

DOUBLE JEOPARDY: MCCOC REPORT - MARCH 2004

Background

At its November 2003 meeting, SCAG approved the release for public consultation of MCCOC's *Discussion Paper on Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, incorporating model provisions. The Discussion Paper recommends that the laws on double jeopardy be changed so that a person acquitted of an offence would not be precluded by the rule against double jeopardy from being prosecuted for an administration of justice offence or the original or related offence in three circumstances:

1. prosecution for an administration of justice offence connected to the original trial,
2. retrial of the original or similar offence where there is fresh and compelling evidence, and
3. retrial of the original or similar offence where the acquittal is tainted.

The Discussion Paper makes it clear that the exception to the double jeopardy rules can be applied to attack the acquittal of any given person only one. In short, the prosecution, if it is to go again, must elect between these three alternatives.

The Discussion Paper also looks at the existing powers of appeal for an acquittal available to the prosecution, and recommends widening these interlocutory powers of appeal, particularly to facilitate appeals from acquittals resulting from trial judge rulings on the admissibility of evidence.

Consultation

MCCOC had a meeting on Friday, 20 February 2004. A large part of the meeting was devoted to discussion of the submissions that had been made on the Discussion Paper. Submissions were received from:

The Chief Justice of Queensland
NSW Council of Civil Liberties and UNSW Council of Civil Liberties
The Law Society of NSW
The NSW DPP
Parliamentary Counsel's Committee
SA Police
Phillip Lillingston
The Chief Justice of the ACT
Morris Forbes OAM
Peter Dutton MP
Queensland Police Service
CM Friel
Daniel Feinstein
Queensland Legal Aid

NSW Bar Association
ASIC
Western Australia Police Service
AFP
Victoria Police
Queensland Law Society
Northern Territory Police
Western Australia DPP
Western Australian Bar Association
Queensland Council for Civil Liberties
Criminal Bar Association of Victoria
Law Institute of Victoria

The Law Council of Australia has also advised that while it is unable to comment at this time, it has referred the Discussion Paper for consideration at its Directors' meeting in March.

Course of Discussions

MCCOC considered a number of issues that were raised in the consultation. They ranged from issues of general principle to very specific drafting issues. It is not intended to detail each of them here, although, when a Final Report is eventually produced, each will receive due consideration. However, a number do require special mention here and all that require changes to the initial recommendations are mentioned.

1. Of course, there was some very articulate and committed opposition to the general principle of meddling with the double jeopardy principle at all. The Committee was unpersuaded by it, for a variety of reasons. But there is one point well worth making here, because it impacts on a later recommendation. The justification for providing an avenue for the overturning of a tainted acquittal is clear and obvious. The accused has not had a proper and valid trial. The "fresh and compelling evidence" exception is different and harder to justify. They cannot and should not be seen as two halves of one whole.

Recommendation 1: The fresh and compelling evidence exception should be recognised as raising different issues from the tainted acquittal exception.

2. There was disquiet in a number of quarters, most clearly from the NSW DPP and other law enforcement authorities, about using the DPP as a gatekeeper in the sense of requiring DPP authorisation for conducting a re-investigation with a view to re-opening the acquittal. MCCOC remains completely convinced that such a gate keeping function is required. It is not prepared to countenance the possibility of the repeated re-investigation of an acquitted individual even though those one or more re-investigations come to nothing. Police concerns about fetters being placed on their investigative powers in this kind of case are simply misplaced. MCCOC felt that the assertion by some that the DPP should not perform this function because it was incompatible with the function of the DPP and that it should be done by a judge instead could not be sustained for two reasons:

- it is not incompatible with the true function of the DPP. Modern criminal trial reform initiatives emphasise the need for a closer alliance between investigating police and prosecutors. More particularly, DPP legislation contains such a role. For example, s 14 of the NSW *DPP Act 1986* allows the DPP to issue guidelines to police in relation to the conducting of investigations for offences and, while that power does not currently extend to individual cases, it is but a short step for it to do so.
- An additional judicial gatekeeper would be incongruous given that the recommended scheme already contains a judicial gatekeeper in guise of the filtering role of the Court of Criminal Appeal.

Recommendation 2: DPP authorisation of re-investigation should continue to be a requirement.

3. In accordance with the different rationale for each of the departures from the normal *autrefois* position set out above, it was decided that the tainted acquittal route should be wider than the fresh and compelling evidence route so far as availability is concerned. While the Discussion Paper listed some 36 offences under the provisions of the Model Criminal Code which attracted a maximum sentence of 15 years imprisonment or more and recommended that both routes could attach to all of these offence, the Committee reconsidered this position and decided that, while the 36 offences should remain for the tainted acquittals route, a much more limited list should apply to the fresh and compelling evidence route. The latter should be seen as truly exceptional. The Committee agreed that the list should certainly include murder, manslaughter and such serious drug offences that attract life imprisonment under the Model Criminal Code. The Committee was inclined to think that the list should also include the most aggravated forms of rape and armed robbery, but recognised that jurisdictional differences in the definitions and scope of these crimes might make equivalence difficult. The Committee is therefore content to refer to a limited list corresponding to this and refer enacting jurisdictions to the spirit of this recommendation.

Recommendation 3: Where the re-opening of a case is based on 'fresh and compelling evidence it should only occur in relation to very serious offences: murder, manslaughter, serious drug offences (where life imprisonment applies), aggravated rape and armed robbery.

4. There was, of course, some general opposition as a matter of principle to the proposal that the exceptions recommended retrospectivity. The Committee considered the objections and was unpersuaded, because (a) the whole idea of the proposals entails revisiting what has gone before and (b) the proposals do not entail changing the law of liability - merely exposure to it. It was pointed out to the Committee that, in that case, the exception relating to prosecution of the offence tainting the acquittal should be retrospective also - and the Committee agreed with the logic of that criticism.

Recommendation 4: All the proposed provisions should apply retrospectively.

5. The Committee agreed that s 2.8.8(2), currently worded “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...” should be reworded *positively* so that (subject to the advice of Parliamentary Counsel) it would read more along the lines “The Court of Criminal Appeal must be satisfied that an order for the retrial of a person is in the interests of justice because a fair trial is likely...”.

Recommendation 5: Section 2.8.8(2) should be clarified.

6. The NSW DPP objected to the proposal which required the DPP to file an application to the Court of Criminal Appeal no more than 2 business days after a previously acquitted person is charged. The ground for objection is that this does not allow the DPP sufficient time to review the brief. The Committee agreed and now recommends 10 business days with a power to apply to the CCA for leave to extend the period.

Recommendation 6: The time for lodging an application should be increased from 2 to 10 business days with power to apply to extend.

7. The Committee thought that a time limit should be placed on appeals against acquittals. That limit should be 28 days with a power to apply to the CCA for leave to extend the period.

Recommendation 7: There should be a 28 day time limit on appeals against acquittals with power to apply to extend.

8. In other respects the model provisions are suitable for implementation.

Recommendation 8: The model provisions should be implemented.¹

Where To From Here?

MCCOC will not have the time or resources to produce a formal Final Report in time for the SCAG meeting. The Final Report will be produced later and will incorporate those changes noted above.

In addition, while consultation has proceeded, MCCOC has written a new section of the Report which deals with the codification of the general principles of double jeopardy. It is these general principles to which the exceptions are recommended. No consultation has taken place on the proposed codification of the general principles and no drafting work has been done on them. That is likely to be a difficult drafting task. It is likely that, in these circumstances, MCCOC will produce an Interim Report which will include both the conclusions of the Committee to date and the proposals on the general principles. In the meantime, those jurisdictions which want to go ahead at once can proceed on the basis of this report to SCAG.

¹ There were a few minor changes of a drafting nature that Parliamentary Counsel has noted.

Recommendation: That the Standing Committee note the changes recommended by MCCOC and its intention to produce further reports on the subject.

Model Criminal Code Officers Committee

March 2004