



New South Wales

CONSULTATION DRAFT BILL

Criminal Appeal Amendment (Double Jeopardy) Bill 2003

3 September 2003

Consultation Draft Bill



New South Wales

Criminal Appeal Amendment (Double Jeopardy) Bill 2003

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

- (a) to enable a person acquitted of an offence to be retried (in the case of a very serious offence) if there is fresh and compelling evidence of guilt (in line with proposed legislation before the UK Parliament (*the UK Bill*)), and
- (b) to enable a person acquitted of an offence to be retried (in the case of a very serious offence) if the acquittal was tainted by the commission of an administration of justice offence (in line with legislation enacted in the UK in 1996), and
- (c) to provide that the Crown may appeal against the acquittal of a person on a question of law where the acquittal was directed by the trial Judge or made at trial by a Judge without a jury.

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Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Criminal Appeal Act 1912* set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [1] inserts a definition of *acquittal* into the Principal Act. The definition makes it clear that an acquittal includes an acquittal in appeal proceedings in respect of an offence and an acquittal at the direction of a court.

Schedule 1 [2] omits section 5A (2) and (3) as a consequence of the transfer of the provisions concerned to section 9J in the proposed new Part relating to appeals against acquittals. The provisions relate to appeals by the Director of Public Prosecutions on points of law in connection with acquittals, being appeals which do not affect the existing acquittal.

Schedule 1 [3] inserts proposed Part 3A into the Principal Act.

Division 1 of the new Part (proposed sections 9A–9H) permits the retrial of an acquitted person for a very serious offence.

Proposed section 9A describes the cases that can be retried under the proposed Division despite the existing rules of law relating to double jeopardy (including rules based on abuse of process). The principal case is a person who is acquitted of a very serious offence in NSW and who is thereby precluded (according to the double jeopardy rule of law known as *autrefois acquit*) from being retried for that same offence. Other cases include the following:

- (a) where the acquittal of a person in a place outside NSW of an offence against the law of that place in respect of a particular act operates as a bar to the trial of the person in NSW for a very serious offence in respect of that act,
- (b) where the acquittal of a person of an offence operates as a bar to the trial of the person for a very serious offence for which an alternative verdict was available when the person was originally acquitted (for example, a person charged with murder can be convicted of manslaughter, so that an acquittal on the charge of murder prevents the person being subsequently charged with manslaughter in respect of the death concerned),

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- (c) where the acquittal of a person for an offence operates as a bar to the trial of the person for a very serious offence that is a more aggravated form of the offence even though an alternative verdict for that offence was not available as an alternative verdict when the person was originally acquitted (for example, a person charged with the supply of a small quantity of a prohibited drug cannot be convicted of the supply of a large commercial quantity of the prohibited drug, but the acquittal on the charge of supplying a small quantity of the drug may prevent the person being subsequently charged with the supply of a large commercial quantity of the drug in respect of the supply concerned).

The proposed Division extends to persons acquitted before the commencement of the proposed Act.

Proposed section 9B defines a *very serious offence* for the purposes of the proposed Division as murder, manslaughter and any other offence punishable by life imprisonment (namely, aggravated sexual assault in company and drug trafficking and related offences involving a large commercial quantity).

Proposed section 9C authorises the Court of Criminal Appeal, on the application of the Director of Public Prosecutions, to order an acquitted person to be retried for a very serious offence. The Court may do so only if satisfied that:

- (a) there appears to be fresh and compelling evidence against the acquitted person in relation to the offence, or
- (b) the acquittal appears to be a tainted acquittal,

and in all the circumstances it is in the interests of justice for the order to be made. The Director of Public Prosecutions cannot make more than one application for a retrial in relation to an acquittal.

Proposed section 9D provides that, for the purposes of an application for a retrial:

- (a) evidence is *fresh* if it was not adduced in the proceedings in which the person was acquitted and it could not have been adduced in those proceedings with the exercise of reasonable diligence, and
- (b) evidence is *compelling* if:
- (i) it is reliable, and
 - (ii) it is substantial, and
 - (iii) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.

The definitions are similar to the definitions of new and compelling evidence in the UK Bill currently before the UK Parliament.

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Proposed section 9E provides that, for the purposes of an application for a retrial, an acquittal is *tainted* if:

- (a) the accused person or another person has been convicted of an administration of justice offence in connection with the proceedings in which the accused person was acquitted (for example, bribery of, or interference with, a juror, witness or judicial officer, the perversion of the course of justice or perjury), and
- (b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

Paragraph (b) of the definition is similar to the test recommended by the New Zealand Law Commission in its report “Acquittal Following Perversion of the Course of Justice” (Report No 70 of March 2001) and also by the UK Law Commission in its report “Double Jeopardy and Prosecution Appeals” (Report No 267 of March 2001).

Proposed section 9F provides that, for the purposes of an application for a retrial, the question of whether it is in the interests of justice to order a retrial is to be determined having regard in particular to the following:

- (a) whether existing circumstances make a fair trial unlikely,
- (b) the length of time since the acquitted person allegedly committed the offence,
- (c) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with a retrial of the acquitted person.

Proposed section 9G provides that an application for a retrial cannot be made unless the acquitted person has been charged with the relevant offence or a warrant has been issued for the person’s arrest. Proposed section 9K requires the Director of Public Prosecutions’ approval for the arrest of the accused or for the issue of a warrant for his or her arrest. An application for a retrial is to be considered by the Court at a hearing at which the acquitted person is given an opportunity to be present.

Proposed section 9H requires the leave of the Court of Criminal Appeal for the presentation of the indictment in a retrial ordered under the proposed Division if more than 2 months have expired since the order for a retrial was made. If such a delay has occurred, the accused person can request that Court to set aside the order for a retrial and restore the original acquittal.

Division 2 of the new Part (proposed sections 9I and 9J) deals with appeals by the Crown to the Court of Criminal Appeal against acquittals on a question of law.

Proposed section 9I confers a right of appeal on a question of law in the case of:

- (a) an acquittal by a jury at the direction of the trial Judge, or

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- (b) an acquittal by a Judge of the Supreme Court or District Court in criminal proceedings for an indictable offence that are tried by the Judge without a jury, or
- (c) an acquittal by the Supreme Court or the Land and Environment Court in its summary jurisdiction in any proceedings in which the Crown was a party.

If such an appeal is upheld, the Court may only quash the acquittal appealed against and order a new trial.

Proposed section 9J re-enacts section 5A (2) and (3) of the Principal Act as a consequence of the transfer of the provisions concerned to the proposed Division. The provisions relate to appeals by the Director of Public Prosecutions on points of law in connection with acquittals, being appeals which do not affect the existing acquittal.

Division 3 of the new Part (proposed sections 9K–9N) contains miscellaneous provisions.

Proposed section 9K places restrictions on any police investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence. The consent of the Director of Public Prosecutions will be required for any police investigation that involves:

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

Proposed section 9L provides that the acquittal of a person of an offence is not to be taken into account as a reason for granting bail if the person is in custody in connection with an application or appeal in respect of the offence under the proposed Part.

Proposed section 9M enables the Court of Criminal Appeal to prohibit the publication of any matter that would give rise to a substantial risk of prejudice to the administration of justice in a retrial that has or may be authorised under the proposed Part.

Proposed section 9N ensures that other appeal or review rights are not affected by the proposed Part (such as the right of appeal in respect of a person's acquittal on the ground of mental illness where mental illness was not set up as a defence by the person, as provided by section 5 (2) or 5AA (2) of the Principal Act).

Schedule 1 [4] enables the Court of Criminal Appeal to delegate the conduct of any part of a hearing into an application for a retrial of an acquitted person to a single Judge of that Court.

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No , 2003

A Bill for

An Act to amend the *Criminal Appeal Act 1912* to provide for the retrial of an acquitted person for murder, manslaughter or other very serious offences and to provide an appeal from a directed acquittal on a question of law.

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The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Criminal Appeal Amendment (Double Jeopardy) Act 2003*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Criminal Appeal Act 1912 No 16

The *Criminal Appeal Act 1912* is amended as set out in Schedule 1.

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Schedule 1 Amendments

(Section 3)

[1] Section 2 Definitions

Insert in alphabetical order in section 2 (1):

Acquittal includes:

- (a) an acquittal in appeal proceedings in respect of an offence, and
- (b) an acquittal at the direction of a court.

[2] Section 5A Point of law stated by judge

Omit section 5A (2) and (3).

Note. The provisions, which relate to appeals by the Director of Public Prosecutions on points of law in connection with acquittals, but which do not affect the existing acquittal, are re-enacted in proposed section 9J below.

[3] Part 3A

Insert after Part 3:

Part 3A Acquittals

Division 1 Retrial after acquittal for very serious offence

9A Application of Division—cases that may be retried

(1) This Division applies where:

- (a) a person has been acquitted of an offence, and
- (b) according to the rules of law relating to double jeopardy (including rules based on abuse of process), the person is thereby precluded or may thereby be precluded from being retried for the same offence, or from being tried for some other offence, in proceedings in this State,

but only if that same or other offence is a very serious offence.

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- (2) To avoid doubt:
 - (a) this section extends to a person acquitted in proceedings outside this State of an offence under the law of the place where the proceedings were held, and
 - (b) this section extends to a person acquitted before the commencement of this Division.
- (3) For the purposes of this Division, the retrial of an acquitted person for an offence includes a trial if the offence is not the same as the offence of which the person was acquitted.

9B Very serious offences—meaning

In this Division, *very serious offence* means:

- (a) murder or any other offence punishable by imprisonment for life, or
- (b) manslaughter.

Note. On the enactment of this Act, the following offences are offences punishable by imprisonment for life:

- (a) murder (section 19A of the *Crimes Act 1900*),
- (b) an offence under section 61JA (1) of the *Crimes Act 1900* (Aggravated sexual assault in company),
- (c) an offence under section 23 (2), 24 (2), 25 (2), 25 (2A), 26, 27 or 28 of the *Drug Misuse and Trafficking Act 1985*, being an offence that relates to a large commercial quantity of certain prohibited plants or drugs.

9C Court of Criminal Appeal may order retrial

- (1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a very serious offence. In that case, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being tried for the offence (as the case requires).
- (2) The Court may order an acquitted person to be retried for a very serious offence only if satisfied that:
 - (a) there appears to be fresh and compelling evidence against the acquitted person in relation to the offence, or
 - (b) the acquittal appears to be a tainted acquittal,and in all the circumstances it is in the interests of justice for the order to be made.

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- (3) Not more than one application for a retrial may be made in relation to an acquittal. An application cannot be made in relation to an acquittal resulting from a retrial under this Part.
- (4) If the Court of Criminal Appeal determines in proceedings under this section that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.

9D Fresh and compelling evidence—meaning

- (1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.
- (2) Evidence is *fresh* if:
 - (a) it was not adduced in the proceedings in which the person was acquitted, and
 - (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.
- (3) Evidence is *compelling* if:
 - (a) it is reliable, and
 - (b) it is substantial, and
 - (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.
- (4) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.
- (5) In this section, a reference to the proceedings in which a person was acquitted includes, if they were appeal proceedings, a reference to the earlier proceedings to which the appeal related.

9E Tainted acquittals—meaning

- (1) This section applies for the purpose of determining under this Division whether the acquittal of an accused person is a tainted acquittal.

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- (2) An acquittal is *tainted* if:
 - (a) the accused person or another person has been convicted (in this State or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted, and
 - (b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.
- (3) An acquittal does not cease to be tainted merely because the conviction for the administration of justice offence is or can be the subject of appeal, so long as it appears that the conviction will stand.
- (4) If the conviction for the administration of justice offence is, on appeal, quashed after the Court of Criminal Appeal has ordered the acquitted person to be retried under this Division because of the conviction, the person may apply to the Court to set aside the order and:
 - (a) to restore the acquittal that was quashed, or
 - (b) to restore the acquittal as a bar to the person being tried for the offence,as the case requires.
- (5) In this section, a reference to an administration of justice offence includes a reference to an offence relating to:
 - (a) the bribery of, or interference with, a juror, witness or judicial officer, or
 - (b) the perversion of (or a conspiracy to pervert) the course of justice, or
 - (c) perjury.
- (6) In this section, a reference to the proceedings in which a person was acquitted includes, if they were appeal proceedings, a reference to the earlier proceedings to which the appeal related.

9F Interests of justice—matters for consideration

- (1) This section applies for the purpose of determining under this Division whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.

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- (2) That question is to be determined having regard in particular to the following:
 - (a) whether existing circumstances make a fair trial unlikely,
 - (b) the length of time since the acquitted person allegedly committed the offence,
 - (c) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with a retrial of the acquitted person.

9G Application for retrial—procedure

- (1) An application for the retrial of an accused person cannot be made under this Division unless the person has been charged with the offence for which a retrial is sought or a warrant has been issued for the person's arrest in connection with such an offence.

Note. Section 9K requires the Director of Public Prosecutions' approval for the arrest of the accused or for the issue of a warrant for his or her arrest.

- (2) The application is to be made not later than 2 business days after the person is so charged with that offence or the warrant is so issued for the person's arrest. The Court of Criminal Appeal may extend that period because of the person's absence from this State or for other good cause.
- (3) The Court of Criminal Appeal must consider the application at a hearing.
- (4) The person to whom the application relates is entitled to be present at the hearing (whether or not the person is in custody). However, the application can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.
- (5) The powers of the Court of Criminal Appeal under section 12 may be exercised in connection with the hearing of the application.
- (6) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned could be tried on the same indictment.

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9H Retrial

- (1) An indictment for the retrial of a person that has been ordered under this Division cannot, without the leave of the Court of Criminal Appeal, be presented after the end of the period of 2 months after the order was made.
- (2) The Court must not give leave unless it is satisfied that:
 - (a) the prosecutor has acted with reasonable expedition, and
 - (b) there is good and sufficient cause for the retrial despite the lapse of time since the order was made.
- (3) If, after the end of the period of 2 months after an order for the retrial of an accused person was made under this Division, an indictment for the retrial of the person has not been presented or has been withdrawn or quashed, the person may apply to the Court of Criminal Appeal to set aside the order for the retrial and:
 - (a) to restore the acquittal that was quashed, or
 - (b) to restore the acquittal as a bar to the person being tried for the offence,as the case requires.
- (4) If the order is set aside, a further application cannot be made under this Division for the retrial of the accused person in respect of the offence concerned.
- (5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person or, as the case requires, more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

Division 2 Appeals on questions of law

9I Directed jury acquittals or acquittals in trials without juries

- (1) This section applies to:
 - (a) an acquittal by a jury at the direction of the trial Judge,or

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- (b) an acquittal by a Judge of the Supreme Court or District Court in criminal proceedings for an indictable offence that are tried by the Judge without a jury, or
 - (c) an acquittal by the Supreme Court or the Land and Environment Court in its summary jurisdiction in any proceedings in which the Crown was a party.
- (2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any such acquittal on any ground that involves a question of law alone.
 - (3) The Court of Criminal Appeal may affirm or quash the acquittal appealed against.
 - (4) If the acquittal is quashed, the Court of Criminal Appeal may order a new trial in such manner as the Court thinks fit. For that purpose, the Court may (subject to the *Bail Act 1978*) order the detention or return to custody of the accused person in connection with the new trial.
 - (5) If the acquittal is quashed, the Court of Criminal Appeal cannot proceed to convict or sentence the accused person for the offence charged nor direct the court conducting the new trial to do so.
 - (6) This section does not apply to a person who was acquitted before the commencement of this section.

Note. See section 5C for appeals against the quashing of an indictment.

9J Appeals not affecting existing acquittal

- (1) This section applies to:
 - (a) an acquittal in any proceedings tried on indictment (whether in respect of the whole or part of the indictment), or
 - (b) an acquittal by the Supreme Court or the Land and Environment Court in its summary jurisdiction in any proceedings in which the Crown was a party.
- (2) The Attorney General or the Director of Public Prosecutions may submit for determination by the Court of Criminal Appeal any question of law arising at or in connection with the trial (together with a statement of the circumstances out of which

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the question arose). The Court is to hear and determine any such question.

- (3) The determination by the Court of Criminal Appeal of the question submitted does not in any way affect or invalidate the verdict of acquittal or any other decision given at the trial.
- (4) Any person charged at the trial or affected by the decision is entitled to be heard before the Court of Criminal Appeal on the determination of the question submitted. If the person does not propose to be represented, the Attorney General or Director of Public Prosecutions is to instruct (and pay the reasonable costs of) counsel to argue the question before the Court on behalf of the person.
- (5) The hearing and determination of any question under this section is to be held in camera.
- (6) The following is not to be published:
 - (a) any report of a submission made under subsection (2),
 - (b) any report of proceedings under this section that discloses the name or identity of the person charged at the trial or affected by the decision given at the trial.

Any such publication is punishable as a contempt of the Supreme Court.

Division 3 Miscellaneous

9K Authorisation of police investigations

- (1) This section applies to any police investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence under this Part.
- (2) For the purposes of this section, a police investigation is an investigation that involves:
 - (a) any arrest, questioning or search of the acquitted person (or the issue of a warrant for the arrest of the person), or

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- (b) any forensic procedure carried out on the person or any search or seizure of premises or property of or occupied by the person,
whether with or without his or her consent.
- (3) A police officer is not to carry out or authorise a police investigation to which this section applies unless the Director of Public Prosecutions:
 - (a) has advised that in his or her opinion the acquittal would not be a bar to the trial of the acquitted person in this State for the offence, or
 - (b) has given his or her written consent to the investigation (whether before or after the start of the investigation).
- (4) The Director of Public Prosecutions may not give his or her consent to the police investigation unless satisfied:
 - (a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation, and
 - (b) it is in the public interest for the investigation to proceed.
- (5) The consent of the Director of Public Prosecutions to the police investigation may be given subject to conditions relating to the conduct of the investigation (including the police officers authorised to conduct the investigation).
- (6) This section does not prevent a police officer from taking any action for the purposes of an investigation if:
 - (a) the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced, and
 - (b) it is not reasonably practicable to obtain the consent of the Director of Public Prosecutions before taking the action.

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9L Bail

The fact that a person was acquitted of an offence is not to be taken into account as a reason for granting bail if the person is in custody in connection with an application or appeal in respect of the offence under this Part.

Note. This provision might be transferred to the *Bail Act 1978*.

9M Restrictions on publication

- (1) If it appears to the Court of Criminal Appeal that the publication of any matter would give rise to a substantial risk of prejudice to the administration of justice in a retrial that has or may be authorised under this Part, the Court may, by order, prohibit the publication of the matter.
- (2) The Court may at any time vary or revoke an order under this section.
- (3) An order under this section ceases to have effect:
 - (a) on the expiration of the period (if any) specified in the order, or
 - (b) when there is no longer any step that could be taken which would lead to the acquitted person being retried under this Part, or
 - (c) if the acquitted person is retried under this Part, at the conclusion of the trial,whichever is the earliest.
- (4) Nothing in this section affects any prohibition of the publication of any matter under any other Act or law.
- (5) A contravention of an order under this section is punishable as contempt of the Supreme Court.

9N Other appeal or review rights not affected

- (1) Nothing in this Part affects a right of appeal in respect of a person's acquittal on the ground of mental illness where mental illness was not set up as a defence by the person, as provided by section 5 (2) or 5AA (2).
- (2) Nothing in this Part affects a right of appeal or review under any other Act in respect of a person's acquittal.

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[4] Section 22 Powers of a judge sitting alone

Insert after section 22 (1) (h):

- (h1) in the case of the hearing of an application under Division 1 of Part 3A, the power to conduct any part of the hearing as directed by the court,