



Crimes Amendment Act (No 2) 2008

Public Act 2008 No 37
Date of assent 25 June 2008
Commencement see section 2

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Crimes Amendment Act (No 2) 2008.

2 Commencement

- (1) Section 4 comes into force on the day that is 6 months after the date on which this Act receives the Royal assent.

- (2) The rest of this Act comes into force on the day after the date on which this Act receives the Royal assent.

3 Principal Act amended

This Act amends the Crimes Act 1961.

4 New sections 361D and 361E inserted

- (1) The following sections are inserted after section 361C:

“361D Judge may order trial without jury in certain cases that are likely to be long and complex

- “(1) This section applies only to a person (the **accused person**) who is committed for trial for an offence that is not—
- “(a) an offence for which the maximum penalty is imprisonment for life or imprisonment for 14 years or more; or
 - “(b) an offence of attempting or conspiring to commit, or of being a party to the commission of, or of being an accessory after the fact to, an offence referred to in paragraph (a).
- “(2) The Judge may, on a written application for the purpose made by the prosecutor to the Judge and served on the accused person before the accused person is given in charge to the jury, order that the accused person be tried for the offence before the Judge without a jury.
- “(3) However, the Judge may make an order under subsection (2) only if the prosecution and the accused person have been given an opportunity to be heard in relation to the application, and following such hearing, the Judge is satisfied—
- “(a) that all reasonable procedural orders (if any), and all other reasonable arrangements (if any), to facilitate the shortening of the trial, have been made, but the duration of the trial still seems likely to exceed 20 days; and
 - “(b) that, in the circumstances of the case, the accused person’s right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively.
- “(4) In considering, for the purposes of subsection (3)(b), the circumstances of the case, the Judge must take into account the following matters:

- “(a) the number and nature of the offences with which the accused person is charged:
 - “(b) the nature of the issues likely to be involved:
 - “(c) the volume of evidence likely to be presented:
 - “(d) the imposition on potential jurors of sitting for the likely duration of the trial:
 - “(e) any other matters the Judge considers relevant.
- “(5) If the accused person is one of 2 or more persons to be tried together, all of them must be tried before a Judge with a jury unless an order under subsection (2) for all of them to be tried by a Judge without a jury is applied for and made.
- “(6) This section does not limit section 361B or 361C or 361E.

“361E Judge may order trial without jury in cases involving intimidation of juror or jurors

- “(1) The Judge may, on a written application for the purpose made by the prosecutor before an accused person is given in charge to the jury, order that the accused person be tried for the offence before the Judge without a jury.
- “(2) However, the Judge may make an order under subsection (1) only if satisfied that there are reasonable grounds to believe—
- “(a) that intimidation of any person or persons who may be selected as a juror or jurors has occurred, is occurring, or may occur; and
 - “(b) that the effects of that intimidation can be avoided effectively only by making an order under subsection (1).
- “(3) If the accused person is one of 2 or more persons to be tried together, all of them must be tried before a Judge with a jury unless an order under subsection (1) for all of them to be tried by a Judge without a jury is applied for and made.
- “(4) This section does not limit sections 361B to 361D.”
- (2) Section 361A is consequentially amended by omitting “Subject to sections 361B and 361C of this Act, every”, and substituting “Every”.
- (3) Section 361A is consequentially amended by adding the following subsection as subsection (2):
- “(2) Subsection (1) is subject to sections 361B to 361E.”

- (4) Section 379A(1) is consequentially amended by inserting the following paragraphs after paragraph (d):
- “(da) against the making of an order under section 361D(2) (Judge may order trial without a jury in certain cases that are likely to be long and complex), or against a refusal to make such an order:
 - “(db) against the making of an order under section 361E(1) (Judge may order trial without a jury in cases involving intimidation of jurors), or against a refusal to make such an order.”.
- (5) Section 28D of the District Courts Act 1947 is amended—
- (a) by omitting from subsection (1) “and 361C” and substituting “to 361E”:
 - (b) by omitting from subsection (2) “1908” and substituting “1981”.
- (6) This section applies in respect of an accused person only if—
- (a) the accused person is committed for trial on or after the date on which this section comes into force; or
 - (b) the accused person is committed for trial before the date on which this section comes into force and the trial has not commenced before that date.

5 Evidence and addresses

- (1) Section 367(1) is amended by omitting “examine” in both places where it appears and substituting in each case “call”.
- (2) Section 367 is amended by inserting the following subsections after subsection (1B):
- “(1C) The Court may give an accused person (whether defended by counsel or not) leave to call 1 or more expert witnesses immediately after counsel for the prosecution has called 1 or more expert witnesses.
 - “(1D) Leave under subsection (1C) overrides subsection (1), but does not affect the calling of expert or other witnesses who are not the subject of the leave, or prevent cross-examination or re-examination of any expert witness.”
- (3) This section applies in respect of an accused person only if—
- (a) the accused person is committed for trial on or after the date on which this section comes into force; or

- (b) the accused person is committed for trial before the date on which this section comes into force and the trial has not commenced before that date.

6 New heading and sections 378A to 378F inserted

The following heading and sections are inserted after section 378:

“Retrials of previously acquitted persons

“378A Order for retrial may be granted if acquittal tainted

“(1) In this section,—

“**acquittal**—

“(a) includes—

“(i) the dismissal of an information on the merits; and

“(ii) a discharge under section 347 or 369A; and

“(iii) the setting aside of a conviction on appeal, without an order for a retrial; and

“(iv) the quashing of a count under section 345(4) or (5); but

“(b) does not include a discharge without conviction

“**acquitted person** means a person who has previously been acquitted of a specified offence, and who has, since that acquittal, been convicted of an administration of justice offence

“**administration of justice offence** means an offence against any of sections 101, 104, 109, 113, 116, and 117

“**prosecution** means—

“(a) an informant acting with the prior consent of the Solicitor-General; or

“(b) the Solicitor-General

“**retrial** includes, in relation to any summary proceedings that led to an acquittal, a rehearing of those proceedings

“**specified offence**, in relation to an acquitted person,—

“(a) means an offence that is punishable by a term of imprisonment and for which the person has previously been acquitted; and

“(b) includes any offence for which the person may not be tried because of that acquittal.

“(2) The High Court may, on the application of the prosecution made in accordance with rules of Court, order that an acquitted

person be retried for a specified offence, if the High Court is satisfied that—

- “(a) it is more likely than not that the commission of the administration of justice offence was a significant contributing factor in the person’s acquittal for the specified offence; and
 - “(b) no appeal or application in relation to the administration of justice offence is pending before any court; and
 - “(c) the retrial is in the interests of justice.
- “(3) In determining whether the retrial sought by the prosecution is in the interests of justice, the High Court is to have particular regard to the following matters:
- “(a) the length of time since the acquitted person is alleged to have committed the specified offence:
 - “(b) whether the prosecution acted with reasonable speed since discovering evidence of the administration of justice offence:
 - “(c) the interests of any victim of the specified offence alleged to have been committed:
 - “(d) whether the retrial for which leave is sought can be conducted fairly.
- “(4) If the prosecution makes an application under this section,—
- “(a) the prosecution must take all reasonable steps to serve a copy of the application on the acquitted person, and must file in the office of the Court notice that the copy has been served or that a copy has not been served but all reasonable steps to do so have been taken:
 - “(b) the defendant is entitled to be heard at the hearing of the application, which must not be held less than 14 days after notice is filed in the office of the Court under paragraph (a):
 - “(c) if the application is granted, and the acquitted person is again acquitted at the retrial, the prosecution may not make any further application for an order for the retrial of the acquitted person for the specified offence that was the subject of the application.
- “(5) This section does not apply if the acquitted person was acquitted of the specified offence before the commencement of this section.

“378B Meaning of terms used in sections 378C and 378D

“(1) In sections 378C and 378D,—

“**acquittal**—

“(a) includes—

“(i) a discharge under section 347 or 369A; and

“(ii) the setting aside of a conviction on appeal, without an order for retrial; and

“(iii) the quashing of a count under section 345(4) or (5); but

“(b) does not include a discharge without conviction

“**acquitted person** means a person who has previously been acquitted of a specified serious offence

“**specified serious offence**, in relation to an acquitted person,—

“(a) means an offence that is punishable by a term of imprisonment of 14 years or more and for which the person has previously been acquitted; and

“(b) includes any offence for which the person may not be tried because of that acquittal.

“(2) For the purposes of sections 378C and 378D, evidence is **new** if—

“(a) it was not given in the proceedings that resulted in the acquittal of the acquitted person; and

“(b) it could not, with the exercise of reasonable diligence, have been given in those proceedings.

“(3) For the purposes of sections 378C and 378D, evidence is **compelling** if—

“(a) it is a reliable and substantial addition to the evidence given in the proceedings that resulted in the acquittal of the acquitted person; and

“(b) it implicates the acquitted person with a high degree of probability in the commission of the specified serious offence.

“378C Consent of Solicitor-General required in certain circumstances for exercise of powers in relation to acquitted person

- “(1) Subsection (2) applies if a member of the police has good cause to suspect that information obtained, or likely to be obtained as a result of an investigation, will tend to implicate an acquitted person in the commission of a specified serious offence.
- “(2) If this subsection applies, a member of the police may exercise any of the powers referred to in subsection (3) in the course of a further investigation of whether the acquitted person has committed a specified serious offence only if a member of the police first obtains the consent of the Solicitor-General.
- “(3) The powers in respect of which subsection (2) applies are the following:
- “(a) questioning the acquitted person or any other person:
 - “(b) searching the acquitted person or any other person:
 - “(c) searching any premises or vehicles:
 - “(d) seizing any thing:
 - “(e) taking fingerprints or samples:
 - “(f) conducting or commissioning forensic tests or analyses.
- “(4) The acquitted person does not need to be notified of any proposal to seek the Solicitor-General’s consent under subsection (2) or of the fact that the consent is being, or has been, sought.
- “(5) The Solicitor-General may consent under subsection (2) only if he or she has reasonable grounds to believe that there is, or that a further investigation is likely to reveal, or confirm the existence of, new and compelling evidence to implicate the acquitted person in the commission of the specified serious offence.
- “(6) This section does not prevent a member of the police from taking any action if—
- “(a) the action is necessary as a matter of urgency to prevent substantial prejudice to an investigation or to the administration of justice; and
 - “(b) it is not reasonably practicable to obtain the consent of the Solicitor-General; and
 - “(c) the Solicitor-General’s consent is sought as soon as reasonably practicable after the action is taken.

“378D Order for retrial may be granted by Court of Appeal if new and compelling evidence discovered

- “(1) The Court of Appeal may, on the application of the Solicitor-General made in accordance with rules of Court, order that an acquitted person be retried for a specified serious offence, if the Court of Appeal is satisfied that—
- “(a) there is new and compelling evidence to implicate the acquitted person in the commission of the specified serious offence; and
 - “(b) a further trial of the acquitted person is in the interests of justice.
- “(2) In determining whether a retrial of the acquitted person is in the interests of justice, the Court of Appeal is to have particular regard to the following matters:
- “(a) whether before or during the proceedings that led to the acquittal of the acquitted person for the specified serious offence all reasonable efforts were made to obtain and present all relevant evidence then available:
 - “(b) the length of time since the acquitted person is alleged to have committed the specified serious offence:
 - “(c) whether the police and the Solicitor-General acted with reasonable speed in making the application after obtaining new evidence against the acquitted person:
 - “(d) the interests of any victim of the specified serious offence alleged to have been committed:
 - “(e) whether the retrial for which leave is sought can be conducted fairly.
- “(3) The Court of Appeal may, if it thinks it just to do so, exclude from its consideration any evidence against the acquitted person that has been obtained in contravention of section 378C.
- “(4) The Solicitor-General may apply under this section only if satisfied of the matters stated in subsection (1)(a) and (b).
- “(5) If the Solicitor-General makes an application under this section,—
- “(a) the Solicitor-General must take all reasonable steps to serve a copy of the application on the acquitted person, and must file in the office of the Court notice that the copy has been served or that a copy has not been served but all reasonable steps to do so have been taken:

- “(b) the defendant is entitled to be heard at the hearing of the application, which must not be held less than 14 days after notice is filed in the office of the Court under paragraph (a):
 - “(c) if the application is granted, and the acquitted person is again acquitted, the Solicitor-General may not make any further application for an order for the retrial of the person for the specified serious offence that was the subject of the application.
- “(6) This section does not apply if the acquitted person was acquitted of the specified serious offence before the commencement of this section.

“378E Orders to safeguard fairness of retrial

- “(1) An order for a retrial under section 378A or 378D may be granted subject to—
- “(a) any conditions that the court considers are required to safeguard the fairness of the retrial:
 - “(b) any other directions as to the conduct of the retrial.
- “(2) A court may, if it considers that the interests of justice so require, exclude any person from the hearing of an application under section 378A or 378D, or forbid any report or account of any evidence given or referred to at such a hearing or prohibit the publication of the name of the acquitted person or of any other person connected with a retrial for which leave is sought or has been granted.
- “(3) For the purposes of subsection (2), sections 138 and 140 of the Criminal Justice Act 1985, so far as they are applicable, apply with all necessary modifications.

“378F Effect of order for retrial

- “(1) If an order for a retrial is granted under section 378A or 378D,—
- “(a) the order of the Court must be certified by the Judge or, as the case requires, the presiding Judge to the Registrar of the Court before which the person was tried, and the order must be carried into effect:
 - “(b) the acquitted person may be arrested or summoned to appear before a court:

- “(c) the retrial must be conducted in the same manner as a retrial ordered following a successful appeal by a defendant against conviction:
 - “(d) the provisions of any enactment that enable a defendant who successfully appeals against conviction but in respect of whom a retrial is ordered, to be arrested, summoned to appear, remanded in custody, or released on bail, pending his or her retrial, apply with any necessary modifications to the acquitted person.
- “(2) Subsection (1) overrides sections 357 to 359 and any other enactment or rule of law.
- “(3) In this section, **retrial** includes, in relation to summary proceedings that led to an acquittal, a rehearing of those proceedings.”

7 Right of appeal in certain cases

Section 379A(1) is amended by inserting the following paragraph after paragraph (g):

“(ga) against the making of an order under section 378A for a person to be retried or against the refusal to make such an order.”.

8 New section 379AB inserted

The following section is inserted after section 379A:

“379AB Appeal against decision of Court of Appeal on appeal against certain orders

- “(1) With the leave of the Supreme Court, an accused person may appeal to the Supreme Court against a decision of the Court of Appeal on appeal under section 379A(1) or (2).
- “(2) With the leave of the Supreme Court, the Solicitor-General may appeal to the Supreme Court against a decision of the Court of Appeal on appeal under section 379A(1).”

9 New section 381A inserted

The following section is inserted after section 381:

“381A Question of law arising out of discharge under section 347 or stay of prosecution may be referred to Court of Appeal

- “(1) A Judge who directs that an accused be discharged under section 347 or for any reason that a prosecution be stayed may, on the application of the prosecutor, refer for the opinion of the Court of Appeal any question of law arising out of that direction.
- “(2) The prosecutor must apply as soon as reasonably practicable after the Judge gives his or her reasons for the direction, and in no case later than 10 days after the reasons for the direction are given.
- “(3) When a question is referred to the Court of Appeal, the accused who has been discharged or whose prosecution has been stayed is subject to again being arrested or summoned to appear if the Court of Appeal orders a new trial.
- “(4) The Judge who refers a question to the Court of Appeal must approve and sign the form of the question.
- “(5) If the Judge refuses to refer a question to the Court of Appeal, the prosecutor may apply to the Court of Appeal for leave to appeal against that refusal.
- “(6) The Court of Appeal may, on considering any evidence it requires, grant or refuse leave.
- “(7) If leave to appeal is granted, a case must be stated for the opinion of the Court of Appeal as if the question had been referred under subsection (1).”

10 Powers of Court of Appeal where appeal is on question of law

Section 382(2)(b) is amended by inserting “or that the accused has been wrongly discharged or that the prosecution has been wrongly stayed” after “a mistrial”.

11 Right of appeal against conviction or sentence

- (1) Section 383 is amended by inserting the following subsection after subsection (1):
- “(1A) Any person sentenced under section 28F(4) of the District Courts Act 1947 to a term of imprisonment or to a fine that

exceeds the maximum term of imprisonment or the maximum fine that may be imposed by a District Court under section 7 of the Summary Proceedings Act 1957 (which is a term of imprisonment not exceeding 5 years or a fine not exceeding \$10,000 or both), may appeal to the Court of Appeal against that sentence.”

- (2) Section 383 is amended by inserting the following subsection after subsection (2):
- “(2A) The Solicitor-General, with the leave of the Court of Appeal, may appeal to the Court of Appeal against a sentence imposed under section 28F(4) of the District Courts Act 1947 if the sentence appealed against is a term of imprisonment or a fine that exceeds the maximum term of imprisonment or the maximum fine that may be imposed by a District Court under section 7 of the Summary Proceedings Act 1957 (which is a term of imprisonment not exceeding 5 years or a fine not exceeding \$10,000 or both).”
- (3) Section 383 is amended by omitting “subsection (2) of this section ” from subsections (3) and (4) and substituting in each case “subsection (2) or (2A)”.

12 New section 384A inserted

The following section is inserted after section 384:

“384A Jurisdiction in certain cases where appeals lie to different Courts

- “(1) This section applies if—
- “(a) a person to whom section 383(1) or (1A) applies also has a right of appeal (a **related right of appeal**) to the High Court against conviction or sentence in respect of—
- “(i) an offence arising from the same incident or series of incidents as the conviction or sentence to which the right of appeal under section 383(1) or (1A) relates; or
- “(ii) an offence for which the person was sentenced on the same occasion as the imposition of the sentence to which the right of appeal under section 383(1) or (1A) relates:

- “(b) the Solicitor-General has a right of appeal under section 383(2) or (2A) against a sentence imposed on a person against whom the informant also has a right of appeal (a **related right of appeal**) to the High Court in respect of the sentence imposed on that person for—
 - “(i) an offence arising from the same incident or series of incidents as the sentence to which the right of appeal under section 383(2) or (2A) relates; or
 - “(ii) an offence for which the person was sentenced on the same occasion as the imposition of the sentence to which the right of appeal under section 383(2) or (2A) relates.
- “(2) If this section applies, and any person or, as the case may be, the Solicitor-General appeals to the Court of Appeal under section 383 or 384,—
 - “(a) all other appeals by the person or the Solicitor-General arising from the exercise of a related right of appeal must also be heard and determined in the Court of Appeal instead of the High Court, unless one or more of those appeals is to the Supreme Court; and
 - “(b) the provisions of this Part apply to those appeals with any necessary modifications.”

13 Determination of appeals in ordinary cases

Section 385 is amended by repealing subsection (3) and substituting the following subsection:

- “(3) On any appeal to which subsection (2A) applies, the Court of Appeal or the Supreme Court must—
 - “(a) dismiss the appeal; or
 - “(b) if it thinks that a different sentence should have been passed,—
 - “(i) quash the sentence and replace it with another sentence warranted in law (whether more or less severe) that the Court thinks ought to have been passed; or
 - “(ii) vary, within the limits warranted in law, the sentence or any part of it or any condition imposed in it; or

“(c) remit the case to the Court that imposed the sentence with a direction that such Court take an action of the kind described in paragraph (b)(i) or (ii) in accordance with any directions given by the Court of Appeal or the Supreme Court as the case may be.”

14 Right of appellant to be represented and restriction on attendance

Section 395(3) is amended by omitting “(1) to (2)” and substituting “(1A) and (2)”.

15 Judgment of Court of Appeal

Section 398(1) is repealed.

16 Prerogative of mercy

Section 406(a) is amended by omitting “section 28F(2)” and substituting “section 28F(4)”.

17 New sections 413 to 415 inserted

The following sections are inserted after section 412:

“413 Enactment creating offence is repealed and replaced or consolidated

Section 414 applies if—

- “(a) an enactment that forms a part of this Act and that creates an offence is repealed and is replaced by, or is consolidated in, a new enactment, whether in the same or a different form; and
 - “(i) proceedings are commenced for an offence contrary to the repealed enactment in reliance on section 19 of the Interpretation Act 1999; or
 - “(ii) proceedings are commenced for an offence contrary to the new enactment; or
 - “(iii) proceedings are commenced for an offence contrary to the repealed enactment in reliance on section 19 of the Interpretation Act 1999 and, in the alternative, for an offence contrary to the new enactment; and

“(b) the date of the act or omission by the defendant constituting the alleged offence cannot be established with sufficient certainty to determine whether it occurred before the repeal of the repealed enactment or after the commencement of the new enactment.

“414 Repealed enactment continues to have effect

“(1) The repealed enactment referred to in section 413(a) continues to have effect for the purposes of the proceedings.

“(2) The defendant may be found guilty or convicted of the offence created by the repealed enactment if the defendant’s act or omission—

“(a) would have constituted an offence under both the repealed enactment and the new enactment referred to in section 413(a); and

“(b) occurred on a date that cannot be established with certainty but that is established to have occurred either after the commencement of the repealed enactment and before its repeal or after the commencement of the new enactment and before its repeal.

“(3) If subsection (1) applies, the defendant is entitled to raise any defence to the repealed enactment that the defendant would be entitled to raise under the new enactment, if that defence is relevant to the repealed enactment.

“(4) A defendant found guilty or convicted, in accordance with this section, of an offence created by the repealed enactment is liable to a maximum penalty which is the lesser of that prescribed for the offence of which the defendant is found guilty or convicted and that prescribed for the corresponding offence created under the new enactment.

“415 Inconsistency with other enactment or rule of law

If sections 413 and 414 are inconsistent with any other enactment or rule of law, sections 413 and 414 prevail over that enactment or rule of law.”

*Amendment to Crimes Amendment Act 2005***18 Amendment to Crimes Amendment Act 2005**

- (1) This section amends the Crimes Amendment Act 2005.
- (2) Section 12(3) is amended by adding “, the District Courts Amendment Act (No 2) 2008, and the Summary Proceedings Amendment Act (No 2) 2008”.

19 Transitional provision

Despite section 384A of the Crimes Act 1961, every appeal filed before the commencement of that section must be heard and determined as if section 384A had not been enacted.

Legislative history

17 June 2008	Divided from Criminal Procedure Bill (Bill 158–2) by committee of the whole House as Bill 158–3A
19 June 2008	Third reading
25 June 2008	Royal assent

This Act is administered by the Ministry of Justice.
