

Criminal Procedure Amendment (Double Jeopardy and Other Matters) Bill 2011

Amended Print

EXPLANATORY MEMORANDUM

Clause Notes

Clause 1 sets out the purposes of the Bill. The purposes are—

- to amend the **Criminal Procedure Act 2009** in order to provide exceptions to the rule against double jeopardy that would permit a person to be tried or re-tried in certain circumstances despite a previous acquittal; and to amend the pre-hearing disclosure requirements before a summary hearing; and to amend the contents of a criminal record to include offences specified in infringement notices that have taken effect as convictions;
- to amend the **Public Prosecutions Act 1994** in relation to the functions of the Director of Public Prosecutions;
- to amend the **Appeal Costs Act 1998** to provide for indemnity certificates where the Director of Public Prosecutions applies to continue a prosecution after a previous acquittal;
- to make minor amendments of a statute law revision nature.

Clause 2 provides for the commencement of the Bill.

Subclause (1) provides that clause 1, clause 22 (1), (2), (3) and (4) and clause 2 come into operation on the day on which the Bill receives the Royal Assent.

Subclause (2) provides that clause 22(5) is taken to have come into operation on 12 October 2010, this being the date of Royal Assent of the **Confiscation Amendment Act 2010** to which the statute law revisions in section 22(5) apply.

Subclause (3) provides that clause 22(6) is taken to have come into operation on 27 April 2010. This is the date of Royal Assent of the **Equal Opportunity Act 2010** to which the minor correction in clause 22(6) applies.

Subclause (4) provides that clause 22(7) is taken to have come into operation on 21 June 2011. This is the date of Royal Assent of the **Equal Opportunity Amendment Act 2011** to which the minor grammatical error in section 22(7) applies.

Subclause (5) provides that the remaining provisions of the Bill come into operation on a day or days to be proclaimed with a forced commencement date of 1 July 2012.

Clause 3 amends section 3 of the **Criminal Procedure Act 2009**.

Subclause (1) inserts the phrase 'and infringement convictions' into the definition of *criminal record* so that a criminal record sets out previous convictions and infringement convictions.

Subclause (2) amends the definition of *direct indictment* to take account of new Chapter 7A (Limitations on rules relating to double jeopardy) inserted by clause 17 of the Bill. It amends the definition of *direct indictment* to include an indictment filed against an accused whose prosecution for the offence charged in the indictment or a related offence resulted in an acquittal within the meaning of Chapter 7A and the prosecution of the offence charged in the indictment may only proceed if the Court of Appeal gives authorisation under new section 327O.

Subclause (3) inserts a definition of *infringement conviction*. Under this definition *infringement conviction* means an infringement notice that has taken effect as a conviction of the offence specified in the notice.

Clause 4 amends section 37(1)(e) of the **Criminal Procedure Act 2009** to require that a preliminary brief must include either a copy of the criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions. The preliminary brief provides important information about the prosecution case.

- Clause 5 amends section 41(1)(c) of the **Criminal Procedure Act 2009** to require that a full brief must include either a copy of the criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions.
- Clause 6 inserts new section 53A in the **Criminal Procedure Act 2009**. This new section sets out the documents to be provided by the informant to the accused or the accused's legal practitioner at the first mention hearing of a matter. It applies if the informant is a member of the police force.
- Often the informant will already have served this information on the accused. Ensuring this information is available at the first mention hearing will assist in progressing the case quickly.
- New subsection (3) provides that the section does not apply to proceedings for certain offences under the **Road Safety Act 1986**, including the regulations or rules under that Act, the **Melbourne City Link Act 1995** or the **EastLink Project Act 2004**. These briefs are so short that the accused's lawyer normally does not need a copy of the brief at the first mention hearing.
- Clause 7 Subclause (1) inserts a note at the foot of section 77(1) of the **Criminal Procedure Act 2009** to explain that *previous conviction* is defined to refer only to a conviction or a finding of guilt made by a court and does not include an infringement conviction.
- Subclause (2) inserts a new section 77(2A) in the **Criminal Procedure Act 2009** which sets out what a criminal record must contain with respect to infringement convictions. Because an infringement conviction is different from a previous conviction, this clause sets out different matters which must be included in the criminal record if the prosecution alleges that the accused has a relevant infringement conviction.
- Clause 8 inserts references to infringement convictions in section 78 of the **Criminal Procedure Act 2009** as a consequence of the new definition of *infringement conviction* and the amendment of section 77. Section 78 deals with proof of previous convictions and infringement convictions by criminal record.

- Clause 9 inserts a reference to infringement convictions in section 83(3) of the **Criminal Procedure Act 2009** as a consequence of the new definition of *infringement conviction*. Section 83 deals with the admissibility of evidence in the absence of an accused where a full brief served.
- Clause 10 inserts a reference to infringement convictions in section 84(5) of the **Criminal Procedure Act 2009** as a consequence of the new definition of *infringement conviction*. Section 84 deals with the admissibility of evidence in the absence of an accused where a preliminary brief is served.
- Clause 11 inserts references to infringement convictions in section 86(1) and (2) of the **Criminal Procedure Act 2009** as a consequence of the new definition of *infringement conviction* and the amendment of section 77. Section 86 deals with proof of a criminal record in the absence of an accused.
- Clause 12 inserts a reference to previous convictions in section 107(3) of the **Criminal Procedure Act 2009** as a consequence of the new definition of *infringement conviction*. Section 107 requires the informant to serve a hand-up brief and either a copy of the criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions.
- Clause 13 inserts a note at the foot of section 165 of the **Criminal Procedure Act 2009** which allows amendments to indictments. The note refers to new section 327Q which limits amendments to direct indictments under Chapter 7A. New section 327Q provides that if the Court of Appeal makes an order under new section 327O(1) or (2) with respect to an offence charged in a direct indictment, the trial court must not amend the indictment to significantly change the offence charged.
- Clause 14 amends section 220(3) of the **Criminal Procedure Act 2009** which provides that the rules of common law with respect to *autrefois convict* and *autrefois acquit* continue in force in respect of pleas of previous conviction and previous acquittal respectively. The words inserted clarify that this rule is subject to Chapter 7A (Limitations on rules relating to double jeopardy).

Clause 15 inserts a note at the foot of section 244(1) of the **Criminal Procedure Act 2009** which specifies that *previous conviction* is defined to refer only to a conviction or finding of guilt by a court and does not include an infringement conviction.

The clause also inserts a new section 244(2A) in the **Criminal Procedure Act 2009** which sets out what a criminal record must contain with respect to infringement convictions. Because an infringement conviction is different from a previous conviction, this clause sets out different matters which must be included in the criminal record if the prosecution alleges that the accused has a relevant infringement conviction.

Clause 16 inserts references to infringement convictions into the heading and specified subsections of section 245 of the **Criminal Procedure Act 2009** as a consequence of the new definition of *infringement conviction* and the amendment of section 244. Section 245 deals with proof of a previous conviction or infringement conviction by criminal record.

Clause 17 inserts a new Chapter 7A (Limitations on rules relating to double jeopardy) in the **Criminal Procedure Act 2009**.

This Chapter reforms the law of double jeopardy based on a model agreed to by the Council of Australian Governments (COAG) in 2007. The reforms will allow persons who have been acquitted of certain defined serious offences to be tried again for that offence in three types of cases, namely: (1) where, after an acquittal there is "fresh and compelling" evidence against the person (for example, where new DNA evidence links a person to a serious crime); (2) where the original acquittal was "tainted" (for example by the commission of an administration of justice offence such as bribery of a witness or perjury); and (3) where there is fresh evidence that the person has committed an administration of justice offence in respect of an acquittal.

New section 327A provides that Chapter 7A extends to acquittals in other jurisdictions that permit an acquitted person to be tried again. However, except in the case of tainted acquittals, the Chapter does not apply to persons acquitted of the offence charged but convicted of a lesser offence arising out of the same set of circumstances.

New section 327B contains two definitions which apply to this Chapter.

Acquittal is defined as including verdicts of not guilty (other than verdicts of not guilty because of mental impairment); and an entry of not guilty made on the record on the direction of the trial judge; and judgments of acquittal entered by the Court of Appeal on appeal.

Administration of justice offence is defined as: perjury or subornation of perjury; or perverting, or attempting to pervert, or conspiracy to pervert the course of justice; or bribery of a public official, being a judge of the County Court or the Supreme Court; or a substantially similar offence against the law of jurisdictions outside Victoria.

New section 327C sets out the meaning of **fresh and compelling evidence**. Fresh and compelling evidence is required because the exception to double jeopardy should not extend to simply providing the prosecution with a second chance to prosecute. Further, the provisions do not operate to excuse or compensate for prosecutions based on inadequate investigations.

New section 327C (2) provides that evidence that would be admissible on a new trial can still be fresh or compelling even if it would not have been admissible in the earlier trial of the offence that resulted in the acquittal.

New section 327D sets out the meaning of **tainted acquittal**. If at the trial of an offence a person is acquitted of that offence, the acquittal will be tainted if the person or another person has been convicted of an administration of justice offence in connection with the trial that resulted in the acquittal and it is more likely than not, had the administration of justice offence not been committed, the person would have been convicted of the first offence at the trial.

New section 327E sets out the circumstances in which police may reinvestigate a person acquitted of an offence. This new section does not apply to an investigation generally. It concerns the exercise of specific investigative powers (eg search and seizure) in relation to the offence of which the person has previously been acquitted. These powers are set out in new section 327E(1).

New section 327E(1) also provides that the phrase **an offence of which a person has previously been acquitted** includes any other offence charged against the person in the same indictment as the charge for the offence of which the person was acquitted and any

other offence of which the person could have been convicted at the trial of the offence of which the person was acquitted.

New section 327E(2) provides that, subject to subsections (5), (6) and (7) which provide for an urgency exception, a member of the police force must obtain the written authorisation of the DPP before conducting or authorising the conduct of a reinvestigation of an offence of which a person has previously been acquitted.

Further, pursuant to new section 327E(3), only the following people may apply for an authorisation under subsection (2)—the Chief Commissioner of Police, a Deputy Commissioner or an Assistant Commissioner of Police.

New section 327E(4) sets out the factors of which the DPP must be satisfied before the DPP can authorise a reinvestigation. This is an important check on the exercise of investigation powers in relation to a person who has previously been acquitted of the offence being investigated. The role of the DPP in giving such advice to Victoria Police is expressly recognised in clause 20 of this Bill.

New section 327E(5) allows a member of the police force (the applicant) to apply to a senior member (defined as a member of the police force of or above the rank of superintendent) for written authorisation to conduct or authorise the conduct of a reinvestigation if the applicant reasonably believes that urgent action is required to prevent the reinvestigation being substantially and irrevocably prejudiced; and it is not reasonably practicable in the circumstances to obtain the DPP's consent before taking the action.

However, in such cases, the DPP must be informed as soon as practicable of any urgent action taken and the reinvestigation must not proceed without the DPP's written authorisation.

A similar test applies to a police officer where the senior member is not able to authorise the urgent action within the available time.

In such cases the DPP must be informed as soon as practicable of any urgent action taken and the reinvestigation must not proceed further without the DPP's written authorisation.

The DPP may delegate this power under new section 327E(9).

This cascading authorisation process balances the need for preservation of key evidence with the need for appropriate authorisation and scrutiny of the proposed exercise of investigation powers in relation to a person who has previously been acquitted of the offence being investigated.

New section 327F(1) allows the DPP to file a direct indictment (in accordance with Chapter 5) to charge an offence. Chapter 5 sets out a number of requirements in relation to a direct indictment. For instance, Part 5.3 sets out requirements to serve a copy of the indictment on the accused and provides mechanisms for compelling the attendance of the accused (by summons or warrant). Further, section 5 of the **Criminal Procedure Act 2009** provides that filing a direct indictment commences a criminal proceeding. However, the prosecution of the offence may only proceed if the Court of Appeal gives authorisation under new section 327O.

New section 327F(2) provides that any circumstances referred to in new section 327M(2) (which set out the offences to which the fresh and compelling evidence exception apply) need not be specified in a charge for an offence referred to in that subsection and are not elements of the offence.

New section 327G provides that it is to be presumed that the accused is to be released on bail, regardless of the offence charged, pending determination of the DPP's application under new section 327H or discontinuance of the prosecution under new section 327K. This presumption displaces special provisions which limit when bail may be granted for certain offences (see section 4 of the **Bail Act 1977**). However, the court may still consider whether the accused is an unacceptable risk in determining whether to grant bail.

New section 327H(1) allows the DPP to apply to the Court of Appeal for an order setting aside the previous acquittal of the accused or removing the previous acquittal as a bar to the accused being tried on the direct indictment (as the case requires) and authorising the continuation of the prosecution of the charge in the indictment.

New section 327H(2) requires the application to specify whether it is based on a tainted acquittal; or fresh and compelling evidence; or an administration of justice offence.

New section 327H(3) provides that an application based on fresh and compelling evidence cannot be made in relation to an acquittal which results from a new trial authorised under Chapter 7A.

New section 327H(4), (5), (6) and (7) ensure that the DPP personally determines whether to file a direct indictment and that matters proceed expeditiously.

The **Criminal Procedure Act 2009** does not normally refer to the accused's entitlement to appear at a hearing concerning them and their right to be legally represented. This is because such rights flow as a matter of procedural fairness from the nature of the hearing. Because of the unusual and preliminary status of the hearing, new section 327H(8) specifically provides such rights for the avoidance of any doubt.

New section 327I allows the Court of Appeal (or the Registrar of Criminal Appeals of the Supreme Court, in accordance with the rules of court) to extend the time for filing or serving the notice of application under new section 327H if the court or the Registrar considers that it is in the interests of justice to do so.

New section 327J allows the DPP to make an application to the Court of Appeal under section 327H only once in relation to a particular acquittal.

New section 327K provides that if the DPP fails to make an application under new section 327H within 28 days after filing a direct indictment under new section 327F (or any extension of that period granted pursuant to new section 327I), the DPP must discontinue the prosecution (in accordance with Part 5.4) within 14 days after the expiry of the 28 days or the extension (as the case requires).

New section 327L sets out the factors of which the Court of Appeal must be satisfied in order to make any order referred to in new section 327O with respect to applications in relation to tainted acquittals.

The Court of Appeal must be satisfied that at the time the offence is alleged to have been committed, the offence was punishable by 15 years imprisonment or more (however the penalty is described) and that the acquittal was tainted (as defined in new section 327D). The court must also be satisfied that it is likely

that a new trial for that offence would be fair, having regard to the factors set out in new section 327L(c)(i)-(iii).

In relation to a tainted acquittal it does not matter whether the acquittal was tainted by the actions of the person acquitted or some other person.

New section 327M sets out the factors of which the Court of Appeal must be satisfied in order to make any order referred to in new section 327O with respect to applications in relation to fresh and compelling evidence.

The Court of Appeal must first be satisfied that the offence is referred to in new section 327M(2) and that any circumstances referred to in that subsection in respect of the offence were present in the commission of the offence. The Court of Appeal must also be satisfied that there is fresh and compelling evidence against the person in relation to the offence (defined in new section 327C). Finally, the Court of Appeal must be satisfied that it is likely that a new trial for that offence would be fair, having regard to the factors set out in new section 327M(1)(d)(i)-(iii).

New section 327M(2) sets out the offences to which the fresh and compelling evidence exception apply. These offences include murder and manslaughter, trafficking in a large commercial quantity of a drug of dependence and rape and armed robbery in specified circumstances.

New section 327N sets out the factors of which the Court of Appeal must be satisfied in order to make any order referred to in new section 327O with respect to applications in relation to a person who has been acquitted of an offence. It applies to the administration of justice offence (as defined in new section 327B) exception to the rule against double jeopardy.

The Court of Appeal must first be satisfied that the offence of which the person was acquitted was an indictable offence at the time it is alleged to have been committed and that there is fresh evidence against the acquitted person of the commission of an administration of justice offence in relation to the previous acquittal. The requirement of fresh evidence ensures that the issues at a new trial will not simply involve a relitigation of the same issues from the trial at which the person was acquitted.

Finally, the Court of Appeal must be satisfied that it is likely that a trial for the administration of justice offence would be fair, having regard to the factors set out in new section 327N(c)(i)-(iii).

In some situations this Bill will change the way in which the High Court decision in *R v Carroll* [2002] HCA 55 (*Carroll*) operates. In that case, following the acquittal of Carroll for the offence of murder, he was prosecuted and convicted of the offence of perjury, based on his denial of the murder charge on oath at his trial for murder. The High Court found that proof of the offence of perjury in essence involved a relitigation of Carroll's culpability for the offence of murder. As a result, the principles of double jeopardy applied to quash his conviction for perjury. The administration of justice exception will change the way in which the double jeopardy rules apply to a case like *Carroll*, where there is fresh evidence and the other tests in new section 327N are met.

New section 327O sets out the orders that the Court of Appeal may make on successful applications under new section 327H.

Under new section 327O(1), if the Court of Appeal is satisfied of the matters in new section 327L (determination of application where acquittal tainted) or new section 327M (determination of application where fresh and compelling evidence), it may order that the previous acquittal of the accused of an offence charged in the direct indictment be set aside or removed as a bar to the accused being tried on the direct indictment and that the prosecution of the charge in the direct indictment may continue.

Under new section 327O(2), if the Court of Appeal is satisfied of the matters in new section 327N (determination of application where administration of justice offence) it may order that the previous acquittal of the accused be removed as a bar to the accused being tried for the administration of justice offence alleged to have been committed in relation to the previous acquittal; and that the prosecution of the charge in the direct indictment may continue.

Under new section 327O(4), if the Court of Appeal is not satisfied that section 327L, 327M or 327N applies or that a fair trial is likely, it must order that the charge in the direct indictment is permanently stayed.

If more than one offence is charged in the direct indictment, the Court of Appeal must make an order under new section 327O(1), (2) or (4) in relation to each charge.

New section 327P provides that if the DPP satisfies the Court of Appeal under new sections 327L, 327M and 327N, or any two of those sections, the DPP must elect whether to prosecute the administration of justice offence or the offence of which the accused has been acquitted or a related offence and may proceed only on that basis.

New section 327Q provides that, if the Court of Appeal makes an order under new section 327O(1) or (2) in relation to an offence charged in a direct indictment, the trial court must not amend the indictment to significantly change the offence charged.

New section 327R prohibits the prosecution from making certain references in any new trial that has been authorised under this Chapter. This assists in ensuring the accused receives a fair new trial.

New section 327S clarifies that Chapter 7A does not affect any right to appeal or review the acquittal of a person.

Clause 18 inserts new section 441 in the **Criminal Procedure Act 2009** which contains various transitional provisions.

New section 441(1) provides that section 53A (documents to be provided by police at first mention hearing) applies to proceedings in which the first mention hearing is held on or after the commencement of clause 6 of this Bill.

New section 441(2) provides that section 77 of the **Criminal Procedure Act 2009** (criminal record) as amended by clause 7 of this Bill applies to a criminal record that is provided to a court on or after the commencement of clause 7.

New section 441(3) provides that section 244 of the **Criminal Procedure Act 2009** (criminal record) as amended by clause 15 of this Bill applies to a criminal record that is filed in a court on or after the commencement of clause 15 of this Bill.

New section 441(4) provides that Chapter 7A as inserted by clause 17 of this Bill applies on and from the commencement of that clause to an acquittal, irrespective of whether the acquittal occurred before, on or after the commencement of clause 17 of this Bill.

- Clause 19 amends Schedule 1 to the **Criminal Procedure Act 2009** to insert a new clause 14. New clause 14 sets out additional information to be included on direct indictments charging offences to which Chapter 7A (Limitations on Rules relating to Double Jeopardy) applies. New clause 14(a) requires inclusion on the indictment of a statement that the DPP will apply to the Court of Appeal to set aside the previous acquittal of the accused or to remove the previous acquittal as a bar to the accused being tried on the direct indictment (as the case requires); and new clause 14(b) requires identification of each charge on the indictment to which the statement is relevant.
- Clause 20 amends section 22(1) of the **Public Prosecutions Act 1994** to give statutory recognition to the broad range of functions of the Director of Public Prosecutions. New section 22(1)(ce) provides that it is a function of the Director to provide advice to agencies, bodies or persons that have the power to investigate or prosecute criminal offences, in relation to an investigation or a prosecution, including a reinvestigation of an offence of which a person has previously been acquitted.
- Clause 21 amends the **Appeal Costs Act 1998** to insert a new section 17A which allows an accused with respect to whom an application is made under the double jeopardy reforms to apply to the Court of Appeal for an indemnity certificate.

The Court of Appeal may grant the certificate if it is in the interests of justice to do so. New section 17A(2) sets out the factors to which the Court of Appeal may have regard in determining this issue. An "interests of justice" test has been included due to unusual features with the exceptions to the double jeopardy principle that may be relevant to the Court's discretion. For example, if the application for a new trial is granted because the person bribed a juror, the Court may consider that it is not in the interests of justice to grant an indemnity certificate. In such a situation, the exception to double jeopardy applies because of the act or fault of the accused that tainted their acquittal.

The indemnity certificate may be granted with respect to the accused's own costs of the application and any additional costs that the accused will pay or will be ordered to pay as a consequence of any order for the continuation of the prosecution.

Clause 22 contains statute law revision amendments.

Subclause (1) amends section 313(1) of the **Criminal Procedure Act 2009** to substitute a reference to the "Rules" with the term "rules of court". This is to maintain consistency with the terminology used elsewhere in the **Criminal Procedure Act 2009**.

Subclause (2) updates a reference to the **Evidence Act 1958** by substituting it with the **Evidence (Miscellaneous Provisions) Act 1958**.

Subclause (3) repeals section 420(1)(b) of the **Criminal Procedure Act 2009** which has been made redundant by section 430ZH of the **Children, Youth and Families Act 2005**. Section 430ZH provides that no costs are payable in relation to an appeal under Part 5.4 of that Act.

Subclause (4) amends section 76C(1) of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** to substitute a reference to the "Rules" with the term "rules of court". This is to maintain consistency with the terminology used elsewhere in the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**.

Subclause (5) amends section 14(2) of the **Confiscation Amendment Act 2010** to correct a reference to section 22(1)(a)(ii) and (1)(c)(iiia) of the **Confiscation Act 1997** and to clarify the intended location of the insertion. Subclause (5) is taken to have come into operation on the date of Royal Assent of the **Confiscation Amendment Act 2010** (see clause 2(2) of the Bill). This is to ensure that the amendments take effect as originally intended.

Subclause (6) amends sections 4(1) and 56(5) of the **Equal Opportunity Act 2010** which incorrectly refer to the **Owners Corporation Act 2006** instead of the **Owners Corporations Act 2006**. Subclause (6) is taken to have come into operation on the date of Royal Assent of the **Equal Opportunity Act 2010** (see clause 2(3) of the Bill). This will ensure that the amended provisions operate as intended.

Subclause (7) amends item 3.26 of the Schedule to the **Equal Opportunity Amendment Act 2011** to accord with the term used in section 57(1) of the **Equal Opportunity Act 2010**.

Subclause (7) is taken to have come into operation on the date of Royal Assent of the **Equal Opportunity Amendment Act 2011** (see clause 2(4) of the Bill). This will ensure that the amendment in clause 3.26 takes effect as intended.

Clause 23 provides for the repeal of this amending Bill on 1 July 2013.