NSW Legislative Council Hansard
Extract from NSW Legislative Council Hansard and Papers Tuesday 17 October 2006.

Second Reading

The Hon. JOHN DELLA BOSCA (Minister for Finance, Minister for Commerce, Minister for Industrial Relations, Minister for Ageing, Minister for Disability Services, and Vice-President of the Executive Council) [3.47 p.m.]: I move:

That these bills be now read a second time.

I seek leave to have the second reading speech as delivered in the other place incorporated in *Hansard,* and then I will make two supplementary remarks.

Leave granted.

These two bills are major reforms to the New South Wales legal system that will help bring the criminal law of this State into the twenty-first century. They are related bills, in part responding to changes in technology, helping to ensure that the guilty are convicted and the innocent are set free, and ensuring the balance of the criminal justice system.

I would like to deal first with the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill. This bill provides one of the most significant reforms to the criminal law enacted in Australia in recent times. The ancient rule of double jeopardy provides that a person may not be tried for the same offence twice. Its purpose is to ensure that criminal proceedings can be brought to a conclusion, and the result in a trial can be regarded as final. It protects individuals against repeated attempts by the State to prosecute. The rule encourages police and prosecutors to be diligent and careful in their investigation and to gather as much evidence as possible against the accused. In this sense, it promotes fairness to the accused and justice for the victim and the community. However, the strengths of the double jeopardy rule also bring weaknesses and too rigid an adherence to the rule may bring the law into disrepute.

There will sometimes be cases where diligent police and prosecutors will still fail to find all the possible evidence. Perhaps it is being concealed from them deliberately, or perhaps developments in forensic technology will reveal new evidence or new conclusions to be drawn from existing evidence. In such cases, there may well be grounds to bring the accused back to trial. In fact, not to do so risks perpetrating a major injustice by allowing a guilty person to walk free even when there is compelling evidence of his or her guilt and this can bring the justice system into disrepute.

There are other cases where an acquittal is obtained by subverting the trial by threatening witnesses, by tampering with the jury, or by perjury by defence witnesses. Where such cases come to light the double jeopardy law can stand in the way of justice. For these reasons the government is proposing reforms to the double jeopardy rule in a measured way by creating exceptions framed with precision and containing appropriate safeguards. These reforms will ensure that justice can be done in our courts. The proposals in this bill are the result of a long and careful process of consultation with the community.

As honourable members will be aware, the Government first announced its intention to reform the ancient rule of double jeopardy in 2003. The Government released an exposure draft bill in 2004 and sought expert advice from Acting Justice Jane Mathews. We also considered models proposed by the national Model Criminal Code Officers Committee, as well as pioneering reforms already enacted in the United Kingdom. The community's views and the view of experts in the field have all been taken into account in drafting this bill.

I would like now to address the main clauses of the bill and explain its scope and effect. The first point to note is that this bill inserts new provisions into the Crimes (Local Courts Appeal and Review) Act which is to be renamed the Crimes (Appeal and Review) Act to reflect its broader scope, which will relate to appeals and reviews from the higher courts as well as the Local Court. The operative clauses of the bill are contained in schedule 1. The first key provision is new section 100. This section allows the Director of Public Prosecutions to apply to the Court of Criminal Appeal for permission to retry an acquitted person if there is fresh and compelling evidence. The court can order a retrial under this section if it reaches the view that there is fresh and compelling evidence and it is in the interests of justice.

This provision is confined to the most serious offences under New South Wales law, namely, murder or another offence carrying a maximum penalty of life imprisonment such as aggravated sexual assault in company, commonly known as gang rape, and major drug offences. Manslaughter is not included because while this is a

very serious offence the range of culpability associated with it is large. Fresh evidence is defined by new section 102 to be any evidence that was not adduced at trial and could not have been adduced at trial with reasonable diligence. Compelling evidence is also defined under new section 102 to cover evidence that is substantial, reliable, and probative of the prosecution case in the context of the issues in dispute.

The new section 104 defines the interests of justice. This section will require the court to consider the amount of time elapsed since the offence was alleged to have been committed and whether there was any failure to act with due diligence on the part of the police or the prosecution. The court must also reach the view that a fair trial is likely. These tests will ensure that only strong cases proceed to retrial. The second group of cases that may be retried are cases of tainted acquittals under section 101. A tainted acquittal arises where any person has been convicted of an offence against the administration of justice in respect of the original trial. These offences include: bribery or interference with a witness, juror or judicial officer; perversion or conspiracy to pervert the course of justice; and perjury. The court must also reach the view that retrial is in the interests of justice.

In tainted acquittal cases a retrial may be ordered by the court for any offence carrying a penalty of 15 years imprisonment or more. The broader scope of this ground recognises the fact that interference in a trial brings the administration of justice into disrepute and offenders must not be able to profit from it. This difference in scope is also a feature of other models of double jeopardy reform, including the model recommended by the Model Criminal Code Officers Committee and the law in the United Kingdom. Safeguards apply to retrials on either ground.

Reinvestigations of acquitted persons cannot be undertaken by police without the permission of the Director of Public Prosecutions. In this context reinvestigation covers the use of police powers, including arrest, search, or any forensic procedure. It does not mean the simple gathering of preliminary information. In addition, there are restrictions on publishing any information about a reinvestigation including proceedings to seek permission to retry and the retrial itself, unless the court orders otherwise. This is intended to protect the integrity of the process.

An additional reform is also proposed in this bill that would increase appeals from acquittals. Under this bill, in cases where the judge directed the jury to acquit or where there was no jury and the judge was the determiner of fact, the prosecution will be able to appeal any acquittal in the higher courts that is obtained by error of law. An acquittal quashed in this process can result in a retrial. The need for these reforms is shown by the case of *R v Carroll*. Carroll was originally tried on a charge of murdering a young girl in Queensland over 30 years ago. He was convicted at trial but that conviction was overturned on appeal. Subsequently, new dental evidence was found casting doubt on that acquittal.

As it happened, Carroll had testified at his own trial. As a result, the prosecution brought perjury charges using the new evidence and Carroll was convicted at first instance. However, in 2002 the High Court upheld the Queensland Court of Appeal's decision overturning this conviction on the grounds of double jeopardy. It found the prosecution for perjury amounted to trying Carroll twice for the same offence. This bill would overcome this problem in New South Wales because a similar case here could potentially be retried on the basis of fresh and compelling evidence under section 100.

As a final note on this bill, honourable members may be aware that the Council of Australian Governments [COAG] has recently agreed to consider a national approach to double jeopardy reform. A COAG working group has been established, jointly chaired by the Commonwealth and New South Wales. The COAG working group will be considering this bill, as well as the model proposed by the Model Criminal Code Officers Committee. These two models differ in some details, but are broadly consistent in their structure and approach. The New South Wales Government will consider amending its legislation based on any recommendations that may be adopted by the COAG process.

I now turn to the second bill, the Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill. This bill recognises that technology has changed over the past 20 years and that in some cases justice requires that older cases be subjected to fresh scrutiny. The main point of this bill is to establish the DNA Review Panel replacing the defunct Innocence Panel that the Hon. Mervyn Finlay QC found should be established by legislation. This bill is intended to supplement existing mechanisms that allow the soundness of a conviction to be investigated and any doubts about unsafe convictions to be considered and resolved.

These existing mechanisms include appeals and applications under part 13A of the Crimes Act, which allow the Attorney General or the Supreme Court to refer a conviction to the Court of Criminal Appeal for reconsideration at any time. As an aside, I note that part 13A of the Crimes Act is re-enacted in this bill and will be included in the newly renamed Crimes (Appeal and Review) Act. This bill is an important but targeted mechanism for convicted persons to have aspects of their conviction reinvestigated. It will allow convicted persons who identify evidence containing biological material that may demonstrate their innocence to ask the panel to have it tested. The provisions of this bill will apply only to persons convicted before the date of introduction. This recognises the fact that DNA technology has become a routine feature of trials. These days there is widespread testing of biological material before the courts. The role of the panel is therefore appropriately limited to past cases in

which DNA technology may not have been fully utilised. The Government is satisfied that this is a reasonable and balanced approach.

Some key features of this bill are as follows. New section 89 governs who may apply to the panel. This will include any person convicted before 19 September 2006 of serious offences that carry a maximum penalty of 20 years or more. Other persons convicted before this date may also apply if the panel considers special circumstances warrant consideration of their application. The person must point to biological material that, if tested, may affect their claim of innocence. For instance, a person convicted of sexual assault might identify a shirt left at the crime scene that the person alleges was worn by the real perpetrator and therefore could contain DNA and ask for that biological material to be tested. This could be relevant if their original defence was mistaken identity but not if their defence was based on consent.

The degree of specificity required to identify the biological material would be a matter for the panel to determine. To do its job, the panel would need enough specificity to be able to ensure the inquiry has reasonable scope: not too broad that it would allow open-ended, potentially limitless inquiries and not too narrow that the convicted person could not meet the requirement. This is a matter of judgment. To be eligible, the convicted person must also be currently in prison, on parole or subject to an order under the Crimes (Serious Sexual Offenders) Act 2006. This ensures that the work of the panel is confined to those persons who might be freed from their sentence if their conviction is overturned. In this context, I note that the provisions of part 13A as re-enacted in this bill remain available to other persons who may seek to review their conviction, even after their release and on any grounds.

The membership of the panel is set out in new section 90. The panel is to be chaired by a former judicial officer, and is to have a balanced membership including: a representative of victims of crime, a former police officer, the Director General of the Attorney General's Department, the Director of Public Prosecutions, and the Senior Public Defender, or their nominees. The broad functions of the panel are set out in new section 91. These functions include receiving applications, arranging for testing and, if justified, referral to the Court of Criminal Appeal for consideration. The panel will have the power to require the Commissioner of Police and other public authorities to provide biological material or information in their possession.

In exercising its functions, the panel must consider the matters set out in section 91 (2) including: the interests of registered victims, the need to maintain public confidence in the administration of criminal justice, the public interest and any other relevant matter. New section 92 sets out the procedure for making an application to the panel. It also provides the panel's key powers to arrange for searches for nominated biological material and to have it tested for DNA. Section 93 provides that the panel has broad discretion to refuse to consider an application. In addition, it is not to consider an application if the matters raised have already been dealt with fully in other ways—for instance, at trial, on appeal or through a part 13A application.

The panel may also defer consideration if another process is under way or if the applicant has given insufficient information. If the panel comes to the view that there is a reasonable doubt as to the conviction the panel may refer the matter to the Court of Criminal Appeal for consideration as to whether the conviction should be set aside. The court considers these matters as if they are criminal appeals and has all the powers relevant to such proceedings, including the power to quash a conviction or order a retrial.

Two key procedural provisions should be highlighted. First, new section 95 contains provisions that ensure that the deliberations of the panel are confidential except for situations when information needs to be shared with officials. It will be an offence to disclose the panel's deliberations except in the exercise of its functions. However, while the deliberations of the panel are confidential, the panel will be able to make public the outcomes of its deliberations. This section also provides that victims will have the right to be notified of the determination of an application by the panel, whether for or against the convicted person. Victims must also be told when the panel exercises its powers to order a search for, or test of, material. This means that victims will be told of every application at the point where it is investigated by the panel or determined. In effect, victims have the same right to be told of progress in the matter as the applicant.

The second procedural provision is a requirement for police and other authorities to retain biological material in their possession and control when it relates to a conviction for an offence carrying a maximum penalty of 20 years or more and when the convicted person remains eligible to make an application. This duty will enable the panel to have access to evidence it may require. The bill permits exceptions in appropriate cases, including where the exhibit is large and a sample can be taken. As I previously indicated, this legislation is targeted at persons convicted before DNA technology was used as a matter of routine. It is therefore likely that the panel's work will end within a fairly short space of time. In order to ensure we do not continue to retain a body without a clear purpose, the panel will automatically expire after seven years unless its existence is extended for a further three years by proclamation. A review after five years will consider whether such a proclamation needs to be made.

These are major reforms designed to maintain a fair and balanced criminal justice system; a system where, as far as humanly possible, no innocent person is wrongly imprisoned and where no guilty person walks free due to

abuses of the legal system or despite fresh evidence of their crime. I commend the bills to the House.

The two matters I wish to comment on arise from a report of the Legislation Review Committee on these bills and, as I understand it, concerns raised by some members. The first is whether the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill complies with the International Convention on Civil and Political Rights, a convention to which Australia is a party. The International Convention on Civil and Political Rights provides in Article 14 that: "No-one shall be liable to be tried for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." While this appears absolute on its face, it is not, because, as the Model Criminal Code Officers Committee points out, a question arises as to what constitutes a final conviction or acquittal.

The United Kingdom House of Commons Joint Committee on Human Rights considered United Nations Human Rights Committee comments and case law on this article, and it determined that there is an "implied exception" to the principle of double jeopardy under the International Convention on Civil and Political Rights. That committee reached the view that reopening an earlier acquittal may be permitted, under relevant international law principles, if there is a legislative scheme in place regulating the circumstances in which a case can be reopened and if that scheme limits the reopening to cases where new evidence has become available or there has been a fundamental defect in the earlier proceedings. The Government considers that the House of Commons report provides a good summary of the principles that should apply. Both the United Kingdom laws and the New South Wales bill comply with these principles. The Government is confident that the bill as it currently stands is consistent with international human rights standards.

The second matter concerns the Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006. There is a suggestion that the bill should apply to persons convicted after 19 September 2006 and that the panel should not be subject to an automatic sunset provision. On these issues I should emphasise that the bill is directed to a specific and temporary situation regarding the introduction of DNA technology. These days, testing of biological material and presenting DNA evidence based on it is a routine part of trials. The role of the panel is therefore limited to past cases, in which DNA technology may not have been fully utilised. For this reason a cut-off date for applications is justified, though any particular date might, necessarily, be seen as somewhat arbitrary. The date chosen is the date of the introduction of the bill into the Parliament, which the Government considers is a fair and reasonable cut-off.

Some have argued that this means that the DNA Review Panel will not be able to correct future errors in the criminal justice system. It is acknowledged that there is no absolute guarantee that the criminal justice system will not make mistakes in the future, but the DNA Review Panel is not and never has been conceived of as a remedy for all mistakes. It has a specific role to do with DNA testing in past cases, which supplements existing review mechanisms. The criminal justice system already has a broader and more flexible review mechanism for potential errors. The general provisions of part 13A of the Crimes Act 1900—as re-enacted in this bill—remain available to any person who may seek to review his or her conviction on any basis, whether DNA-related or otherwise, and no matter when the potential error is identified or when the person was convicted.

Since the DNA Review Panel is designed as an additional mechanism to address a specific problem at a specific point in time, it is likely that its work will end within a limited space of time. In order to ensure we do not continue to retain a body without any work to do, the panel will automatically expire after seven years unless its existence is extended for a further three years by proclamation. A review after five years will consider whether such a proclamation should be made.

The Legislation Review Committee raises the issue that the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill does not contain sunset provisions and asks why the two bills are different. The committee appears to assume, quite wrongly, that the two bills provide corresponding rights to the prosecution and the convicted persons. The two bills are related in that they both address issues of review of convictions and acquittals and can be seen as two elements in the overall balance of the criminal justice system.

However, they address two fundamentally different issues, and should not be seen as giving corresponding rights to the prosecution and convicted persons. In terms of appeal and review of unsafe convictions, a convicted person has now, and will have after the enactment of these bills, far greater rights than the prosecution. The double jeopardy reform addresses a limited range of situations where fresh and compelling evidence has come to light, whether DNA-related or not, and where a trial has been tainted by an "administration of justice" offence. If either of these situations comes to light and throws doubt on a conviction, the accused already has access to review under the provisions of part 13A of the Crimes Act, as re-enacted in this bill.

The re-enacted part 13A applies to all convictions, not just the limited range of acquittals in very serious cases covered by the double jeopardy reforms. The re-enacted part 13A also has no sunset provision. Having made these supplementary comments, I would reiterate that these are major reforms that will maintain a fair and balanced criminal justice system. I commend the bills to the House.