

MODEL CRIMINAL CODE

Discussion Paper

CHAPTER 2

ISSUE ESTOPPEL, DOUBLE JEOPARDY AND PROSECUTION APPEALS AGAINST ACQUITTALS

November 2003

This Discussion Paper was prepared by the Model Criminal Code Officers Committee. It does not necessarily represent the views of the Standing Committee of Attorneys-General or an individual Attorney-General.

**MODEL CRIMINAL CODE
OFFICERS
COMMITTEE OF THE
STANDING COMMITTEE OF
ATTORNEYS-GENERAL**

DISCUSSION PAPER
MODEL CRIMINAL CODE
CHAPTER 2

**ISSUE ESTOPPEL, DOUBLE JEOPARDY
AND PROSECUTION APPEALS
AGAINST ACQUITTALS**

Model Criminal Code Officers Committee of the
Standing Committee of Attorneys-General

November 2003

This Discussion Paper was prepared by the Model Criminal Code Officers' Committee. It does not necessarily represent the views of the Standing Committee of Attorneys-General or an individual Attorney-General.

ISBN 0 642 21170 1

Preface

On 28 June 1990 the Standing Committee of Attorneys-General (“SCAG”) placed the question of the development of a national model criminal code for Australian jurisdictions on its agenda. In order to advance the concept, SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee was originally known as the Criminal Law Officers Committee (CLOC), but, in November 1993, the name was changed to the Model Criminal Code Officers Committee (MCCOC) in order to reflect the principal remit of the Committee directly.

The first formal meeting of the Committee took place in May 1991. In July 1992, the Committee released a discussion draft of the general principles of criminal responsibility. After a great deal of public consultation, the Committee delivered a Final Report to SCAG which was released in December 1992. With the exception of the general principles relating to intoxicated defendants, the recommendations in that Final Report formed the basis for the Commonwealth Criminal Code Bill, 1994, which was passed by the Commonwealth Parliament in March, 1995.

In 1994, both the Commonwealth Government and the State and Territory Premiers’ Leaders Forum endorsed the Model Criminal Code project as one of national significance.

In December 1995 MCCOC released its Final Report titled Theft, Fraud, Bribery and Related Offences. MCCOC has since released discussion papers on Non Fatal Offences Against the Person in August 1996 (report September 1998), Sexual Offences in November 1996 (report June 1999), Contamination of Goods Offences in May 1997 (report March 1998), Serious Drug Offences in June 1997 (report October 1998), Administration of Justice Offences in July 1997 (report June 1998), Model Domestic Violence Laws in November 1997 (report April 1999), Serious Drug Offences in Commonwealth Jurisdiction in December 1997, Slavery Offences in April 1998 (report November 1998), Fatal Offences in June 1998, Model Forensic Procedures Bill and the Proposed National DNA Database in May 1999 (report February 2000) and Damage and Computer Offences in January 2000 (report January 2001).

This discussion paper deals with the law on double jeopardy. The rule against double jeopardy prevents a person who has been acquitted or convicted of an offence from being tried again for an offence relating to the same conduct or event. The rules which govern this area of law are technical and complex, and will not be the main focus of this paper. The paper will focus instead on the principles which guide and reinforce the application of the law on double jeopardy in relation to acquittals and subsequent

prosecutions. The views expressed by the Committee are reflected in the draft model provisions that accompany this paper.

The issue of double jeopardy has gained recent prominence due to public disquiet about a small number of controversial cases, and in particular the High Court decision in *Carroll*. Carroll was convicted of murder in a Queensland court in 1985, but was later acquitted on appeal. In 2000 he was convicted of perjury based on his denial of the murder charge on oath at his initial trial, but later was acquitted of this charge by the Court of Appeal. The High Court upheld this decision, holding that trying Carroll for perjury triggered the double jeopardy rule. The *Carroll* decision was uncontroversial in a legal sense, being a mere rationalisation of previous authority. However, along with a handful of other cases it has subjected the basic principles underlying the double jeopardy rule to vigorous scrutiny.

SCAG referred the issue of double jeopardy to MCCOC for review and to consider possible reforms that would militate against any injustices flowing from a strict operation of the double jeopardy principle. The Committee initially intended to deal with the general codification of the rule of double jeopardy, but due to time and resource constraints has been unable to do so. Consistent with the objects of the Model Criminal Code exercise, the Committee hopes to prepare codified provisions at a later date. In this discussion paper the Committee has instead focused on developing protective principles that would operate in limited circumstances as a guarantee of certain procedural protections before a person who has been acquitted can be retried.

Three protective principles canvassed by the Committee are prosecution for an administration of justice offence connected to the original trial, a retrial of the original or similar offence where fresh evidence arises and a retrial of the original or similar offence if the acquittal is tainted. Under these protective principles, a person acquitted of an offence will not be precluded by the rule against double jeopardy from being prosecuted for an administration of justice offence or the original or related offence.

1. Prosecution for an administration of justice offence connected to the original trial

Under this proposal an acquitted accused could be prosecuted for an administration of justice offence (eg. perjury, bribery of a juror) committed at the original trial. Prosecution for the administration of justice offence would be permitted even where the prosecution may involve an assertion, implicit or explicit, that the accused was really guilty of the offence upon which he or she was acquitted.

Before a prosecution for an administration of justice offence could proceed, two conditions would have to be met: (i) there is fresh evidence of the

commission of the administration of justice offence; and (ii) the prosecution does not charge the person with the original offence or one similar to it in the same proceedings.

Fresh evidence is evidence that could not be adduced in the original proceedings through the exercise of reasonable diligence. The aim of this safeguard is to protect the acquitted accused from being subjected to a prosecution as a result of lazy or incompetent police work during the original investigation.

The second safeguard requires further explanation as the relationship between this protective principle and the principles 2 and 3 below is complex. The Committee believes that when armed with evidence suggesting the commission of an administration of justice offence that directly attacks the legitimacy of the original acquittal the prosecution should be required to choose which type of prosecution to pursue. The prosecution could seek to try the person for the administration of justice offence or to retry the person for the original or related substantive offence. But it should not be permitted to do both in the same proceedings. The prosecution may subsequently apply to retry the person for the original or related substantive offence on 'tainted acquittal' grounds.

Subject to this qualification, the Committee's proposed protective principle here would involve overturning the High Court's *Carroll* decision.

2. Retrial of the original or similar offence where there is fresh and compelling evidence

Under this proposal an acquitted accused could be retried for a very serious offence where there is fresh and compelling evidence against the acquitted person in relation to the offence. The Court of Criminal Appeal would have to be satisfied that, in addition to being fresh, the evidence is reliable, substantial and highly probative of the case against the acquitted person. A typical example of such evidence may be DNA evidence.

The 'very serious offence' threshold is important. The retrial application must relate to an indictable offence punishable by imprisonment for life or for more than a period of 15 years or more (for example, murder, terrorism, rape, armed robbery and drug trafficking offences).

The Court must also be satisfied that it is in the interests of justice to order a retrial. The length of time since the acquitted person allegedly committed the offence and the length of time since the person was acquitted are factors that the Court must consider in determining what the 'interests of justice' require. For example, if the length of time passed suggests to the Court that a fair trial is unlikely, a retrial should not be ordered. The Crown is permitted only one retrial application in relation to a particular acquittal.

3. Retrial of the original or similar offence where the acquittal is tainted

Under this proposal an acquitted accused could be retried for a very serious offence where the acquittal appears to be tainted. The Court of Criminal Appeal would have to be satisfied that the original acquittal is in doubt because of a subsequent, relevant conviction of an administration of justice offence. The Committee believes that the Court of Criminal Appeal should only authorise such retrials if 'it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted'.

The same 'very serious offence' threshold would apply to this protective principle.

As with the second proposal, the Court must also be satisfied that it is in the interests of justice to order a retrial, with the same factors to be considered by the Court. Only one retrial application in relation to a particular acquittal is permitted. This is subject to one exception: if a retrial was considered 'tainted' because of the commission of a related administration of justice offence, another retrial application could be made. The integrity of the criminal justice system requires a valid trial to be carried out.

Prosecution Appeals Against Acquittals

In reviewing the application of the double jeopardy principle as it applies to acquittals, the Committee has also taken the opportunity to examine the existing powers of appeal from an acquittal available to the prosecution. The Committee includes in the discussion paper a proposal to widen these interlocutory powers of appeal, particularly to facilitate appeals from acquittals resulting from trial judge rulings on the admissibility of evidence.

The Committee has sought to develop its reform proposals with close reference to the general principles underlying the double jeopardy rule. These include the prevention of the State, with its considerable resources, from repeatedly attempting to convict an individual; the according of finality to defendants, witnesses and others involved in the original criminal proceedings; and the safeguarding of the integrity of jury verdicts. The Committee has been mindful of the desirability of achieving a balance between the rights of the individual who has been lawfully acquitted and the interest held by society in ensuring that the guilty are convicted and face appropriate consequences. As will be apparent from the discussion paper, the Committee has favoured a national approach to reform so as to prevent a situation arising in which acquittals are treated differently depending on jurisdiction.

As with its previous publications, MCCOC has attempted to produce a document which is comprehensive, concise and capable of being understood by the general public as well as those who have some legal expertise.

The Committee encourages interested people and groups to provide their views on any aspect of this discussion paper. These comments will be used to assist MCCOC in preparing its final report.

Most of the discussion paper was written by Matthew Goode of the Office of the Attorney-General of South Australia.

Comments should be sent to:

The MCCOC Secretariat
Criminal Law Division
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600.

COMMITTEE MEMBERS

Chairperson

His Honour Judge Rod Howie
Supreme Court of New South Wales

Members

New South Wales

Mr Mark Marien SC
Criminal Law Review Division
Attorney-General's Department

Victoria

Mr Greg Byrne
Manager
Legislation & Policy
Department of Justice

Queensland

Ms Virginia Sturgess
Principal Legal Consultant
Strategic Policy Division
Department of Justice and Attorney-General

Western Australia

Mr George Tannin SC
Crown Counsel
Crown Solicitor's Office

South Australia

Mr Matthew Goode
Attorney-General's Department

Tasmania

Ms Lisa Hutton
Director
Legislation Development and Review
Department of Justice

Northern Territory

Ms Rosslyn Chenoweth
Policy Division
Department of Justice

Australian Capital Territory

Ms Nicole Mayo
Criminal Law and Justice Group
Legislation and Policy Branch
Department of Justice and Community Safety

Commonwealth

Mr Geoff McDonald
Mr Andrew Egan
Attorney-General's Department

Consultants

Mr Ian Leader-Elliott
Faculty of Law
University of Adelaide

Legislation

ACT	<i>Supreme Court Act 1933</i>
Cth	<i>Judiciary Act 1903</i>
NSW	<i>Criminal Appeal Act 1912</i> <i>Crimes (Local Courts Appeal and Review) Act 2001</i>
NT	<i>Criminal Code of the Northern Territory of Australia</i> <i>Justices Act</i>
Qld	<i>Criminal Code 1899</i> <i>Justices Act 1886</i>
SA	<i>Magistrates Court Act 1991</i> <i>Criminal Law Consolidation Act 1935</i>
Tas	<i>Criminal Code Act 1924</i>
Vic	<i>Magistrates Court Act 1989</i> <i>Supreme Court Act 1986</i> <i>Crimes Act 1958</i>
WA	<i>Criminal Code</i>

Table Of Contents	
PREFACE	i
Committee Members	vi
Legislation	viii
Part 1: The general principles of double jeopardy	1
Part 2: Autrefois acquit law - the effect of acquittals at common law	5
Part 3: Autrefois acquit law - the principles applied to prosecution appeals	14
Part 4: Autrefois acquit law - the Carroll decision	19
Part 5: Autrefois acquit law - statute law on prosecution appeals	28
Part 6: Autrefois acquit at common law - recent inquiries arguing for change	44
Part 7: Examination of the proposals for change of the common law principle	53
Part 8: Some general conclusions	69
Part 9: Proposals for reform of the double jeopardy principle	70
Part 10: Prosecution appeals	79
General codification of the general principles of double jeopardy	86
Division 1 Definintions	89
2.8.1 Definitions	89
Division 2 Double jeopardy	95
The general rule	95

2.8.2	Exception for administration of justice offences	97
2.8.3	Trial for administration of justice offence or retrial under Division 3	101
Division 3	Retrial after acquittal	103
2.8.4	Application of Division—cases that may be retried	103
2.8.5	Court of criminal appeal may order retrial	107
2.8.6	Fresh and compelling evidence—meaning	109
2.8.7	Tainted acquittals—meaning	111
2.8.8	Interests of justice—matters for consideration	115
2.8.9	Application for retrial—procedure	117
2.8.10	Retrial	119
2.8.11	Authorisation of police investigations	121
2.8.12	Restrictions on publication	123
2.8.13	Other appeal or review rights not affected	125
2.8.14	Directed jury acquittals or acquittals in trial without juries	127
Appendix A		129
Appendix B		138

Part 1: The General Principles of Double Jeopardy

The general principle known as the rule against double jeopardy has a long history in the common law¹, so old that the answer to a criminal charge that is alleged to violate the rule against double jeopardy is still expressed in Norman-French—*autrefois acquit* (“I have [already] been acquitted”) and *autrefois convict* (“I have [already] been convicted”).

The technical rules which govern this area of the law had no comprehensive judicial review until the decision of the House of Lord in *Connelly*², and remained unbelievably complex³ in Australia until the decision of the High Court in *Pearce*⁴, which had the dolorous effect of consigning almost all of the technicalities to the unguided and unstructured realm of the abuse of process discretion. It is not intended to make this paper a treatise on the details and complexity of the law on double jeopardy in all of its manifestations. The principles which guide and reinforce it are the focus of this paper.

First, it is clear that the principle against double jeopardy has international recognition. Article 14(7) of the *International Covenant on Civil and Political Rights* says:

No one shall be liable to be tried and punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.⁵

It may be noted, however, that this command leaves a great deal of interpretation. In particular, the insertion of the word “finally” means that the principle cannot be taken to prohibit, for example, prosecution appeals against acquittals - for to enact such a law would simply mean that the acquittal was not “final”⁶. The same holds true for double jeopardy reform - for all that does, it can be argued, is redefine “finally”. As will be seen from

1 See, generally, the classic work on the subject, Friedland, *Double Jeopardy* (1969), ch 1; Thomas, *Double Jeopardy: The History, The Law* (1998); Hunter, “The Development of The Rule Against Double Jeopardy” (1984) 5 J Legal History 3. A relatively early example of its more formal recognition in the common criminal law can be found in Blackstone, *Commentaries on the Laws of England: Volume IV* (1769), at 330. However, note that the doctrine appeared in reported cases as early as *Sperry* (1589) 5 Co Rep 61a, 77 ER 148.

2 [1964] AC 1254.

3 See, for example, the voluminous judgments in *O’Loughlin ex parte Ralphs* (1971) 1 SASR 219.

4 (1998) 72 ALJR 1416, 103 A Crim R 372.

5 This sort of principle stands in constitutional status in over 50 countries. For the relevant references, see Roberts, “Double Jeopardy Law Reform: A Criminal Justice Commentary” (2002) 65 Modern LR 393 at 404-405. [Roberts MLR].

6 Article 4 of Protocol 7 to the *European Convention of Human Rights* not only repeats the use of the word “finally” but also provides specifically for the reopening of the prosecution case in accordance with domestic law.

the discussion below, that is precisely the course that has been espoused, officially, in the United Kingdom.

A general proposition of the double jeopardy principle, often quoted, is that stated by Black J in *Green v United States*:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁷

In the High Court decision in *Rogers v Queen*, Deane and Gaudron JJ said:

It is convenient, before doing so, to say something of the Latin maxims to which his Honour referred. The first expresses the need, based on public policy, for judicial determinations to be final, binding and conclusive. The second looks to the position of the individual and reflects the injustice that would occur if he or she were required to litigate afresh matters which have already been determined by the courts. It is correct to say that *res judicata* or cause of action estoppel derives from the principles embodied in those maxims, which principles are fundamental to any civilized and just judicial system. There is, however, another related principle, likewise fundamental, which is embodied in the Latin maxim *res judicata pro veritate accipitur*. That maxim gives expression to a rule of Roman law which has since been recognized as part of our common law. It expresses the need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct.⁸

It is now necessary to detail the separate policies that lie behind these general propositions. What are the specific legal policies at stake here? They appear to be:

- the various interests in securing finality of decisions;
- the protection of citizens from harassment by the State;
- the promotion of efficient investigation;
- the sanctity of a jury verdict; and
- the prevention of wrongful conviction.

7 355 US 184 at 187-188 (1957).

8 (1994) 181 CLR 251 at 273.

These interests overlap to some extent.

The concept in favour of finality is capable of subdivision. The UK Law Commission⁹ recently dissected it into four different sub-interests.

- *Finality as an antidote to distress and anxiety*: the general principle here is that those subject, or potentially subject, to any double jeopardy should not be subjected to the anxiety and distress occasioned by the fear that he or she may have to undergo the admittedly stressful trial process all over again. This fear would not only affect the truly guilty - for even the innocent are subject to the stress concerned. They are in jeopardy even if truly innocent.
- *Finality and individual liberty*: the general principle here is best put by the Law Commission itself: “In a liberal democracy, it is a fundamental political and social objective to allow individuals as much personal autonomy as possible, to allow people the space to live their own lives and pursue their own visions of the good life. Lack of finality in criminal proceedings impinges on this to a significant degree, in that the individual, though acquitted of a crime, is not free thereafter to plan his or her life, enter into engagements with others and so on, if required constantly to have in mind the danger of being once more subject to a criminal prosecution for the same alleged crime.”¹⁰
- *Finality and the interests of third parties* it must be recognised that the interests of finality also affect friends, family and others dealing with the person concerned. Some weight must be given to the emotional and financial interests of these people.
- *Finality as a wider social value*: this aspect of the finality interest sees the finality aspect of double jeopardy as a statement of liberty and the relationship between the State and the citizen in a wider sense than mere individual circumstances. It is a statement of a “fundamental value”. The Law Commission quoted Paul Roberts to this effect as follows (in significant part): “It is more illuminating to think of double jeopardy as forming one, significant strand of the limits on a state’s moral authority to censure and punish through criminal law. A defendant is not pleading unfair treatment *qua* criminal accused when invoking the

9 The Law Commission, *Double Jeopardy and Prosecution Appeals* (Law Com No 267), March 2001 paras 4.11-4.19. <<http://www.lawcom.gov.uk/library/lc267/lc267.pdf>> [The Law Commission].

10 The Law Commission, *ibid*, para 4.16.

pleas in bar, but rather reminding the state – as the community’s representative, the community in whose name the business of criminal justice is done – of the limits of its power. ... Defendants asserting double jeopardy protection act almost as private attorneys general, policing the boundaries of legitimacy in criminal law enforcement, keeping state power in check for the benefit of all who value democracy and personal freedom.”¹¹

The other interests listed above require little amplification. However, it is necessary to emphasise that, given the state of Australian law and despite the high moral values involved in the double jeopardy principles, a significant component of the operation of the double jeopardy principle in practice must be the inscrutability of the jury verdict. The inscrutability of the deliberations of the jury are protected by fierce legislation in all jurisdictions.¹² Inherent in this is the idea that juries can be (and, indeed, are entitled to be) capricious within limits. There is a vast literature on this but it is not intended to refer to any of it here. Neither is this the place to debate the worth of the jury system in general or this specific aspect of it. It is enough to recognise that all Australian jurisdictions currently adhere to this policy and do so firmly. One of the results of this policy is the double jeopardy principle.

The double jeopardy principle has two faces of course. The principle that prevents a person from being punished twice for the same offence (*autrefois convict*) is based on merger¹³ - the lesser offence or second offence is merged in the judgement of guilt for the first offence. The principle that prevents a person from being prosecuted twice for an offence of which he or she has been previously acquitted (*autrefois acquit*) is based on estoppel by verdict.¹⁴ The underlying policies and legal principles are quite different in each case.¹⁵ The issues discussed in this paper exclusively concern the latter principle. Those issues are (a) the disquiet that has arisen about the decision of the High Court in *Carroll*; and (b) the reference to MCCOC by the Standing Committee of Attorneys-General of the question of prosecution appeals against acquittals. Both questions centrally involve that aspect of double jeopardy law known traditionally as *autrefois acquit*. They will be examined in turn.

11 Roberts, “Acquitted Misconduct Evidence and Double Jeopardy Principles, from *Sambisivam* to *Z*” [2000] Crim LR 952.

12 See, for example, (NSW) *Jury Act*, 1977, s 68A; (SA) *Criminal Law Consolidation Act*, 1935, s 246; (Qld) *Jury Act*, 1995, s 70.

13 See, generally, Friedland, *Double Jeopardy* (1969) at 198-204.

14 See, for example, *O’Loughlin ex parte Ralphs* (1971) 1 SASR 219 at 222 (Bray CJ) and 272 (Wells J).

15 de Tan and Shorts, “Double Jeopardy - Double Trouble” (2002) 66 J Criminal Law 624 at 627-628 neatly explain that *autrefois acquit* is centred on providing a consistent rule preventing the ordeal of endlessly renewed prosecution, whereas *autrefois convict* is centred on making sure that the offender is not doubly punished rather than to prevent the hardship of a second trial.

Part 2: Autrefois Acquit Law - The Effect of Acquittals At Common Law

A recent High Court decision in *Carroll*¹⁶ has brought very obscure aspects of the double jeopardy rule to the attention of the Australian public, sparking debate as to whether or not it should be relaxed or reformed. It is necessary to present an outline of the law that the High Court had to consider in that case in order to understand why the decision says what it says.

There existed a principle of law that the prosecution could not, in any subsequent trial, lead evidence which called into question a previous acquittal. It is not new nor is it an invention of the High Court in *Carroll*. The *modern* source of this rule is thought to be the following quotation from *Sambasivam*:

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication.¹⁷

A similar statement can be found in the High Court decision in *Garrett*:

The relevant principle is that the acquittal may not be questioned or called in question by any evidence which, if accepted, would overturn or tend to overturn the verdict. That the applicant was not guilty of the former charge because acquitted of it is a matter which passed into judgment: it is *res judicata*.¹⁸

It was thought until *Carroll* that this principle was too widely stated, although the extent to which it was overstated was uncertain. Nevertheless, a doctrine of the kind, whether known as ‘*res judicata*’ or ‘*cause of action estoppel*’ was accepted by the High Court in 1978 in the leading case of *Storey*.¹⁹ The court in *Storey* saw the proposition at that time more in evidentiary terms than in terms of a legal rule, and decided:

- (1) There is a general rule precluding the Crown from challenging the effect of a previous acquittal in proceedings for any other offence charged against the acquitted person.
- (2) That general rule does not render evidence tending to contradict the acquittal as automatically inadmissible. Rather, the question is whether, on ordinary general

¹⁶ *Carroll* [2002] HCA 55 (5 December 2002).

¹⁷ [1950] AC 458 at 479.

¹⁸ (1977) 139 CLR 437 at 445 per Barwick CJ (Stephen, Mason and Jacobs JJ concurring).

¹⁹ (1978) 140 CLR 364.

principle, the relevance of the evidence outweighs its prejudicial nature or its capacity to work injustice.

- (3) If the evidence is admitted it must be accompanied by a precise instruction that the previous acquittal stands and must be given full weight.
- (4) In the appropriate case, the trial judge can 'edit' the evidence to reduce prejudice.

The effect of the decision in *Storey* on res judicata remained unaffected and was repeated, in a more precise form, in *Carroll*.

In England, the *Sambasivam* principle was subject to limitation in the decision of the House of Lords in *Z*.²⁰ The defendant was charged with rape. His defence was that, while he had sexual intercourse with the complainant, she consented or, in the alternative, that he believed that she consented. The defendant had faced four separate trials of previous allegations of rape of young women. In three of the trials the defendant was acquitted. In the fourth trial he was convicted. In each of the four trials the defendant did not dispute that sexual intercourse had taken place between him and the respective complainants. The prosecution proposed to call the four complainants in the previous trials to give evidence of the defendant's conduct towards them to negate the defence of consent or belief as to consent in respect of the charge of rape in the current case. The trial judge ruled inadmissible the evidence of the three complainants in respect of whose complaints the defendant had been acquitted by reason of *Sambasivam*. That question went to the House of Lords.

The House unanimously ruled that the evidence was admissible. The relevant principles were stated by Lord Hutton as follows (authorities omitted):

- (1) The principle of double jeopardy operates to cause a criminal court in the exercise of its discretion, and subject to the qualification as to special circumstances stated by Lord Devlin in *Connelly* at p. 1360, to stop a prosecution where the defendant is being prosecuted on the same facts or substantially the same facts as gave rise to an earlier prosecution which resulted in his acquittal (or conviction),
...
- (2) Provided that a defendant is not placed in double jeopardy as described in (1) above, evidence which is relevant on a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was, in fact, guilty of an offence of which he had earlier been acquitted.

²⁰ [2000] 2 AC 483.

- (3) It follows from (2) above that a distinction should not be drawn between evidence which shows guilt of an earlier offence of which the defendant had been acquitted and evidence which tends to show guilt of such an offence or which appears to relate to one distinct issue rather than to the issue of guilt of such an offence. ...²¹

The Australian authorities were not cited by the House.²² It is difficult to read the Australian line of authority and the English line of authority together. While it would appear that they have a deal in common in trying to define the difficult interface between this area of law and other larger areas of the law of evidence, notably “propensity evidence”²³ and the general exclusionary discretion based on prejudicial effect, it seemed on the face of it that the preclusive rule in *Storey* was firmer than that in *Z*. In addition, it may be remarked that the House of Lords in *Z* appeared to see the *autrefois* plea (or some analogous rule) as potentially wider than that contemplated by the High Court in *Pearce*. That may explain the difference in the related area of *res judicata*. If *autrefois* is wider, there is less need for an expansive doctrine of *res judicata* or cause of action estoppel.

Other jurisdictions have taken differing lines. The Canadian Supreme Court appears to have taken a line which is at least as strong, if not stronger than *Storey*.²⁴ On the other hand, the New Zealand Court of Appeal has adopted the reasoning in *Z*.²⁵ The recent Australian authority was canvassed in neither case. In *Degnan*, the New Zealand Court of Appeal conveniently summarised the policy position reached in *Z* (and followed by that court) as follows:

In policy terms such evidence as is in issue in this case should be admissible at law subject to a judicial discretion to exclude it. If it were not so the unedifying spectacle might arise of a succession of acquittals based on individual allegations which, viewed in isolation, left room for doubt, but which, when viewed as part of a pattern, each drawing support from the others, might lead irresistibly to a conclusion of guilt. The accused has the benefit of the earlier acquittal or acquittals in that he can never again be tried for the offences involved. But he should not have the further benefit of being immunised from the relevant evidence when facing a similar charge in the future. This is an issue on which the law must strike a balance between

21 [2000] 2 AC 483 at.

22 Nor was an equally emphatic Canadian line of authority to the contrary. See *G(KR)*(1991) 68 CCC (3d) 268; *Cullen* (1989) 52 CCC (3d) 459; *M(RA)* [1995] 1 WWR 509.

23 The problem in *Z* is addressed by statute in Victoria. The evidence would be admissible. Cf *Crimes Act 1958*, s 398A.

24 *Arp*, [1998] 3 SCR 339.

25 *Degnan* [2001] 1 NZLR 280.

the interests of those previously acquitted and the interests of society in having all relevant evidence before the Court when someone is prosecuted for a crime. In this field that balance generally comes down in favour of the interests of society. But there must always be a reserve power to exclude the evidence, if in the particular circumstances it would not be fair to the accused to admit it. An example of such a case might be the alibi situation mentioned by Lord Hobhouse in *Z*. On a prior charge of rape the accused has stated he was not the rapist. He has gone to much time, trouble and expense to procure alibi witnesses to say he was elsewhere at the relevant time. He is found not guilty. Two years later a very similar rape occurs in much the same location. The accused is charged with it. It might then be unfair to the accused to seek to lead evidence from the first complainant, in spite of her evidence otherwise qualifying on similar fact principles. We find it difficult to endorse the approach taken in some of the Canadian cases that a verdict of not guilty is the equivalent of a declaration of innocence. That approach risks elevating perceived theory over the realities of criminal practice. In the vast majority of cases a jury, when returning a verdict of not guilty, cannot be taken as saying affirmatively they are satisfied the accused is innocent; what they are really saying is that they are not satisfied beyond reasonable doubt the accused is guilty. While our system of criminal justice does not allow a second trial, whatever the force of new evidence that may be discovered, it would be to tilt the balance too far in favour of the accused to have an absolute rule of exclusion of the evidence supporting the first complaint at a subsequent trial of an unrelated but sufficiently similar complaint.²⁶

At that time, there was an allied but separate doctrine also operating in Australian law known as ‘issue estoppel’. This is not the same thing as cause of action estoppel. The distinction between issue estoppel and cause of action estoppel or *res judicata* is critical. Issue estoppel is concerned with the situation in which the Crown is seeking to re-litigate a precise factual issue determined in favour of the accused in a previous trial. It is about the finality of litigation and the prevention of inconsistent results. Cause of action estoppel or *res judicata* is concerned with verdicts rather than issues. It deals with the situation where the Crown is seeking to call into question a verdict of acquittal on another previous charge, and is more about double jeopardy. The general idea has been explained as follows:

26 [2001] 1 NZLR 280 at.

There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding.²⁷

The existence of any formal doctrine of issue estoppel has been controversial. The House of Lords decided that it did not exist in *Humphreys*²⁸. That decision was followed in New Zealand²⁹ but the doctrine was held to exist in Canada³⁰ and Ireland.³¹ In Australia, the matter was decided by the High Court in *Rogers v Queen*.³²

Rogers was interviewed in 1988 by police about a series of armed robberies. He made admissions. There were four records of interview. He signed them all. He was charged with four counts of armed robbery. The trial judge ruled that two of the interviews and a part of a third were inadmissible because the Crown could not show that they were made voluntarily. The jury acquitted on two counts and convicted on two.

In 1992 Rogers was charged with eight counts of armed robbery. Seven of the eight counts were based on two of the four 1988 confessional statements. One of these statements had not been tendered at the earlier trial and one had been tendered and excluded. The defence argued that the proceedings were an abuse of the process of the court or, alternatively, that there was an issue estoppel. The trial judge refused a stay and the Court of Appeal agreed.

Rogers appealed to the High Court. A majority of the High Court allowed the appeal. The decision may be summarised as follows:

1. Mason CJ, Deane and Gaudron JJ held that the doctrine of issue estoppel had no place in the criminal law. However, they held that the introduction of the impugned records of interview was an abuse of the process of the court and that Rogers should be acquitted in the absence of any other evidence.
2. Brennan J held that there was a doctrine of issue estoppel and that it applied in this case. There was no abuse of process.

27 *Wilkes* (1948) 77 CLR 511 at 519.

28 [1977] AC 1.

29 *Davis* [1982] 1 NZLR 584; *Cossey* [1991] 1 NZLR 566.

30 *Gushue* [1980] 1 SCR 768; *Grdic* [1985] 1 SCR 810; *Grant* [1991] 3 SCR 139.

31 *Kelly* [1986] ILRM 318; *Breathnach* [1989] IR 489; *O'Callaghan* [2001] 1 IR 584.

32 (1994) 181 CLR 251.

3. McHugh J dissented. He held that there was no such doctrine as issue estoppel and that there was no abuse of process in this case.

There is no need for an extensive analysis of the reasons for decisions here. A summary of the principles involved is all that is required.

The decision was, in essence, one of policy on two bases. The first policy, or more accurately, set of policies, involved that familiar set of policies underlying the general principle of *autrefois acquit* and *res judicata*. The majority was clearly of the opinion that there had to be some kind of legal recourse to back up the principles of the need for judicial decisions to be final, binding and conclusive, the injustice that would occur through repeated litigation of the same issue and the need for decisions to be seen to be correct.³³ These principles have been discussed in detail above.

The second policy was that the legal recourse should lie, not in a doctrinal remedy (such as issue estoppel) but in the general discretion known as the power to prevent an abuse of process of the court. Deane and Gaudron JJ, for example, put this clearly when they said:

Issue estoppel would not only overlap with the plea of *autrefois acquit* and with the doctrines that have already developed, but its importation into the realm of criminal proceedings could well impede the development of coherent principles which recognise and allow for the distinct character of such proceedings. The preferable course, in our view, is to accept the principles which operate in this area are fundamental and that the pleas and the developed doctrines relating to the unassailable nature of acquittals and the need for consistency may not exhaust their operation.³⁴

It has been argued that the idea behind the operation of the principles in a case such as *Rogers* is the idea of “moral double jeopardy”.³⁵ The contextual relevance of the principle can be seen in this quotation from *Walton v Gardiner*:

Proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which had already been disposed of by earlier proceedings.³⁶

³³ (1994) 181 CLR 251 at 273.

³⁴ (1994) 181 CLR 251 at 278.

³⁵ Goode and Leader-Elliott, “Criminal Law” in Baxt and Moore (ed), *An Annual Survey of Australian Law 1994*(1995) at 150-161.

³⁶ (1993) 177 CLR 378 at 393. The prediction of the result in *Carroll* seems obvious, at least in retrospect. Neither this case nor *Rogers* caused editorials in *The Australian*. One wonders why.

The other important decision of the High Court prior to *Carroll v Pearce*.³⁷ The facts were simple. The accused was charged with a number of offences. Two were critical. One was maliciously inflicting grievous bodily harm with intent to do grievous bodily harm and the other was breaking and entering a dwelling house and while there inflicting grievous bodily harm. Both of these offences related to the one incident. Pearce broke into the victim's house and beat him. He was convicted of both offences and sentenced for both offences. The question which came to the High Court was whether he could be punished for both.

The traditional plea of *autrefois convict* did not apply. The offences were not the same. The elements of the offences were not the same,³⁸ although, obviously, there was overlap. Neither is included in the other. But there was some hope for Pearce. There was a respectable legal argument that the plea of *autrefois convict* extended to offences of a similar character to different offences in respect of the same or substantially the same set of facts, or where the "gist or gravamen" of the second charge is the same as the first. This is the rule that is said to derive from the decision in *Wemyss v Hopkins*.³⁹

However, all High Court judges disapproved of this rule as being a far too uncertain basis for the exercise of a right. The result was that the *autrefois* plea was narrowly confined. McHugh, Hayne and Callinan JJ said:

Inevitably, any test of the availability of the pleas in bar which considers the evidence to be given on the trial of the second prosecution except in aid of an inquiry about identity of elements of the offences charged would bring with it uncertainties... The stream of authorities in this country runs against adopting such a test and there is no reason for departing from a test which looks to the elements of the offences concerned. Each of the offences with which the appellant was charged required proof of a fact which the other did not. It follows that no plea in bar could be upheld.⁴⁰

Their Honours also held that cases which fell outside the strict scope of the plea could amount to an abuse of the process of the court where charges are unnecessarily split or unnecessarily proliferated, but that was not this case and so they did not dilate upon the necessary principles. They went on to point out, however, that the double jeopardy principle militated against double punishment, and it was clear that that had happened, to a degree, in this case. Pearce had received a sentence for both offences and, even though

³⁷ (1998) 194 CLR 610.

³⁸ One required proof of an intention to cause grievous bodily harm and the other did not. One required proof of breaking and entering and the other did not.

³⁹ (1875) LR 10 QB 378.

⁴⁰ (1998) 194 CLR 610 at 620 citing *Maxwell* (1996) 184 CLR 501. The rule survives in statutory form in the Northern Territory: *Criminal Code*, ss 17, 18.

the sentences were concurrent, had in effect received a sentence for the common element - inflicting grievous bodily harm - twice. That being so, he should be re-sentenced on a proper basis.⁴¹

In *Pearce* as in *Rogers*, therefore, the High Court has moved a great deal of what used to be thought of as doctrinal rules into the area of the abuse of process discretion.

The details of the Australian legal position were therefore not *completely* certain prior to *Carroll*. The consequences of that uncertainty were that it was not absolutely clear what the law was where the accused obtains an acquittal on one charge and is subsequently charged with an offence which calls that acquittal into doubt. The clear and central case where that might be so is where the accused is acquitted on a charge of an offence and is subsequently charged with perjury in relation to evidence given at the first trial. That was the situation in *Carroll*. The general *Sambasivam* principle would lead one to believe that such a prosecution could not succeed, and indeed, that was believed to be the general position. For example, Lord Salmon stated in the leading case of *Humphreys*:

It is almost unheard of for those who have been convicted in spite of their lies to be prosecuted for perjury save in the most exceptional circumstances - and rightly so. A charge of perjury after a full trial in respect of another offence, in which the prosecution has failed to persuade a jury that the accused was lying and that he was guilty, could in some circumstances smack of an attempt by a disappointed prosecution to find what it considered to be a more perspicacious jury or tougher judge. This would in reality be putting the accused in double jeopardy. Although the form of charge would be different from that of the charge upon which he had already been tried and acquitted, the true substance of the charge would be the same. It is of great importance that in such a case, if it arose, the courts should not hesitate to exercise their inherent powers in relation to prosecutions which are oppressive and an abuse of the process of the court.⁴²

The general test for a subsequent perjury prosecution was commonly taken to be that formulated by Lord Hailsham in the following passage:

Where the second charge consists in an allegation that the accused in the first charge has committed perjury in his evidence given on his own behalf in his defence on the former charge, the mere fact that some of the evidence brought in support of

41 See also *Hoare* (1981) 148 CLR 32.

42 [1977] AC 1 at 47.

the charge of perjury is identical with evidence given in the first charge and inconsistent with evidence given on that charge does not preclude the Crown from adducing evidence in support of the charge of perjury but where the evidence is substantially identical with the evidence given at the first trial without any addition and the Crown is in substance simply seeking to get behind a verdict of acquittal, the second charge is inadmissible both on the ground that it infringes the rule against double jeopardy and on the ground that it is an abuse of the process of the court whether or not the charge is in form a charge of perjury at the first trial.⁴³

Of course, much depends on the “in substance” test. That was what the High Court objected to in *Pearce*. But all that uncertainty was put aside in Australia by the High Court’s decision in *Carroll*.

43 [1977] AC 1 at 41.

Part 3: Autrefois Acquit Law - The Principles Applied To Prosecution Appeals

The High Court has taken a much stronger position when considering the policy against placing an accused or a defendant in double jeopardy as a general matter than is the case when considering prosecution appeals against acquittals. The leading case on appeals is *Davern v Messel*.⁴⁴ In that case, the defendant was convicted of offences against the Northern Territory *Fisheries Act* and *Territory Parks and Wildlife Conservation Act*. He appealed to the Supreme Court of the Northern Territory and the appeal was referred to the Full Court. The defendant was successful and the convictions were quashed. The complainant then tried to appeal the matter further to the Full Court of the Federal Court. The matter then went to the High Court and argument centred on the question whether such an appeal was competent given the general wording of the *Federal Court of Australia Act*. In deciding the matter, the High Court considered the interaction between the rules of double jeopardy and the power of the prosecution to appeal from an acquittal.

The High Court came to the unsurprising conclusion that the general appellate power at least conferred a right to appeal on a prosecutor who had lost an earlier appeal in the same matter (although two judges dissented). The exact matter with which the decision dealt is unimportant for present purposes. What is important is what the Court said about prosecution appeals and double jeopardy in general.

Gibbs CJ said:

When the prosecution seeks to appeal from an acquittal, the rule against double jeopardy has an indirect application. An appeal is a remedy given by statute; the scope of the appeal must be governed by the terms of the enactment creating it: *Commissioner for Railways (N.S.W.) v. Cavanough* (1935) 53 CLR 220, at p 225. The question whether an appeal lies from an acquittal therefore must be decided as a matter of statutory interpretation. However it is a principle of interpretation that no statute will be construed as abrogating a fundamental principle of the common law unless an intention to do so is clearly expressed. The view has been taken that the common law rule against double jeopardy would be infringed by allowing an appeal from an acquittal, since the rule requires that an acquittal be treated as final. In *Benson v. Northern Ireland Road Transport Board* [1942] AC 520, at p 526, the House of Lords accepted as correct a statement by Palles C.B. in *R v. Tyrone County Justices* (1906) 40 Ir LT 181, at p 182, that it is an elementary principle that “an acquittal made by a Court of

44 (1984) 155 CLR 21.

competent jurisdiction and made within its jurisdiction, although erroneous in point of fact, cannot as a rule be questioned and brought before any other Court.” It was accordingly held that the general words of a statute conferring a right to appeal against an order of a court of summary jurisdiction on “any party against whom an order is made for payment of any penal or other sum ...” did not suffice to give a complainant a right of appeal against an order of a court of summary jurisdiction which had dismissed the complaint and ordered the complainant to pay costs. The principle of the decision has been applied in Australia: see *Platz v. Osborne* (1943) 68 CLR 133, at p 141; *Keetley v. Bowie* (1951) 83 CLR 516, at p 518; and *Beer v. Toms; Ex parte Beer* [1952] St R Qd 116, at p 119.⁴⁵

Gibbs CJ also said:

It might not be quite so obvious that it would be unfair to put an accused upon his trial again if fresh evidence, cogent and conclusive of his guilt, came to light after his earlier acquittal, but in such a case the facts that an unscrupulous prosecutor might manufacture evidence to fill the gaps disclosed at the first trial, and the burden that would in any case be placed on an accused who was called upon repeatedly to defend himself, provide good reasons for what is undoubtedly the law, that in such a case also the acquittal is final: cf. *Reg. v. Miles*, (1890) 24 QBD 423 at p 433.⁴⁶

Mason and Brennan JJ stated in similar terms:

The classic statement of the principle of interpretation according to which the courts have acted in these cases was that made by Palles L.C.B. in *R (Kane) v. Chairman and Justices of Co. Tyrone* (1905) 40 Ir LT 181, where certiorari was granted to quash an order of “conviction” by a Court of Quarter Sessions on the hearing of an appeal from an order of “dismissal without prejudice” by justices sitting in a Court of Petty Sessions. Palles L.C.B., with whom Gibson J. concurred, said (at p.182) “that, before you can appeal against an acquittal, the words must be clear, express, and free from any ambiguity.” He held that the language of the particular statutory provision did not confer upon a prosecutor a right of appeal from an acquittal, basing his decision on “the broad principles of the common law” which he expressed (*Ibid.*) in these terms:

⁴⁵ (1984) 155 CLR 21 at 30-31 (emphasis added).

⁴⁶ (1984) 155 CLR 21 at 30.

“... that as a rule an acquittal made by a Court of competent jurisdiction and made within its jurisdiction, although erroneous in point of fact, cannot as a rule be questioned and brought before any other Court.”

This statement reflects with more precision the earlier assertion by the Attorney-General in the *Duchess of Kingston's case* (1776) 20 How. St.Tr. 355, at p.528 that “whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops”. ... In the result Australian, as well as English and Irish, authority supports the principle of interpretation stated in *Tyrone* which was endorsed in *Benson* and applied by the Federal Court in *Mastertouch*. The main foundation for the principle as it has been expressed is the rule against double jeopardy, though the principle may also be based more generally on a notion of justice and fairness to the accused as the weaker party to criminal proceedings.⁴⁷

Murphy J dissented from the result, and did so because he gave the operation of the general principles of double jeopardy more force than the majority. He said:

There is a disturbing trend towards erosion of the value of an acquittal. In our criminal justice system the finality of an acquittal is the keystone of personal freedom (see *The Queen v. Darby* (1982) 40 ALR 594). A decision to permit the government to appeal against an acquittal presents another undermining of the finality of an acquittal and a serious undermining of personal freedom. It means “that the right of personal freedom ... is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination ... may only be arrived at by the last Court of Appeal” (Lord Halsbury, *Cox's case*, p.522). Legal proceedings, especially criminal ones, can be an instrument of oppression by governments against their citizens; they can ruin an individual despite the fact that he or she is ultimately acquitted. Even a relatively minor charge can have this effect. It is common knowledge that every year in Australia tens of thousands of citizens plead guilty to minor offences although they dispute their guilt. They do this rather than suffer the cost and inconvenience of the criminal justice process. To add the risk that the prosecution will appeal against an accused person's acquittal adds a new dimension and a further avenue of cost and inconvenience. It is of little concern to the government, as prosecutor, if it prosecutes a defendant once,

47 (1984) 155 CLR 21 at 48-49, 55.

twice or three times in an effort to secure a conviction. The present case illustrates some of these issues graphically. An artificial distinction should not be drawn between acquittals at first instance and at other stages. The result of a subsequent prosecution appeal is the same. It puts the person in jeopardy after an acquittal. The fact that the acquittal on appeal may have occurred because of what is considered to be a legal error by the acquitting court, is not material. The same could occur whether it is at first instance or on appeal. The purpose of the rule is to protect persons who have been acquitted even by legal error. The person is not to be put in jeopardy after an acquittal, mistaken or not.⁴⁸

The double jeopardy principles have also been strictly applied by the High Court in relation to statutorily granted prosecution rights of appeal against sentence. The leading case is *Everett*.⁴⁹ In that case, the joint judgment of Brennan, Deane, Dawson and Gaudron JJ held:

Such a jurisdiction has become commonplace throughout this country and the common law world. Nonetheless, in its exercise, a court of criminal appeal must, in the absence of clear statutory direction to the contrary, recognize that there are strong reasons why the jurisdiction to grant leave to the Attorney-General⁵⁰ to appeal against sentence should be exercised only in the rare and exceptional case. An appeal by the Crown against sentence has long been accepted in this country as cutting across the time-honoured concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed ... That being so, a “court entrusted with the jurisdiction to grant or refuse such leave should give careful and distinct consideration to the question whether the Attorney-General has discharged the onus of persuading it that the circumstances are such as to bring the particular case within the rare category in which a grant of leave to the Attorney-General to appeal against sentence is justified” (*Malvaso v. The Queen* (1989) 168 CLR 227 at 234-235.). In determining whether that question should be answered in the affirmative, a court of criminal appeal should be guided by the following comment of Barwick CJ in *Griffiths v. The Queen* (1977) 137 CLR 293 at 310. See, to the same effect, at 327 per Jacobs J, with whom Stephen J agreed, and 329-330 per Murphy J):

48 (1984) 155 CLR 21 at 63-64.

49 (1994) 181 CLR 295.

50 The principle applies also to an appeal by the DPP or other Crown agents.

“an appeal by the Attorney-General should be a rarity, brought only to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted person”.

The reference to “matter of principle” in that passage must be understood as encompassing what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which Barwick CJ saw as constituting “error in point of principle” (ibid. at 310.).⁵¹

This decision has been applied in numerous appeals throughout all Australian jurisdictions.⁵²

51 (1994) 181 CLR 295 at 299-300.

52 See, for example, *Shepperbottom* (2001) 121 A Crim R 69.

Part 4: Autrefois Acquit Law - The Carroll Decision

The Facts Of The Case

Raymond John Carroll had been convicted by jury of murdering baby Deidre Kennedy, whose body was found on the roof of a toilet block, strangled and assaulted. Carroll appealed against conviction. The conviction was overturned on appeal. The Court of Appeal refused to order a retrial. It ruled that there was insufficient evidence upon which a reasonable jury could convict.⁵³ Many years later Mr Carroll was prosecuted for perjury on the grounds that he gave false testimony under oath when he stated in the witness box under oath in the original trial that he did not kill Deidre Kennedy. The jury convicted Mr Carroll of perjury, but he again appealed and eventually the matter reached the High Court. The High Court held that the perjury proceedings should have been stayed on the grounds that the second trial would controvert Mr Carroll's acquittal for murder. The result has caused a deal of public controversy.

The question before the High Court was whether the Court of Appeal could exercise a discretion to stay the perjury trial on the grounds of abuse of process.⁵⁴ "Abuse of process" is a general judicial doctrine by which a court preserves a very general and unstructured discretion to prevent what it perceives to be an abuse of judicial process by any means.⁵⁵ One of the long recognised⁵⁶ manifestations of this doctrine is abuse of process in the nature of double jeopardy.⁵⁷ That was the issue in this case. In other words, did the trial for perjury controvert the acquittal for murder so as to be an abuse of the process of the court in the nature of undermining the principles against double jeopardy?⁵⁸ The High Court held that it did.

Autrefois Pleas

Gleeson CJ and Hayne J began their judgment by considering the traditional doctrine of *autrefois acquit*. Under s17 of the *Criminal Code* (Queensland) (the Code), *autrefois acquit* is a defence to a charge.

It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted

53 The basis of the decision largely turned on the admissibility of forensic "similar fact" evidence about bite marks on the deceased's body. It is not intended to enter into the details of that legal dispute in this paper.

54 [2002] HCA 55 para 6.

55 *Jago* (1989) 168 CLR 23; *Walton v Gardiner* (1993) 177 CLR 378; *Williams v Spautz* (1992) 174 CLR 509.

56 See, for example, *Connelly* [1964] AC 1254 at 1364 (Lord Pearce).

57 See, for example, *Jones v Tysoe* (1998) 100 A Crim R 218 (plea unsuccessful, but principle accepted).

58 [2002] HCA 55 para 6.

of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged.⁵⁹

Their Honours held that if the plea of *autrefois acquit* is made out, it will constitute a complete defence to the charge. However, Gleeson CJ and Hayne J also pointed out that s17 of the Code must be read in light of s16, which provides that:

A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof the person causes the death of another person, in which case the person may be convicted of the offence of which the person is guilty by reason of causing such death, notwithstanding that the person has already been convicted of some other offence constituted by the act or omission.⁶⁰

These two sections codify the *autrefois* pleas for Queensland. Despite considering this legislation, their Honours explained that ss 16 and 17 of the Code were designed to deal with “less complicated cases of possible intersection between offences”.⁶¹ Section 17 was held not to apply to this case because on the respondent’s trial for murder, perjury was not a verdict open to the jury; similarly, on the respondent’s trial for perjury, a finding of murder was not open to the jury.⁶² Their Honours therefore concluded that the respondent had no available plea under the Code.⁶³ McHugh, Gaudron and Gummow JJ arrived at the same conclusion, generally applying similar reasoning. But that was not the end of the matter.

Abuse of Process in the Nature of Double Jeopardy

The respondent’s argument was formed on the basis that having being acquitted for murder, he should not now face a charge that he lied on oath when he denied killing Deidre Kennedy. In other words, the perjury trial would have the effect of trying Mr Carroll again for the issue which was central to his trial for murder and to controvert the verdict of acquittal entered after the trial and appeal.⁶⁴

59 Section 17 of the *Criminal Code*(Queensland).

60 [2002] HCA 55 para 8.

61 [2002] HCA 55 para 9.

62 [2002] HCA 55 para 12. For similar reasons, s 598 of the Code could not avail the respondent. That section merely contains the formal basis for the *autrefois* pleas in bar.

63 [2002] HCA 55 para 18.

64 [2002] HCA 55 para 20.

This argument required the High Court to consider the rule against double jeopardy and the fundamental principles of criminal law that underpin it. The result of the arguments put in the case may be summarised as follows.

(1) Gleeson CJ and Hayne J began by explaining that many rules and principles associated with the criminal trial reflect two propositions. First, “the power and resources of the State as prosecutor are much greater than those of the individual accused” and, secondly, that the consequences of conviction are very serious.⁶⁵ In addition to these fundamental considerations, the principle of double jeopardy highlights two other important underpinnings of criminal law. First, without safeguards, the power to prosecute could “readily be used by the executive as an instrument of oppression.”⁶⁶ Secondly, “finality is an important aspect of any system of justice”.⁶⁷ On the second point, their Honours referred to a statement made by Lord Wilberforce:

... there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality.⁶⁸

In competition to this principle is another fundamental underpinning of the criminal law system, namely the concept that those who engage in criminal conduct are to be prosecuted, and in appropriate cases, punished.⁶⁹ As their Honours point out, these values of the criminal law system often pull in different directions. The challenge is to strike a balance between them.⁷⁰

(2) Gaudron and Gummow JJ identified four fundamental principles behind the concept of double jeopardy:⁷¹

- the public interest in concluding litigation through judicial determinations which are final, binding and conclusive;
- the “need for orders and other solemn acts of the court (unless set aside or quashed) to be treated as incontrovertibly correct;
- the interest of the individual “not being twice vexed for one and the same cause”;

65 [2002] HCA 55 para 21.

66 [2002] HCA 55 para 22.

67 [2002] HCA 55 para 22.

68 [2002] HCA 55 para 22.

69 [2002] HCA 55 para 23.

70 [2002] HCA 55 para 24.

71 [2002] HCA 55 para 86.

- the principle that “a cause of action is changed by a judgement recovered in a court of record into a matter of record, which is of a higher nature”.⁷²

As Gaudron and Gummow JJ point out, there is competition between these principles when applying the double jeopardy principle. It may be noted that these principles are very much the same as those identified by Gleeson CJ and Hayne J.

(3) But what real effect do these principles have? What is the specific result of their application in cases such as the present?

Gleeson CJ and Hayne J considered a line of authority in other common law jurisdictions which has been taken to favour the conclusion that a perjury trial may proceed “where the perjury alleged is that in a previous criminal trial the accused swore that he or she was not guilty of the offence then charged against him or her”.⁷³ In a number of cases, the issue has been, not whether the perjury trial can commence, but what evidence may be led in proof of that charge.⁷⁴ Sometimes, these issues are discussed in terms of issue estoppel or preclusion, although their Honours warned that this terminology could present some difficulties.⁷⁵ That is hardly surprising, since in *Rogers v Queen*⁷⁶, the High Court had held that issue estoppel had no place in criminal proceedings in Australia.

In *Grdic*, the Supreme Court of Canada identified a similar legal question as one of preclusion, formulating a principle that focused on the “evidence that had been called on the first offence and the evidence which [the prosecution] intended to lead on the trial for perjury”.⁷⁷ It was held by the majority that:

the prosecution would be estopped from pursuing the perjury charge unless it sought to tender, in addition to or in lieu of the evidence previously adduced, evidence that was not at the time of the first trial available by the exercise of reasonable diligence.⁷⁸

Gleeson CJ and Hayne J did not approve this test, because its focus is not on issues of fact or law, but rather on the nature of the *evidence* sought to be

⁷² [2002] HCA 55 para 86.

⁷³ [2002] HCA 55 para 27. Their Honours referred to the leading decisions of *HM Advocate v Cairns* [1967] SLT 165 (Scotland), *Grdic* [1985] 1 SCR 810 (Canada), *Humphreys* [1977] AC 1 (UK), *Z* [2000] 2 AC 483 (UK), *Arp* [1998] 3 SCR 339 (Canada), *Moore* [1999] 3 NZLR 385 (NZ), *Degnan* [2001] 1 NZLR 280 (NZ) and *Dowling v United States* 493 US 342 (1989) (USA).

⁷⁴ [2002] HCA 55 para 28.

⁷⁵ [2002] HCA 55 para 29 -31.

⁷⁶ (1994) 181 CLR 251.

⁷⁷ [2002] HCA 55 para 32.

⁷⁸ [2002] HCA 55 para 33.

adduced at the second trial.⁷⁹ The problem their Honours found with the test was that its application will eventually “call for an assessment by the judge in the second trial, the trial of perjury, of the strength of the case which is to be made against the accused.”⁸⁰ Their Honours felt that this is a matter to be determined by the jury. Further, such a test directs attention away from whether the prosecution of perjury seeks to controvert the decision in the earlier case and directs attention towards “whether the second case is a new and good case”.⁸¹

Consequently, their Honours preferred to apply a text that focuses on whether or not a second trial would controvert the acquittal gained in a previous trial. This was the approach favoured in *Humphrys*.⁸²

In *Humphrys* the issue estoppel/preclusion approach was not followed. A discretionary approach with a focus on abuse of process was preferred:

in an appropriate case, when a prosecution for perjury is merely a secondary attempt to secure a conviction on a criminal charge, the court has a discretion to stay the proceedings in the exercise of its inherent jurisdiction to prevent an abuse of its process.⁸³

In Australia, an application to stay proceedings builds on this proposition and is based on the principle formulated in *Rogers*, namely, “the need for decisions of courts, unless set aside or quashed, to be incontrovertibly correct”.⁸⁴ This approach is founded on the “finality” principle, one of the fundamental underpinnings of the criminal law system. When applying the *Rogers* principle:

Attention must first be directed to the ambit and effect of the proposition that the verdict of acquittal at the first trial is to be treated as incontrovertibly correct. Only then will it emerge whether it is necessary to consider the nature or quality of the evidence that it sought to be adduced on the second trial, in this case perjury.⁸⁵

The *Rogers* principle is based on two fundamental notions: the first is that issue estoppel has no place in criminal law; the second is that the traditional plea of *autrefois acquit* has a different and further operation than what was called issue estoppel.⁸⁶ The *Rogers* principle has been restated in a number of ways, some, such as that in *Garrett v The Queen*, widening its scope:

79 [2002] HCA 55 para 33.

80 [2002] HCA 55 para 33.

81 [2002] HCA 55 para 33.

82 [1977] AC 1.

83 [2002] HCA 55 para 34.

84 [2002] HCA 55 para 35.

85 [2002] HCA 55 para 35.

86 [2002] HCA 55 para 36.

the acquittal may not be questioned or called into question by any evidence which, if accepted, would overturn or tend to overturn the verdict.

Their Honours referred to the case before them as an example of a case in which “a charge of an offence would be manifestly inconsistent on the facts with a previous acquittal”, another formulation of the *Rogers* principle.⁸⁷ This is because, in the present case:

there was a manifest inconsistency between the charge of perjury and the acquittal of murder. That inconsistency arose because the prosecution based the perjury charge solely upon the respondent’s sworn denial of guilt. The alleged false testimony consisted of a negative answer to a question, asked by his counsel, whether the respondent killed the child. ... Once such manifest inconsistency appeared, then the case for a stay of proceedings was irresistible.⁸⁸

Despite favouring a similar conclusion on the issue as the Court of Appeal, their Honours held that the Court of Appeal’s focus on the strength and cogency of the new evidence as crucial to the exercise of discretion as to whether or not to stay the proceedings was misplaced:

... the reasoning of the Court of Appeal was unduly favourable to the prosecution. The inconsistency between the charge of perjury and the acquittal of murder was direct and plain. The laying of the charge of perjury, solely on the basis of the respondent’s sworn denial of guilt, for the evident purpose of establishing his guilt of murder, was an abuse of process *regardless of the cogency and weight of the further evidence that was said to be available*.⁸⁹

Whilst their Honours stated that the discretionary considerations relevant in dealing with whether or not to stay proceedings cannot be rigidly confined, they held that:

where it is said that the abuse lies in seeking to controvert the earlier verdict of acquittal, there appears much to be said for the view that it is necessary to direct attention to the elements of the offence of which the person was acquitted and the elements of the offence with which the person is later charged. *Seldom, if ever, will considering whether the later charge controverts an earlier acquittal require attention to whether the evidence which would be lead at a second trial is new or persuasive*.⁹⁰

87 [2002] HCA 55 para 41.

88 [2002] HCA 55 para 42.

89 [2002] HCA 55 para 44 (emphasis added).

90 [2002] HCA 55 para 47 (emphasis added).

Their Honours held that attention should be directed at the elements of the two offences in order to recognise the principle that an acquittal is incontrovertible and the principle of finality of judicial proceedings, rather than directing attention to the evidence sought to be adduced at the second trial.⁹¹

Gleeson CJ and Hayne J concluded that the proceedings for perjury should be stayed because the prosecution inevitably sought to controvert the earlier acquittal of the charge of murder. Special leave to appeal was to be granted, but the appeal was to be dismissed.

McHugh, Gaudron and Gummow JJ arrived at the same conclusion, generally applying similar reasoning. Like Gleeson CJ and Hayne J, their Honours held that the Australian position on double jeopardy stems from the decisions of *Rogers* and *Garrett*, which support the proposition that defendants acquitted of an offence will be protected from retrial for a subsequent offence where:

- (i) the elements of the two offences are identical, or
- (ii) the elements of one offence are wholly included in the other.⁹²

Applying this approach to the present case, Gaudron and Gummow JJ held that the text of the perjury indictment itself disclosed that the prosecution sought to controvert the respondent's acquittal for murder.⁹³ The indictment referred to the falsity of the respondent's "testimony to the effect that he, Raymond John Carroll did not kill the said Deidre Kennedy".⁹⁴ As Gaudron and Gummow JJ pointed out:

That testimony necessarily was central to the earlier trial. The only issue in contest was the identity of the killer. For this reason, the testimony sought to be impugned by the subsequent indictment for perjury went to the ultimate and live issue in the murder trial. It was a re-affirmation on oath by the respondent of his plea of not guilty to murder. Proof of the falsity of that re-affirmation was a necessary ingredient of the perjury charge.⁹⁵

Therefore, their Honours concluded that the proceedings should have been stayed.⁹⁶ This conclusion was also reached by McHugh J.⁹⁷

91 [2002] HCA 55 para 48.

92 [2002] HCA 55 para 91.

93 [2002] HCA 55 para 101.

94 [2002] HCA 55 para 101.

95 [2002] HCA 55 para 101.

96 [2002] HCA 55 para 114.

97 [2002] HCA 55 para 149.

Even the traditional and special rules of double jeopardy known as *autrefois acquit* and *autrefois convict* as articulated and confined by the High Court in *Pearce*⁹⁸ appear to be a matter of public controversy as a result of *Carroll*. The latter was, of course, not about the *autrefois* pleas themselves at all, but rather about an extension of the *principles* of double jeopardy by means of the discretionary doctrine of abuse of process. It appears that the doctrine of abuse of process itself is not contested by advocates for change. It is this manifestation of it that is controversial. It is suggested that it is controversial for the same reason that some go so far as to challenge the well established *autrefois* doctrines themselves: the decision in *Carroll*, for the first time, correctly (in a legal sense) placed the abuse of process extension of the *autrefois* pleas on the same basis as the pleas themselves. That basis is that the protection attaches against the second prosecution *no matter the strength of the case* of the prosecution the second time around. If D is charged with the murder of V and acquitted, then D cannot be charged again with the murder of V, no matter what new evidence has turned up or can be found. It is suggested that this is what causes offence. The accused will not be found guilty however guilty he or she manifestly is, or, indeed, can be proved or confesses (or proclaims) to be.

The High Court cannot be blamed for this. As has been shown, that principle has operated in the criminal law for centuries. Although its deployment in the area of *res judicata* is relatively new in the sense that the content and place of cause of action estoppel in the criminal law has been controversial for a century, in practice *Carroll* represents simply a shifting of the old doctrine from one ancient area of law to another more modern area of the law. It is, so to speak, a refinement not a revolution. However, now the *fundamental* question is asked. That question, for legislators and the Australian public, is whether or not this application of the double jeopardy rule, or indeed the double jeopardy rule itself, is producing just outcomes for the community.⁹⁹

98 (1998) 194 CLR 610.

99 This is a technical legal footnote for technical criminal lawyers only. It should be noted that that the High Court in *Carroll*, and, in particular, Gleeson CJ and Hayne J speak constantly in terms of "elements of offences". That language has been reproduced faithfully in the account in this paper because it reflects the judgments accurately. It is, however, less than ideal. It is quite clear that Gleeson CJ and Hayne J, when they speak of "elements of offences" mean to speak of *factual* elements - such as whether D killed V or not. The terminology of "elements of offences" should rather be restricted to *legal* elements of offences. In that preferred sense, for example, perjury and murder have no "elements of the offence" in common at all. One involves the causing of the death of another person with the requisite fault and the other involves telling a material lie with another quite different requisite fault element. On the other hand, as *Carroll* shows and Gleeson CJ and Hayne J mean, the *factual allegations* underlying these legal *elements* may be identical. The purpose of this note is simply to make the point that correct legal terminology clarifies rather than obscures the legal issues involved.

The Australian newspaper found the High Court ruling abhorrent, calling for a full review of Australia's laws on double jeopardy. (*The Australian* 11 December 2002, p 1). *The Australian* editor-in-chief Chris Mitchell informed Deidre Kennedy's mother that the newspaper would fund a civil action against Carroll (*The Weekend Australian*, 14-15 December 2002, pp 2, 20). Former Chief Justices Sir Harry Gibbs (*The Australian* 12 December 2002 pp 1-2) and Sir Anthony Mason (*The Australian* 13 December 2002 pp 1-2) and NSW DPP Nicholas Cowdery also supported a national review. So did the original trial judge, Angelo Vasta (*Courier Mail* 14 April 2003 p 7), although all of these were careful to indicate their support of the general idea of double jeopardy and only called for a review. On the other hand, Richard Ackland of *Justinian* was not impressed by *The Australian's* offer to provide the financial backing for Mrs Kennedy's future legal action and called for a more informed debate about the possibilities of reforming the rule against double jeopardy (*Justinian*, 13 December 2002).

In early 2003, the Premier of NSW promised to change the law so that a decision such as *Carroll* could not happen (*Sydney Morning Herald* 10 February 2003) much along the UK proposals for reform (*The Daily Telegraph* 11 February 2003). The Premier of Queensland branded the *Carroll* acquittal "an injustice" and promised to examine Mr Carr's proposals (*The Australian* 11 February 2003). A little later, the Prime Minister condemned the result in *Carroll* and supported review of the double jeopardy rule which led to it (*The Australian* 10 April 2003). However, the Victorian Premier did not join the chorus. He said it was not wise to rush into changing longstanding laws and would look at alternatives (*The Australian* 13 February 2003).

Part 5: Autrefois Acquit Law - Statute Law On Prosecution Appeals

It follows from the previous discussion on general principles that under the common law, the prosecution may not appeal against an acquittal¹⁰⁰, except perhaps in limited circumstances where a court's inherent discretion to prevent an abuse of process intervenes. Large scale modification of this rule by statute is the norm in Australian jurisdictions, though no two jurisdictions share precisely the same forms of appeal against acquittal, and the spectrum of models ranges from a qualified scrutiny of the jury verdict in Tasmania to a bare reference of a question of law in Queensland.

The main variables on the basis of which each model differs from the others are:

1. whether leave to appeal, or a certificate from the trial court is required;
2. whether final acquittals or only intermediate and preliminary judgments may be appealed;
3. if final acquittals can be appealed: whether jury verdicts can be appealed, directed or non-directed, or only verdicts of a judge sitting alone;
4. whether the appeal is confined to questions of law, or whether it extends to questions of fact or questions of mixed fact and law;
5. which parties or authorities may appeal - the Attorney-General, the DPP, and/or police prosecutions.

Of these the key issues appear to be 3 and 4. That leave to appeal (1) may also be required is the next most interesting issue, and it is ancillary to the policies adopted by a model to govern the first two issues. The degree to which each model varies the common law position is a function of the varying concerns on the one hand for public interest in the administration of criminal justice, and on the other, fairness in the individual case.

Here follows a brief summary of the current state of the law in each of the autonomous criminal jurisdictions in Australia in order of most radical departure from the common law.

100 *Duchess of Kingston's case* (1776) 20 How. St.Tr. 355; *R (Kane) v. Chairman and Justices of Co. Tyrone* (1905) 40 Ir LT 181; *Miles*, (1890) 24 QBD 423; *Benson v. Northern Ireland Road Transport Board* [1942] AC 520; *Davern v Messel* (1984) 155 CLR 21. Indeed, for many years, the rule in England was that, where an accused succeeded in an appeal against conviction - on any ground - double jeopardy principles prevented a retrial. This rule was the subject of a notorious fictional short story in which the trial judge, convinced of the innocence of the accused against the overwhelming formal evidence, deliberately misdirected a jury so that the result had to be the acquittal on appeal.

Tasmania

In Tasmania the Attorney-General can appeal to the Court of Criminal Appeal against adverse decisions, including the non-directed jury acquittal.

s401(2) of the Tasmanian *Criminal Code* provides:

- (2) The Attorney-General may appeal to the Court -
 - (a) against an order arresting judgment;
 - (b) by leave of the Court or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against an acquittal on a question of law;
 - (c) against the sentence;
 - (d) by leave of the Court or the trial judge, against an order quashing an indictment; or
 - (e) by leave of the Court or the trial judge, against an order upholding a demurrer.

Section 402 provides the manner of determination of appeals, in particular the four grounds upon which a verdict, including a jury verdict, can be set aside. It applies equally to appeals against a verdict of conviction and a verdict of acquittal. Only the first two grounds evaluate the strength of the jury verdict. The third ground would be used if the jury is misdirected. The fourth ground appears to be a “catch-all” giving the provision some elasticity, and might be used if the Court is of the opinion that an abuse of process or other miscarriage of justice has occurred.

s402(1) On an appeal the Court shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment or order of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

Leave to Appeal

The grounds upon which the Court of Criminal Appeal should grant leave to appeal are not articulated in the statute. Initially, it was held in *Jenkins*¹⁰¹ that the discretion under s401(2)(b) to grant leave to appeal should only be exercised when some threshold of public interest attaches to the case. However in *Jessop*, it was held that, while public interest in the broad sense was a relevant factor in granting leave to appeal, it was not determinative, since

101 [1970] Tas SR 13 at 15 per Crisp J.

the discretion is in terms unconfined.¹⁰² In dissent in *Jessop*, Chambers J agreed with the majority that the proposed test did not confine the judge's discretion, but that equally, it was proper for the Court of Criminal Appeal to formulate guidelines as to the exercise of the discretion, and that public interest was the appropriate criterion.¹⁰³

In *Pawsey*¹⁰⁴ the same reasoning was applied, and it now seems settled that the discretion is not confined strictly by the general public importance test. In *Pawsey* the Court took account of the general public significance and application of the question, a concern for the state of the administration of criminal justice, the nature of the statute creating the relevant offence, and the justice of the individual case.¹⁰⁵

Error of Law

The meaning of "question of law" in s401(2) is ambiguous. Do questions of mixed fact and law qualify as questions of law? Prior to 1987 s401(2)(b) read "... question of law alone." Initially that phrase was interpreted narrowly to exclude from its ambit an appeal impugning the exercise of judicial discretion on a matter of procedure.¹⁰⁶ The reasoning appeared to turn upon the use of the word "alone," and it was upon that basis that a broader interpretation in English authority was distinguished.¹⁰⁷ The policy underlying this narrow vision of the scope of the statutory appeal was that the appeal existed to resolve important questions of law rather than to correct errors in the individual case.

In *Jessop* the original phrase was given a broader interpretation. Nettlefold J held, after considering Canadian authority, that "a conclusion of mixed law and fact may be challenged by the Attorney-General on appeal where that conclusion proceeds from a misdirection in law."¹⁰⁸

However in *Williams v R*¹⁰⁹ the High Court found a firm distinction between mixed questions of fact and law on the one hand, and questions of law alone on the other, thus reinstating the narrow interpretation of the phrase. Mixed questions of fact and law could not be questions of law alone. Accordingly the section did not permit the setting aside of a verdict on the ground that the trial judge erred in law in the course of exercising his or her discretion on a matter of procedure.¹¹⁰

102 [1974] Tas SR 64 at 70 per Crawford J.

103 [1974] Tas SR 64 at 83.

104 [1989] Tas R 189; (1989) 44 A Crim R 282.

105 *Pawsey* (1989) 44 A Crim R 282 at 284-286.

106 *Jenkins* [1970] Tas SR 13 at 15 per Crisp J.

107 *Jenkins* [1970] Tas SR 13.

108 [1974] Tas SR 64 at 89.

109 *Williams* (1986) 161 CLR 278.

110 (1986) 161 CLR 278 at 301-302 per Mason and Brennan JJ.

In 1987 the word “alone” was removed from s401(2)(b), apparently with the intention of restoring the wide interpretation of the phrase. The effect of this amendment has not received express judicial treatment.

The New South Wales Law Reform Commission suggests that the reform may not have had the intended effect.¹¹¹ When the word “alone” was removed from s401(2) it was also removed from s401(1)(b) (which gives the defendant a right to appeal against conviction), yet s401(1) expressly differentiates between questions of fact and questions of mixed fact and law, and would by implication differentiate between a mixed question of fact and law and a question of law. If this is so, then s401(2) would also seem to retain that distinction.

In the only relevant post-1987 case, *Pawsey*, the question of law under s401(2)(b) was the meaning of the word “patient” in the legislation. The trial judge appears to have reasoned that “patient” included deceased persons who were under medical treatment just prior to death, while the appeal court thought otherwise. This seems to be a disagreement between the trial and appellate courts as to the ordinary English meaning of the word - a controversy which would not qualify as a question of law in the narrowest sense. It does not illuminate the issue whether an erroneous exercise of judicial discretion is a question of law, or a mixed question of law and fact, or indeed, whether a mixed question of law and fact is a question of law in the relevant sense.

One can infer from s402(1) that the meaning of question of law in s401(2) is wide enough to encompass the reasonableness of the jury verdict, the strength of the evidence against the accused, and the integrity of the justice of the case. Impliedly therefore, the statute itself demands a liberal construction of “question of law.”

The Court of Criminal Appeal has further discretion beyond legalities to the justice of the case. Under s402(2) the Court of Criminal Appeal may dismiss an appeal notwithstanding that it may have decided the point raised by the appeal in favour of the appellant, if it considers that no substantial miscarriage of justice has occurred. Other jurisdictions also have equivalent provisions.

The Tasmanian *Criminal Code* also permits the reservation of a question of law for the Court of Criminal Appeal. Section 387 gives the trial judge the power to reserve a question of law for the consideration of the Court of Criminal Appeal and to respite execution of judgment or postpone judgment until the question of law has been determined. A question of law reserved under this section can influence the outcome of a trial.

Section 388AA gives to the Attorney-General the power to refer questions of law arising upon a trial on indictment to the Court of Criminal Appeal

111 NSWLRC Discussion Paper 37.

within 28 days after a person tried has been acquitted. Section 388AA(3) provides that that neither the reference by the Attorney-General nor the determination by the Court of Criminal Appeal of the question of law will call into question the acquittal reached at trial.

The Tasmanian *Criminal Code* grants the most far-reaching right of appeal to the prosecution in Australia. However appeals against acquittals are only by leave and not as of right.

Western Australia

The law in Western Australia is governed by the *Criminal Code* s 668(2) which provides

688(2) An appeal may be made to the Court of Criminal Appeal on the part of the prosecution —

- (a) against any decision allowing a demurrer to an indictment or arresting judgment on an indictment or quashing an indictment or staying or adjourning proceedings on an indictment; or
- (b) against any verdict of acquittal on an indictment and any judgment founded thereon when such verdict has been found by direction of the judge or other authority entitled to give directions on law to the jury at the trial; or
- (ba) against any verdict of acquittal given by a judge alone under Chapter LXIVA and any judgment founded on that verdict —
 - (i) on any ground of appeal which involves a question of law alone; or
 - (ii) with the leave of the Court of Criminal Appeal or upon the certificate of the judge that it is a fit case for appeal, on any ground of appeal which involves a question of fact alone or a question of mixed law and fact;

or

- (c) against any judgment (including any verdict on which the same is founded) given on a plea to the jurisdiction of a court to try an accused person for an offence alleged in an indictment; or
- (d) against any punishment imposed or order made in respect of a person convicted on indictment or convicted by a court of summary jurisdiction and committed for sentence.

Under s 688(2) appeals arise both from offences tried on indictment and from indictable offences tried summarily. Appeals in respect of summary offences are governed by the *Justices Act* 1902.

By s 688(2)(ba)(i), the WA *Criminal Code* gives the prosecution an appeal against a decision of a judge alone as of right on a “question of law alone.” A grant of leave is required for an appeal involving a question of fact alone, or a question of mixed law and fact. The *Code* provides for an appeal as of right against a directed jury verdict of acquittal, but it does not provide for a general appeal against a jury verdict. It therefore differs from the Tasmanian *Code* in three significant ways. First, it permits appeals on questions of fact and mixed questions of fact and law, secondly, leave is not required for the appeal on the question of law alone, and thirdly, the independent jury verdict of acquittal cannot be called into question.

Further s 690(3) of *Code* gives the court the power to reverse any judgment, decision or verdict the subject of the appeal, and may order new trial or retrial of the accused.

Questions of Law and Fact

Prior to the introduction of s 688(2)(ba), the issue of whether an appeal lies only where the trial judge had directed the jury to acquit because of an “erroneous understanding of the law”¹¹² or whether an appeal was permitted where “it is alleged that an order [is] based upon the erroneous exercise of a judicial discretion”¹¹³ had been the subject of some contention. The issue remains live because s 688(2)(ba) retains the distinctions between questions of law, mixed questions and questions of fact.

Section 688(2) without subsection (ba) was examined in *Udechuku* by the WA Supreme Court, which held by a majority that the erroneous exercise of the discretion not to grant an adjournment by the trial judge could be reviewed by the appellate court under s 688(2)(b) because the verdict of the jury had been “found by direction” of the judge after the prosecution offered no evidence.¹¹⁴

This controversy reflects the same concerns as those regarding the meaning of an “error of law” in the Tasmanian *Code* - that is, what is the status of the exercise of a judicial discretion relating to procedure, based upon an understanding of the facts of the case? Accordingly it would seem wise to address this issue specifically.

112 *Udechuku* [1982] WAR 21.

113 *Udechuku* [1982] WAR 21.

114 *Udechuku* [1982] WAR 21, per Wallace and Jones JJ.

The WA *Code* allows for a reference on a question of law from a verdict of acquittal by the trial judge at the request of the prosecution, but the acquittal or conviction of the accused will stand irrespective of the decision on appeal.¹¹⁵

New South Wales

The law of criminal appeals in NSW is set down in the *Criminal Appeal Act* 1912 and, in addition, until recently, the *Justices Act* 1902. The *Justices Act* was repealed as of 7 July 2003 and replaced by a number of Acts. The relevant Act for present purposes is the *Crimes (Local Courts Appeal and Review) Act* 2001. Under section 5C of the *Criminal Appeal Act* 1912 the prosecution may appeal to the Court of Criminal Appeal against the quashing of an indictment or information by the Supreme or District Court and the quashing of an application by the Supreme Court exercising summary jurisdiction. The section says:

Where the Supreme Court or the District Court has quashed any information or indictment or any count thereof or the Supreme Court in its summary jurisdiction, in any proceedings to which the Crown was a party, has quashed any application made under section 4 (1) of the *Supreme Court (Summary Jurisdiction) Act* 1967 or any charge specified in such an application ... the Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against the order made, and such court may thereupon determine the appeal and if the appeal is sustained may make such order for the prosecution of the trial as may be necessary.

Section 5F allows the Attorney General or the Director of Public Prosecutions to appeal as of right against interlocutory orders in prosecutions on indictment before the Supreme and District Courts:

- (2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in proceedings to which this section applies.

That section also allows other parties to appeal against interlocutory judgments with leave or certificate. It would appear to apply to a defendant and any co-accused.

- (3) Any other party to proceedings to which this section applies may appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in the proceedings:

¹¹⁵ WA *Code* s 693A(3).

- (a) if the Court of Criminal Appeal gives leave to appeal,
or
- (b) if the judge, justice, justices or magistrate of the court of trial certifies that the judgment or order is a proper one for determination on appeal.

Under s 56(1) of the *Crimes (Local Courts Appeal and Review) Act* 2001, a prosecutor can appeal as of right to the Supreme Court against a number of orders on a ground that involves a question of law alone, including an order by a Local Court that stays any summary proceedings for the prosecution of an offence and an order made by a Local Court dismissing a matter the subject of any summary proceedings. Under s 57(1) a prosecutor can appeal by leave to the Supreme Court against a number of orders on a ground that involves a question of law alone, including a Magistrate's order made in relation to a person in committal proceedings or an interlocutory order made by a Local Court in relation to a person in summary proceedings. Section 59(2) says that the Supreme Court on appeal may set aside the order appealed from and make such orders as it sees fit or dismiss the appeal.

There is no substantive right of appeal against an acquittal, with or without leave, for the Crown in New South Wales. Appeals against interlocutory and other non-final judgments under the *Criminal Appeal Act* are not confined to questions of law.

It is understood that the New South Wales Government proposes to consult on proposed legislation which would allow the prosecution to appeal against a directed verdict of acquittal on a question of law. It is also understood that the New South Wales Government proposes to consult on proposed legislation which would widen the power to appeal under s 5F of the *Criminal Appeal Act* so that it applies not only to trial rulings that "destroy" the case for the Crown¹¹⁶, but also to rulings which substantially weaken the case for the Crown.

Victoria

Section 92 of the *Magistrates Court Act* 1989 permits an appeal to the Supreme Court from a final order of the Magistrates Court in a criminal proceeding by the prosecution or the defence.

- (1) A party to a criminal proceeding (other than a committal proceeding) in the Court may appeal to the Supreme Court on a question of law, from a final order of the Court in that proceeding.

¹¹⁶ See for example *Bozatsis and Spanakakis* (1997) 97 A Crim R 296 and *Pera* [2000] NSWCCA 109.

- (2) If an informant who is a member of the police force wishes to appeal under sub-section (1), the appeal must be brought by the Director of Public Prosecutions on behalf of the informant.

Section 92(7) empowers the Supreme Court to make the appropriate orders, including remitting the case for rehearing with or without a direction of law. This appeal does not seem to be first and foremost an abrogation of the common law rule against prosecution appeals from acquittals, but an amplification of judicial review powers for errors of law.

Section 10 of the *Supreme Court Act* 1986 permits appeals from a s 92 determination of the Supreme Court to the Court of Appeal:

- (1) Subject to this Act, the Court of Appeal has jurisdiction to hear and determine-
 - (a) all appeals from the Trial Division constituted by a Judge;
 - (b) all applications for new trials;
 - (c) all appeals from the County Court constituted by a Judge;
 - (d) all appeals, applications, questions and other matters, whether civil or criminal, which, by or under an Act-
 - (i) immediately before the commencement of section 20 of the Constitution (Court of Appeal) Act 1994, were required or authorised to be heard or disposed of by the Full Court of the Supreme Court (including any such matter pending, but the hearing of which by the Full Court had not commenced, before that commencement); or
 - (ii) are referred to or reserved for the consideration of, or directed to be brought for argument before, the Court of Appeal.

The Victorian *Crimes Act* 1958 contains provisions for reference of a question of law to the Court of Appeal by the trial court,¹¹⁷ and also by the Director of Public Prosecutions under s 450A:

- (1) Where a person tried on an indictment or presentment or who has appealed to the County Court from the Magistrates' Court in a criminal proceeding has been acquitted (whether in respect of the whole or part of the indictment or presentment or charge) the Director of Public

¹¹⁷ *Crimes Act*, s 446.

Prosecutions may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer the point of law to the Court of Appeal, and the Court of Appeal shall, in accordance with this section, consider the point of law and give its opinion on it.

Section 450A(4) also provides that the Court of Appeal's opinion on the referred point of law "shall not in any way affect the trial in relation to which the reference is made or any acquittal in that trial."

Queensland

Section 669A of the Queensland *Criminal Code* allows the Attorney-General to refer a point of law to the Court of Appeal to be determined for the future. This appears to be the public interest driven model, comparable to Victoria's s 450A of the *Crimes Act* and equivalent provisions in the Northern Territory (see below).

s669A

[.....]

- (1A) The Attorney-General may appeal to the court against an order staying proceedings or further proceedings on an indictment.
- (2) The Attorney-General may refer any point of law that has arisen at the trial upon indictment of a person in relation to any charge contained therein to the Court for its consideration and opinion thereon if the person charged has been—
- (a) acquitted of the charge; or
 - (b) discharged in respect of that charge after counsel for the Crown, as a result of a determination of the court of trial on that point of law, has duly informed the court that the Crown will not further proceed upon the indictment in relation to that charge; or
 - (c) convicted, following a determination of the court of trial on that point of law—
 - (i) of a charge other than the charge that was under consideration when the point of law arose; or
 - (ii) of the same charge with or without a circumstance of aggravation.
- (2A) The Attorney-General may refer to the Court for its consideration and opinion a point of law that has arisen at

the summary trial of a charge of an indictable offence, if the person charged has been—

- (a) acquitted of the charge at the summary trial; or
- (b) discharged on the charge after the prosecution, because of a decision on the point of law by the court of trial, indicates to the court that it will not further proceed on the charge in the proceeding before the court; or
- (c) convicted, following a determination of the court of trial on that point of law—
 - (i) of a charge other than the charge that was under consideration when the point of law arose; or
 - (ii) of the same charge with or without a circumstance of aggravation.

[...]

- (5) Where the reference relates to a trial in which the person charged has been acquitted or convicted, the reference shall not affect the trial of nor the acquittal or conviction of the person.

The Attorney-General can only refer points of law arising at trials on indictment and at summary trials of indictable offences. There is no right of appeal for the Crown against an acquittal proper. Nor does there appear to be any provision for intermediate determination by the Court of Appeal of a question of law to be applied subsequently in reaching a verdict or decision upon the case originating the question of law. This mechanism is purely to enable a post facto determination of questions of law by the superior criminal court.

Section 222 of the *Justices Act 1886* gives the complainant and defendant a right of appeal against the decision of a justice. However, when this involves the summary determination of an indictable offence, the complainant only has a right of appeal on sentence or costs. Consequently, while a complainant may appeal an acquittal of a summary offence, there is no appeal from an acquittal of an indictable offence dealt with summarily.

The Queensland Parliament has recently changed these rules via the passage of the *Evidence (Protection of Children) Amendment Act 2003*. New s 668A of the *Criminal Code* will permit the Attorney-General to refer a point of law relating to a pre-trial direction or ruling to the Court of Appeal. The Act does not give the same right to the accused. The rationale for this difference is that, if convicted, the accused may appeal, including challenging an adverse ruling, but if the accused is acquitted, the ruling could not otherwise be challenged. The Act will enter into force on 5 January 2004.

South Australia

In South Australia, the prosecution can appeal against an acquittal in any summary matter or any indictable offence tried summarily. Section 42 of the *Magistrates Court Act* provides:

Appeals

- 42.(1) A party to a criminal action may, subject to this section and in accordance with the rules of the appellate court, appeal against any judgment given in the action (including a judgment dismissing a charge of a summary or minor indictable offence but not any judgment arising from a preliminary examination).
- (1a) An appeal does not, however, lie against an interlocutory judgment given in summary proceedings.
- (2) The appeal lies—
- (a) in the case of an action relating to an offence categorised under the *Summary Procedure Act 1921* as an industrial offence—to the Industrial Court; or
- (b) in any other case—to the Supreme Court constituted of a single Judge (but the Judge may, if he or she thinks fit, refer the appeal for hearing and determination by the Full Court).

In addition, the prosecution may appeal with leave against any acquittal on a charge of an indictable offence brought about by a decision of a judge after trial by judge alone. Section 352(1)(ab) of the *Criminal Law Consolidation Act* says:

- (ab) if a person is tried on information and acquitted and the trial was by a judge sitting alone, the Director of Public Prosecutions may appeal against the acquittal on any ground with the leave of the Full Court;

In addition, s 352(1)(b) says:

- (b) if a court makes a decision on an issue antecedent to trial that is adverse to the prosecution, the Director of Public Prosecutions may appeal against the decision—
- (i) as of right, on any ground that involves a question of law alone; or
- (ii) on any other ground with the leave of the Full Court;

Section 348 says:

“**issue antecedent to trial**” means a question (whether arising before or at trial) as to whether proceedings on an information or a count of an information should be stayed on the ground that the proceedings are an abuse of process of the court;

Both the *Magistrates Court Act* and the *Criminal Law Consolidation Act* contain other provisions - in both Acts for cases stated and in the latter, for reservation of questions of law - but these are not appeals properly so called and cannot overturn any acquittal of the accused. However, where in a trial on information, for an indictable offence, the trial judge reserves a question of law for the opinion of the Full Court during the course of the trial, the decision of the Full Court may adversely affect the interests of the accused in subsequent proceedings at the trial.¹¹⁸

Northern Territory

Section 408 of the NT *Criminal Code* permits the reservation of a question of law for the consideration of the Court of Appeal by the trial judge either in his/her own discretion or at the request of the accused person's counsel. By implication the trial judge is not generally bound to reserve a question of law for consideration at the request of the prosecution, but retains his or her discretion to do so. Under s 409 the prosecution's request for the trial judge to reserve a case must be observed when an accused is found guilty but the judgment is arrested. The statute does not expressly say that the case stated must relate to the arresting of the judgment, though it may be argued cogently that this is implied.

Section 163 of the *Justices Act* contains a broad power of appeal from a court of summary jurisdiction on both questions of fact and law, without leave required. It says:

163. Right of appeal to Supreme Court

- (1) A party to proceedings before the Court may appeal to the Supreme Court from a conviction, order, or adjudication of the Court (including a conviction of a minor indictable offence but not including an order dismissing a complaint of an offence), on a ground which involves –
 - (a) sentence; or

¹¹⁸ See s 43 of the *Magistrates Court Act* 1991 and s 350 of the *Criminal Law Consolidation Act* 1935. There is a considerable jurisprudence on the latter section. See, for example, *Question of Law Reserved on Acquittal* (1993) 63 SASR 1.

-
- (b) an error or mistake, on the part of the Justices whose decision is appealed against, on a matter or question of fact alone, or a matter or question of law alone, or a matter or question of both fact and law,

as hereinafter provided, in every case, unless some Special Act expressly declares that such a conviction, order, or adjudication shall be final or otherwise expressly prohibits an appeal against it.

- (2) Any provision of any Special Act conferring a right of appeal to a Local Court against any conviction, order, or adjudication mentioned in subsection (1) or (3) shall be read as conferring a right of appeal to the Supreme Court under this Act in lieu of to a Local Court.
- (3) A party to proceedings before the Court arising from a complaint or an information in relation to a minor indictable offence that the Court summarily disposes of may appeal to the Supreme Court from an order or adjudication of the Court dismissing the complaint or information.
- (5) An appeal under subsection (3) may be on a ground that involves an error or mistake on the part of the Justices whose decision is appealed against on a matter or question of law alone or a matter or question of both fact and law.

Australian Capital Territory

The ACT has created a form of proceeding known as a “reference appeal”. Where a person has been tried on indictment and acquitted, the Attorney-General or the DPP may apply to have a question of law arising at or in relation to the trial heard. The decision of the Court of Appeal on this issue or issues cannot affect the verdict.¹¹⁹ The trial court may also state a case or reserve a question of law at trial.¹²⁰

Commonwealth

There does not appear to be any Commonwealth legislation expressly modifying the rules regarding prosecution appeals against acquittals of offences against Commonwealth laws. Prosecutions for offences against

119 *Supreme Court Act* ss 37E, 37S.

120 *Supreme Court Act* s 37E(2)(c).

Commonwealth laws in each State or Territory adopt the features of the jurisdiction of the State or Territory court hierarchy in which the matter is being determined. This is as a result of section 68(2) of the *Judiciary Act* 1903, which provides:

- (2) The several Courts of a State or Territory exercising jurisdiction with respect to:
 - (a) the summary conviction; or
 - (b) the examination and commitment for trial on indictment; or
 - (c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

The intention behind section 68(2) was thought to be “to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice.”¹²¹ This provision has been taken to incorporate the law of the State or Territory regarding Crown appeals against acquittals where there is a prosecution of an offence against a law of the Commonwealth. In *R v Sender*¹²² it was held by the Tasmanian Court of Criminal Appeal that the qualified prosecution right of appeal against an acquittal in Tasmania could be exercised by the Commonwealth Attorney-General. However in the recent cases of *Bond v R*¹²³ and *Byrnes v R*¹²⁴ the High Court declined to infer from s68(2) the right of a Commonwealth prosecuting agency to appeal against an acquittal or other adverse determination pursuant only to a law of a State or Territory. The decisions turn upon a construction of the powers of the agency, the corresponding scope for the application of s68(2), and importantly the strong presumption against finding an implied capacity for the prosecution to appeal against an acquittal where the language of a statute is not express.¹²⁵ Accordingly the

121 *R v Williams* (1934) 50 CLR 551 at 560 per Dixon J.

122 (1982) A Crim R 344.

123 (2000) 201 CLR 213.

124 (1999) 199 CLR 1.

125 *Bond v R* [2000] HCA 13 at paragraphs 27- 29; *Byrnes v R* [1999] HCA 38 at paragraph 56 onwards.

state of the law on Commonwealth offences turns upon the capacity for incorporation and harmonisation under s68(2) of the *Judiciary Act* (Cth) between State and Commonwealth schemes, and is not relevant to this paper.

Part 6: Autrefois Acquit At Common Law - Recent Inquiries Arguing For Change

The common law principle which led to the decision in *Carroll* has sparked public controversy in the United Kingdom and in New Zealand recently. It is therefore clear that this matter is not confined to Australia alone. What has happened in those countries?

The United Kingdom

The source of the controversy in the United Kingdom was the so-called “Stephen Lawrence” affair. Lawrence, a black man, was murdered by a group of white youths in what appeared to have been (and was taken by the general public to have been) an incident of extreme racial violence. There was one witness. In the heat of the moment during a very quick group attack, that witness was unable to identify those responsible. *After the Crown decided that it had insufficient evidence to warrant a prosecution*, a private prosecution was brought against three suspects. They were acquitted because of the lack of firm identification. Two others were discharged at committal. It was subsequently found by an official investigation that the police investigation had been “palpably flawed”.¹²⁶ There were many aspects to the Inquiry, which are not relevant to this subject. What is relevant is that, because of the private prosecutions, the three suspects concerned remain untouchable in relation to the murder whatever new evidence may turn up.

*Stephen Lawrence Inquiry February 1999*¹²⁷

In response to public demand, the *Stephen Lawrence Inquiry* was established to consider the public and private prosecutions of the case and the application of the principle of double jeopardy. Recommendation 38 of the Inquiry was particularly important to reform to the double jeopardy principle:

That consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented.

*UK Law Commission - Double Jeopardy and Prosecution Appeals March 2001*¹²⁸

The Law Commission was subsequently asked to look into this aspect of the law. It published a report entitled *Double Jeopardy and Prosecution Appeals* in March 2001.

The Commission summarised its conclusions as follows:

¹²⁶ The Stephen Lawrence Inquiry - Report by Sir William McPherson of Cluny (1999) Cmnd 4262 <<http://www.official-documents.co.uk/document/cm42/4262/4262.htm>> [The Stephen Lawrence Inquiry].

¹²⁷ The Stephen Lawrence Inquiry.

¹²⁸ The Law Commission, *Double Jeopardy and Prosecution Appeals* (Law Com No 267), March 2001 <<http://www.lawcom.gov.uk/library/lc267/lc267.pdf>> [The Law Commission].

OUR MAIN RECOMMENDATIONS

1.18 Our main recommendations on double jeopardy are that the Court of Appeal should have power to set aside an acquittal *for murder only*, thus permitting a retrial, where there is compelling new evidence of guilt *and* the court is satisfied that it is in the interests of justice to quash the acquittal; and that that power should apply equally to acquittals which have already taken place before the law is changed.

The (quite extensive) details of this recommendation will be examined below.

The Right Honourable Lord Justice Auld, Review of the Criminal Courts of England and Wales, September 2001

In 2001 Lord Justice Auld undertook a general review of the operation of the criminal justice system in England, and, in so doing, also reviewed the recommendations for reform of the double jeopardy principle made by the *Stephen Lawrence Inquiry* and the Law Commission.¹²⁹ Lord Justice Auld generally supported the Law Commission's proposal for creating a statutory exception to the double jeopardy principle, despite noting that it would "make inroad on our hallowed common law doctrine of *autrefois acquit*".¹³⁰ Lord Justice Auld argued that the doctrine of double jeopardy should not be considered absolute and must be applied in light of "the general justifying aim of the administration of the criminal justice system", namely "to control crime by detecting, convicting and duly sentencing the guilty".¹³¹ He was also confident that allowing retrials of acquitted persons in certain circumstances would not be in contravention of the *International Covenant on Civil and Political Rights*, as that convention prohibits persons being tried for a second time who have already been *finally* convicted or acquitted of the offence in accordance with the law of each state.¹³²

Lord Justice Auld felt that the Law Commission's recommendations achieved an acceptable balance between competing principles behind criminal law:

They seem to me to give proper weight to justice in individual cases whilst, in the criterion of exceptionality, to take into account of and reasonably limit their impact on the principle of 'finality' of decisions and the anxiety and insecurity to defendants and others involved in the process.¹³³

129 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, September 2001 (Auld).

130 Auld, p. 629.

131 Auld, p. 629.

132 Auld, p. 629.

133 Auld, p. 630.

In response to concerns that such a relaxation of the double jeopardy principle could “encourage a laxity of police investigation”,¹³⁴ Lord Justice Auld argued that it would be very unlikely that competent investigating police officers would “regard the possibility of a second trial as a reason for not trying hard enough the first time.”¹³⁵ In response to the idea that retrials would be unfair to the accused as the jury would already be aware of the Court’s opinion of the evidence, His Honour explained that this was “largely a matter of semantics or presentation” as the proposals were constructed to ensure only “prima facie compelling new evidence” would be enough to challenge an acquittal.¹³⁶ In any event, he noted, retrials already occur routinely without massive public outcry, in cases where, for example, the jury at the first trial was exposed to inadmissible evidence.¹³⁷

Despite his general support for the Law Commission’s recommendations, Lord Justice Auld did hold some reservations.¹³⁸ His main reservation was that by confining the exception to the double jeopardy rule to murder, the Law Commission failed to take heed of their own findings.¹³⁹ Originally, the Law Commission was going to recommend the exception be extended to all offences punishable by more than three years imprisonment. However, fearing uncertainty and making too big an inroad into the double jeopardy rule, the Commission limited its recommendations to murder.¹⁴⁰ Lord Justice Auld saw this restriction as preferring the public interest in protecting defendants over numerous other public interests the Commission identified, most notably holding those responsible for criminal acts accountable:

In my view, the Law Commission’s retreat, ..., to murder as the sole exception where there is new and apparently reliable and compelling evidence of guilt is hard to justify. What principled distinction, for individual justice or having regard for the integrity of the system as a whole, is there between murder and other serious offences capable of attracting sentences that may in practice be as severe as the mandatory life sentence? Why should an alleged violent rapist or robber, who leaves his victim near dead, or a large scale importer of drug, dealing in death, against whom new compelling evidence of guilt emerges, not be answerable to the law in the same way as an alleged murderer?¹⁴¹

134 Auld, p. 630.

135 Auld, p. 630.

136 Auld, pp. 630 - 631.

137 Auld, p. 631.

138 Auld, p. 631.

139 Auld, p. 632.

140 Auld, pp. 632 - 633.

141 Auld, p. 633.

Lord Justice Auld also found the Law Commission's public interest test problematic, particularly in the context of double jeopardy, where a number of different public interests conflict and are in competition with each other.¹⁴² His Lordship, accepting "the general thrust" of the Law Commission's recommendation for the introduction of statutory exceptions to the double jeopardy rule,¹⁴³ made the following recommendations:

- the exceptions should not be limited to murder and allied offences, but should extend to other grave offences punishable with life and/or long terms of imprisonment as Parliament might specify; and
- there should be no reopening of an investigation of a case following an acquittal without the Department of Public Prosecution's prior, personal consent and recommendation as to which police force should conduct it.¹⁴⁴

Both of Lord Justice Auld's reservations were addressed in the Government's further policy document, *Justice for All*, which in turn formed the basis of the Criminal Justice Bill 2002 containing proposals for statutory exceptions to the double jeopardy principle.

*Justice for All, July 2002*¹⁴⁵

In July 2002 the Blair Government published a policy statement based on the Auld Report entitled *Justice for All*. This document included a commitment to reform the existing double jeopardy principle in the United Kingdom. While *Justice for All* acknowledged the double jeopardy principle as an "important safeguard to acquitted defendants", it proposed to extend the exceptions to the principle on the grounds that there are some cases where a "re-trial would be justified if there were *compelling fresh evidence giving a clear indication of guilt*".¹⁴⁶

The statement proposed to extend the proposed exceptions to the double jeopardy principle to include "very serious offences" such as rape or armed robbery as well as murder.¹⁴⁷ While confident that these procedures would not be used frequently, it was stated that "their existence will benefit justice".¹⁴⁸ The *Justice for All* proposals on this issue were summarised in para 4.65 of the Review as follows:

142 Auld, pp. 631, 633.

143 Auld, p. 634.

144 Auld, p. 634.

145 *Justice for All: Review of the Criminal Courts of England and Wales*, presented to Parliament by the Secretary of State for the Home Department, the Lord Chancellor and the Attorney General by Command of Her Majesty, July 2002. (*Justice for All*).

146 *Justice for All* 4.64 (emphasis added).

147 *Justice for All* 4.64.

148 *Justice for All* 4.64.

- Should fresh evidence emerge that could not reasonably have been available for the first trial and strongly suggests that a previously acquitted defendant was in fact guilty, the Director of Public Prosecutions (DPP) will need to give his personal consent for the defendant to be re-investigated. He may also indicate that another police force should conduct the re-investigation. This will ensure that the rights of acquitted defendants are properly protected.
- Before submitting an application to the Court of Appeal to quash an acquittal, the DPP will need to be satisfied that there is new and compelling evidence and that an application is in the public interest and a re-trial fully justified.
- The Court of Appeal will have the power to quash the acquittal where:
 - there is compelling new evidence of guilt; and
 - the Court is satisfied that it is right in all the circumstances of the case for there to be a re-trial.
- There will be scope for only one re-trial under these procedures.

Importantly, it was proposed that the power to order a retrial would apply retrospectively.¹⁴⁹

Criminal Justice Bill 2002

The Blair Government has included the *Justice For All* proposals in Part Ten of the Criminal Justice Bill 2002 (the Bill).

Section 62 of the Bill outlines the types of cases that may be retried under the Bill. An application for a retrial may be made in cases where a person has been acquitted of a qualifying offence (on indictment or on appeal).¹⁵⁰ The requirement of a “qualifying offence” extends the exception beyond murder, as suggested by Lord Justice Auld in his earlier report. A “qualifying offence” is defined in Schedule 4 of the Bill¹⁵¹ and includes offences against the person (such as murder, manslaughter, kidnapping), sexual offences (such as rape, incest), drugs offences (such as unlawful importation, production, supply), violent dishonesty offences (such as robbery), criminal damage offences (such as arson), war crimes and terrorism and conspiracy.¹⁵² This

¹⁴⁹ *Justice for All* 4.66.

¹⁵⁰ s62(1).

¹⁵¹ s62(8).

¹⁵² Schedule 4: Qualifying Offences for the Purposes of Part 10.

section provides that Part 10 of the Bill is to apply retrospectively – “whether the acquittal was before or after the passing of this Act”.¹⁵³ It may therefore be noted that “at a stroke, every living person ever acquitted of one of the designated serious offences will in principle become eligible for retrial and possible conviction and punishment.”¹⁵⁴

Section 63 of the Bill outlines the procedure for applying for a retrial. Under this section, a prosecutor, with the written consent of the DPP,¹⁵⁵ may apply to the Court of Appeal for an order quashing a person’s acquittal and ordering him or her to be retried for the offence.¹⁵⁶ The DPP is only allowed to give his or her consent if satisfied that there is evidence, which meets the requirement of s 65 of the Bill (ie is new and compelling) and if it is in the public interest for the application to proceed.¹⁵⁷ Only one application for a retrial may be made under this section.¹⁵⁸

Section 64 of the Bill provides the procedure for determination of applications by the Court of Appeal. If satisfied that the application meets the requirements set out in ss 65 and 66 of the Bill, the Court must order a retrial, otherwise, the Court must dismiss the application.¹⁵⁹ If the Court determines that acquittal is a bar to the person being tried again, it must make a declaration to the effect that the acquittal is a bar to the person being tried for the offence.¹⁶⁰

Sections 65 and 66 of the Bill contain guidelines for the DPP and the Court of Appeal when deciding whether to apply for or order a retrial. Under s 65, there must be “new and compelling evidence that the acquitted person is guilty of the qualifying offence” before a retrial can be applied for or ordered.¹⁶¹ “New” evidence is evidence that “was not available or known to an officer or prosecutor at or before the time of the acquittal”.¹⁶² “Compelling evidence” is reliable, substantial and “when considered in the context of outstanding issues, it is highly probable that the person is guilty of the offence”.¹⁶³ “Outstanding issues” are those issues in dispute in the proceedings or on appeal.¹⁶⁴ In other words, in order for a retrial to be

153 s62(6).

154 Roberts, “Justice for all? Two bad arguments (and several good suggestions) for resisting double jeopardy reform” (2002) 6 *International J of Evidence & Proof* 197 at 200. [Roberts E&P].

155 s63(3).

156 s63(1).

157 s63(4).

158 s63(5).

159 s64(1).

160 s64 (3).

161 s65(1).

162 s65(2).

163 s65(3).

164 s65(4).

applied for or ordered, new, reliable, substantial evidence that appears to resolve the issues in dispute in the first trial and generally supports the conclusion that the acquitted person is guilty of the crime, must be shown.

Section 66 outlines the type of factors that should be considered when the Court of Appeal is determining whether, in all the circumstances of the case, it is in the interests of justice for the court to make and order.¹⁶⁵ This goes some way to address Lord Justice Auld's initial reservations about the exceptions. These factors include:

- whether a fair trial would be possible;
- the length of time since the offence was allegedly committed; and
- whether the officer or prosecutor has acted with timeliness and due diligence.¹⁶⁶

Part 10 of the Bill also describes the procedure and evidentiary rules to be applied at any retrial.¹⁶⁷ Section 69 of the Act places restrictions on the reporting of applications for retrial and s 70 makes it an offence if a publisher breaches the restrictions outlined in s 69.

Investigations are also a subject of Part 10 of the Bill. Under section 72, an officer may not arrest, question, search, seize anything in the possession or take fingerprints of the acquitted person¹⁶⁸ unless the DPP has given his or her written consent.¹⁶⁹ An officer may apply for the DPP's consent if new evidence relevant to an application for a retrial is available or known to the officer or the officer "has reasonable grounds for believing that such new evidence is likely to become available or known to him as a result of the investigation".¹⁷⁰ The DPP must only consent to the investigation if he or she is satisfied that there is (or is likely to be as a result of the investigation) sufficient new evidence to warrant the investigation and that the investigation is in the public interest.¹⁷¹ If the DPP does consent to the investigation, he or she may recommend that it be carried out by a different police force than that involved in the investigation of the original trial.¹⁷² Certain exceptions are made for "urgent investigations", where authorisation for the investigation may be given by a higher ranked officer in urgent circumstances.¹⁷³

165 s66(1).

166 s66(2).

167 ss67, 68, 71.

168 s72(3).

169 s72(2).

170 s72(5).

171 s72(6).

172 s72(7).

173 s73.

Arrest, charge, bail and custody procedures are also outlined in the Part 10 of the Bill.¹⁷⁴

New Zealand Law Commission

The New Zealand Law Commission published a report called *Acquittal Following Perversion of the Course of Justice* in March, 2001¹⁷⁵. This, too, was prompted by a particular case. At the time, the principle of double jeopardy was contained in s 26(2) of the *New Zealand Bill of Rights Act 1990* which stated that:

No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

Moore and another were tried for murder. A defence witness gave Moore an alibi and he was acquitted. Moore was subsequently convicted of conspiracy to pervert the course of justice in relation to that evidence. He received the maximum penalty - seven years imprisonment - but of course escaped what would otherwise have been the murder conviction and a life sentence.¹⁷⁶

The Law Commission identified three main purposes behind the rule against double jeopardy as:

- the prevention of harassment of the accused by repeated prosecution for the same matter;¹⁷⁷
- the avoidance of inconsistency and securing finality of a verdict (protection of the administration of justice;¹⁷⁸ and
- the promotion of efficient investigation.¹⁷⁹

The Commission felt that:

All of these considerations are of significance not only to whether there should be limits to an exception to the double jeopardy rule but also as to whether there should be any exception at all.

In this context, and aware of the concern that “any dilution of the double jeopardy rule tends to impair the important values that it protects”,¹⁸⁰ the Law Commission saw their principal options as:

- leaving the existing law unaltered; or

174 Sections 74, 75, 76, 77.

175 (New Zealand) Law Commission, *Acquittal Following Perversion of the Course of Justice* (Report 70), March, 2001. <<http://www.lawcom.govt.nz>> [NZLC].

176 *Moore* (17 September, 1999) unreported; *Moore* (23 November, 1999) unreported.

177 NZLC p. 5.

178 NZLC p. 5.

179 NZLC p. 7.

180 From a submission received in response to the New Zealand Law Commission's Preliminary Paper 42 NZLC p. 8.

- permitting a limited departure from the principle of double jeopardy.¹⁸¹

After considering the current public demand for reform resulting from *Moore* and the UK Law Commission proposals for reform, the Law Commission recommended taking the second option.

It expressed its conclusions as follows:

We have proposed as conditions to an application to reopen:

- the accused must have been convicted of an administration of justice crime;
- the crime of which the accused was originally acquitted must carry a penalty of 14 years imprisonment or more.

We further propose:

- that the High Court alone have jurisdiction to consider an application;
- that it must be satisfied that:
 - the accused has been convicted of an administration of justice crime;
 - it is more likely than not that, but for the administration of justice crime, the acquitted person would not have been acquitted;
 - the prosecution has acted with reasonable despatch since discovering evidence of the administration of justice offence;
 - the acquitted person has been given a reasonable opportunity to make written or oral submissions to the Court;
 - no appeal or other application to set aside the administration of justice conviction remains undisposed of;
 - it would not, because of lapse of time or for any other reason, be contrary to the interests of justice to take proceedings against the acquitted person for the crime of which he or she was acquitted.

It may be noted that, unlike the UK Law Commission, the New Zealand Commission did not recommend a “new evidence” exception to the double jeopardy rule, nor did it give the proposed reforms retrospective application.

¹⁸¹ NZLC, p. 9.

Part 7: Examination of the Proposals For Change Of The Common Law Principle

It may now be seen that one can divide proposals for change into two general camps - one general and one more specific. The decision in *Carroll*, and the controversy surrounding it, is relevant to both. It is convenient to examine the least restrictive general proposal first.

New Evidence After Acquittal Generally

The Law Commission Recommendations

After extensive discussion and consultation, the UK Law Commission recommended that a general exception be made to the *autrefois* rule. It is best to state the recommendations in the form of the actual recommendations themselves:¹⁸²

NEW EVIDENCE AND THE DOUBLE JEOPARDY RULE

1. We recommend that the rule against double jeopardy should be subject to an exception in certain cases where new evidence is discovered after an acquittal, but only where the offence of which the defendant was acquitted was murder, genocide consisting in the killing of any person, or (if and when the recommendations in our report on involuntary manslaughter are implemented) reckless killing.

Retrospective effect

2. We recommend that the new exception should apply equally to acquittals which have already taken place before the exception comes into force.

What new evidence will trigger the exception?

3. We recommend that

(1) the new exception should be available only where the court is satisfied that the new evidence

(a) appears to be reliable; and

(b) when viewed in context, appears at that stage to be compelling;

(2) the context in which the court views the new evidence for this purpose should comprise the issues that arose at trial, whether or not a matter of dispute between the prosecution and the defence;

(3) the court should be permitted to have regard to the evidence adduced at trial solely for the purpose of identifying those issues and assessing the impact of the new evidence in the light of them; and

¹⁸² The Law Commission, Part VIII.

(4) the new evidence should be regarded as compelling if, in the opinion of the court, it makes it highly probable that the defendant is guilty.

The interests of justice

4. We recommend that a retrial should be allowed on grounds of new evidence only where the court is satisfied that, in all the circumstances of the case, it is in the interests of justice; and that, in determining whether it is so satisfied, the court should be required to have regard to

- (1) whether a fair trial is likely to be possible;
 - (2) whether it is likely that the new evidence would have been available at the first trial if the investigation had been conducted with due diligence;
 - (3) whether the prosecution has acted with reasonable despatch since
 - (a) the new evidence was discovered (or would, with due diligence, have been discovered), or
 - (b) the new exception came into force, whichever is the later;
- and
- (4) the time that has elapsed since the alleged offence, together with any other considerations which appear to the court to be relevant.

The appropriate court

5. We recommend that the court empowered to quash an acquittal on grounds of new evidence should be the Criminal Division of the Court of Appeal, and that there should be no right of appeal against that court's decision.

Evidence which was inadmissible at the first trial

6. We recommend that it should not be possible to apply for a retrial on the basis of evidence which was in the possession of the prosecution at the time of the acquittal but could not be adduced because it was inadmissible, even if it would now be admissible because of a change in the law.

Successive retrials, and successive applications for retrials

7. We recommend that

- (1) where an acquittal is quashed on grounds of new evidence, and the defendant is acquitted at the retrial, no application to quash that later acquittal on grounds of new evidence should be permitted;
- (2) where an unsuccessful application is made to quash an acquittal on grounds of new evidence, no further application to quash that acquittal on grounds of new evidence should be permitted;

(3) where a person is acquitted at a retrial held on some other ground, it should be possible to make one application to quash that acquittal on grounds of new evidence, but the fact that the acquittal occurred at a retrial should be one of the factors to which the court should be required to have regard in determining whether a further retrial would be in the interests of justice.

Consent to the making of an application

8. We recommend that it should be necessary to obtain the consent of the Director of Public Prosecutions, in person, before making an application for an acquittal to be quashed on grounds of new evidence.

Reporting restrictions

9. We recommend that

(1) there should be a prohibition on the reporting of the hearing of an application for a retrial on grounds of new evidence until the application is dismissed or any retrial has finished; but

(2) the Court of Appeal should have power to make an order disapplying or varying that prohibition if

(a) the defendant does not object to the making of such an order, or

(b) having heard representations from the defendant, the court is satisfied that it is in the interests of justice to make it.

The General Principles Underlying Double Jeopardy Protection

The most general of the options (no matter how restricted in detail) that have been presented for change, like that proposed by the Law Commission, challenge the double jeopardy rules themselves. To think about this requires a fundamental reconsideration of why we have these rules at all. There is no point in debating the existence of a rule unless we know (really) why we have it. This is not easy to do - the rules have been taken as a given for centuries. The discussion which follows cannot be and is not intended to be a retelling of the lengthy work that has been done by the Law Commission and academic commentators. There is a gigantic literature on the general subject. The purpose of this paper is to present a general outline. The most definitive and interesting recent relevant work that has been published on the debate in the United Kingdom has been that produced by academic Paul Roberts.¹⁸³ This commentary is heavily influenced by his helpful summaries and analysis.

The Law Commission of the United Kingdom identified four moral and legal justifications for maintaining the existing double jeopardy laws: the risk of wrongful conviction; the distress of the trial process; the need for

¹⁸³ Roberts, "Acquitted Misconduct Evidence and Double Jeopardy Principles, from *Sambisivam* to *Z*" [2000] Crim LR 952; Roberts, E&P at 197; Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 Modern LR 393.

finality in the law; and the need to encourage efficient investigation.¹⁸⁴ These themes, and variations upon them, run throughout the judgments and writings in the area. A list, given above, bears repetition at this point:

- the various interests in securing finality of decisions;
- the protection of citizens from harassment by the State;
- the promotion of efficient investigation;
- the sanctity of a jury verdict; and
- the prevention of wrongful conviction.

The second of these, which is made more explicit in the High Court judgments, ought to be given more prominence. It is the risk of oppression. In notorious cases, like those recent cases which have sparked public outrage in the United Kingdom, New Zealand and Australia, the basis for the public outrage is saturated media coverage based on the premise that the accused is really guilty, when “the system” has (wrongly) found him not guilty. If the pressure is on to prosecute once, then twice - then why not three or four times until the criminal justice system somehow manages to “get it right” and the baying of the media is stilled? If the risk of oppression can be seen, is it not all the more a risk because it may be subject to the whimsical pressures of media driven public opinion? The *Carroll* case itself is the perfect instance of the far from dispassionate media in full cry.

The reaction to a particular case can be vocal, powerful and immediate. In a highly charged atmosphere which might understandably arise it may be all too easy to discount the reassurance gained by reflecting, in less emotive circumstances, on long-standing traditional bulwarks of individual liberty.¹⁸⁵

Of the four Law Commission justifications, it is only the third, the principle of finality, that Roberts finds truly persuasive.¹⁸⁶ That is articulated as follows:

¹⁸⁴ Roberts, E&P at 206. See also the Law Commission.

¹⁸⁵ Roberts MLR at 412.

¹⁸⁶ Roberts finds weakness with two of the other justifications given by the Law Commission. In regards to the argument that the current double jeopardy principle protects persons accused of criminal activity from the anxiety and distress of the trial process, Roberts argues: “If a first trial can be justified, notwithstanding the unavoidable distress it brings, it is difficult to see why distress could be a serious objection to a second trial, provided that the positive reasons for reopening the acquittal are otherwise persuasive” (Roberts E&P at 209). Roberts also attacks the argument that the existing double jeopardy principle encourages full and proper investigations and prosecutions, due to the “one shot only” nature of the trial process, on a number of grounds. Roberts argues that this argument underestimates the “range of pragmatic and normative pressures” placed on investigators and prosecutors “to perform their functions conscientiously and effectively in *every case*.” (Roberts E&P at 211). In any case, particularly if challenge to acquittals is to be very rare, police officers and prosecutors would have no way of knowing whether or not their case would be one of a handful subject to retrial.

In a liberal democracy, it is a fundamental political and social objective to allow individuals as much personal autonomy as possible, to allow people the space to live their own lives and pursue their own visions of the good life. Lack of finality in criminal proceedings impinges on this to a significant degree, in that the individual, though acquitted of a crime, is not free thereafter to plan his or her life, enter into engagements with others and so on, if required constantly to have in mind the danger of being once more subject to a criminal prosecution for the same alleged crime.

.... The finality involved in the rule against double jeopardy ... represents an enduring and rescinding acknowledgement by the State that it respects the principle of limited government and the liberty of the subject ... the concept of finality of issues as between the individual and the state is a fundamental process value, which operates on the collective as well as the individual level.¹⁸⁷

Roberts encapsulates this general notion as 'the criminal justice deal'. He says of it:

... the intuition that criminal conviction and punishment can only hope to be legitimate for as long as political authorities abide by the terms of the criminal justice deal. If governments could accept or reject acquittal verdicts much as it suited them, criminal proceedings would soon be exposed as a sham trial of guilt, and jury acquittal would lose its current practical and symbolic meaning.¹⁸⁸

And what of oppression? Although he does not identify it as such, that is the true meaning behind a quotation that Roberts uses in the same context:

If two trials are okay, why not three, or four, or...? Eventually, the state may be able to wear an innocent [accused] down, and find one statistically aberrant or quirky jury that would erroneously convict... Basic notions of symmetry are also offended by this 'heads-we-win, tails-let's-play-it-again' scheme. If the state wins in an initial fair trial ... it does not give the defendant the right to ignore the verdict and demand a new trial on a clean slate. Why should the defendant be placed in a lesser position when she wins? When the game is over, it's over. The winner is the winner; that's that; done is done.¹⁸⁹

187 Law Commission, as quoted by Roberts E&P at 207 – 208.

188 Roberts MLR at 411.

189 Amar, "Double Jeopardy Laws Made Simple" (1997) 106 Yale LJ 1807 at 1815.

It must be admitted at once that this argument is overdone. The convicted accused has a right of appeal from a conviction, although it might be hedged about by some restrictions, depending on the jurisdiction involved. If the accused succeeds, there is almost always (but not invariably) a retrial. Sometimes there may be a number of successful appeals from conviction and a number of retrials.¹⁹⁰ The symmetry argument may lead one to think that there might be an argument for giving the prosecution a right to appeal an acquittal on similar grounds. Indeed, that can be done in Tasmania for indictable offences and for summary offences in most Australian jurisdictions. This idea will be pursued later in the paper. But, for present purposes, it suffices to say that an argument for giving the prosecution a right to appeal an acquittal on an indictable offence is not an argument to deal a blow directly at the heart of the double jeopardy principle.

The reader can (and should) gauge the worth of these arguments for himself or herself. Whatever the result of that process, it is worthwhile to look at the detail of the proposal.

Some Details of the UK Proposal

This UK proposal contains a number of elements, which require further exploration. With some exceptions, the Law Commission's recommendations have emerged as the legislative proposals contained in the Criminal Justice Bill 2002.

(a) *The exception is limited to situations which, in effect, amount to murder.*

The Law Commission proposed a "new evidence" exception limited to situations which amount to murder after a detailed analysis of the "process values" of the double jeopardy rule. Those "process values" can be found in the general discussion above - in particular, the need for finality in the criminal process as putting an end to distress and anxiety among defendants and their supporters, the need for finality as a fundamental social value impacting on liberty, protection from harassment by state officials and finality as a wider social value representing a limit on the power of the state over the individual.¹⁹¹ Having said that, the Law Commission proposed an exception limited to murder because of the

... widespread perception, which we share, that murder is not just more serious than other offences but qualitatively different. The effect of this difference is that murder satisfies the test we have proposed for the scope of the new exception, namely whether a manifestly illegitimate acquittal sufficiently damages

¹⁹⁰ See, for example, *Jack* (1997) 117 CCC 3d 43 (Supreme Court of Canada - 4th trial); *Martin* (No 4) (1999) 105 A Crim R 390 (4th trial).

¹⁹¹ The Law Commission paras 4.11-4.19. citing in discussion Roberts, "Acquitted Misconduct Evidence and Double Jeopardy Principles, from *Sambasivam* to *Z*" [2000] Crim LR 952.

the reputation of the criminal justice system so as to justify overriding the rule against double jeopardy.¹⁹²

In his commentary on the Law Commission Report, Roberts was sceptical that the acquittal quashing power would only be used as an exceptional remedy for cases where new evidence almost unequivocally demonstrates that the previously acquitted person is 'getting away with murder' as a justification for a relaxing of existing double jeopardy laws.¹⁹³

Roberts warned:

if something is unjust it remains unjust even if it only happens once. If it is justice to which we aspire – and not just public order, social hygiene, or satisfaction of victims' preferences etc. – the numbers simply cannot be allowed to count in this crude fashion.¹⁹⁴

Roberts was right to be sceptical. Having identified a breach in the “criminal justice deal or, put another way, the finality process argument, proponents of reform were not going to stop at murder. It was successfully argued, by, for example, Lord Justice Auld, that the Law Commission failed to justify why only murder cases would be excepted from the double jeopardy rule, explaining that if the principle of “finality” is relied on as a reason for not including other serious offences in the exception, the same principle cannot justify murder as an exception. And so it happened. The exceptions proposed in the *Criminal Justice Bill* are significantly wider. They may be found in the account above. The thin edge of the wedge argument, often derided, turned out to be true in this instance. One of the Law Commission's significant compromises turned out to be no compromise at all.

(b) *Compelling Evidence*

The Law Commission's reform proposal required new, reliable and compelling evidence. “Compelling” means “makes it highly probable that the defendant is guilty”. This has turned into “new and compelling” under the Criminal Justice Bill. There are a number of problems with this generally.

- If re-trials will only be allowed if new evidence is shown to be “so compelling that it drives the appeal court to the conclusion that it is highly probable that the defendant is guilty”, there is a substantial risk of prejudicing the jury. In other words, if the jury is aware that a court has ruled the new evidence to be compelling, they may be prejudiced

192 The Law Commission para 4.30. The Commission then goes on to justify the special nature of murder by a series of citations, which are not reproduced here.

193 Roberts E&P at 215. The UK Government certainly does not envisage such a remedy being used frequently, for example see *Justice for All*.

194 Roberts E&P at 215.

into returning a guilty verdict on that basis. There would seem to be a case for, at the least, very strong provisions for a black out on media reporting, which would not make the media very happy - and which would not solve the problem of prejudice arising from reportage of the first case anyway.¹⁹⁵ Consider the problem of getting a jury in any retrial of Carroll who had not heard of the furore.

- It can be argued that the “new evidence” test could result in police and/or prosecutors launching “prosecutions prematurely or without comprehensive investigation”.
- Roberts identifies the meaning and application of the requirement of “compelling new evidence of guilt”. He warns that such a phrase is not easily translated “into a robust legal norm that courts can apply”.¹⁹⁶ When attempting to apply such a requirement, the decision of the DPP and the Court of Appeal may conflict, raising the problem of inconsistent decision making and the potential for inappropriate criteria being used to determine what is or is not “new” and “compelling” evidence.¹⁹⁷
- When closely analysed, a precondition based on “new and compelling” evidence is far from certain and open to a great deal of interpretation. This carries two kinds of danger. First, it may lead to unreal expectations of certainty amongst advocates of reform. Second, it may well generate its own sequence of cases on interpretation, in turn influenced by the double jeopardy principle.

But let us test all of this with the *Carroll* decision. We would (on the UK proposals) require new and compelling evidence of Carroll’s guilt. What is there? According to the advocate for change, *The Australian*, the basis for the acquittal was a “technicality”.¹⁹⁸ The “technicality” appears to be that the acquittal was entered by the Court of Criminal Appeal on the basis that propensity evidence was inadmissible. On this account, therefore, the “new and compelling” evidence would be that (a) there was propensity evidence

195 See Fitzpatrick, “Double Jeopardy - One Idea And Two Myths” (2003) 67 J Criminal Law 149 at 156: ‘...there is a seemingly comprehensively drafted reporting restrictions clause which is activated when the prosecutor gives the required notice of application to the Court of Appeal. However, while the clause may be comprehensively drafted and well-intentioned, the problem of recruiting a ‘fresh’ jury to the second trial should not be underestimated. By definition, the second trials with which we are concerned are those involving serious offences which are likely to receive substantial publicity in the first instance.’.

196 Roberts E&P at 202.

197 Roberts, E&P at 203.

198 *The Australian* 11 December 2002.

available at the trial¹⁹⁹, ruled inadmissible, which is now supposed to be admissible on the basis of subsequent High Court decisions and (b) once admissible, a subsequent jury would again convict on that evidence.

It is true that the propensity evidence was ruled inadmissible and it is true that the High Court has spoken, yet again, on propensity evidence. But that evidence is certainly not new; in any event, anyone who argues that propensity evidence is compelling after perusal of the High Court decisions on the subject is delusional. Propensity evidence does not go to show that the accused committed any of the elements of the offence however that term is interpreted. It is reasonably clear that, even if the UK scheme were adopted in Australia, *Carroll* would be decided in the same way.

(c) *Procedural Safeguards*

The UK scheme, from the Law Commission recommendations to the proposals in the Criminal Justice Bill, contains a number of what are clearly intended to be procedural safeguards. For example, the safeguards require the DPP to make an investigative decision, as opposed to a prosecutorial decision. This is an unaccustomed role for the DPP in Australia. This also raises the question whether the DPP would be expected to undertake proactive scrutiny of police surveillance of an acquitted person.²⁰⁰ This is, again, an unaccustomed role for the DPP in Australia.

Roberts also fears such safeguards may lead to a situation where the DPP and the Court of Appeal have decided that there exists new and compelling evidence such as to warrant a quash of a conviction and a retrial, only to result in a jury acquittal at the retrial, possibly decided upon the weight of the new evidence.²⁰¹ Roberts states:

it would be a strange kind of retrial where only a conviction could avoid producing blatantly inconsistent official evaluations of the evidence, a kind of normative schizophrenia from which a final determination, of innocence or guilt, would struggle to emerge.²⁰²

(d) *Retrospectivity*

The Law Commission recommended that the proposed exception be retrospective. It based this recommendation on the following arguments: (a) the change does not make criminal what was previously not criminal -

199 *Carroll* (1985) 19 A Crim R 410.

200 Roberts E&P at 202.

201 Roberts E&P at 204.

202 Roberts E&P at 204.

the alleged act was always a crime²⁰³; (b) the potential advantage of using DNA analysis in old cases would be lost; and (c) there would otherwise be an arbitrary distinction between those acquitted before the relevant date and those acquitted after it.²⁰⁴

These arguments are not particularly persuasive in the absence of answers to the following.

- Reason (a) is sophistry. The law on the matter is that the defendant has secured an acquittal in relation to that crime. That fact may be interpreted as a statement by a jury that a crime was not committed. Of course murder is always a crime. The question is whether this act by this person amounted to murder. Sometimes the question is about the person and sometimes the question is about the act. Sometimes it is about the fault with which the act is done and sometimes it is about a defence that the defendant may have asserted with success. It is just not as simple as that.
- Reason (b) is true but not to the point. Just because a new technique for recovering new evidence has been established does not necessarily mean that it should be employed against people who have been acquitted. By all means, let it be employed in relation to old and unsolved cases. No-one could argue against that. But it must be remembered that the rhetoric of the infallibility of DNA evidence is just that - rhetoric - the evidence does not prove guilt beyond reasonable doubt in itself.²⁰⁵
- Reason (c) is no reason at all. The date would not be arbitrary. Arbitrary means that there is no reason for it. There would be a reason for that date. That would be the date on which the Parliament had decided to change the 'crime deal'. The principle that changes to substantive criminal rights are generally not retrospective is well known and respected. There is nothing arbitrary about it.

203 In a subsequent discussion centred around the question whether retrospectivity would offend the European Convention of Human Rights, the Law Commission argued that it would not, for the expression of the principle does not prevent the removal of a bar or obstacle to prosecution. See The Law Commission para 4.52.

204 The Law Commission paras 4.44-4.46.

205 See, for example, amid a considerable literature, Evett et al, "DNA Profiling: A Discussion of Issues Relating To the Reporting of Very Small Match Probabilities" [2000] Crim LR 341.

Acquittal by Perversion of the Course of Justice

The NZ Law Commission recommendations concern the specific situation in which it can be proven beyond a reasonable doubt that the accused was acquitted of the primary offence charged by means (in whole or in part) of the commission of an offence against the administration of justice, such as perjury or attempt to pervert the course of justice. That, of course, was precisely the allegation in *Carroll*. The situation dealt with in this section of the paper falls into two parts.

- First, a situation might be contemplated in which the prosecution *is* seeking the ability to retry the accused for the primary offence because of the escape from the finding of guilt of that primary offence by the commission of the course of justice offence. It is clear beyond argument that this cannot be done under current Australian law. It is this situation with which the NZ Law Commission was concerned.
- Second, a situation might be contemplated in which the prosecution is *not* seeking the ability to retry the accused for the primary offence. It is a situation in which, as in *Carroll*, the prosecution is seeking to try the accused for the course of justice offence by means which necessarily controvert the primary acquittal. *Carroll* stands for the proposition that this cannot be done.

Retrial For The Primary Offence

Should not the law allow for a defendant to be prosecuted again for the offence that he or she was acquitted by the commission of an offence against the administration of justice? This is, of course, a matter firmly denied by the rules of double jeopardy in their central form of the *autrefois* plea.

The United Kingdom has a law already, which allows that course to be undertaken. In the words of the UK Law Commission:

The only genuine exception to the *autrefois* rule at present is the tainted acquittal procedure introduced by the *Criminal Procedure and Investigations Act 1996*. That Act created a procedure by which a person could be retried for an offence of which that person had already been acquitted, if the acquittal was “tainted”. This procedure is available where

- (a) a person has been acquitted of an offence, and
- (b) a person has been convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal.

If these conditions are met, and the court before which the person was convicted certifies that there is a real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted, and that it would not be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he or she was acquitted, then an application may be made to the High Court for an order quashing the acquittal. The High Court may, upon such application, make an order under section 54(3) of the Act quashing the acquittal, but only if:

- (1) it appears to the High Court likely that, but for the interference or intimidation, the acquitted person would not have been acquitted;
- (2) it does not appear to the court that, because of lapse of time or for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which that person was acquitted;
- (3) it appears to the court that the acquitted person has been given a reasonable opportunity to make written representations to the court; and
- (4) it appears to the court that the conviction for the administration of justice offence will stand.²⁰⁶

As has already been noted above, the New Zealand Law Commission made a similar recommendation. There are, however, differences of detail. These appear to be as follows:

The New Zealand proposal is limited to “serious crimes”. That is defined to mean crimes carrying a penalty of 14 years maximum or more (except perjury itself). The UK provision applies to any offence.²⁰⁷

The UK provision is limited to an offence involving interference with or intimidation of a juror or a witness (or potential witness), whereas the New Zealand proposal potentially attaches when there is a conviction for any offence against the administration of justice.

²⁰⁶ The Law Commission at paras 2.9-2.12 citing s 54 of the *Criminal Procedure and Investigations Act* 1996 (UK).

²⁰⁷ The NZ Law Commission adopted the restriction, agreeing with criticism of the width of the UK provision in Dennis, “Rethinking Double Jeopardy” [2000] Crim LR 933.

The UK provision requires proof that there is a real possibility²⁰⁸ that, but for the offence, the accused person would not have been acquitted, whereas the NZ proposal is that it be more likely²⁰⁹ than not²¹⁰ that, but for the offence, the accused person would not have been acquitted.

The New Zealand proposal required the court on review to be satisfied that the prosecution has acted with “reasonable despatch” since discovering the evidence of the administration of justice offence.

Both proposals require, sensibly enough, that the acquitted person be given a reasonable opportunity to make representations to the court. However, the wording in both cases is curious. One would have thought that the acquitted person should be a party to the application.

The Law Commission made several recommendations about the existing UK procedure. These were as follows:

THE TAINTED ACQUITTAL PROCEDURE

The objects of the interference or intimidation

10. We recommend that the tainted acquittal procedure should be extended so as to apply where the administration of justice offence involves interference with or intimidation of a judge, magistrate or magistrates’ clerk.

The definition of “administration of justice offence”

11. We recommend that, for the purposes of the tainted acquittal procedure, the definition of an “administration of justice offence” should be extended to include

- (1) offences under the *Prevention of Corruption Acts* 1889–1916, and the common law offence of bribery (or, if and when the recommendations in our report on corruption are implemented, the offences there proposed);

and

208 Section 54 of the *Criminal Procedure and Investigations Act* 1996 says “real possibility” but the Law Commission interprets this as meaning “likely”: cf The Law Commission at para 2.12(1). No reason is offered for this interpretation.

209 NZLC at para 47 says: “The term ‘likely’ is one that requires comment. It can in some contexts connote ‘more likely than not’; in others it may signify a real or significant risk. We are of the view that in the present context the former sense is appropriate and should be made explicit.

210 NZLC at para 46 is somewhat contradictory. It appears to contemplate that there be some kind of “substantial” requirement. It is not clear what this might mean.

- (2) conspiracy to commit any administration of justice offence.

The necessity for a conviction of an administration of justice offence

12. We recommend that the tainted acquittal procedure should be available not only where a person has been convicted of the administration of justice offence, but also where the court hearing the application

- (1) is satisfied, to the criminal standard of proof, that an administration of justice offence has been committed, and
- (2) is satisfied that
 - (a) the person who committed it is dead;
 - (b) it is not reasonably practicable to apprehend that person;
 - (c) that person is overseas, and it is not reasonably practicable to bring that person within the jurisdiction within a reasonable time; or
 - (d) it is not reasonably practicable to identify that person.

13. We recommend that, where an acquittal is quashed on the grounds that it is tainted although no-one has been convicted of an administration of justice offence in relation to it, the court's finding that an administration of justice offence has been committed should be inadmissible as evidence of that fact in subsequent criminal proceedings for any offence.

The requirement that the acquittal be secured by the interference or intimidation

14. We recommend that the tainted acquittal procedure should be available only where it appears to the court hearing the application that, but for the interference or intimidation, the trial would have been more likely to result in a conviction than in an acquittal.

The interests of justice test

15. We recommend that an acquittal should be liable to be quashed on the grounds that it is tainted only where the court is satisfied that, in all the circumstances of the case, this is in the interests of justice; and that, in determining whether it is so satisfied, the court should be required to have regard to

- (1) whether a fair trial is likely to be possible;
- (2) whether the prosecution has acted with reasonable despatch since evidence of the administration of justice offence was discovered (or would, with due diligence, have been discovered); and

-
- (3) the time that has elapsed since the alleged offence, together with any other considerations which appear to the court to be relevant.

A limit on the number of times the procedure can be used

16. We recommend that

- (1) where an unsuccessful application has been made to quash an acquittal on the grounds that it is tainted, no further application to quash that acquittal (on any grounds) should be permissible; but
- (2) where an unsuccessful application has been made to quash an acquittal on grounds of new evidence, it should be possible to make one further application to quash that acquittal on the grounds that it is tainted.

The procedure

17. We recommend that the legislation governing the tainted acquittal procedure be amended so as to provide for

- (1) a hearing of the question whether the acquittal should be quashed;
- (2) the hearing to be in open court;
- (3) the acquitted person to have a right to be present;
- (4) both parties to be legally represented, and legal aid to be available for the acquitted person;
- (5) witnesses to be heard and cross-examined on the question whether an administration of justice offence has been committed; and
- (6) consideration of transcripts of the first trial, together with witnesses if necessary, in determining whether the acquitted person would not have been acquitted but for the interference or intimidation.

The appropriate court

18. We recommend that the court empowered to quash acquittals on the grounds that they are tainted should be the Criminal Division of the Court Appeal.²¹¹

211 The Law Commission Part VIII.

These recommendations concern the fine detail of any such scheme, but the basic differences between it and the New Zealand proposals remain. The Law Commission recommendations have not been taken up yet. It would appear, however, that Mr Carroll could not be convicted under the UK law because he did not interfere with a witness or a juror. Under the New Zealand proposal it is possible that Mr Carroll *could* have been convicted if, and only if, the prosecution could establish a causal link between his perjury and his acquittal.

Retrial For The Secondary Offence

The last option that might be considered as reform is the least drastic of them all. It would be to legislate to reverse the effect of *Carroll* itself, allowing prosecution for the secondary offence against the administration of justice even if that prosecution inevitably controverted the acquittal. Some such offences do not controvert the acquittal and therefore can be prosecuted under current law. If, for example, it could be proved that Mr Carroll bribed a juror and was acquitted, he could be tried for bribing the juror, even under current law (as was the case with Moore in New Zealand). What harm, it could be asked, could there be in prosecuting Mr Carroll for perjury just because the basis for the prosecution is his arguably false protestation of innocence under oath?

By now the arguments are familiar and need not be rehearsed. The principles at stake are identical. The only difference this time is that cases like *Carroll* are rare birds indeed. This would be such a limited exception to the fundamental principles that it would go virtually unnoticed. Perhaps that is why it was not the subject of discussion or recommendation by either Law Commission.

Part 8: Some General Conclusions

It is possible to draw some conclusions from the discussion in this paper. It can be said with some conviction that the following statements are true:

- The law of double jeopardy is intricate and complex in detail, but the basic principles have been in place for centuries and the core doctrine has not been the subject of any reasonable or sustained challenge on policy grounds until very recently. The reason for that challenge has been a small number of controversial cases, the facts of which are not new. It is not clear why these cases have suddenly attained public prominence right now.
- The decision of the High Court in *Carroll* was not new and unexpected, but a mere rationalisation of previous authority by classic judicial method. In particular, the decision cleared up considerable uncertainty, which had surrounded previous High Court decisions in the area.
- Similar kinds of decisions have sparked inquiries by law reform bodies in the United Kingdom and New Zealand. These law reform bodies have not come to the same conclusion, except that it can be said that both have recommended that the common law be changed. The recommendations have prompted a Bill in the United Kingdom but not in New Zealand. It seems a fair conclusion that, even if the recommendations of either or both law reform bodies were enacted, *Carroll* would probably be decided in the same way.
- In very general terms, the law on that aspect of double jeopardy which deals with prosecution appeals against acquittals can be described as saying that, with the exception of Tasmania, an acquittal on a charge of an offence tried by a jury is final subject to very limited exceptions. It can also be seen from the account of State and Territory laws above, that virtually the entire statutory application of this aspect of the double jeopardy principle can be summarised as saying that the prosecution can appeal, one way or another, with varying effect, against an acquittal pronounced by any legal authority other than a jury.

Part 9: Proposals For Reform of the Double Jeopardy Principle

Some General Observations

It is common to see rules and procedures in the criminal justice system as being a balance. Traditionally, that is a balance between the rights of the individual accused (such as the presumption of innocence), on the one hand, and the rights of society to ensure conviction and appropriate consequences for the guilty on the other hand. In comparatively recent times, it has been acknowledged that the balance is a sort of three way balance (if there can be such a thing), as the rights of victims within the criminal justice system have been enumerated and recognised.

It is also common, especially among those who are not accused, victims or the prosecution to see these rights as antagonistic to each other. The consequence of this is that there is a perception that an enhancement of the rights of the victim, for example, must inevitably be at the expense of the rights of the accused. That is a short sighted way of looking at the matter. We are all potential accused, victims and “prosecutors”. The rights at issue are all essentially social rights in the sense that they apply to all of us and we all have an interest in all of them. Our interest is coloured when we happen to be cast in a particular role from time to time, but that does not alter the fundamental truth of common interest. Take, for example, the rule that confessions obtained under torture are not admissible in a court of law even if they are true. It is a mistake to think of this rule as a rule favouring the interests of the accused over those of victims and the prosecution. It is a rule for the benefit of society as a whole - it benefits all of us, for we have made a social judgment about torture - an historically recent one, it might be added.

Hence, it is well to bear in mind:

In considering the question of whether the prohibition against double jeopardy is inviolable, these five considerations are however but one side of the ledger. Competing considerations include the need for the public to have confidence in the processes of the law and to believe that the criminal justice system is not being exploited by those who are (in fact and in law) guilty of serious offences, yet escape conviction. Further, there exists a structural tension between, on the one hand, the notion that criminal proceedings are designed to establish the objective truth (that is, did this accused in fact and in law commit the alleged crime or not?) and, on the other hand, the institutional or system requirements such as finality in decision-making and political requirements such as prohibitions on oppressive powers of the state.²¹²

²¹² Corns, “Retrial of acquitted persons: Time for reform of the double jeopardy rule?” (2003) 27 Criminal LJ 80 at 87.

Ascertaining the applicable general principles

Double Jeopardy - Administration of Justice Offence

It is convenient to first consider the most limited proposal for change. It is that, if an accused secures an acquittal involving the commission of an offence against the administration of justice, he or she should be liable to be prosecuted for the offence against the administration of justice even though that prosecution may involve an assertion, implicit or explicit, that the accused was really guilty of the offence upon which he or she was acquitted. For these purposes, perjury must be seen as an offence against the administration of justice. It would be absurd not to do so. The offence of perjury protects interests that lie at the heart of the criminal trial process. The fact that one happens to be the accused in a criminal trial does not and should not confer a licence to lie on oath. For that reason, it is not rational to limit such an option to serious offences. The insult to the integrity of the legal process is the same no matter what the offence.

In cases such as bribing a juror, any notion that the accused could not be tried for the offence of bribing a juror seems irrational. That is particularly so where the offence against the administration of justice (even perjury) does not go to the heart of the original acquittal. Indeed, sensibly, current law does not prevent this and the Committee intends that this situation will remain. But, as *Carroll* itself demonstrates, there is real potential for offence to the principles underlying the notion of double jeopardy where the prosecution for, say, perjury, goes to the heart of the previous acquittal. This distinction will be explored in more detail below. However, for the moment it suffices to say that the hard cases will be ones in which the real motive of the prosecution is not merely to convict for the administration of justice offence, but primarily to secure some conviction against a person who is regarded, for whatever reason, as really guilty of the first offence. The countervailing consideration is that there can (and should) be no estoppel based on fraud.²¹³

The Committee is of the opinion that, even if the motive of the prosecution is to, *in effect*, retry the accused for the original offence, the prosecution should be allowed to proceed on the basis that the estoppel has been vitiated by fraud if the facts upon which the allegation of an offence against the administration of justice is based are facts additional to those presented at the original trial and which could not, by the exercise of due diligence, have been presented to the original trial. Where the accused has, for example, attempted to bribe a juror or intimidate a witness, that should be so, either because the existence of those facts only came to light after the trial, or

²¹³ See, for example, *McIlkenny v Chief Constable of West Midlands* [1980] QB 283; *Grdic* [1985] 1 SCR 810; *Smith* (1997) 119 CCC (3d) 547.

because the facts would have been inadmissible at the trial itself as irrelevant to the facts in issue.

Double Jeopardy - Retrial For Original Offence

The hard case is the one in which there are *no* fresh facts at all and the prosecution is simply seeking to re-litigate the entire trial anew on the same facts under a different charge. The Committee is of the opinion that this form of retrial should not be permitted. In addition to all of the considerations underlying double jeopardy discussed in detail above, it amounts to jury shopping or, to put it another way, it attacks the sanctity of the institution of the jury.²¹⁴ The Committee has been concerned, throughout its deliberations on these issues, to uphold the sanctity of the decision of the jury, properly obtained, and to keep intact the considerations and interests underlying the principle of double jeopardy, properly interpreted.

The next question is whether there are circumstances in which the accused can be retried for the original offence even though he has been acquitted once already. Both the New Zealand Law Commission and the UK Law Commission (and other bodies in the UK) have argued for an exception to the *autrefois acquit* rule to be made in certain circumstances, but they are different models. Broadly speaking, the New Zealand retrial would be triggered by conviction for an administration of justice offence. By contrast, the UK proposal would be triggered by new and compelling evidence.

Conviction Of An Administration of Justice Offence

The Committee considered the New Zealand proposal carefully. If implemented, it would be activated by application by the DPP to the Court of Criminal Appeal with the accused's full participation. But it would have the following safeguards:

- the accused (or another person) must have been convicted of an offence against the administration of justice;
- a subsequent court, upon application by the DPP, must find that it is more likely than not that, but for the commission of that crime, the acquittal would not have occurred;
- the subsequent court, upon application by the DPP, must find that the prosecution has acted with reasonable despatch to bring the application before the court;

²¹⁴ It necessarily follows, however, that forms of collateral attack should be possible. Suppose D is charged with drink driving and his friend, X, gives perjured evidence that D was not driving the car but was at home with her. The law should allow X to be tried for perjury even though the essence of the case is that D was driving the car and the evidence is the same. The prosecution is not jury shopping and neither D nor X is in a position where double jeopardy attaches.

-
- the offence which is sought to be retried must be a serious offence. The New Zealand proposal is for a threshold of 14 years maximum (and the UK law is unlimited as to level of the offence). The Committee is of the opinion that, in the context of the penalties that have been recommended as a part of the Model Criminal Code project, any offence punishable by imprisonment for 15 years or more should suffice;
 - the subsequent court must be satisfied that the accused will receive a fair trial on the retrial and that it is not, for any reason, contrary to the interests of justice that the retrial take place;
 - the application may only be made once and is not appealable; and
 - there should be a prohibition on the reporting of the application and its result.

The issue of retrospectivity is dealt with below.

The Committee has decided that this option should be available in some circumstances and not in others. The principles involved are not simple. In trying to understand the reasoning employed by the Committee, it is best to concentrate on a key distinction. The distinction is between an allegation in criminal proceedings that directly attacks the acquittal and one that does not. In *Carroll* itself, for instance, it was clear (and conceded) that the prosecution for perjury was a direct attempt to attack the legitimacy of the previous acquittal. But, to take a fictional case, suppose Donald was tried for murder and acquitted. It is subsequently discovered that Donald had intimidated a number of jurors with a view to securing the acquittal. The acquittal is tainted. But a subsequent prosecution for intimidating jurors carries no necessary implications (one way or the other) for the question whether Donald was really guilty of the murder or not - although one might legitimately infer that he thought he had a good chance of being convicted. In Donald's case, the subsequent prosecution for the offence against the administration of justice is not a direct attack on the acquittal.

The Committee has decided that these two kinds of cases should be treated differently. In the first case, the *real* problem is that the accused cannot, under current law, be tried again for the primary offence of murder. Prosecuting Carroll for perjury is just a very much second-best device to punish him on the basis that he really committed the primary offence of murder because the subsequent prosecution is, in effect, an allegation that he committed the murder.

The Committee has recommended in the section above that prosecution for, among other things, perjury should be permitted in certain circumstances. In this kind of case, if the Crown elects to take this course of action, the matter should stop there. In effect, the Crown should be put to an election between that remedy and the one that is recommended below. The reason for this is that the administration of justice could not possibly contemplate the following possible sequence:

1. acquittal of primary offence (ie the accused is not guilty of, say, murder);
2. conviction of administration of justice offence (ie the accused is really guilty of murder);
3. acquittal of retrial of primary offence (ie the accused is not guilty of murder after all).

In such a case, the Crown would be having a third try at the accused (triple jeopardy) with possible major inconsistency as the result. Nothing could be more calculated to bring the administration of justice into disrepute.

In the second type of case, however, the matter is different. The sequence is not the same and the threat to the repute of justice is not the same. There is no triple jeopardy. The sequence would be:

1. acquittal of primary offence (ie the accused is not guilty of, say, murder);
2. conviction of administration of justice offence (ie the accused may or may not be really guilty of murder, but did something else criminal);
3. acquittal or conviction on retrial of primary offence (ie the accused is or is not guilty of murder after all).

The consequences of drawing this distinction will be explored in greater detail below.

Fresh And Compelling Evidence

The Committee is inclined to be of the opinion that this exception to double jeopardy principles is justified.²¹⁵ There must be sufficiently stringent safeguards against the possibility of abuse. It would be necessary for the DPP to make application for a retrial to the Court of Criminal Appeal and it would be necessary for the defendant to be heard on the question. In addition, the following minimum safeguards are necessary:

²¹⁵ It may be noted that there is some academic support for this view. See Corns, "Retrial of acquitted persons: Time for reform of the double jeopardy rule?" (2003) 27 Crim LJ 80.

- there must be protections in place so that police powers of investigation cannot be used unless an independent authority (the Committee contemplates that it should be the DPP) decides that there is a sufficient basis to re-open an investigation even though there has been an acquittal;
- the court must be satisfied that there is fresh evidence²¹⁶ which is both reliable and sufficiently compelling to call into question the safety of the previous acquittal²¹⁷, in the sense of it being highly probative of the case against the accused²¹⁸;
- the court must be satisfied that the fresh evidence was not available to be presented at the first trial and that the investigation was conducted with due diligence - and a change in legal rules of inadmissibility since the acquittal allowing the evidence will not make that evidence fresh evidence for these purposes²¹⁹;
- the court must be satisfied that the accused will receive a fair trial on the retrial and that it is not, for any reason, contrary to the interests of justice that the retrial take place;
- the subsequent court, upon application by the DPP, must find that the prosecution has acted with reasonable despatch to bring the application before the court;
- the offence which is sought to be retried must be a serious offence. Again, the Committee is of the opinion that, in the context of the penalties that have been recommended as a part of the Model Criminal Code project, any offence punishable by imprisonment for 15 years or more should suffice; and
- the application may only be made once and is not appealable.

216 See below on the meaning of "fresh evidence".

217 Courts are well used to making this judgment: see, for example, *Chamberlain (No 2)*(1984) 153 CLR 521; *Shepherd*(1990) 170 CLR 573; *Ratten*(1974) 131 CLR 510.

218 The UK Bill, as originally introduced, used the test "whether the evidence is such as to make it highly probable that the accused is guilty of the offence". This was amended in debate to the test used in the text on the ground that the latter is less prejudicial to the retrial of the accused. The Committee agrees.

219 For example, suppose that an accused is acquitted on a charge (it is conjectured, in part) because certain evidence of a scientific nature is ruled inadmissible on the grounds that there is no ascertainable body of scientific opinion upon which expert evidence can be founded. Suppose also that, a year later, another court rules that there is. The fact of that ruling does not make the rejected evidence "fresh evidence".

Again, the Committee is minded to recommend that there should be a prohibition on the reporting of the application and its result, and welcomes comment on the issue.

“Fresh evidence” and “New evidence”: While it is common for people to refer to “fresh evidence” and “new evidence” interchangeably, it happens that there is a technical legal distinction between “fresh” and “new” evidence. In essence, the distinction is between evidence that could not have been brought to the primary trial (**fresh evidence**) and evidence that existed at the time of the primary trial but was not, for whatever reason, adduced at that trial (**new evidence**). There are sophisticated legal debates about the difference. The difference may be vital. The UK Bill opted for “new evidence”. It says:

72 New and compelling evidence

(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.

(2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).

“Fresh evidence” is more restrictive than that. This is a common definition. It is the first of the three parts which is critical:

“in general, three conditions need be met before fresh evidence can be admitted. These are: (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict; (3) The evidence must be credible.”²²⁰

The difference is clear. If the “new evidence” test is applied then, all else being equal, a defendant may be retried if a crucial piece of existing evidence was not presented at trial because of a mistake by police or prosecution. If a “fresh evidence” test is applied, then there can be no retrial on that basis. The Committee is of the opinion that, given the departure from fundamental general principle being suggested here, it should recommend the more limited exception. The prosecution should not be allowed to retry the accused on the basis of the incompetence of its first effort. To do so would be to encourage sloppiness.²²¹

²²⁰ *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160. See also: *Mickelberg v The Queen* (1989) 167 CLR 259; *Crouch v Hudson* (1970) 44 ALJR 31; *Hashman v Downie* (1996) 39 NSWLR 169.

²²¹ This necessarily means also that evidence not led by the prosecution at the original trial as a matter of tactics cannot be “fresh evidence” for the purposes of the retrial.

Retrospectivity: It has been noted above that the arguments that were made by the UK Law Commission in favour of retrospectivity are not strong. However, there remain those who are strongly in favour of retrospectivity. The Committee was divided on the issue, noting that the draft Bill released for consultation by the NSW Government incorporated retrospectivity.²²² The Committee would, therefore, welcome submissions on the subject, with particular reference to the arguments canvassed earlier in this Discussion Paper. For the purposes of this Discussion Paper, however, the Committee offers a compromise position. The draft Bill appended to this Discussion Paper makes the provision for retrial retrospective, but subject to a finding that the retrial must be “in the interests of justice”. This test also occurs in the UK Bill. The Committee confidently expects that any superior court, faced with the possible retrial of a person acquitted before the possibility of retrial came into effect, would take that fact into account under this criterion in deciding whether to order a retrial or not.

Application of the distilled principles

It is possible to separate out six different scenarios for the application of the principles explained above. They are as follows:

1. Donald is tried for murder and acquitted. It is subsequently discovered that he bribed several jurors to acquit him. Donald is tried for bribing the jurors.
2. David is tried for murder and acquitted. It is subsequently discovered that David lied on oath when he gave evidence that he was in Bangkok at the time. On that basis, David is tried for perjury.
3. Donald is tried for murder and acquitted. It is subsequently discovered that Davina committed perjury when she testified that Donald was with her in Bangkok at the time. Donald is tried for the same murder again.
4. Davina is tried for murder and acquitted. It is subsequently discovered that there are minute traces of DNA attributable to Davina on the murder weapon. Davina is tried again for the same murder. The DNA evidence is fresh in the sense described above.
5. Donna is tried for murder and acquitted. It is subsequently discovered that she bribed several jurors to acquit her. She is convicted. Donna is then tried for the same murder again.

²²² Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (Consultation Draft).

6. Delphine is tried for murder and acquitted. It is subsequently discovered that Delphine lied on oath when she gave evidence that she was in Bangkok at the time. On that basis, Delphine is convicted of perjury. Delphine is then tried for the same murder.

These seem to be all of the available options. Of these:

- (a) Donald (1) presents no problems. He can and should be tried. The current law allows it and should allow it. It remains unaffected by *Carroll*.
- (b) Delphine (6) is a case of triple jeopardy. The last of the three prosecutions should not be allowed. In effect, the Committee thinks that this should be a David (2) or Davina(4) case.
- (c) The Committee's recommendations mean that the last prosecution in the cases of David (2), Donald (3), Davina (4) and Donna (5) should be allowed.

Part 10: Prosecution Appeals

The UK Law Commission recommended some modification of the common law position in relation to indictable offences. It said:

1.19 On prosecution appeals we recommend that, in certain types of case, the Crown should have the right to appeal against a ruling by the judge which has the effect of terminating the proceedings. This would include not only (as we originally proposed) rulings made in advance of the trial and those made during the prosecution's case, but also a ruling at the close of the prosecution's case that there is no case to answer, provided that it is made under the first limb of *Galbraith* (that is, on the basis that the Crown has not adduced any evidence of one or more elements of the offence – a ruling on a point of law) as distinct from the second (namely that the evidence adduced is such that a jury could not properly convict on it – a ruling based on the court's view of the evidence). We recommend that rights of appeal against acquittal be limited to the more serious cases. The criterion we adopt for this purpose is whether (had the defendant been convicted) the Attorney-General would have had power to refer the sentence to the Court of Appeal as being unduly lenient.

1.20 We also recommend certain extensions to the scope of the preparatory hearing regime, under which either side can appeal against certain rulings made in advance of the trial. We do *not* recommend a right of appeal against rulings (other than those made at preparatory hearings) which do not result in the termination of the trial, nor against misdirections which may result in an acquittal by the jury.

This is not a lone call.²²³ For example:

the current inability of the Crown to appeal what it believes to be a wrong ruling that a trial is an abuse of the process should be subject to appeal... Rulings on admissibility of evidence ... should be subject to careful procedural safeguards... But if a judge makes a ruling which is clearly wrong, which therefore deprives society and the victim of the chance of, for instance, a jury assessing the weight of a confession ... the Crown, should have the right to appeal that sort of ruling...if a judge stops a case at the close of the prosecution on a basis which is a purely

²²³ The NSW Attorney-General announced that he favoured broadening the power of the prosecution to appeal acquittals by press release dated Sunday, 9 February 2003. By Tuesday, the Victorian Attorney-General had made a similar announcement: *The Age*, 11 February 2003.

legal one which is wrong, we do, of course, at present, have the academic right, via the Attorney General, to refer the question to the Court of Appeal, so that, retrospectively, the Court of Appeal can say, 'Well, the judge shouldn't have stopped the case', but that has no effect on the instant defendant, and I think we ought to look carefully at whether the time has come for that to be more than an academic exercise but a real one.²²⁴

It is common ground in most jurisdictions that the prosecution can appeal an acquittal for a summary offence. So too trial for an indictable offence by judge alone.²²⁵ So this discussion will concentrate on indictable offences triable by jury.

Section 5F of the New South Wales *Criminal Appeal Act* 1912 is a good place to start. In effect, it says that that the prosecution can appeal against any interlocutory judgment or order made in a trial for an indictable offence. The scope of that power has been the subject of some judicial interpretation. For example, in *Marchione*,²²⁶ it was held that the power extended to an order permanently staying an indictment or refusing to make such an order. In *F*²²⁷ it was held that the power extended to the question whether there should have been a joinder or severance of counts. In *Saunders and Georgiou*²²⁸ it was held to apply to the question of joinder or severance of trials. In *Anson*,²²⁹ it was held to apply to a ruling that the prosecution was not statute barred. But it has been held firmly that it does not apply to rulings on the admissibility of evidence.²³⁰

Why *should* that be so? As noted above, the Attorney-General of New South Wales has foreshadowed amendments to widen this power to appeal. Queensland is also moving in that direction.

Similar questions arise in other States. For example, in *Police v Dorizzi and Others*,²³¹ the case for the Crown was that the respondents were involved in a number of serious assaults in a shopping centre. The assaults were recorded on security video tapes. On the voir dire, the magistrate ruled that the tapes were inadmissible because of provenance and quality. In the absence of the tapes, the Crown case collapsed and the magistrate dismissed the information for want for prosecution. On appeal by the Crown, Gray J held that the magistrate was wrong. He confused questions of admissibility and the exercise

224 UK Select Committee on Home Affairs, Third Report, *The Double Jeopardy Rule*, 2000, para 60.

225 *Criminal Law Consolidation Act* s 352(1)(ab).

226 (2002) 128 A Crim R 575 applying *Edelsten* (1989) 18 NSWLR 21 and *Bozatsis* (1997) 97 A Crim R 296.

227 (2002) 129 A Crim R 126.

228 [1999] NSWCA 125.

229 (2002) 129 A Crim R 328.

230 *Powch* (1988) 14 NSWLR 136; *Rogerson* (1990) 45 A Crim R 253; *Steffan* (1993) 30 NSWLR 633.

231 [2002] SASC 356.

of discretion and hence failed to address either issue properly. He misunderstood critical evidence, erred in placing emphasis on the opportunity to contaminate the tapes and erred in not allowing the prosecution to call evidence. On further appeal, the Court of Criminal Appeal held that there was no power to appeal the original verdict.²³² It held that the order excluding the video tape was an interlocutory order and there was no power to appeal against it. Further, the prosecution had not called any of its witnesses so there was no evidence on which to determine whether there should be a new trial.

Surely this kind of result is an affront to the public sense of justice.

Widening the power to appeal interlocutory orders will have substantial benefits for an accused as well. Many, if not most, attempts to appeal interlocutory orders (widely interpreted) are by the defence. What happens when, at trial, an accused fails in an attempt to have crucial evidence excluded? The practice grew in South Australia that the accused would change the plea to one of guilty, seek to be sentenced on the basis of the guilty plea, and then appeal the conviction on the ground that the evidence was wrongly admitted.²³³ After some signs of disapproval, the Court of Criminal Appeal formally put an end to this practice in *Day*.²³⁴ Gray J said:

Such a practice has a tendency to undermine public confidence in the administration of justice. The public may have an understandable difficulty in accepting that an accused can plead guilty, thereby making a solemn confession to each of the ingredients of the offence, have those confessions accepted and acted upon by the court, and then pursue an appeal in an attempt to have the conviction set aside with a view to securing an order for a retrial. The procedures of the court should not be used in this way.²³⁵

The Committee is of the opinion that an interlocutory power to appeal by the prosecution along the lines of s 5F of the NSW *Criminal Appeal Act*, as proposed to be expanded, is right in principle. The Committee is also of the opinion that the powers of appeal against an acquittal proposed in the NSW *Consultation Draft Bill*²³⁶ are worthy of approval and recommends accordingly.

The appeal should be by leave only. Traditional law, which must remain unimpaired by granting the power, will act to restrict its use. Double jeopardy principles will continue to inform the use of the discretion so conferred. For

232 In this case, the relevant legislation was ss 42 and 43 of the *Magistrates Court Act 1991*.

233 See, for example, *Frantzis* (1996) 66 SASR 558; *Cheng* (1999) 73 SASR 502.

234 (2002) 82 SASR 85.

235 (2002) 82 SASR 85 at 101.

236 *Criminal Appeal Amendment (Double Jeopardy) Bill 2003* (Consultation Draft).

example, in *Application for Reservation of Questions of Law (No 2 of 1999)*,²³⁷ the South Australian Court of Criminal Appeal said:

Bearing in mind that Parliament has not conferred upon the Director of Public Prosecutions a right of appeal against an acquittal, it is reasonable to assume that Parliament envisaged the use of s350 mainly in relation to relevant questions that raise an important question of law or a question of law of general application. Parliament could not have intended that the Full Court would exercise its powers under s350 to provide, as a matter of routine, a process for reviewing decisions by trial judges made in the ordinary course of trying a case. The routine use of the power would confer on the Director something like a right of appeal against an acquittal. The terms in which and on which the power is conferred suggest to me that Parliament envisaged it usually being exercised when there is a particular reason to do so. The fact that a relevant question involves an important question of law or a question of law of general application, would be a reason (not necessarily decisive) for doing so. That is not to say that there will not be cases in which an aspect of the case itself, or the impact of a decision upon a case, is a reason for the exercise of the powers under s350. But I consider that the usual basis for the exercise of the power will be the importance of the relevant question. ... The power is to be exercised in connection with a criminal trial. The courts have long had power to entertain an appeal against a conviction. But in South Australia there is still no power to entertain an appeal against an acquittal of an offence tried on Information in a superior court. That is generally the position throughout Australia, as far as I am aware. The relevance of this is that an exercise of the power with a view to having a judge reverse a decision that will, or is likely to, lead to the acquittal of a person charged, entrenches upon a fundamental principle that there be no appeal against acquittals. Parliament has allowed that principle to be entrenched upon. It has done so by conferring the power that it has conferred. But a court asked to exercise the power must be mindful, if it is the fact (and it appears to be here) that the Director of Public Prosecutions seeks to reverse a decision that would result in an acquittal. Of course, that will not always be so.

If the court is asked to consider a relevant question, with a view

237 [1999] SASC 260.

to it giving answers that might result in the reversal of a decision that would otherwise lead to an acquittal, there is no direct interference with the equally fundamental principle against double jeopardy. However, considerations that underpin that principle are again relevant to the exercise of the discretion.

It is a considerable argument against the introduction of such a power of appeal that it will lead to the unnecessary, wasteful and counter-productive fragmentation of the criminal trial. However, the same court went on to say about the exercise of discretion:

Another relevant factor is the longstanding reluctance by appeal courts to interfere with the progress of a criminal trial, and to fragment it: for recent observations on this point see *R v Elliott* (1996) 185 CLR 250 at 257 and *Frugetnie v Victoria* (1997) 71 ALJR 1598 at 1602. There are various reasons for this. It is not necessary to enumerate them here. However, anything which contributes to delay is to be avoided if that is practicable. These days courts are making a considerable effort to expedite the criminal process. In most cases, the reservation of questions of law will contribute to delay.

Another example is *Gee and Thaller*.²³⁸

In my opinion, the consistent theme to emerge from these authorities is that the court's power pursuant to s 350(2)(a) to require a judge to reserve relevant questions for the consideration of the Full Court is a discretionary power which should not be invoked as "a matter of routine", and should only be exercised with "restraint" in "rare", "unusual", and "exceptional" circumstances. At the heart of the relevant considerations are the importance and/or general applicability of the questions sought to be reserved. It is not sufficient that there exist a prima facie error of law in the reasoning of the trial judge. A test founded on that basis would effectively convert the Full Court into a court of criminal appeal.

In enacting s 350 Parliament clearly contemplated that there would be occasions on which it would be appropriate to provide the Full Court with a means by which to interrupt a criminal trial. Nevertheless, in my view, the provisions of this section do not signal a complete departure from the long-standing recognition as to the undesirability of interfering with the trial process. This is illustrated by the inclusion of s 350(3) which is concerned with avoiding undue delay. In my opinion, the

238 [1999] SASC 361.

effect of this is that the power vested in the Full Court pursuant to s 350 should be exercised in a manner that is consistent with the court's general reluctance to interfere in criminal trials. The power should only be invoked in special circumstances in which interference with the trial is warranted by the importance or general applicability of the questions in issue.

This, in my view, is supported by the comments of the High Court in *R v Elliott* (1995) 185 CLR 250 at 257, wherein Brennan CJ, Gummow and Kirby JJ said (at 257) in reference to the corresponding Victorian legislation:

“It is understandable that the ordinary course of criminal procedure in Victoria requires the interlocutory rulings of a trial judge to be accepted for the purposes of the trial, whether those rulings be right or wrong. If the rulings are wrong then, upon conviction, an accused person is entitled to challenge the ruling on appeal. But the prosecution has no such right. If the ruling results in an acquittal the ruling, albeit erroneous, can be canvassed on appeal, but only to correct the ruling - not to impeach the acquittal: see s 450A. Obviously two considerations are in competition here. On the one hand, the prosecution is entitled no less than the defence to a trial according to correct rulings on questions of law. On the other, interlocutory appeals in criminal trials delay the trial and are likely to produce miscarriages of justice in ways unrelated to the ruling. The witnesses' memories and the sheer delay between criminal conduct and the administration of condign punishment are factors which weigh heavily in favour of expediting the process of the criminal trial even though incorrect rulings have to be accepted by the prosecution in order to achieve that object, subject to s 450A. The legislative scheme gives greater weight to the despatch of criminal trials than it has given to protecting the prosecution's ability to appeal against rulings which it thinks to be incorrect.”

In *Frugtniet v Victoria* (1977) 71 ALJR 1598, Kirby J said (at 1602):

“This Court has more than once, including recently, emphasised how rare it is to make orders which would have the effect of interfering in the conduct of a criminal trial. No case has been brought to my notice where the Court has made a stay order equivalent to the one sought on this summons. Although I do not doubt that, in a proper case, the Court would have the jurisdiction to make such

an order to protect the utility of its process, it would be truly exceptional for it do so. The Court expressed its attitude of restraint most recently in its decision in *R. v Elliott* (1996) 185 CLR 250 at 257. There are many earlier such cases. See, eg, *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 435-436; *Sankey v Whitlam* (1978) 142 CLR 1 at 26, 79. They evidence the strong disposition of appellate courts in Australia - and especially of this Court - not to interfere in the conduct of criminal trials except in the clearest of cases where the need for such interference is absolutely plain and manifestly required.”

The Committee is of the opinion that these principles would continue to be applied and would sufficiently mitigate any real abuse of the power it thinks should be granted.

General Codification of the General Principles of Double Jeopardy

The Committee intended to deal with the *general* codification of the rules of double jeopardy in this Discussion Paper. However, as is evident from the Discussion Paper so far, that is no easy task and the Committee has found that it does not have the time or resources to do the task properly at the moment. It hopes that it will be able to do so in the near future.

Division 1 Definitions

2.8.1 Definitions

(1) In this Part:

acquittal includes:

- (a) an acquittal in appeal proceedings in respect of an offence, and
- (b) an acquittal at the direction of a court.

administration of justice offence includes any of the following offences:

- (a) bribery of, or interference with, a juror, witness or judicial officer,
- (b) the perversion of (or a conspiracy to pervert) the course of justice,
- (c) perjury.

Court of Criminal Appeal means [here insert reference to the superior criminal court in the jurisdiction which will be authorised to order the retrial of an acquitted person under Division 3].

very serious offence means any indictable offence punishable by imprisonment for life or for a period of 15 years or more.

Note: The offences concerned are those within the range of penalties provided for offences in this Code. The offences include those listed at Appendix B.

- (2) In this Part, 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.
- (3) In this Part, a reference to the retrial of an acquitted person for an offence includes a reference to a trial if the offence is not the same as the offence of which the person was acquitted.

Division 1 Definitions

2.8.1 Definitions

Acquittal

The concept of an acquittal is central to the possible reforms to the common law double jeopardy principle discussed in this paper. The reform provisions are relevant only once a person has been acquitted – they touch upon that area of double jeopardy law known as *autrefois acquit*.

This inclusive definition of acquittal covers instances where a person is acquitted by a jury, by an appellate court, or via a direction of a court (for example, a trial judge presiding in committal proceedings may direct that a person be acquitted because the evidence presented does not justify proceeding to trial).

Because the Committee has not yet developed proposals for the codification of the general principle, it is unnecessary to define the concept of conviction for the purposes of these current reform recommendations. However, when the Committee moves to codify the general principle a definitive codification of complex notions of what technically constitutes an acquittal and conviction will be necessary.

Administration of justice offence

One of the key reform proposals favoured by the Committee would allow, in certain circumstances and subject to key procedural safeguards, a person to be tried for an administration of justice offence committed during the original proceedings that resulted in an acquittal. The Committee's view is strong on this point. If an accused secures an acquittal via the commission of an administration of justice offence the State should be able to prosecute that administration of justice offence even if that prosecution may suggest that the accused was really guilty of the original offence.

It is therefore necessary to define exactly what constitutes an 'administration of justice offence'.

Classifying offences such as bribing a juror or perverting the course of justice as administration of justice offences is relatively non-controversial. Providing an exception to the double jeopardy principle for these types of offences will often accord with existing law. This is because a subsequent prosecution for a bribery offence, for example, does not seek to revisit the central allegation in the original proceedings that resulted in an acquittal.

The most controversial instances are those where the subsequent prosecution for an 'administration of justice offence' would directly controvert the earlier acquittal. This is most likely to arise in the context of 'perjury'. The offence of perjury was central to the High Court of Australia's decision in *R v Carroll*

Code

--

[2002] HCA 55 (5 December 2002). The High Court held that the subsequent prosecution for perjury constituted a violation of the double jeopardy principle because it directly attacked the earlier acquittal (in *Carroll* this was murder). By classifying perjury as an ‘administration of justice offence’ the Committee is proposing to overturn the High Court’s *Carroll* decision. The Committee believes that perjury should be treated consistently with other administration of justice offences. If perjury was considered a separate and special offence, immune in all cases from the proposed exception to the double jeopardy principle, this would equate to conferring a licence on accused persons to lie on oath. However, the Committee also believes that *Carroll* should not be overturned absolutely, recommending appropriate limitations to protect against prosecutorial abuse of the proposed reversal of *Carroll*.

Court of Criminal Appeal

The proposed protective principles to the double jeopardy rule that would permit retrial of the original offence, or some other similar offence, must be exercised with considerable caution. The Committee believes that the highest criminal court in each jurisdiction (i.e. the Court of Criminal Appeal) should operate as a judicial guardian to prevent abuse and over-zealous efforts to override the standard double jeopardy protections.

Very serious offence

The Committee believes that the protective principles to the double jeopardy rule that would permit retrial of the original offence, or some other similar offence, should only be available in limited circumstances and subject to certain safeguards. (The very serious offence threshold does not apply to the principles that would permit a subsequent prosecution for an administration of justice offence.) One of the key limitations is that the protective principles should only be available when the retrial relates to a very serious offence. The Committee considers that a maximum penalty of imprisonment for life or for a period of 15 years or more sets the threshold at an appropriate level. In retrials involving offences that do not meet this penalty threshold, the Committee believes that departing from the standard common law double jeopardy rule cannot be justified.

It is important to note that the original offence that resulted in an acquittal need not have been a very serious offence – it is only the retrial offence that must meet the threshold. For example, suppose a defendant is tried and acquitted of common assault on the basis that he or she was not at the crime scene at the relevant time. It later emerges that the defendant was at the crime scene and implicated in murder. It is entirely possible that the current double jeopardy rule would prevent a second prosecution for murder. However, the Committee’s recommendations would permit that second

Code

prosecution (subject to stringent procedural safeguards) even though common assault is not a very serious offence.

A list of relevant Model Criminal Code offences is included at Appendix B.

Division 2 Double jeopardy

The general rule

[Note: The Committee is considering the codification of the double jeopardy rule that a person ought not be tried more than once in respect of the same matter. The rule finds expression in the pleas of *autrefois acquit* and *autrefois convict* (an accused may not be tried for an offence if he or she has previously been acquitted or convicted of the same offence or if the accused could have been convicted at the first trial of the offence with which he or she is charged at the second). The rule also finds expression in the power of a court to stay proceedings on the ground that they constitute an abuse of process of the court (the court may stay proceedings for an offence if conviction for the offence would contradict an acquittal of the accused for another offence).]

Division 2 Double jeopardy

The general rule

The double jeopardy principle has never been fully codified and will require careful consideration. Consistent with the objects of the Model Criminal Code exercise, the Committee will prepare codified provisions but not at this time because a solution to the procedural issues has been given priority by Attorneys-General.

2.8.2 Exception for administration of justice offences

- (1) A person acquitted of an offence is not precluded by the rule against double jeopardy from being tried for an administration of justice offence that was committed in connection with the proceedings in which the person was acquitted if there is fresh evidence of the commission of the administration of justice offence.
- (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) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.
- (4) This section does not apply unless the administration of justice offence was committed after the commencement of this Part.

2.8.2 Exception for administration of justice offences

The Committee considers this to be the most limited proposal for change, although in the context of perjury it involves directly overturning the High Court's *Carroll* decision.

Although this protective principle is not limited by a very serious offence threshold, there are two main safeguards, or prerequisites, before a prosecution for an administration of justice offence can proceed: (i) there must be fresh evidence of the commission of the administration of justice offence; and (ii) the prosecution must not also be seeking to retry the person for the original or similar substantive offence (*see clause 2.8.3*).

The first safeguard is designed to prevent situations where the prosecution is simply seeking to re-litigate the entire trial anew on the same facts under a different charge. Instead some 'fresh' evidence is required to trigger this principle. In other words, the prosecution must be able to point to evidence suggesting the commission of an administration of justice offence that has come to light since the original proceedings.

'Fresh' evidence is defined in subsection (2). The key is subparagraph (2)(b) which stipulates that 'fresh' evidence is that which could not be adduced in the original proceedings through the exercise of reasonable diligence. If investigators and prosecutors could have reasonably obtained evidence of an administration of justice offence at the time of the original proceedings they should be required to utilise that evidence at that time. The Committee believes that crafting these rules more loosely would only serve to reward lazy or incompetent police work.

The difference between 'fresh' and 'new' evidence is discussed in detail in section 9 of the discussion paper.

Subclause (3) merely clarifies that the dichotomy of admissible and inadmissible evidence does not impact upon the determination of whether evidence is 'fresh'. If evidence was available at the earlier proceedings against the acquitted person, but was ruled inadmissible, that same evidence, even if considered admissible in a subsequent administration of justice prosecution, would not satisfy the 'fresh' evidence criteria. Additional 'fresh' evidence is always required.

Retrospectivity

Subclause (4) reflects that Committee's belief that this exception to the double jeopardy principle should not have retrospective operation. The Committee notes that the additional retrial double jeopardy reforms do operate with limited retrospectivity (an application for a retrial of a very serious offence could be sought but the Court of Criminal Appeal should refuse the application if the length of time between the original acquittal

Code

and the retrial application meant that the retrial would not be ‘in the interests of justice’). The Committee welcomes submissions on these retrospectivity issues.

2.8.3 Trial for administration of justice offence or retrial under Division 3

- (1) The trial of an acquitted person for an administration of justice offence that was committed on connection with the proceedings in which the person was acquitted does not, subject to this section, preclude an application under Division 3 for the retrial of the person or the person's retrial.
- (2) An application under Division 3 for the retrial of an acquitted person or the person's retrial does not, subject to this section, preclude the trial of the person for an administration of justice offence that was committed in connection with the proceedings in which the person was acquitted.
- (3) However, if a finding that the person committed the administration of justice offence would, in effect, contradict the person's acquittal, the person may be either tried for the administration of justice offence or an application may be made under Division 3 for the retrial of the person (at the election of the Director of Public Prosecutions).

2.8.3 Trial for administration of justice offence or retrial under Division 3

The second safeguard relates to the interface between the administration of justice offence principle and the retrial after acquittal principles. The Committee believes that when armed with evidence suggesting the commission of an administration of justice offence that directly attacks the legitimacy of the original acquittal the prosecution should be required to choose which type of prosecution to pursue. The prosecution could seek to try the person for the administration of justice offence or to retry the person for the original or similar substantive offence. But it should not be permitted to do both.

Division 3 Retrial after acquittal

2.8.4 Application of Division—cases that may be retried

[(1) This Division applies where:

- (a) a person has been acquitted of an offence, and
 - (b) according to the rule against double jeopardy, the person is thereby precluded or may thereby be precluded from being retried for the same offence, or from being tried for some other offence, in proceedings in this jurisdiction, but only if that same or other offence is a very serious offence.]
- (2) To avoid doubt, this section extends to a person acquitted in proceedings outside this jurisdiction of an offence under the law of the place where the proceedings were held.
- (3) This Division extends to a person acquitted before the commencement of this Division.

Division 3 Retrial after acquittal

2.8.4 Application of Division—cases that may be retried

As mentioned above, these proposed protective principles to the double jeopardy principle apply only when a person has been acquitted of an offence.

The protective principles outlined in Division 3 permit the retrial of a person for a very serious offence following an acquittal subject to certain procedural safeguards. The original offence that resulted in an acquittal need not have been a very serious offence; only the retrial offence must be very serious. (A 'very serious offence' is defined in clause 2.8.1.) The ability to mount a retrial is quite different to the more limited exception in clause 2.8.3 that permits the prosecution of administration of justice offences after an acquittal.

Subclause (1) is bracketed to reflect its provisional nature. As outlined above, the Committee intends to codify the general double jeopardy principle at a later stage. This will require the Committee to revisit this subclause, and perhaps refine the application of these protective principles.

Inter-jurisdictional application

The principles are expressed to apply even when the original acquittal occurred in another jurisdiction. For example, this would allow a retrial to be pursued in appropriate circumstances by New South Wales where the original acquittal had occurred in Queensland. State and Territory borders are increasingly porous and crime often impacts across Australia's borders. Federal, State and Territory law enforcement agencies increasingly cooperate in investigating criminal activity, particularly serious organised crime. Original proceedings are therefore frequently a product of collaborative law enforcement efforts. It makes sense, then, that any retrial pursuant to a double jeopardy exception be subject to a cross-jurisdictional rule. The inter-jurisdictional application of these double jeopardy applications has import for the international context as well. All of the same stringent safeguards would apply to cross-jurisdictional applications for a retrial.

Cross-jurisdictional retrial applications also make sense if a nationally consistent approach is taken to double jeopardy reform.

Retrospectivity

Subclause (3) reflects the Committee's belief that the retrial exceptions should apply retrospectively. The Committee notes that the Consultation Draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003, recently released by the New South Wales Attorney-General for public consultation, contains similar retrial exceptions to the double jeopardy principle that operate retrospectively. However, the Committee does not go as far as the NSW Bill. Incorporated into the 'interests of justice' test (*see* clause 2.8.8)

Code

--

is a requirement for the Court of Criminal Appeal to consider the length of time since the original acquittal and the alleged commission of the relevant offence. The Committee believes that empowering the Court in this way provides an appropriate balance between ensuring that retrials of past crimes based on, say, fresh evidence can proceed in appropriate circumstances with potential abuse of these exceptions if investigators and prosecutors dip too far back into the past. The application of even limited retrospectivity here may be controversial. The Committee welcomes submissions on this issue.

2.8.5 Court of Criminal Appeal may order retrial

- (1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a very serious offence. In that case, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being tried for the offence (as the case requires).
- (2) The Court of Criminal Appeal may order an acquitted person to be retried for a very serious offence only if satisfied that:
 - (a) there appears to be fresh and compelling evidence against the acquitted person in relation to the offence, or
 - (b) the acquittal appears to be a tainted acquittal,and in all the circumstances it is in the interests of justice for the order to be made.
- (3) Not more than one application for a retrial may be made in relation to an acquittal. An application based on fresh and compelling evidence cannot be made in relation to an acquittal resulting from a retrial under this Division.
- (4) An application for a retrial may not be made if it is precluded by the operation of section 2.8.3.
- (5) If the Court of Criminal Appeal determines in proceedings under this section that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.

2.8.5 Court of Criminal Appeal may order retrial

The Court of Criminal Appeal is the appropriate judicial institution to administer the proposed double jeopardy retrial protective principles – it should not be open for the Director of Public Prosecutions to initiate a retrial without court authorisation. Before a retrial can proceed the original acquittal must be quashed or removed. This is simply a procedural step.

The Court of Criminal Appeal must be satisfied that one of the two retrial principles applies – that is, there is fresh and compelling evidence against the acquitted person in relation to the offence or that the acquittal appears to be a tainted acquittal. The key concepts here are ‘fresh’ and ‘compelling’ evidence and a ‘tainted acquittal’. These are defined separately in clauses 2.8.6 and 2.8.7 and are discussed below. The safeguards built into these definitions are complemented with an additional safeguard: the Court of Criminal Appeal must be satisfied that in all the circumstances it is in the ‘interests of justice’ to order a retrial. The ‘interests of justice’ test is separately outlined in clause 2.8.8. In reaching a view on these issues the Court of Criminal Appeal should provide the acquitted person with an opportunity to make representations to the Court. This procedural fairness requirement is contained in clause 2.8.9(4).

Persistent retrial applications are prohibited. The Crown is entitled to make only one retrial application in relation to a particular acquittal. However, this form rule would not apply to a ‘tainted retrial’. In these cases, the overwhelming public interest in ensuring that valid trials occur requires that the ‘tainted acquittal’ principle facilitate revisiting the ‘tainted retrial’.

2.8.6 Fresh and compelling evidence—meaning

- (1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.
- (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 highly probative of the case against the acquitted person.
- (4) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

2.8.6 Fresh and compelling evidence—meaning

The ‘fresh and compelling’ protective principle is targeted to particular instances where for some reason evidence surfaces after an acquittal with the effect of casting significant doubt on the integrity of the original acquittal. A typical example of ‘fresh and compelling’ evidence may be DNA evidence, or evidence obtained through the advancement of new technology. In the United States the persuasive nature of DNA evidence is illustrated by the significant numbers of ‘wrongfully convicted’ prisoners that have been released from prison on the basis of DNA evidence. If DNA evidence became available after an original acquittal then no matter how persuasive that ‘fresh’ DNA evidence was, the strict operation of the double jeopardy principle would preclude a retrial. In some circumstances this could lead to injustice.

Fresh

The distinction between ‘new’ and ‘fresh’ evidence is important. In essence, ‘new’ evidence is simply evidence that was not presented at the original proceedings (for whatever reason). ‘Fresh’ evidence is evidence that is ‘new’ with an additional condition: it could not have been presented at the original proceedings despite competent police and/or prosecution work.²³⁹ The United Kingdom double jeopardy reforms have opted for the lower threshold of ‘new’ evidence. The Committee believes that allowing retrials for all ‘new’ evidence is not appropriate given the departure from long-standing legal principle being suggested with these double jeopardy reforms. The evidence should not have been available, through the exercise of due diligence, at the time of the original acquittal – this is the essence of ‘fresh’. The New South Wales Consultation Draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 adopts the higher threshold of ‘fresh’ evidence.

Highly Probative

For evidence to be ‘compelling’ it must be reliable, substantial and ‘highly probative of the case against the acquitted person’. When first considering this issue, the Committee considered that ‘compelling’ evidence should make it ‘highly probable that the accused will be found guilty during the retrial’. Arguably, this is a more stringent test. However, the Committee abandoned this formula because a court order for a retrial on the basis that the ‘fresh’ evidence makes it ‘highly probable that the accused will be found guilty’ appears overly prejudicial against the interests of the acquitted person. The ‘highly probative’ formula is less prejudicial to the retrial of the acquitted person. During debate of the United Kingdom Bill containing similar double jeopardy reforms, the UK parliament made a similar change. The New South Wales Consultation Draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 adopts the higher threshold of ‘fresh’ evidence.

²³⁹ The differences between ‘new’ and ‘fresh’ evidence are outlined in greater detail in Part 9 of this discussion paper.

2.8.7 Tainted acquittals—meaning

- (1) This section applies for the purpose of determining under this Division 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 jurisdiction or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted, and
 - (b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

2.8.7 Tainted acquittals—meaning

The Committee believes that retrials for very serious offences should be permitted in circumstances where the legitimacy of the original acquittal is in doubt because of a subsequent, relevant conviction of an administration of justice offence.

The interface between this ‘tainted acquittal’ principle, the other protective principles and subsequent prosecutions that directly controvert the original acquittal (for example, prosecutions for the offence of perjury) is particularly complex. The Committee’s approach deserves some explanation in light of the proposed model provision.

The Committee has been concerned to avoid ‘triple’ jeopardy situations. A ‘triple’ jeopardy situation involves the State having a further two attempts to convict the accused of offences that directly attack the legitimacy of the initial acquittal. The problem with ‘triple jeopardy’ situations is twofold: (i) they involve the State prosecuting what amounts to the same case under different guises (either as a primary offence or an administration of justice offence) and (ii) they could lead to major inconsistency that would bring the criminal justice system into disrepute:

- acquittal of primary offence;
- conviction of administration of justice offence that goes to the heart of the acquittal and suggests that the original acquittal was illegitimate;
- acquittal of retrial of primary offence (suggesting that the original acquittal was, in fact, legitimate).

The Committee has endeavoured to avoid the possibility of such major inconsistencies by requiring the State to choose between prosecuting an acquitted person for particular administration of justice offences or retrying the acquitted person for the original or similar offence. This issue is also discussed in the commentary accompanying clause 2.8.3 above.

In circumstances where the administration of justice offence does not go to the heart of the acquittal a ‘triple’ jeopardy problem does not arise. The Committee believes that acquitted persons should be able to retry the acquitted person subject to the procedural safeguards outlined in the ‘interests of justice’ test at clause 2.8.8. The Committee believes that the fact that the current strict double jeopardy rule does not currently allow this option is problematic. If acquitted persons interfere with the criminal justice system, through the commission of an administration of justice offence (for example, bribing or intimidating jurors or witnesses) the State should be able to revisit the original acquittal and carry out a valid trial. This can be viewed as a mechanism of self-correction for the criminal justice system.

Code

--

Retrying an acquitted person is a major undertaking. The Committee believes that the Court of Criminal Appeal should only authorise such retrials if 'it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted' *and* the retrial is 'in the interests of justice'.

2.8.8 Interests of justice—matters for consideration

- (1) This section applies for the purpose of determining under this Division whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.
- (2) An order for the retrial of a person is not in the interests of justice if the Court of Criminal Appeal is satisfied that a fair trial is unlikely having regard to the length of time since the acquitted person allegedly committed the offence or was acquitted and the other existing circumstances.
- (3) The Court of Criminal 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 a retrial of the acquitted person,
 - (b) the objective seriousness of the facts of the case,
 - (c) whether the person was acquitted before or after the commencement of this Division.

2.8.8 Interests of justice—matters for consideration

The interests and principles bound up in the double jeopardy principle are often fungible; all aspects cannot be easily specified with some matters appropriately left to judicial discretion. The ‘interests of justice’ test reflects this reality and provides Courts with the necessary flexibility to respond to the idiosyncrasies raised by each retrial application made by the Director of Public Prosecutions.

One of the rationales for the double jeopardy protective principles proposed by the Committee is to ensure that a valid trial occurs – for example, this is a principal rationale for the ‘tainted acquittal’ mechanism, where the original trial is considered invalid because of the commission of an administration of justice offence. But a valid trial must be fair. This is a fundamental principle underpinning Australia’s criminal justice system. If a Court of Criminal Appeal considers that an acquitted person is unlikely to receive a fair retrial, then a retrial should not be ordered.

The proposed ‘interests of justice’ test also militates against potential abuses flowing from the retrospective application of the retrial exceptions.

Similar ‘interests of justice’ tests were included in the United Kingdom Bill containing similar double jeopardy reforms and the New South Wales Consultation Draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003.

2.8.9 Application for retrial—procedure

- (1) An application for the retrial of an accused person cannot be made under this Division unless the person has been charged with the offence for which a retrial is sought or a warrant has been issued for the person's arrest in connection with such an offence.

Note. Section 2.8.11 requires the Director of Public Prosecutions' approval for the arrest of the accused or for the issue of a warrant for his or her arrest. The reference to "charged" in this subsection refers to the initial process in the jurisdiction for commencing criminal proceedings against a person.

- (2) The application is to be made not later than 2 business days after the person is so charged with that offence or the warrant is so issued for the person's arrest. The Court of Criminal Appeal may extend that period because of the person's absence from this jurisdiction or for other good cause.
- (3) The Court of Criminal Appeal must consider the application at a hearing.
- (4) The person to whom the application relates is entitled to be present at the hearing (whether or not the person is in custody). However, the application can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.
- (5) The powers of the Court of Criminal Appeal in an appeal against a conviction may be exercised in connection with the hearing of the application.
- (6) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned should be tried on the same indictment.

2.8.9 Application for retrial—procedure

An important procedural step is required before an application for retrial can proceed: the acquitted person must be charged with a relevant offence or a warrant must be issued for that person's arrest. It is important to note that clause 2.8.11 requires the approval of the Director of Public Prosecutions. This is an important safeguard. It ensures that police investigatory activity in relation to a retrial offence cannot be exercised without the approval of an independent authority, here the Director of Public Prosecutions, who is satisfied that there is a sufficient basis to re-open an investigation even though there has been an earlier acquittal.

The other key procedural safeguard is the requirement on the Court of Criminal Appeal to provide an opportunity for the acquitted person to make representations about the merit of a retrial order.

2.8.10 Retrial

- (1) An indictment for the retrial of a person that has been ordered under this Division cannot, without the leave of the Court of Criminal Appeal, be presented after the end of the period of 2 months after the order was made.
- (2) The Court of Criminal Appeal must not give leave unless it is satisfied that:
 - (a) the prosecutor has acted with reasonable expedition, and
 - (b) there is good and sufficient cause 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 Division, 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 of Criminal Appeal 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 tried for the offence, as the case requires.
- (4) If the order is set aside, a further application cannot be made under this Division for the retrial of the accused person in respect of the offence concerned.
- (5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person or, as the case requires, more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

2.8.10 Retrial

These provisions stipulate additional procedural requirements regulating the retrial exceptions. The principal rationale for these provisions is that the Director of Public Prosecutions must move quickly to act upon a retrial order. The Director of Public Prosecutions should have a very strong case before even applying for a retrial. It is therefore reasonable to require an indictment to be issued within 2 months of a retrial order.

2.8.11 Authorisation of police investigations

- (1) This section applies to any police investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence under this Division.
- (2) For the purposes of this section, a police investigation is an investigation that involves:
 - (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, whether with or without his or her consent.
- (3) A police officer is not to carry out or authorise a police investigation to which this section applies unless the Director of Public Prosecutions:
 - (a) has advised that in his or her opinion the acquittal would not be a bar to the trial of the acquitted person in this jurisdiction for the offence, or
 - (b) has given his or her written consent to the investigation (whether before or after the start of the investigation).
- (4) The Director of Public Prosecutions may not give his or her consent to the police investigation unless satisfied:
 - (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.
- (5) The consent of the Director of Public Prosecutions to the police investigation may be given subject to conditions relating to the conduct of the investigation (including the police officers authorised to conduct the investigation).
- (6) This section does not prevent a police officer from taking any action for the purposes of an investigation if:
 - (a) the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced, and
 - (b) it is not reasonably practicable to obtain the consent of the Director of Public Prosecutions before taking the action.

2.8.11 Authorisation of police investigations

These provisions impose appropriate restrictions on any police investigation of an acquitted person in connection with the possible retrial of that person for a relevant offence. The Director of Public Prosecutions must approve re-opening a criminal investigation into a retrial offence. The Director of Public Prosecutions must consider the public interest before approving re-opening an investigation.

Another key constraint on police investigations into possible retrial offences is the power of the Director of Public Prosecutions to approve the investigation 'subject to conditions relating to the conduct of the investigation (including the police officers authorised to conduct the investigation)'. The ability of the Director of Public Prosecutions to assign responsibility for the re-investigation to different police officers may be necessary to ensure that the re-investigation is conducted with full impartiality.

The Committee acknowledges that these kind of investigative oversight roles are not usually imposed on Australian Directors of Public Prosecutions, who typically make prosecutorial decisions. However, given the legal complexity of the double jeopardy rule, the Committee believes that a Director of Public Prosecutions is well placed to perform these limited functions. These discrete functions should not create expectations that Directors of Public Prosecutions should engage in a more general proactive scrutiny of police treatment of acquitted persons.

2.8.12 Restrictions on publication

- (1) If it appears to the Court of Criminal Appeal that the publication of any matter would give rise to a substantial risk of prejudice to the administration of justice in a retrial that has or may be authorised under this Division, the Court may, by order, prohibit the publication of the matter.
- (2) The Court of Criminal Appeal may at any time vary or revoke an order under this section.
- (3) An order under this section ceases to have effect:
 - (a) on the expiration of the period (if any) specified in the order, or
 - (b) when there is no longer any step that could be taken which would lead to the acquitted person being retried under this Division, or
 - (c) if the acquitted person is retried under this Division, at the conclusion of the trial, whichever is the earliest.
- (4) Nothing in this section affects any prohibition of the publication of any matter under any other Act or law.
- (5) A contravention of an order under this section is punishable as contempt of the Court of Criminal Appeal.

2.8.12 Restrictions on publication

These provisions are important to prevent any risk of prejudice to a possible retrial of an acquitted person. Once it is accepted that the Court of Criminal Appeal needs to be given the power to take action to ensure that a fair and valid retrial of an acquitted person occurs, clauses (2) – (5) follow as necessary machinery provisions.

2.8.13 Other appeal or review rights not affected

Nothing in this Division affects a right of appeal or review under any other Act in respect of a person's acquittal.

Note: The following provisions would be included in the legislation of the jurisdiction relating to appeals to the Court of Criminal Appeal against interlocutory judgment or order, or decision on admissibility of evidence.

- (1) This section applies to:
 - (a) proceedings for the prosecution of offenders on indictment, and
 - (b) proceedings for the summary disposal of any such proceedings where the accused pleads guilty.
- (2) The Attorney General, the Director of Public Prosecutions or, with the leave of the Court of Criminal Appeal, any other party to the proceedings may appeal to the Court against:
 - (a) any interlocutory judgment or order given or made in proceedings to which this section applies, or
 - (b) any decision on the admissibility of evidence in proceedings to which this section applies, but only if the decision eliminates or substantially weakens the prosecution's case.
- (3) An appeal under this section is to be determined on the evidence (if any) given in the proceedings to which the appeal relates, unless the Court of Criminal Appeal gives leave to adduce fresh, additional or substituted evidence.
- (4) The Court of Criminal Appeal may:
 - (a) affirm or quash the judgment, order or decision appealed against, or
 - (b) give or make a judgment, order or decision instead of the judgment, order or decision appealed against.

2.8.13 Other appeal or review rights not affected

These proposed provisions ensure that the double jeopardy protective principles do not affect any other appeal or review rights.

2.8.14 Directed jury acquittals or acquittals in trials without juries

- (1) This section applies to:
 - (a) an acquittal by a jury at the direction of the trial Judge, or
 - (b) an acquittal by a Judge in criminal proceedings for an indictable offence that are tried by the Judge without a jury.
- (2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any such acquittal on any ground that involves a question of law alone.
- (3) The Court of Criminal Appeal may affirm or quash the acquittal appealed against.
- (4) If the acquittal is quashed, the Court of Criminal Appeal may order a new trial in such manner as the Court thinks fit. For that purpose, the Court must (subject to the law relating to bail) order the detention or return to custody of the accused person in connection with the new trial.
- (5) If the acquittal is quashed, the Court of Criminal Appeal cannot proceed to convict or sentence the accused person for the offence charged nor direct the court conducting the new trial to do so.
- (6) This section does not apply to a person who was acquitted before the commencement of this Part.

2.8.14 Directed jury acquittals or acquittals in trials without juries

These proposed provisions would widen the interlocutory power to appeal by the prosecution and are modelled on similar provisions contained in the New South Wales Consultation Draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003. Similar reforms are being contemplated in the United Kingdom and other Australian jurisdictions.

Because this issue relates to rights of appeal from an acquittal, the Committee decided to address it in this Discussion Paper. The widening of the interlocutory power to appeal responds to the now firm common law position that such an appeal power does not apply to trial judge rulings on the admissibility of evidence. (The power to appeal can currently be exercised in many different contexts, including: if a trial judge makes an order permanently staying an indictment or refusing to make such an order; on the question of whether there should have been a joinder or severance of counts or trials.)

The Committee believes that there are principled reasons to allow such trial judge rulings to be appealed to the Court of Criminal Appeal. These reasons are discussed in considerable detail in the body of the Discussion Paper.

Only the Attorney-General or the Director of Public Prosecutions is entitled to lodge an appeal.

The Committee favours not making this reform retrospective.

The Committee's recommendations for reform of the double jeopardy principle are predicated on an acceptance that an acquittal is no longer incontrovertible. This may then lead to a realisation that the prosecution should also be entitled to seek a retrial if a jury's verdict can be attributed to a wrong direction or ruling by a trial judge.

For example, if the trial judge misdirects the jury, the mistake cannot be remedied by an appeal and retrial. In that case, despite having a good case, the prosecution has no remedy unless they are fortunate enough to obtain 'fresh' evidence later. In other words, the prosecutor of a good case which is undermined by an incorrect ruling or misdirection is in a worse position than one with a weak case that improves after acquittal through the emergence of 'fresh' evidence.

The rationale for such a retrial mechanism would appear to be consistent with the 'tainted acquittal' principle outlined above. The Committee has not proposed such a reform in this Discussion Paper. However, the Committee welcomes comments on this issue.

Division 1 Definitions

2.8.1 Definitions

(1) In this Part:

acquittal includes:

- (a) an acquittal in appeal proceedings in respect of an offence, and
- (b) an acquittal at the direction of a court.

administration of justice offence includes any of the following offences:

- (a) bribery of, or interference with, a juror, witness or judicial officer,
- (b) the perversion of (or a conspiracy to pervert) the course of justice,
- (c) perjury.

Court of Criminal Appeal means [here insert reference to the superior criminal court in the jurisdiction which will be authorised to order the retrial of an acquitted person under Division 3].

very serious offence means any indictable offence punishable by imprisonment for life or for a period of 15 years or more.

Note: The offences concerned are those within the range of penalties provided for offences in this Code. The offences include those listed in Appendix B.

- (2) In this Part, 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.
- (3) In this Part, a reference to the retrial of an acquitted person for an offence includes a reference to a trial if the offence is not the same as the offence of which the person was acquitted.

Division 2 Double jeopardy

The general rule

[Note: The Committee is considering the codification of the double jeopardy rule that a person ought not be tried more than once in respect of the same matter. The rule finds expression in the pleas of *autrefois acquit* and *autrefois convict*

(an accused may not be tried for an offence if he or she has previously been acquitted or convicted of the same offence or if the accused could have been convicted at the first trial of the offence with which he or she is charged at the second). The rule also finds expression in the power of a court to stay proceedings on the ground that they constitute an abuse of process of the court (the court may stay proceedings for an offence if conviction for the offence would contradict an acquittal of the accused for another offence).]

2.8.2 Exception for administration of justice offences

- (1) A person acquitted of an offence is not precluded by the rule against double jeopardy from being tried for an administration of justice offence that was committed in connection with the proceedings in which the person was acquitted if there is fresh evidence of the commission of the administration of justice offence.
- (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) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.
- (4) This section does not apply unless the administration of justice offence was committed after the commencement of this Part.

2.8.3 Trial for administration of justice offence or retrial under Division 3

- (1) The trial of an acquitted person for an administration of justice offence that was committed on connection with the proceedings in which the person was acquitted does not, subject to this section, preclude an application under Division 3 for the retrial of the person or the person's retrial.
- (2) An application under Division 3 for the retrial of an acquitted person or the person's retrial does not, subject to this section, preclude the trial of the person for an administration of justice offence that was committed in connection with the proceedings in which the person was acquitted.
- (3) However, if a finding that the person committed the administration of justice offence would, in effect, contradict

the person's acquittal, the person may be either tried for the administration of justice offence or an application may be made under Division 3 for the retrial of the person (at the election of the Director of Public Prosecutions).

Division 3 Retrial after acquittal

2.8.4 Application of Division—cases that may be retried

[(1) This Division applies where:

- (a) a person has been acquitted of an offence, and
- (b) according to the rule against double jeopardy, the person is thereby precluded or may thereby be precluded from being retried for the same offence, or from being tried for some other offence, in proceedings in this jurisdiction, but only if that same or other offence is a very serious offence.]

- (2) To avoid doubt, this section extends to a person acquitted in proceedings outside this jurisdiction of an offence under the law of the place where the proceedings were held.
- (3) This Division extends to a person acquitted before the commencement of this Division.

2.8.5 Court of Criminal Appeal may order retrial

- (1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a very serious offence. In that case, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being tried for the offence (as the case requires).
- (2) The Court of Criminal Appeal may order an acquitted person to be retried for a very serious offence only if satisfied that:
 - (a) there appears to be fresh and compelling evidence against the acquitted person in relation to the offence, or
 - (b) the acquittal appears to be a tainted acquittal, and in all the circumstances it is in the interests of justice for the order to be made.
- (3) Not more than one application for a retrial may be made in relation to an acquittal. An application based on fresh and compelling evidence cannot be made in relation to an acquittal resulting from a retrial under this Division.

Appendix A

- (4) An application for a retrial may not be made if it is precluded by the operation of section 2.8.3.
- (5) If the Court of Criminal Appeal determines in proceedings under this section that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.

2.8.6 Fresh and compelling evidence—meaning

- (1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.
- (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 highly probative of the case against the acquitted person.
- (4) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

2.8.7 Tainted acquittals—meaning

- (1) This section applies for the purpose of determining under this Division 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 jurisdiction or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted, and
 - (b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

2.8.8 Interests of justice—matters for consideration

- (1) This section applies for the purpose of determining under this Division whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.
- (2) An order for the retrial of a person is not in the interests of justice if the Court of Criminal Appeal is satisfied that a fair trial is unlikely having regard to the length of time since the acquitted person allegedly committed the offence or was acquitted and the other existing circumstances.
- (3) The Court of Criminal 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 a retrial of the acquitted person,
 - (b) the objective seriousness of the facts of the case,
 - (c) whether the person was acquitted before or after the commencement of this Division.

2.8.9 Application for retrial—procedure

- (1) An application for the retrial of an accused person cannot be made under this Division unless the person has been charged with the offence for which a retrial is sought or a warrant has been issued for the person's arrest in connection with such an offence.

Note. Section 2.8.11 requires the Director of Public Prosecutions' approval for the arrest of the accused or for the issue of a warrant for his or her arrest. The reference to "charged" in this subsection refers to the initial process in the jurisdiction for commencing criminal proceedings against a person.

- (2) The application is to be made not later than 2 business days after the person is so charged with that offence or the warrant is so issued for the person's arrest. The Court of Criminal Appeal may extend that period because of the person's absence from this jurisdiction or for other good cause.
- (3) The Court of Criminal Appeal must consider the application at a hearing.
- (4) The person to whom the application relates is entitled to be present at the hearing (whether or not the person is in custody). However, the application can be determined even if the person

Appendix A

is not present so long as the person has been given a reasonable opportunity to be present.

- (5) The powers of the Court of Criminal Appeal in an appeal against a conviction may be exercised in connection with the hearing of the application.
- (6) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned should be tried on the same indictment.

2.8.10 Retrial

- (1) An indictment for the retrial of a person that has been ordered under this Division cannot, without the leave of the Court of Criminal Appeal, be presented after the end of the period of 2 months after the order was made.
- (2) The Court of Criminal Appeal must not give leave unless it is satisfied that:
 - (a) the prosecutor has acted with reasonable expedition, and
 - (b) there is good and sufficient cause 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 Division, 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 of Criminal Appeal 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 tried for the offence, as the case requires.
- (4) If the order is set aside, a further application cannot be made under this Division for the retrial of the accused person in respect of the offence concerned.
- (5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person or, as the case requires, more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

2.8.11 Authorisation of police investigations

- (1) This section applies to any police investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence under this Division.
- (2) For the purposes of this section, a police investigation is an investigation that involves:
 - (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, whether with or without his or her consent.
- (3) A police officer is not to carry out or authorise a police investigation to which this section applies unless the Director of Public Prosecutions:
 - (a) has advised that in his or her opinion the acquittal would not be a bar to the trial of the acquitted person in this jurisdiction for the offence, or
 - (b) has given his or her written consent to the investigation (whether before or after the start of the investigation).
- (4) The Director of Public Prosecutions may not give his or her consent to the police investigation unless satisfied:
 - (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.
- (5) The consent of the Director of Public Prosecutions to the police investigation may be given subject to conditions relating to the conduct of the investigation (including the police officers authorised to conduct the investigation).
- (6) This section does not prevent a police officer from taking any action for the purposes of an investigation if:
 - (a) the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced, and
 - (b) it is not reasonably practicable to obtain the consent of the Director of Public Prosecutions before taking the action.

Appendix A

2.8.12 Restrictions on publication

- (1) If it appears to the Court of Criminal Appeal that the publication of any matter would give rise to a substantial risk of prejudice to the administration of justice in a retrial that has or may be authorised under this Division, the Court may, by order, prohibit the publication of the matter.
- (2) The Court of Criminal Appeal may at any time vary or revoke an order under this section.
- (3) An order under this section ceases to have effect:
 - (a) on the expiration of the period (if any) specified in the order, or
 - (b) when there is no longer any step that could be taken which would lead to the acquitted person being retried under this Division, or
 - (c) if the acquitted person is retried under this Division, at the conclusion of the trial, whichever is the earliest.
- (4) Nothing in this section affects any prohibition of the publication of any matter under any other Act or law.
- (5) A contravention of an order under this section is punishable as contempt of the Court of Criminal Appeal.

2.8.13 Other appeal or review rights not affected

Nothing in this Division affects a right of appeal or review under any other Act in respect of a person's acquittal.

Note: The following provisions would be included in the legislation of the jurisdiction relating to appeals to the Court of Criminal Appeal against interlocutory judgment or order, or decision on admissibility of evidence.

- (1) This section applies to:
 - (a) proceedings for the prosecution of offenders on indictment, and
 - (b) proceedings for the summary disposal of any such proceedings where the accused pleads guilty.
- (2) The Attorney General, the Director of Public Prosecutions or, with the leave of the Court of Criminal Appeal, any other party to the proceedings may appeal to the Court against:

- (a) any interlocutory judgment or order given or made in proceedings to which this section applies, or
 - (b) any decision on the admissibility of evidence in proceedings to which this section applies, but only if the decision eliminates or substantially weakens the prosecution's case.
- (3) An appeal under this section is to be determined on the evidence (if any) given in the proceedings to which the appeal relates, unless the Court of Criminal Appeal gives leave to adduce fresh, additional or substituted evidence.
- (4) The Court of Criminal Appeal may:
- (a) affirm or quash the judgment, order or decision appealed against, or
 - (b) give or make a judgment, order or decision instead of the judgment, order or decision appealed against.

2.8.14 Directed jury acquittals or acquittals in trials without juries

- (1) This section applies to:
- (a) an acquittal by a jury at the direction of the trial Judge, or
 - (b) an acquittal by a Judge in criminal proceedings for an indictable offence that are tried by the Judge without a jury.
- (2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any such acquittal on any ground that involves a question of law alone.
- (3) The Court of Criminal Appeal may affirm or quash the acquittal appealed against.
- (4) If the acquittal is quashed, the Court of Criminal Appeal may order a new trial in such manner as the Court thinks fit. For that purpose, the Court must (subject to the law relating to bail) order the detention or return to custody of the accused person in connection with the new trial.
- (5) If the acquittal is quashed, the Court of Criminal Appeal cannot proceed to convict or sentence the accused person for the offence charged nor direct the court conducting the new trial to do so.
- (6) This section does not apply to a person who was acquitted before the commencement of this Part.

Appendix B

Offences under the Model Criminal Code carrying a maximum penalty of life or 15 or more years imprisonment

Clause reference	Subject	Maximum penalty
3.2.9	Aggravated robbery	20 years
3.2.11	Aggravated robbery	15 years
4.1.7	Arson	15 years
4.1.8	Bushfires	15 years
4.3.3	Sabotage	25 years
4.3.4	Threaten sabotage	15 years
5.1.9	Murder	life
5.1.10	Manslaughter	25 years
5.1.11	Causing death by criminal negligence	25 years
5.1.14	Child destruction	25 years
5.1.17	Intentionally causing serious harm	15 years 25 years (aggravated offence)
5.1.18	Recklessly causing serious harm	15 years 19 years (aggravated offence)
5.1.30	Setting traps or devices to kill	15 years 19 years (aggravated offence)
5.1.33	Kidnapping	15 years 19 years (aggravated offence)
5.1.37	Prohibited female genital mutilation	15 years
5.2.6	Unlawful sexual penetration	15 years 20 years (aggravated offence)
5.2.7	Compelling sexual penetration	15 years 20 years (aggravated offence)
5.2.11	Sexual penetration of child	25 years
5.2.12	Aggravated indecent touching	15 years
5.2.14	Persistent sexual abuse of a child	25 years
5.2.22	Aggravated sexual penetration of young person by person in authority	15 years

Appendix B

Clause reference	Subject	Maximum penalty
5.2.29	Aggravated sexual penetration of mentally impaired person by person responsible for care	15 years
6.2.3	Trafficking in commercial quantity of controlled drug	20 years
6.3.6	Manufacture of commercial quantity of controlled drugs	20 years
6.3.6(1)	Sale of large commercial quantity of controlled precursor for purposes of manufacture of controlled drugs	25 years
6.3.6(2)	Sale of commercial quantity of controlled precursor for purposes of manufacture of controlled drugs	15 years
6.3.12	Cultivation of commercial quantity of controlled plant	20 years
6.3.15(1)	Sale of large commercial quantity of controlled plant	life
6.3.15(2)	Sale of commercial quantity of controlled plant	20 years
6.4.2(1)	Supply of commercial quantity of controlled drug to child for trafficking	life
6.4.2(2)	Supply of controlled drug to child for trafficking	20 years
6.4.3(1)	Procuring child to traffic in commercial quantity of controlled drug	life
6.4.3(2)	Procuring child to traffic in controlled drug	20 years
6.6.4	Concealing conversion and transfer of property directly or indirectly derived from drug offence	20 years
9.1.3	Slavery	25 years
9.1.5	Sexual servitude	15 years 19 years (aggravated offence)