court of Appeal is
28 satisfied a fair trial of the new charge is unlikely
29 having regard to —
- 30 (a) the length of time since offence A was
31 allegedly committed or since trial A; and

s. 4

- 1 (b) all other existing circumstances.
- 2 (3) The Court of Appeal is to have regard in particular to
3 the following —
- 4 (a) whether any police officer or prosecutor has
5 failed to act with reasonable diligence or
6 expedition in connection with applying for
7 leave to charge the acquitted accused with the
8 new charge;
- 9 (b) the objective seriousness of the facts of the new
10 charge.
- 11 **46L. Restrictions on publicity**
- 12 (1) This section does not affect any prohibition in any
13 other written law of the publication of any information.
- 14 (2) A person must not publish any information that
15 conveys or has the effect of conveying that a person
16 whom the information identifies directly or indirectly is
17 the subject of any of these —
- 18 (a) an application made under section 46C;
- 19 (b) an investigation authorised under section 46C;
- 20 (c) a leave application;
- 21 (d) leave given under section 46H;
- 22 (e) a new charge laid pursuant to leave given under
23 section 46H.
- 24 (3) The prohibition on publication in subsection (2) does
25 not apply —
- 26 (a) if and to the extent an order made under
27 subsection (4) authorises publication; or
- 28 (b) if subsection (2) has ceased to operate under
29 subsection (9).
- 30 (4) The Court of Appeal or the court in which the acquitted
31 accused is being tried on the new charge may make an

- 1 order that authorises the publication of some or all of
2 the information to which subsection (2) applies.
- 3 (5) An order made under subsection (4) may be in any
4 terms, and include any conditions, the court thinks just.
- 5 (6) A court must not make an order under subsection (4)
6 unless satisfied it is in the interests of justice to do so.
- 7 (7) Before making an order under subsection (4) a court
8 must give the acquitted accused a reasonable
9 opportunity to be heard on the application for the order.
- 10 (8) A court that has made an order under subsection (4)
11 may amend or cancel it at any time.
- 12 (9) Subject to any order made under subsection (4), the
13 prohibition in subsection (2) ceases to have effect —
- 14 (a) when there is no longer any step that could be
15 taken in order to charge and try the acquitted
16 accused with a new charge under this Part; or
- 17 (b) when the trial (if any) of the acquitted accused
18 on a new charge concludes,
- 19 whichever occurs first.
- 20 (10) A person who contravenes subsection (2) commits a
21 contempt of the Supreme Court.

22 **46M. Leave for new charge, effect of**

- 23 (1) If under this Part the Court of Appeal gives leave to
24 charge an acquitted accused with a new charge, only
25 the person given leave, or another authorised officer,
26 may commence a prosecution of the new charge.
- 27 (2) A prosecution of a new charge cannot be commenced
28 after —
- 29 (a) 2 months after the date on which leave is given;
30 or

s. 4

- 1 (b) any longer period that the Court of Appeal may
2 allow on an application made before the
3 2 months elapse.
- 4 (3) The Court of Appeal must not allow a longer period
5 under subsection (2)(b) unless it is satisfied —
- 6 (a) the person given leave has taken and is taking
7 reasonable steps to commence the prosecution
8 as quickly as possible; and
- 9 (b) there is a good reason why a longer period
10 should be allowed.
- 11 (4) In a prosecution of the new charge —
- 12 (a) a court dealing with the new charge cannot stay
13 it because it is an abuse of process unless it is
14 an abuse of process for reasons unrelated to it
15 being —
- 16 (i) a charge of a serious offence the details
17 of which are the same or substantially
18 the same as those in charge A; or
- 19 (ii) a charge of some other serious offence
20 of which, at trial A, the acquitted
21 accused might have been convicted
22 instead of offence A; or
- 23 (iii) a charge of an AOJ offence allegedly
24 committed in or in connection with
25 trial A;
- 26 and
- 27 (b) the acquitted accused is not entitled —
- 28 (i) on the grounds of the acquittal in
29 trial A, to plead a defence under
30 *The Criminal Code* section 17; or
- 31 (ii) to prove or refer to the acquittal in
32 trial A;
- 33 and

- 1 (c) the defence under *The Criminal Code*
2 section 17 to the new charge that, but for this
3 section, would exist by virtue of the acquittal in
4 trial A does not apply to the new charge; and
- 5 (d) the prosecutor is not entitled to refer to the fact
6 that the Court of Appeal has given leave to
7 charge the acquitted accused with the new
8 charge or to any findings of the Court of
9 Appeal in doing so.

10 (5) If—

- 11 (a) a new charge against an acquitted accused is
12 the same or substantially the same as charge A;
13 and
- 14 (b) the acquitted accused was acquitted of charge A
15 in trial A; and
- 16 (c) trial A occurred in this State; and
- 17 (d) the acquitted accused is convicted on the new
18 charge,

19 the court dealing with the new charge must set aside
20 the judgment of acquittal, entered in trial A, of
21 charge A.

22 **5A. Section 52 inserted**

23 After section 51 insert:
24

25 **52. Double jeopardy amendments to be reviewed**

- 26 (1) The Minister must carry out a review of the operation
27 of the amendments made to this Act and *The Criminal*
28 *Code* by the *Criminal Appeals Amendment (Double*
29 *Jeopardy) Act 2011* as soon as practicable after the
30 expiration of 5 years after the date on which the
31 amendments come into operation.

s. 5A

- 1 (2) The Minister must prepare a report based on the review
2 and, as soon as practicable after the report is prepared
3 and in any event not more than 18 months after the
4 expiry of the period referred to in subsection (1), cause
5 it to be laid before each House of Parliament.
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Part 3 — Other Acts amended

5. Criminal Code amended

(1) This section amends *The Criminal Code*.

(2) In section 17 delete “It” and insert:

(1) It

(3) At the end of section 17 insert:

(2) Subsection (1) is subject to the *Criminal Appeals Act 2004* section 46M(4)(b) and (c).

6. Criminal Investigation Act 2006 amended

(1) This section amends the *Criminal Investigation Act 2006*.

(2) After section 7 insert:

8A. Authority required for some investigations

This Act is subject to the *Criminal Appeals Act 2004* section 46C.

7. Criminal Investigation (Extra-territorial Offences) Act 1987 amended

(1) This section amends the *Criminal Investigation (Extra-territorial Offences) Act 1987*.

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1 (2) At the end of Part 1 insert:
2

3 **3A. Authority required for some investigations**

4 This Act is subject to the *Criminal Appeals Act 2004*
5 section 46C.
6

7 **8. Criminal Investigation (Identifying People) Act 2002**
8 **amended**

9 (1) This section amends the *Criminal Investigation (Identifying*
10 *People) Act 2002*.

11 (2) After section 11 insert:
12

13 **12A. Authority required for some investigations**

14 This Act is subject to the *Criminal Appeals Act 2004*
15 section 46C.
16

17 **9. Misuse of Drugs Act 1981 amended**

18 (1) This section amends the *Misuse of Drugs Act 1981*.

19 (2) At the end of Part 1 insert:
20

21 **5A. Authority required for some investigations**

22 This Act is subject to the *Criminal Appeals Act 2004*
23 section 46C.
24

25 **10. Surveillance Devices Act 1998 amended**

26 (1) This section amends the *Surveillance Devices Act 1998*.

1 (2) After section 4 insert:
2

3 **4AA. Authority required for some investigations**

4 This Act is subject to the *Criminal Appeals Act 2004*
5 section 46C.
6

7 **11. *Telecommunications (Interception and Access) Western***
8 ***Australia Act 1996* amended**

9 (1) This section amends the *Telecommunications (Interception and*
10 *Access) Western Australia Act 1996*.

11 (2) At the end of Part 1 insert:
12

13 **4A. Authority required for some investigations**

14 The exercise of a power under the Commonwealth Act
15 by a law enforcement officer, as defined in the
16 *Criminal Appeals Act 2004* section 46C, is subject to
17 that section.
18

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