

TASMANIA

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**CRIMINAL CODE AMENDMENT BILL 2008**

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# **CRIMINAL CODE AMENDMENT BILL 2008**

*(Brought in by the Minister for Justice, the Honourable David Edward Llewellyn)*

## **A BILL FOR**

### **An Act to amend the *Criminal Code***

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

#### **1. Short title**

This Act may be cited as the *Criminal Code Amendment Act 2008*.

#### **2. Commencement**

This Act commences on the day on which this Act receives the Royal Assent.

#### **3. Principal Act**

In this Act, the *Criminal Code Act 1924\** is referred to as the Principal Act.

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**4. Schedule 1 amended (*Criminal Code*)**

Schedule 1 to the Principal Act is amended as follows:

- (a) by inserting the following definition after the definition of “contaminate” in section 1:

**“controlled substance”** has the same meaning as in the *Misuse of Drugs Act 2001*;

- (b) by inserting the following definition after the definition of “ship” in section 1:

**“trafficable quantity”** has the same meaning as in the *Misuse of Drugs Act 2001*;

- (c) by inserting the following Chapter after section 389:

***Chapter XLIV – Exceptions to Double Jeopardy Rules***

**390. Definitions**

- (1) In this chapter –

**“acquittal”** –

- (a) includes –

- (i) an acquittal in appeal proceedings

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in relation  
to a crime;  
and

(ii) an acquittal  
at the  
direction of  
a court; but

(b) does not include a  
verdict of not  
guilty on the  
ground of  
insanity;

**“administration of justice  
crime”** means a crime  
under Chapter X;

**“Court”** means the Court of  
Criminal Appeal;

**“fresh and compelling  
evidence”** – see  
section 395;

**“interests of justice”** – see  
section 397;

**“serious crime”** means a  
crime punishable upon  
indictment listed in  
Appendix D;

**“tainted acquittal”** – see  
section 396;

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**“very serious crime”** means a crime, or an attempt to commit a crime, under section 158, a crime under section 159, 185 or 240(4) or a crime under Part 2 of the *Misuse of Drugs Act 2001* being a crime that relates to a trafficable quantity of a controlled substance.

- (2) For the purposes of this chapter, the retrial of an acquitted person for a crime includes a trial if the crime is not the same as the crime of which the person was acquitted.
- (3) In this chapter, 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.

**391. Application of Chapter XLIV**

- (1) This chapter applies if, before or after the commencement of this chapter, a person is acquitted of a crime, whether the crime is committed before or after the commencement of this chapter.

- (2) This section extends to a person acquitted in proceedings outside this State of a crime under the law of the place where the proceedings were held.
- (3) However, this section does not extend as mentioned in subsection (2) if the law of the place where the proceedings were held does not permit the person to be retried and the application of this chapter to the retrial is inconsistent with the Constitution of the Commonwealth or a law of the Commonwealth.

**392. Circumstances in which person may be charged with administration of justice crime relating to previous acquittal**

- (1) The Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of a crime to be tried for an administration of justice crime that is related to the crime of which the person has been acquitted if the Court is satisfied that –
  - (a) there appears to be fresh evidence against the acquitted person in

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relation to the  
administration of justice  
crime; and

- (b) in all the circumstances it  
is in the interests of  
justice for the order to be  
made.
- (2) If the Court orders a person to be  
tried for an administration of  
justice crime that is related to a  
crime of which the person has  
been acquitted, the Court must  
quash the person's acquittal or  
remove the acquittal as a bar to  
the person being tried.
- (3) On the trial of a person for an  
administration of justice crime,  
section 355(1)(b) does not apply  
in relation to the charge of the  
administration of justice crime.
- (4) For the purposes of this section,  
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.



**393. Court may order retrial for a very serious crime – fresh and compelling evidence**

- (1) The Court may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a very serious crime if satisfied that –
  - (a) there appears to be fresh and compelling evidence against the acquitted person in relation to the crime; and
  - (b) in all the circumstances it is in the interests of justice for the order to be made.
- (2) The Court may order a person to be retried for a very serious crime under this section even if the person had been charged with and acquitted of a lesser crime.
- (3) If the Court orders an acquitted person to be retried for a very serious crime, the Court must quash the person's acquittal or remove the acquittal as a bar to the person being retried.

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- (4) On the retrial, section 355(1)(b) does not apply in relation to the charge of the very serious crime.

**394. Court may order retrial for a serious crime – tainted acquittal**

- (1) The Court may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a serious crime if satisfied that –
- (a) the acquittal is a tainted acquittal; and
  - (b) in all the circumstances it is in the interests of justice for the order to be made.
- (2) The Court may order a person to be retried for a serious crime under this section even if the person had been charged with and acquitted of a lesser crime.
- (3) If the Court orders an acquitted person to be retried for a serious crime, the Court must quash the person's acquittal or remove the acquittal as a bar to the person being retried.

- (4) On the retrial, section 355(1)(b) does not apply in relation to the charge of the serious crime.

**395. Fresh and compelling evidence – meaning**

- (1) This section applies for the purpose of deciding under this chapter whether there is fresh and compelling evidence against an acquitted person in relation to a very serious crime.
- (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

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highly probative of the case against the acquitted person.

- (4) Evidence that would be admissible on a retrial under this chapter is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

**396. Tainted acquittal – meaning**

- (1) This section applies for the purpose of deciding under this chapter whether the acquittal of an accused person is a tainted acquittal.
- (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 crime in relation to the proceedings in which the accused person was acquitted; and
  - (b) it is more likely than not that, but for the

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commission of the administration of justice crime, the accused person would have been convicted.

- (3) An acquittal is not a tainted acquittal during any of the following periods:
- (a) the period provided under section 407 for the person convicted of the administration of justice crime (the “**convicted person**”) to appeal, or obtain leave to appeal, from the conviction;
  - (b) if, within the period mentioned in paragraph (a), the convicted person gives notice of appeal, the period ending when the appeal is decided;
  - (c) if, within the period mentioned in paragraph (a), the convicted person gives notice of an application for leave to appeal, the period ending –

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- (i) if the application is refused, when the decision refusing the application is made; or
  - (ii) if the application is granted, when the appeal is decided.
- (4) If the conviction for the administration of justice crime is, on appeal, quashed after the Court has ordered the acquitted person to be retried under this chapter because of the conviction, the person may apply to the Court to set aside the order and –
- (a) restore the acquittal that was quashed; or
  - (b) restore the acquittal as a bar to the person being retried for the crime.

**397. Interests of justice – matters for consideration**

- (1) This section applies for the purpose of deciding under this chapter whether it is in the interests of justice for an order to

be made for the retrial of, or prosecution of an administration of justice crime against, an acquitted person.

- (2) It is not in the interests of justice to make an order for the retrial of, or prosecution of an administration of justice crime against, an acquitted person unless the Court is satisfied that a fair retrial or trial is likely in the circumstances.
- (3) The Court must have regard in particular to –
  - (a) the length of time since the acquitted person allegedly committed the crime; and
  - (b) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to –
    - (i) the investigation of the commission of the crime of which the person was acquitted and the prosecution of the proceedings in

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which the person  
was acquitted; and

- (ii) the application for  
the retrial of, or  
prosecution of an  
administration of  
justice crime  
against, the  
acquitted person.

**397A. Application for prosecution for  
administration of justice crime –  
procedure**

- (1) An application under section 392  
may not be made unless –
  - (a) the person has been  
charged with the  
administration of justice  
crime; or
  - (b) a warrant has been issued  
for the person's arrest for  
the administration of  
justice crime.
- (2) The application must be made not  
later than 28 days after the person  
is charged with the relevant crime  
or the warrant is issued for the  
person's arrest in relation to the  
relevant crime.



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- (3) The Court may extend the period mentioned in subsection (2) for good cause.
- (4) The Court must consider the application at a hearing.
- (5) The person to whom the application relates is entitled to be present and heard at the hearing, whether or not the person is in custody.
- (6) However, if the person has been given a reasonable opportunity to be present, the application may be decided even if the person is not present.
- (7) The powers of the Court mentioned in section 409(1) may be exercised in relation to the hearing of the application.
- (8) The Court may at one hearing consider more than one application under section 392, but only if the administration of justice crimes concerned may be tried on the same indictment.
- (9) If the Court decides in proceedings on an application under section 392 that the acquittal is not a bar to the person being tried for an administration of justice crime that is related to

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the crime of which the person has been acquitted, it must make a declaration to that effect.

**397AB. Prosecution for administration of justice crime**

- (1) An indictment for the trial of a person in respect of whom the Court has made an order under section 392 may not, without leave of the Court, be presented after the end of the period of 2 months after the order was made.
- (2) The Court may give leave only if satisfied that –
  - (a) the prosecutor has acted with reasonable expedition; and
  - (b) there is good and sufficient reason why the late presentation of the indictment should be allowed.
- (3) If, after the end of the period of 2 months after an order for the trial of an accused person was made under section 392, an indictment for the trial of the person has not been presented or has been withdrawn or quashed, the person

may apply to the Court to set aside the order for the trial and –

- (a) restore the acquittal that was quashed; or
  - (b) restore the acquittal as a bar to the person being tried for the crime.
- (4) If the order is set aside, a further application may not be made under section 392 for the trial of the accused person in relation to the administration of justice crime.
- (5) At the trial of a person for an administration of justice crime, the prosecution is not entitled to refer to the fact that the Court has found that there appears to be fresh evidence against that person.

**397AC. Application for retrial – procedure**

- (1) If a person has been acquitted, not more than one application for the retrial of the person may be made under this chapter in relation to the acquittal.
- (2) If the acquittal results from a retrial under section 393 or 394 –

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- (a) an application may not be made for an order under section 393 in relation to the acquittal; but
  - (b) an application may be made for an order under section 394 in relation to the acquittal.
- (3) An application for the retrial of an acquitted person may not be made under this chapter unless –
  - (a) the person has been charged with the crime for which the retrial is sought (the “**relevant crime**”); or
  - (b) a warrant has been issued for the person’s arrest in relation to the relevant crime.
- (4) The application must be made not later than 28 days after the person is charged with the relevant crime or the warrant is issued for the person’s arrest in relation to the relevant crime.
- (5) The Court may extend the period mentioned in subsection (4) for good cause.
- (6) The Court must consider the application at a hearing.

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- (7) The person to whom the application relates is entitled to be present and heard at the hearing, whether or not the person is in custody.
- (8) However, if the person has been given a reasonable opportunity to be present, the application may be decided even if the person is not present.
- (9) The powers of the Court mentioned in section 409(1) may be exercised in relation to the hearing of the application.
- (10) The Court may at one hearing consider more than one application under this chapter for a retrial (whether or not relating to the same person), but only if the crimes concerned may be tried on the same indictment.
- (11) If the Court decides in proceedings on an application under this chapter that the acquittal is not a bar to the person being retried for the crime concerned, it must make a declaration to that effect.

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**397AD. Retrial**

- (1) An indictment for the retrial of a person that has been ordered under this chapter may not, without the leave of the Court, be presented after the end of the period of 2 months after the order was made.
- (2) The Court may give leave only if it is satisfied that –
  - (a) the prosecutor has acted with reasonable expedition; and
  - (b) there is good and sufficient reason 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 chapter, 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 to set aside the order for the retrial and –
  - (a) restore the acquittal that was quashed; or

- (b) restore the acquittal as a bar to the person being tried for the crime.
- (4) If the order is set aside, a further application may not be made under this chapter for the retrial of the accused person in relation to the crime concerned.
- (5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court has found that it appears that –
  - (a) there appears to be fresh and compelling evidence against the acquitted person; or
  - (b) more likely than not, but for the commission of the administration of justice crime, the accused person would have been convicted.

**397AE. Authorisation of police investigations**

- (1) This section applies to any police investigation of the commission of a crime by an acquitted person in relation to the possible retrial of the person for the crime or

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prosecution of the person for an administration of justice crime under this chapter.

- (2) For the purposes of this section, a police investigation is an investigation that involves, whether with or without the consent of the acquitted person –
- (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.
- (3) A police officer may not carry out or authorise a police investigation to which this section applies unless the Director of Public Prosecutions –
- (a) has advised that, in the opinion of the Director of Public Prosecutions, the acquittal would not be a bar to the retrial of the acquitted person in this State for the crime or the trial of an acquitted



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person for an  
administration of justice  
crime; and

- (b) has given written consent to the police investigation on the application in writing of the Commissioner of Police.
- (4) However, a commissioned police officer may authorise the carrying out of a police investigation to which this section applies, without the advice and written consent of the Director of Public Prosecutions under subsection (3)(a) or (b), if the commissioned police officer reasonably believes that –
- (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.

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- (5) The Director of Public Prosecutions must be informed, as soon as practicable, of any action taken under subsection (4) and the investigation must not proceed further without the advice and written consent of the Director of Public Prosecutions under subsection (3)(a) or (b).
- (6) The Commissioner of Police may make an application for the police investigation only if satisfied that relevant evidence for the purposes of an application for a retrial under this chapter –
  - (a) has been obtained; or
  - (b) is likely to be obtained as a result of the investigation.
- (7) The Director of Public Prosecutions may give consent to the police investigation only if satisfied that –
  - (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.
- (8) Despite section 8 of the *Police Service Act 2003*, the Commissioner of Police may not delegate powers of the Commissioner under this section to a police officer or an employee or officer, within the meaning of the *State Service Act 2000*.

**397AF. Restrictions on publication**

- (1) A person must not publish any matter for the purpose of identifying or having the effect of identifying an acquitted person who is being retried or tried for an administration of justice crime under this chapter or who is the subject of—
  - (a) a police investigation, or an application for a police investigation, mentioned in section 397AE; or
  - (b) an application for a retrial or trial for an administration of justice crime, or an order for retrial or trial for an

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administration of justice  
crime, under this chapter.

- (2) Subsection (1) does not apply if the publication is authorised by order of the Court or of the court before which the acquitted person is being retried or tried for the administration of justice crime.
- (3) The relevant court may make an order authorising publication only if the court is satisfied that it is in the interests of justice to make the order.
- (4) Before making an order under this section, the relevant court must give the acquitted person a reasonable opportunity to be heard on the application for the order.
- (5) The relevant court may at any time vary or revoke an order under this section.
- (6) The prohibition on publication under this section ceases to have effect, subject to any order under this section, when whichever of the following situations occurs first:
  - (a) there is no longer any step that could be taken which would lead to the

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acquitted person being  
retried or tried for the  
administration of justice  
crime under this chapter;

(b) if the acquitted person is  
retried or tried for the  
administration of justice  
crime under this chapter,  
the trial ends.

(7) Nothing in this section affects  
any prohibition of the publication  
of any matter under any other Act  
or law.

(8) A contravention of a prohibition  
on publication under this section  
is punishable as contempt of the  
Supreme Court.

(d) by inserting the following subsection  
after subsection (4) in section 402:

(4A) The Court, on hearing an appeal  
that does or may require it to  
impose a sentence, or to vary a  
sentence imposed, on a person for  
an offence (whether the appeal  
was brought, made or lodged by  
the person or by the prosecutor) –

(a) may take into account any  
matter relevant to the  
sentence that has occurred  
between when the court of  
trial dealt with the person

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and when the appeal is heard; but

(b) despite paragraph (a), must not take into account the fact that the Court's decision may mean that the person is again sentenced for the crime.

(e) by inserting the following Appendix after Appendix C:

**APPENDIX D – SERIOUS CRIMES**

**1.** *Criminal Code Act 1924*

Section 124	Sexual intercourse with a young person under the age of 17 years
Section 125A	Maintaining sexual relationship with a young person under the age of 17 years
Section 125C(2)	Procuring unlawful sexual intercourse with person under the age of 17 years
Section 126	Sexual intercourse with person with mental impairment
Section 127A	Aggravated sexual assault
Section 130	Involving person under age of 18 years in production of child exploitation material
Section 130A	Producing child exploitation material
Section 130B	Distributing child exploitation material

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Section 133	Incest
Section 158	Murder
Section 159	Manslaughter
Section 161	Being accessory after the fact to murder
Section 165	Causing death of child before birth
Section 170	Committing an unlawful act intended to cause grievous bodily harm
Section 172	Wounding or causing grievous bodily harm
Section 178A	Performing female genital mutilation
Section 179	Setting man-traps &c., or allowing man-traps &c. to remain set
Section 185	Rape
Section 191A	Kidnapping
Section 240(3)	Armed robbery
Section 240(4)	Aggravated armed robbery
Section 245	Aggravated burglary
Section 268	Arson
Section 268A	Unlawfully setting fire to vegetation

**2.** *Sex Industry Offences Act 2005*

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Section 9(1)      Procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business

Section 9(2)      Receiving a fee or reward that a person knows &c. is derived, directly or indirectly, from sexual services provided by a child in a sexual services business

**3.**      *Misuse of Drugs Act 2001*

A crime under Part 2 of the *Misuse of Drugs Act 2001* being a crime that relates to a trafficable quantity of a controlled substance