

Western Australia

**Criminal Appeals Amendment (Double
Jeopardy) Act 2012**

As at 21 May 2012

No. 9 of 2012

Extract from www.slp.wa.gov.au, see that website for further information

Criminal Appeals Amendment (Double Jeopardy) Act 2012

CONTENTS

Part 1 — Preliminary matters		
1.	Short title	2
2.	Commencement	2
Part 2 — <i>Criminal Appeals Act 2004</i> amended		
3.	Act amended	3
4.	Part 5A inserted	3
Part 5A — Prosecuting acquitted accused		
46A.	Terms used	3
46B.	Term used: acquitted accused	5
46C.	Criminal investigations of acquitted accused that need authorised officer's authority	5
46D.	Charges against acquitted accused that need leave	7
46E.	Applying for leave for new charge	8
46F.	Procedure on leave applications	9
46G.	Hearing leave applications	9
46H.	Deciding leave applications	10
46I.	Meaning of fresh and compelling evidence	12
46J.	Meaning of tainted acquittal	13
46K.	Interests of justice, matters to be considered	13
46L.	Restrictions on publicity	14
46M.	Leave for new charge, effect of	15
5.	Section 52 inserted	17

52.	Double jeopardy amendments to be reviewed	17
Part 3 — Other Acts amended		
6.	<i>Criminal Code</i> amended	19
7.	<i>Criminal Investigation Act 2006</i> amended	19
	8A. Authority required for some investigations	19
8.	<i>Criminal Investigation (Extra-territorial Offences) Act 1987</i> amended	19
	3A. Authority required for some investigations	20
9.	<i>Criminal Investigation (Identifying People) Act 2002</i> amended	20
	12A. Authority required for some investigations	20
10.	<i>Misuse of Drugs Act 1981</i> amended	20
	5A. Authority required for some investigations	20
11.	<i>Surveillance Devices Act 1998</i> amended	20
	4AA. Authority required for some investigations	21
12.	<i>Telecommunications (Interception and Access) Western Australia Act 1996</i> amended	21
	4A. Authority required for some investigations	21

Western Australia

Criminal Appeals Amendment (Double Jeopardy) Act 2012

No. 9 of 2012

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

[Assented to 21 May 2012]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary matters

1. Short title

This is the *Criminal Appeals Amendment (Double Jeopardy) Act 2012*.

2. Commencement

This Act comes into operation as follows —

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

Part 2 — *Criminal Appeals Act 2004* amended

3. Act amended

This Part amends the *Criminal Appeals Act 2004*.

4. Part 5A inserted

After Part 4 insert:

Part 5A — Prosecuting acquitted accused

46A. Terms used

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

AOJ offence means —

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

authorised officer means —

- (a) the Attorney General; or
- (b) the Solicitor-General; or
- (c) the State Solicitor; or
- (d) the DPP; or
- (e) the Director of Public Prosecutions appointed under the *Director of Public Prosecutions Act 1983* (Commonwealth);

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

leave application means an application for leave made under section 46E;

new charge, in relation to an acquitted accused, has the meaning given in section 46E(1);

offence A, in relation to an acquitted accused, has the meaning given in section 46B(1);

serious offence means an indictable offence the statutory penalty for which is —

- (a) life imprisonment; or
- (b) imprisonment for 14 years or more;

trial A, in relation to an acquitted accused, has the meaning given in section 46B(1).

- (2) For the purposes of this Part, an offence under a section of *The Criminal Code* listed in the Table is an administration of justice offence.

Table

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

46B. Term used: acquitted accused

- (1) For the purposes of this Part a person is an ***acquitted accused*** if the person, in this State or elsewhere —
 - (a) is tried on a charge (***charge A***) of a serious offence (***offence A***); and
 - (b) at the trial (***trial A***), or on appeal from a conviction in trial A, is acquitted, other than on account of unsoundness of mind, of —
 - (i) charge A; and
 - (ii) any other offence of which, on charge A, the acquitted accused might have been convicted instead of offence A.
- (2) For the purposes of subsection (1) it does not matter if the acquittal occurred before or after the commencement of this Part.

46C. Criminal investigations of acquitted accused that need authorised officer's authority

- (1) In this section —

investigate, an offence, includes to exercise any power under the common law, a written law or a law of the Commonwealth for the purposes of obtaining evidence as to the commission of the offence;

law enforcement officer means —

 - (a) a police officer; or
 - (b) 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 law of the Commonwealth confers powers to investigate offences;

s. 4

relevant offence means a serious offence, or an AOJ offence, a charge of which may be subject to —

- (a) a defence under *The Criminal Code* section 17 on the ground that the accused has been acquitted as described in that section, other than on account of unsoundness of mind; or
 - (b) a requirement at law to permanently stay it because it would be an abuse of process.
- (2) A law enforcement officer, whether with or without an acquitted accused's consent, must not investigate or authorise another person to investigate whether the acquitted accused may have committed a relevant offence unless —
- (a) under subsection (4), an authorised officer, in writing, has authorised the investigation; or
 - (b) the law enforcement officer believes on reasonable grounds —
 - (i) the investigation needs to be done urgently in order to prevent it from being substantially and irrevocably prejudiced; and
 - (ii) it is not reasonably practicable in the circumstances to obtain an authorised officer's authorisation before doing the investigation.
- (3) If a law enforcement officer acts under subsection (2)(b) —
- (a) the officer, as soon as it is practicable to do so, must inform an authorised officer of —
 - (i) the grounds for acting under that provision; and
 - (ii) the action taken;
- and

- (b) the investigation of the relevant offence must not continue unless, under subsection (4), an authorised officer, in writing, has authorised the investigation.
- (4) An authorised officer must not authorise the investigation of a relevant offence unless —
- (a) the officer is satisfied a charge of the offence would not be subject to —
 - (i) a defence under *The Criminal Code* section 17 on the ground that the accused has been acquitted as described in that section, other than on account of unsoundness of mind; or
 - (ii) a requirement at law to permanently stay it because it would be an abuse of process;
- or
- (b) the officer is satisfied —
 - (i) there is, or the investigation is likely to obtain, evidence to justify making an application under this Part for leave to charge the acquitted accused with the relevant offence; and
 - (ii) it is in the public interest to investigate the relevant offence.

46D. Charges against acquitted accused that need leave

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

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

- (b) a charge of some other serious offence of which, at trial A, the acquitted accused might have been convicted instead of offence A;
- (c) a charge of an AOJ offence allegedly committed in or in connection with trial A.

46E. Applying for leave for new charge

- (1) An authorised officer may apply to the Court of Appeal for leave to charge an acquitted accused with a new charge (the *new charge*) being one of these —
 - (a) a charge of a serious offence the details of which are the same or substantially the same as those in charge A;
 - (b) a charge of some other serious offence of which, at trial A, the acquitted accused might have been convicted instead of offence A;
 - (c) a charge of an AOJ offence allegedly committed in or in connection with trial A.
- (2) An application cannot be made under subsection (1) if —
 - (a) the acquittal in trial A (as described in section 46B(1)(b)) of the acquitted accused occurred on a charge for which leave had been given under this Part; and
 - (b) that leave was given because, under section 46H(2)(c)(i), the Court of Appeal was satisfied that fresh and compelling evidence (within the meaning given by section 46I) existed against the acquitted accused in relation to the charge.
- (3) An application made under subsection (1) may relate to 2 or more new charges.
- (4) An application permitted by subsection (1) must be made in accordance with this Part and rules of court.

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

46F. Procedure on leave applications

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

46G. Hearing leave applications

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

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

46H. Deciding leave applications

- (1) On a leave application, the Court of Appeal may give or refuse to give the applicant leave to charge the acquitted accused with the new charge.
- (2) If the new charge to which a leave application relates is —
 - (a) a charge of a serious offence the details of which are the same or substantially the same as those in charge A; or
 - (b) a charge of some other serious offence of which, at trial A, the acquitted accused might have been convicted instead of offence A,

but not a charge of an AOJ offence allegedly committed in or in connection with trial A, the Court of Appeal must not give leave unless —

- (c) the Court of Appeal is satisfied on the balance of probabilities —
 - (i) there is fresh and compelling evidence (within the meaning given by section 46I) against the acquitted accused in relation to the new charge; or

- (ii) the acquittal in trial A is a tainted acquittal (within the meaning given by section 46J);
 - and
 - (d) 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 section 46K.
- (3) If the new charge to which a leave application relates is a charge of an AOJ offence allegedly committed in or in connection with trial A, the Court of Appeal must not give leave unless it is satisfied on the balance of probabilities that charging the acquitted accused with the AOJ offence is in the interests of justice having regard to section 46K.
- (4) If the acquitted accused is an acquitted accused for the purposes of this Part because, in a place outside this State, he or she was charged with and acquitted of an offence under the law of that place —
- (a) leave cannot be given under subsection (2) if the law of that place does not permit the person to be tried —
 - (i) on another charge of offence A the details of which are the same or substantially the same as those in charge A; or
 - (ii) on a charge of some other offence of which, on charge A, the acquitted accused might have been convicted instead of offence A;
 - and
 - (b) leave cannot be given under subsection (3) if the law of that place does not permit the person to be tried on a charge of an AOJ offence

allegedly committed in or in connection with trial A; and

- (c) leave cannot be given under subsection (2) or (3) if the application of this Part to the person is inconsistent with the *Constitution* (Commonwealth) or the law of the Commonwealth.
- (5) If the Court of Appeal refuses to give leave to charge the acquitted accused with a new charge, it must discharge the acquitted accused.
- (6) If the Court of Appeal gives leave to charge the acquitted accused with a new charge, then, subject to the *Bail Act 1982*, it may order that the acquitted accused be kept in custody until —
 - (a) his or her first appearance in the court in which the prosecution of the new charge is commenced; or
 - (b) the time for commencing the prosecution of the new charge expires,

whichever occurs first.

46I. Meaning of fresh and compelling evidence

- (1) For the purposes of section 46H, evidence is fresh in relation to the new charge if —
 - (a) despite the exercise of reasonable diligence by those who investigated offence A, it was not and could not have been made available to the prosecutor in trial A; or
 - (b) it was available to the prosecutor in trial A but was not and could not have been adduced in it.
- (2) For the purposes of section 46H, evidence is compelling in relation to the new charge if, in the

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

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

46J. Meaning of tainted acquittal

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

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

46K. Interests of justice, matters to be considered

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

- (b) all other existing circumstances.
- (3) The Court of Appeal is to have regard in particular to the following —
 - (a) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with applying for leave to charge the acquitted accused with the new charge;
 - (b) the objective seriousness of the facts of the new charge.

46L. Restrictions on publicity

- (1) This section does not affect any prohibition in any other written law of the publication of any information.
- (2) 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 the subject of any of these —
 - (a) an application made under section 46C;
 - (b) an investigation authorised under section 46C;
 - (c) a leave application;
 - (d) leave given under section 46H;
 - (e) a new charge laid pursuant to leave given under section 46H.
- (3) The prohibition on publication in subsection (2) does not apply —
 - (a) if and to the extent an order made under subsection (4) authorises publication; or
 - (b) if subsection (2) has ceased to operate under subsection (9).
- (4) The Court of Appeal or the court in which the acquitted accused is being tried on the new charge may make an

order that authorises the publication of some or all of the information to which subsection (2) applies.

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

46M. Leave for new charge, effect of

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

s. 4

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

- (c) the defence under *The Criminal Code* section 17 to the new charge that, but for this section, would exist by virtue of the acquittal in trial A does not apply to the new charge; and
 - (d) the prosecutor is not entitled to refer to the fact that the Court of Appeal has given leave to charge the acquitted accused with the new charge or to any findings of the Court of Appeal in doing so.
- (5) If —
- (a) a new charge against an acquitted accused is the same or substantially the same as charge A; and
 - (b) the acquitted accused was acquitted of charge A in trial A; and
 - (c) trial A occurred in this State; and
 - (d) the acquitted accused is convicted on the new charge,

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

5. Section 52 inserted

After section 51 insert:

52. Double jeopardy amendments to be reviewed

- (1) The Minister must carry out a review of the operation of the amendments made to this Act and *The Criminal Code* by the *Criminal Appeals Amendment (Double Jeopardy) Act 2012* as soon as practicable after the expiration of 5 years after the date on which the amendments come into operation.

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

Part 3 — Other Acts amended

6. Criminal Code amended

- (1) This section amends *The Criminal Code*.
- (2) In section 17 delete “It” and insert:
 - (1) It
- (3) At the end of section 17 insert:
 - (2) Subsection (1) is subject to the *Criminal Appeals Act 2004* section 46M(4)(b) and (c).

7. Criminal Investigation Act 2006 amended

- (1) This section amends the *Criminal Investigation Act 2006*.
- (2) After section 7 insert:

8A. Authority required for some investigations

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

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

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

(2) At the end of Part 1 insert:

3A. Authority required for some investigations

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

9. Criminal Investigation (Identifying People) Act 2002 amended

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

(2) After section 11 insert:

12A. Authority required for some investigations

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

10. Misuse of Drugs Act 1981 amended

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

(2) At the end of Part 1 insert:

5A. Authority required for some investigations

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

11. Surveillance Devices Act 1998 amended

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

- (2) After section 4 insert:

4AA. Authority required for some investigations

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

12. Telecommunications (Interception and Access) Western Australia Act 1996 amended

- (1) This section amends the *Telecommunications (Interception and Access) Western Australia Act 1996*.
- (2) At the end of Part 1 insert:

4A. Authority required for some investigations

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.
