

Legislative Council—No 107A

As reported with amendments, report adopted, Standing Orders suspended and passed remaining stages, 19 June 2008

South Australia

**Criminal Law Consolidation (Double Jeopardy)
Amendment Bill 2008**

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008*.

5 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Criminal Law Consolidation Act 1935*

5 4—Amendment of section 5—Interpretation

Section 5(1)—after the definition of *firearm* insert:

Full Court means the Supreme Court constituted of an uneven number of judges, not being less than 3;

5—Insertion of Part 10

10 After section 330 insert:

Part 10—Limitations on rules relating to double jeopardy

Division 1—Preliminary

331—Interpretation

15 (1) In this Part—

acquittal of an offence includes—

(a) acquittal in appellate proceedings relating to the offence;
and

(b) acquittal at the direction or discretion of the court,

20 (whether in this State or in another jurisdiction);

administration of justice offence means any of the following offences:

(a) an offence of perjury or subornation of perjury;

(b) an offence against section 243, 244, 245 or 248;

25 (c) an offence against section 249 or 250 where the public officer is a judicial officer;

(d) an offence against section 256;

(e) a substantially similar offence against a previous enactment or the law of another jurisdiction corresponding to an offence referred to in a preceding paragraph;

30 *Category A offence* means any of the following offences:

(a) an offence of murder;

(b) manslaughter or attempted manslaughter;

(c) an aggravated offence of rape;

- (d) an aggravated offence of robbery;
- (e) an offence of trafficking in a commercial quantity, or large commercial quantity, of a controlled drug contrary to section 32(1) or (2) of the *Controlled Substances Act 1984*;
- (f) an offence of manufacturing a commercial quantity, or large commercial quantity, of a controlled drug contrary to section 33(1) or (2) of the *Controlled Substances Act 1984*;
- (g) an offence of selling a commercial quantity, or large commercial quantity, of a controlled precursor contrary to section 33A(1) or (2) of the *Controlled Substances Act 1984*;
- (h) a substantially similar offence against a previous enactment or the law of another jurisdiction corresponding to an offence referred to in a preceding paragraph;

judicial body means a court or tribunal, body or person invested by law with judicial or quasi-judicial powers, or with authority to make an inquiry or to receive evidence;

judicial officer means a person who alone or with others constitutes a judicial body;

relevant offence means—

- (a) a Category A offence; and
 - (b) any other offence for which the offender is liable to be imprisoned for life or for at least 15 years.
- (2) For the purposes of this Part, a reference to an ***offence of murder*** includes—
- (a) an offence of conspiracy to murder; and
 - (b) an offence of aiding, abetting, counselling or procuring the commission of murder.

332—Meaning of fresh and compelling evidence

- (1) For the purposes of this Part, evidence relating to an offence of which a person is acquitted is—
- (a) ***fresh*** if—
 - (i) it was not adduced at the trial of the offence; and
 - (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and
 - (b) ***compelling*** if—
 - (i) it is reliable; and
 - (ii) it is substantial; and
 - (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.

- (2) Evidence that would be admissible on a retrial under this Part is not precluded from being fresh or compelling just because it would not have been admissible in the earlier trial of the offence resulting in the relevant acquittal.

5 **333—Meaning of tainted acquittal**

For the purposes of this Part, if at the trial of an offence a person is acquitted of the offence, the acquittal will be *tainted* if—

- 10 (a) the person or another person has been convicted (whether in this State or in another jurisdiction) of an administration of justice offence in connection with the trial resulting in the acquittal; and
- (b) it is more likely than not that, had it not been for the commission of the administration of justice offence, the person would have been convicted of the offence at the trial.

15 **334—Application of Part**

- (1) This Part applies whether the offence of which a person is acquitted is alleged to have occurred before or after the commencement of this Part.
- 20 (2) This Part does not apply if a person is acquitted of the offence with which the person is charged but is convicted of a lesser offence arising out of the same set of circumstances that gave rise to the charge.
- (3) However, this Part does apply in the circumstances set out in subsection (2) if the acquittal was tainted.

25 **Division 2—Circumstances in which police may investigate conduct relating to offence of which person previously acquitted**

335—Circumstances in which police may investigate conduct relating to offence of which person previously acquitted

- 30 (1) A police officer may not carry out an investigation to which this section applies, or authorise the carrying out of an investigation to which this section applies, without the written authorisation of the Director of Public Prosecutions.
- 35 (2) However, a police officer may carry out, or authorise the carrying out of, such an investigation without the written authority of the Director of Public Prosecutions if the police officer reasonably believes that—
- 40 (a) urgent action is required in order to prevent the investigation being substantially and irrevocably prejudiced; and
- (b) it is not reasonably practicable in the circumstances to obtain the consent of the Director of Public Prosecutions before taking the action.

- (3) The Director of Public Prosecutions must be informed, as soon as practicable, of any action taken under subsection (2) and the investigation must not proceed further without the written authorisation of the Director of Public Prosecutions.
- 5 (4) The Director of Public Prosecutions must not authorise an investigation to which this section applies unless—
- (a) the Director of Public Prosecutions is satisfied that—
- (i) as a result of the investigation, the person under investigation is, or is likely, to be charged with—
- 10 (A) an offence of which the person has previously been acquitted; or
- (B) an administration of justice offence that is related to the offence of which the person has previously been acquitted; and
- 15 (ii) it is in the public interest for the investigation to proceed; and
- (b) in the opinion of the Director of Public Prosecutions, the previous acquittal would not be a bar to the trial of the person for an offence that may be charged as a result of the investigation.
- 20 (5) This section applies to an investigation in respect of a person's conduct in relation to an offence of which the person has previously been acquitted and includes—
- (a) the questioning, search or arrest of the person;
- 25 (b) the issue of a warrant for the arrest of the person;
- (c) a forensic procedure (within the meaning of the *Criminal Law (Forensic Procedures) Act 2007*) carried out on the person;
- 30 (d) the search or seizure of property or premises owned or occupied by the person.
- (6) In subsection (5), a reference to ***an offence of which the person has previously been acquitted*** includes a reference—
- (a) to any other offence with which the person was charged that was joined in the same information as that in which the offence of which the person was acquitted was charged; and
- 35 (b) to any other offence of which the person could have been convicted at the trial of the offence of which the person was acquitted.

**Division 3—Circumstances in which trial or retrial of
offence will not offend against rules of double jeopardy**

**336—Retrial of relevant offence of which person previously
acquitted where acquittal tainted**

- 5 (1) The Full Court may, on application by the Director of Public
Prosecutions, order a person who has been acquitted of a relevant
offence to be retried for the offence if the Court is satisfied that—
- (a) the acquittal was tainted; and
- 10 (b) in the circumstances, it is likely that the new trial would be
fair having regard to—
- (i) the length of time since the relevant offence is
alleged to have occurred; and
- (ii) whether there has been any failure on the part of the
15 police or prosecution to act with reasonable
diligence or expedition with respect to the making
of the application; and
- (iii) any other matter that the Court considers relevant.
- (2) An application under subsection (1) must be made within 28 days
after—
- 20 (a) the person is charged with the relevant offence following the
acquittal; or
- (b) a warrant is issued for the person's arrest for the relevant
offence following the acquittal.
- (3) If the Full Court orders a person to be retried for an offence of which
25 the person has been acquitted, the Court—
- (a) must—
- (i) quash the acquittal; or
- (ii) remove the acquittal as a bar to the person being
retried for the offence,
- 30 (as the case requires); and
- (b) must make a suppression order under Part 8 of the *Evidence
Act 1929* forbidding the publication of specified material or
material of a specified class if satisfied that the order is
35 necessary to prevent prejudice to the administration of
justice; and
- (c) may make any other order that the Court thinks fit in the
circumstances.
- (4) The Director of Public Prosecutions may not, without the permission
40 of the Full Court, present an information for the retrial of a person in
respect of whom the Court has made an order under this section more
than 2 months after the Court made the order.

(5) The Full Court should not give permission for the late presentation of an information for a retrial unless the Court is satisfied that, despite the period of time that has passed since the Court made the order for the retrial—

- (a) the Director of Public Prosecutions has acted with reasonable expedition; and
- (b) there is good and sufficient reason why the late presentation of the information should be allowed.

(5a) If, more than 2 months after an order for the retrial of a person for a relevant offence was made under this section, an information for the retrial of the person for the offence has not been presented or has been withdrawn or quashed, the person may apply to the Full Court 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 retried for the offence,

(as the case requires).

(6) In this section—

acquitted person means a person who has been acquitted of a relevant offence (whether in this State or in another jurisdiction).

337—Retrial of Category A offence of which person previously acquitted where there is fresh and compelling evidence

(1) The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of a Category A offence to be retried for the offence if the Court is satisfied that—

- (a) there is fresh and compelling evidence against the acquitted person in relation to the offence; and
- (b) in the circumstances, it is likely that the new trial would be fair having regard to—

- (i) the length of time since the offence is alleged to have occurred; and
- (ii) whether there has been any failure on the part of the police or prosecution to act with reasonable diligence or expedition with respect to the making of the application.

(2) An application under subsection (1)—

- (a) must be made within 28 days after—
 - (i) the person is charged with the Category A offence following the acquittal; or
 - (ii) a warrant is issued for the person's arrest for the Category A offence following the acquittal; and

- (b) may only be made once in respect of the person's acquittal of the Category A offence.

Note—

An application cannot be made under this section for a further retrial if the person is acquitted of the Category A offence on being retried for the offence (but an application may be made under section 336 if the acquittal resulting from the retrial is tainted).

- (3) If the Full Court orders a person to be retried for an offence of which the person has been acquitted, the Court—

- (a) must—

- (i) quash the acquittal; or
(ii) remove the acquittal as a bar to the person being retried for the offence,

(as the case requires); and

- (b) must make a suppression order under Part 8 of the *Evidence Act 1929* forbidding the publication of specified material or material of a specified class if satisfied that the order is necessary to prevent prejudice to the administration of justice; and

- (c) may make any other order that the Court thinks fit in the circumstances.

- (4) The Director of Public Prosecutions may not, without the permission of the Full Court, present an information for the retrial of a person in respect of whom the Court has made an order under this section more than 2 months after the Court made the order.

- (5) The Full Court should not give permission for the late presentation of an information for a retrial unless the Court is satisfied that, despite the period of time that has passed since the Court made the order for the retrial—

- (a) the Director of Public Prosecutions has acted with reasonable expedition; and
(b) there is good and sufficient reason why the late presentation of the information should be allowed.

- (5a) If, more than 2 months after an order for the retrial of a person for a Category A offence was made under this section, an information for the retrial of the person for the offence has not been presented or has been withdrawn or quashed, the person may apply to the Full Court 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 retried for the offence,

(as the case requires).

(6) In this section—

acquitted person means a person who has been acquitted of a Category A offence (whether in this State or in another jurisdiction).

338—Circumstances in which person may be charged with administration of justice offence relating to previous acquittal

(1) The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of an indictable offence to be tried for an administration of justice offence that is related to the offence of which the person has been acquitted if the Court is satisfied that—

(a) there is fresh evidence against the acquitted person in relation to the administration of justice offence; and

(b) in the circumstances, it is likely that a trial would be fair having regard to—

(i) the length of time since the administration of justice offence is alleged to have occurred; and

(ii) whether there has been any failure on the part of the police or prosecution to act with reasonable diligence or expedition with respect to the making of the application; and

(iii) any other matter that the Court considers relevant.

(2) An application under subsection (1) must be made within 28 days after—

(a) the person is charged with the administration of justice offence; or

(b) a warrant is issued for the person's arrest for the administration of justice offence.

(3) If the Full Court orders a person to be tried for an administration of justice offence that is related to an indictable offence of which the person has been acquitted, the Court—

(a) must remove the acquittal as a bar to the person being tried for the administration of justice offence; and

(b) may make any other order that the Court thinks fit in the circumstances.

(4) The Director of Public Prosecutions may not, without the permission of the Full Court, present an information for the trial of a person in respect of whom the Court has made an order under this section more than 2 months after the Court made the order.

(5) The Full Court should not give permission for the late presentation of an information for any such trial unless the Court is satisfied that, despite the period of time that has passed since the Court made the order for the trial—

- (a) the Director of Public Prosecutions has acted with reasonable expedition; and
- (b) there is good and sufficient reason why the late presentation of the information should be allowed.

(5a) If, more than 2 months after an order for the trial of a person for an administration of justice offence was made under this section, an information for the trial of the person for the offence has not been presented or has been withdrawn or quashed, the person may apply to the Full Court to set aside the order for the trial and to restore the acquittal as a bar to the person being tried for the offence.

(6) In this section—

acquitted person means a person who has been acquitted of an indictable offence (whether in this State or in another jurisdiction).

Division 4—Prohibition on making certain references in retrial

339—Prohibition on making certain references in retrial

At the retrial of a person for an offence of which the person had previously been acquitted by order of the Full Court under Division 3, the prosecution must not refer to the fact that, before making the order for the retrial of the offence, the Court had to be satisfied that—

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

(as the case requires).

Part 10A—Appeal against sentence

340—Appeal against sentence

Despite any other rule of law, if on an appeal against sentence the court is satisfied that the sentence should be quashed and another sentence (whether more severe or otherwise) imposed, the court must—

- (a) impose the sentence that should have been imposed in the first instance; and
- (b) order that the sentence—
 - (i) will be taken to have come into effect on a date before the date of the order; or

- (ii) will take effect on a date on or after the date of the order.

6—Amendment of section 348—Interpretation

Section 348, definition of *Full Court*—delete the definition

5 **7—Amendment of section 352—Right of appeal in criminal cases**

Section 352(1)(ab)—delete paragraph (ab) and substitute:

(ab) if a person is tried on information and acquitted, the Director of Public Prosecutions may, with the permission of the Full Court, appeal against the acquittal on any ground—

- 10 (i) if the trial was by judge alone; or
- (ii) if the trial was by jury and the judge directed the jury to acquit the person;

8—Amendment of section 353—Determination of appeals in ordinary cases

(1) Section 353(2a)(b)—delete "and direct" and substitute:

15 , quash the acquittal and order

(2) Section 353(3)—delete subsection (3) and substitute:

(3) If the Full Court orders a new trial under subsection (2a)(b), the Court—

- 20 (a) may make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but
- (b) may not make any order directing the court that is to retry the person on the charge to convict or sentence the person.