

## EXPLANATORY MEMORANDUM AND CLAUSE NOTES

### CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

The **double jeopardy principle** broadly states that no person should be twice placed in jeopardy of conviction or punishment for the same offence. Once convicted or acquitted, the accused person should be immune from further prosecution for that offence, or for a difference offence covering the same factual evidence. The double jeopardy principle serves to protect an accused from the "oppressive might" of the state (recognising that the power and resources of the state are greater than those of the individual), and acts as a procedural safeguard to protect the integrity of judicial verdicts.

The Council of Australian Governments (COAG) agreed to review the laws relating to double jeopardy following a number of high profile cases in Australia, notably that of *R v. Carroll* [2002] HCA 55.

Carroll was charged in 1985 with the murder of one Deidre Kennedy. Carroll was convicted by a jury, but the conviction was later set aside by the Queensland Court of Appeal. Carroll was subsequently charged and, in 2000, convicted of perjury, based on the Crown's case that there was new and reliable evidence to establish Carroll had murdered Deidre Kennedy, and that therefore Carroll had lied during the course of his trial for murder.

Carroll appealed against the decision. The Queensland Court of Appeal found that the perjury trial was an abuse of process, as it had effectively tried Carroll again for the murder of Deidre Kennedy, therefore breaching the double jeopardy principle. In 2002, The Crown appealed that decision to the High Court of Australia, but the appeal was dismissed.

The Carroll case focused national attention on the perceived unjust consequences of the double jeopardy rule. It was considered grossly unfair that the rule prohibits a further trial in circumstances where advances in forensic science (for example, DNA) or fresh evidence has emerged that was unavailable at the time of the initial trial directly points to the guilt of an acquitted person.

In March 2007, COAG agreed to implement the following uniform exceptions to the double jeopardy rule in relation to serious offences such as murder, manslaughter and the most aggravated forms of sexual assault. COAG also agreed to the implementation of a number of safeguards. The relevant exceptions and safeguards are summarized as follows:

#### **Exceptions**

- **Fresh and compelling evidence.** This exception would allow for a retrial of the original offence, or prosecution for a similar offence, where there appears to be "fresh and compelling" evidence.
- **Tainted acquittals.** This exception would allow for the retrial of the original offence, or prosecution for a similar offence, where the original acquittal could be considered tainted. Under the COAG model, this exception would apply to acquittals for serious offences, that is, offences under the Model Criminal Code carrying a maximum penalty of life, or 14 or more years' imprisonment.
- **Administration of Justice.** This exception would apply in cases where there is fresh evidence of the commission of by an acquitted person an 'administration of justice' offence in connection with the proceedings in which the person was acquitted. Under the

COAG model, this exception would apply to acquittals for all indictable offences. Administration of justice offences include:

- Bribery or interference with a juror, witness or judicial officer;
- Perversion of, or conspiracy to pervert, the course of justice; and
- Perjury.

### Safeguards

The safeguards adopted include:

- An '**interests of justice test**', to be determined by the relevant court. In determining whether it is in the interests of justice for an order for a retrial to be made, the court must have regard in particular to:
  - the length of time since the acquitted person allegedly committed the offence; and
  - whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for a retrial of the acquitted person.
- A requirement for the **Director of Public Prosecutions to authorise** a police reinvestigation of an acquitted person in writing. There is an "urgency" exception to the requirement for DPP authorisation of police reinvestigation, to allow a police officer to take investigative action without DPP consent if:
  - the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced; and
  - it is not reasonably practical to obtain DPP consent before taking the action.
- **Not more than one application** for a retrial may be made in relation to an acquittal.
- **Restrictions on publication.** The court may prohibit publication of any matter, if it appears to the court that such publication would give rise to a substantial risk of prejudice to the administration of justice in a retrial.
- **Time limits** on applications for retrials.
- **Prohibition on referring to court's findings** in ordering a retrial. At the retrial of the accused person, the prosecution is not entitled to refer to the fact that the court has found that (as the case may be):
  - there appears to be fresh and compelling evidence against an acquitted person; or
  - more likely than not, the accused person would have been convicted but for the commission of the administration of justice offence.

## CLAUSE NOTES

### Part 1 – Preliminary matters

#### Clause 1. Short title

The short title of the Act will be the *Criminal Appeals Amendment (Double Jeopardy) Act 2011*.

#### Clause 2. Commencement

Proposed sections 1 and 2 of the Act will come into operation on assent. The rest of the proposed Act will commence on a day, or days, to be fixed by proclamation.

### Part 2 – *Criminal Appeals Act 2004* amended

#### Clause 3. Act amended

Clause 3 provides that this Part amends the *Criminal Appeals Act 2004*.

#### Clause 4. Part 5A inserted

Clause 4 states that proposed section 4 will insert Part 5A into the *Criminal Appeals Act 2004* (the Act) after Part 4. The proposed new **Part 5A – Prosecuting acquitted accused**, provides as follows:

#### Clause 46A Terms used

Proposed section 46A(1) sets out the definitions used in new Part 5A of the Act.

The term “**acquitted accused**” is further defined in proposed section 46B(1) of the Act.

An “**AOJ offence**” is an administration of justice offence that is listed in proposed subsection 46A(2) or a substantially similar offence committed in outside the State.

An “**authorised officer**” in proposed Part 5A is defined to mean the Attorney General, the Solicitor-General, the State Solicitor or the State or Commonwealth DPP. Under Part 5A only an “authorised officer” can apply to the Court of Appeal for leave to charge an acquitted accused with a new charge.

The term “**charge A**” has the meaning given in proposed section 46B(1).

A “**leave application**” is an application for leave made by an authorised person under proposed section 46E.

The term “**new charge**” has the meaning given in proposed section 46E(1) in relation to an acquitted accused.

The term “**offence A**” has the meaning given in proposed section 46B(1).

A “**serious offence**” means an indictable offence the penalty for which is life imprisonment or imprisonment for 14 years or more. The definition ensures that the exception to the double jeopardy principle is only usable in the most extreme cases.

The term “**trial A**” has the meaning given in proposed section 46B(1).

Proposed section 46A(2) lists the administration of justice offences covered by the amending Act together with the relevant section numbers from the *Criminal Code*.

**Clause 46B Term used: acquitted accused**

Proposed subsection 46B(1) provides that for the purposes of proposed part 5A a person is an **acquitted accused** if they have been tried on a charge (defined as **charge A**) of a serious offences (**offence A**) and at the trial, or on appeal, they were acquitted, other than for unsoundness of mind, of charge A and any other offence of which they might have been convicted instead of charge A.

Proposed subsection 46B(2) provides that it does not matter if the acquittal occurred before or after the commencement of proposed Part 5A.

**Clause 46C Criminal investigations of acquitted accused that needs authorised officer’s authority**

Proposed subsection 46C(1) sets out the definitions of some terms used in the section.

The term “**investigate**” in relation to an offence includes the exercise of any power under the common law, a written law or a Commonwealth law for the purpose of obtaining evidence of the commission of an offence.

A “**law enforcement officer**” is defined to mean a police officer, or a person other than a police officer, appointed under a written law to an office on which the common law, a written law or a Commonwealth law has conferred powers to investigate offences.

A “**relevant offence**” means a serious offence, or an OAJ offence, a charge of which may be subject to a defence under the *Criminal Code*, section 17, on the ground that the accused has been acquitted, other than on account of unsoundness of mind, or a requirement at law to permanently stay it because it would otherwise be an abuse of process.

Proposed subsection 46C(2) provides that a law enforcement officer must not investigate, or authorise another person to investigate, whether an acquitted accused may have committed a relevant offence unless an authorised officer has authorised the investigation or the law enforcement officer believes, on reasonable grounds, an investigation needs to be done urgently to prevent it being substantially and irrevocably prejudiced and it is not reasonably practicable to obtain an authorised officer’s authority before doing the investigation.

Proposed subsection 46C(3) provides that if a law enforcement officer undertakes an investigation under proposed subsection 46C(2) without the approval of an authorised officer then the law enforcement officer, as soon as is practicable, must inform an authorised officer of the grounds for taking action and the action taken and not continue the investigation unless an authorised officer, in writing, authorises the investigation.

Proposed subsection 46C(4) provides that an authorised officer must not authorise an investigation unless the authorised officer is satisfied that a charge of a relevant offence would not be subject to a defence under section 17 of the *Criminal Code*, on the ground that the accused had been acquitted as described in that section, other than on account of unsoundness of mind, or that it would be an abuse of process or the officer is satisfied the investigation is likely to obtain evidence to justify making an application for leave to charge the acquitted accused *and* it is in the public interest to do so.

**Clause 46D Charges against acquitted accused that need leave**

Proposed subsection 46D provides that a person must have the leave of the Court of Appeal to charge an acquitted accused with a serious offence the details of which are the same or substantially the same as the original offence, or one that the acquitted accused might have been convicted of at the time, or an AOJ offence allegedly committed in connection with the first trial.

**Clause 46E Applying for leave for new charge**

Proposed subsection 46E(1) provides that an authorised officer may apply to the Court of Appeal to charge an acquitted accused with a serious offence the details of which are the same or substantially the same as the original offence, or one that the acquitted accused might have been convicted of at the time, or an AOJ offence allegedly committed in connection with the first trial.

Proposed subsection 46E(2) provides that not more than one application can be made in relation to a relevant matter. The proposed subsection provides an application cannot be made under proposed subsection 46E(1) if the acquitted accused has previously been acquitted of a charge for which leave had been given under this Part *and* that leave had been given because the Court of Appeal was satisfied that fresh and compelling evidence existed against the acquitted accused in relation to the charge.

Proposed subsection 46E(3) provides an application under subsection (1) may relate to 2 or more charges.

Proposed subsection 46E(4) provides an application under subsection (1) must be made in accordance with this part and the rules of court.

Proposed subsection 46E(5) allows an application to be made under subsection (1) without notice of it being given to the acquitted accused.

**Clause 46F Procedure on leave applications**

Proposed subsection 46F(1) provides that the Court of Appeal must issue a summons or arrest warrant requiring the acquitted accused to appear or be brought before the Court as soon as practicable after a leave application is made, unless the Court is satisfied that the application is an abuse of process.

Proposed subsection 46F(2) provides that if the acquitted accused does not obey a summons issued under subsection (1) the Court must issue an arrest warrant to have the acquitted accused brought before the Court.

Proposed subsection 46F(3) provides that on being summonsed or arrested the acquitted accused must be given a copy of the leave application.

Proposed subsection 46F(4) provides that when the acquitted accused appears or is brought before the Court of Appeal the court may make any necessary orders in relation to hearing the leave application and, subject to the *Bail Act 1982*, order that the accused be kept in custody until the hearing.

#### **Clause 46G Hearing leave applications**

Under proposed subsection 46G(1) the acquitted accused is entitled to be heard at the hearing of a leave application.

Proposed subsection 46G(2) provides the Court of Appeal may exercise any powers in sections 40 and 43 of the Act as if the application for leave were an appeal for the purpose of dealing with a leave application. Section 40 lists the general powers of the court to hear an appeal and section 43 provides that a person in custody is entitled to be present at the appeal.

Proposed subsection 46G(3) provides that the Court of Appeal may deal with 2 or more leave applications at the one hearing if the new charges will or may be tried together.

Proposed subsection 46G(4) provides that if the Court of Appeal is satisfied that the acquitted accused has received adequate notice of the hearing, the court may hear a leave application in the absence of the acquitted accused.

#### **Clause 46H Deciding leave applications**

Proposed subsection 46H(1) provides that the Court of Appeal may give or refuse to give the applicant leave to charge the acquitted accused with the new charge.

Proposed subsection 46H(2) provides that if the new charge to which the leave application relates is in relation to a serious offence the details of which are the same or substantially the same as the original offence, or one that the acquitted accused might have been convicted of at the time, (but not an AOJ offence allegedly committed in connection with the first trial) the Court of Appeal must not give leave unless it is satisfied on the balance of probabilities that there is fresh and compelling evidence (as defined in proposed section 46I) against the acquitted accused *or* the acquittal was a tainted acquittal *and* the Court of Appeal is satisfied on the balance of probabilities that charging the acquitted accused with the new charge is in the interests of justice having regard to proposed section 46K.

Proposed subsection 46H(3) provides that if the new charge to which the leave application relates is a charge of an AOJ offence the Court of Appeal must not give leave unless it is satisfied on the balance of probabilities that charging the acquitted accused is in the interests of justice having regard to proposed section 46K.

Proposed subsection 46H(4) provides that if the acquitted accused is an acquitted accused in a place outside this State leave cannot be given to charge an acquitted accused if leave would not be given in that other jurisdiction. This applies in relation to charges for substantially similar facts, if the person was charged with an AOJ offence in the other jurisdiction or the application for leave is inconsistent with the Commonwealth *Constitution* or the law of the Commonwealth.

Proposed subsection 46H(5) provides that if the Court of Appeal refuses leave to charge the acquitted accused it must discharge the acquitted accused.

Proposed subsection 46H(6) provides that if the Court of Appeal gives leave to charge the acquitted accused with the new charge, then subject to the *Bail Act 1882*, it may order the acquitted accused to be kept in custody until his or her first appearance in court on the new charge or the time for commencing the prosecution expires, whichever comes first.

**Clause 46I                      Meaning of fresh and compelling evidence**

Proposed subsection 46I(1) provides that for the purposes of proposed subsection 46H, evidence is fresh in relation to the new charge if it was not and could not have been made available to the prosecutor in the first trial despite the exercise of reasonable diligence or it was available to the prosecutor but was not and could not have been adduced at that trial.

Proposed subsection 46I(2) provides that for the purposes of proposed subsection 46H evidence is compelling in relation to the new charge if it is highly probative of the new charge.

Proposed subsection 46I(3) provides that for the purposes of this section only it is irrelevant whether the evidence being considered by the Court of Appeal would have been admissible in the original trial against the acquitted accused.

**Clause 46J                      Meaning of tainted acquittal**

Proposed section 46J provides that for the purposes of section 46H an acquittal is tainted if the acquitted accused has been convicted anywhere of an AOJ offence committed in connection with the first trial *and* but for that AOJ offence, it is more likely than not that the acquitted accused would have been found guilty of the offence or some other similar offence .

**Clause 46K                      Interests of justice, matters to be considered**

Proposed subsection 46K(1) makes it clear that this section applies to the term "interests of justice" as used in proposed section 46H.

Proposed subsection 46K(2) makes it clear that a new charge is not in the interests of justice if the Court of Appeal is satisfied a fair trial is unlikely having regard to the time since the offence occurred and all other existing circumstances.

Proposed subsection 46K(3) provides that the Court of Appeal is to have regard, in particular, to whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in applying for leave to make the new charge and the objective seriousness of the facts of the new charge.

**Clause 46L                      Restrictions on publicity**

Proposed subsection 46L(1) makes it clear that proposed section 46L does not override any other written law of the publication of information.

Proposed subsection 46L(2) provides that a person must not publish any information that conveys or has the effect of conveying that a person whom the information identifies directly or indirectly is subject to an application, investigation, leave application, leave given or new charge laid pursuant to leave.

Proposed subsection 46L(3) provides that the prohibition on publication does not apply to the extent that an order authorises publication or the second trial has been completed or there is nothing further to be done in the matter.

Proposed subsection 46L(4) provides that the Court of Appeal may make an order that authorises the publication of information about an acquitted accused.

Proposed subsection 46L(5) provides that the Court of Appeal may make an order allowing publication in any terms and include any conditions that it thinks fit.

Proposed subsection 46L(6) provides that the Court of Appeal must not make an order under proposed subsection (4) unless it is satisfied that it is in the interests of justice to do so.

Proposed subsection 46L(7) provides that the Court of Appeal must give the acquitted accused a reasonable opportunity to be heard before an order can be made to allow publication.

Proposed subsection 46L(8) provides that the Court of Appeal can amend or cancel an order relation to publication.

Proposed subsection 46L(9) provides that an order relating to publication of information about an acquitted accused ceases to have effect where there is nothing further that can be done to try the acquitted accused or the trial of the acquitted accused on the new charge has concluded.

Proposed subsection 46L(10) provides that contravention of an order relating to publication is a contempt of the Supreme Court.

#### **Clause 46M Leave for new charge, effect of**

Proposed subsection 46M(1) provides that if the Court of Appeal grants leave to charge an acquitted accused, only the applicant for leave or another authorised person must commence the prosecution of the new charge.

Proposed subsection 46M(2) provides that a prosecution of a new charge cannot be commenced after 2 months following the date on which leave is given or any longer period that the Court of Appeal may allow on an application made before the 2 months elapse.

Proposed subsection 46M(3) provides that the Court of Appeal must not allow a longer period than 2 months unless it is satisfied the person given leave, or another authorised person, has taken and is taking reasonable steps to commence the prosecution as soon as possible and there is good reason why a longer period should be allowed.

Proposed subsection 46M(4) provides that a court dealing with the new charge cannot stay it as an abuse of process unless the abuse of process is related to reasons unrelated to the charge being about the matter considered in the first trial. The prosecutor is not entitled to refer to the fact that the Court of Appeal has given leave for the new trial.

Proposed subsection 46M (5) provides that the court dealing with the new charge against an acquitted accused must set aside the original judgment of acquittal.



### Part 3 Other Acts amended

#### **Clause 5      *Criminal Code* amended**

Clause 5(1) provides that proposed section 5 amends the *Criminal Code*. Clause 5(2) effectively inserts the number "(1)" at the start of the section turning the existing section 17 into section 17(1). Clause (3) adds a new subsection 2 to section 17 to make it clear that section 17(1) is subject to the *Criminal Appeals Act 2004* section 46M(4)(b) and (c).

#### **Clause 6      *Criminal Investigation Act 2006* amended**

Clause 6(1) provides that proposed section 6 amends the *Criminal Investigation Act 2006* (WA). Clause 6(2) inserts a new section 8A after section 7 to make it clear that the *Criminal Investigation Act 2006* (WA) is subject to the *Criminal Appeals Act 2004* section 46C.

#### **Clause 7      *Criminal Investigation (Extra-territorial Offences) Act 1987* amended**

Clause 7(1) provides that proposed section 7 amends the *Criminal Investigation (Extra-territorial Offences) Act 1987* (WA). Clause 7(2) inserts a new section 3A at the end of Part 1 making it clear that the Act is subject to the *Criminal Appeals Act 2004* section 46C.

#### **Clause 8      *Criminal Investigation (Identifying People) Act 2002* amended**

Clause 8(1) provides that proposed section 8 amends the *Criminal Investigation (Identifying People) Act 2002* (WA). Clause 8(2) inserts a new section 12A after section 11 making it clear that the Act is subject to the *Criminal Appeals Act 2004* section 46C.

#### **Clause 9      *Misuse of Drugs Act 1981* amended**

Clause 9(1) provides that proposed section 9 amends the *Misuse of Drugs Act 1981* (WA). Clause 9(2) inserts a new section 5A at the end of Part 1 making it clear that the Act is subject to the *Criminal Appeals Act 2004* section 46C.

#### **Clause 10     *Surveillance Devices Act 1998* amended**

Clause 10(1) provides that proposed section 10 amends the *Surveillance Devices Act 1998* (WA). Clause 10(2) inserts a new section 4AA after section 4 making it clear that the Act is subject to the *Criminal Appeals Act 2004* section 46C.

#### **Clause 11     *Telecommunications (Interception and Access) Western Australia Act 1996* amended**

Clause 11(1) provides that proposed section 11 amends the *Telecommunications (Interception and Access) Western Australia Act 1996* (WA). Clause 11(2) inserts a new section 4A at the end of Part 1 making it clear that the exercise of a power under the Commonwealth Act by a law enforcement officer as defined in the *Criminal Appeals Act 2004* section 46C, is subject to that section.

