

PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

DRAFT REPORT

Consultation Draft Bill —
Criminal Appeal Amendment (Double Jeopardy) Bill 2003

24 October 2003

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Functions of the Legislation Review Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - (i) trespasses unduly on personal rights and liberties, or
 - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - (iv) inappropriately delegates legislative powers, or
 - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations:

- (1) The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - (i) that the regulation trespasses unduly on personal rights and liberties,
 - (ii) that the regulation may have an adverse impact on the business community,
 - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
 - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
 - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
 - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - (vii) that the form or intention of the regulation calls for elucidation, or
 - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
 - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
 - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

1. CONSULTATION DRAFT BILL — CRIMINAL APPEAL AMENDMENT (DOUBLE JEOPARDY) BILL 2003

Introduced: Consultation Draft

House:

Minister: The Hon Bob Debus MP

Portfolio: Attorney General

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓	✓	✓	✓	

Purpose and Description

1. The Bill proposes to amend the *Criminal Appeal Act 1912*. Its objects are:
 - (a) to enable a person acquitted of an offence to be retried (in the case of a very serious offence) if there is fresh and compelling evidence of guilt (in line with proposed legislation before the UK Parliament (*the UK Bill*)), and
 - (b) to enable a person acquitted of an offence to be retried (in the case of a very serious offence) if the acquittal was tainted by the commission of an administration of justice offence (in line with legislation enacted in the UK in 1996), and
 - (c) to provide that the Crown may appeal against the acquittal of a person on a question of law where the acquittal was directed by the trial Judge or made at trial by a Judge without a jury.

Clause 9B defines “*very serious offence*” as murder or any other offence punishable by imprisonment for life or manslaughter. An offence punishable by imprisonment for life includes aggravated sexual assault in company and some drug offences (e.g. those relating to large commercial quantities).

Background¹

2. The right not to be tried more than once for the same crime, which is generally referred to as the principle relating to *double jeopardy*, is regarded as a central human right. It is recognised under Australian common law (*R v Carroll* [2002] HCA 55), reflected in NSW legislation (*Criminal Procedure Act 1986*, s 156) and enshrined in Article 14(7) of the International Covenant on Civil and Political Rights, to which Australia is a party.²
3. The justifications for the development of this rule were set out in the recent High Court decision of *Carroll* by Gleeson CJ and Hayne J:
 - the power and resources of the State as prosecutor are much greater than those of the accused,
 - the consequences of conviction are very serious,

¹ See *Double Jeopardy*, A Briefing Paper of the NSW Parliamentary Research Service, No.16/03.

² The Rome Statute for the International Criminal Court (ICC) is the most recent pronouncement by the international community on what it believes are the fundamental principles that must be adhered to in criminal trials. These include the double jeopardy rule (Article 20).

- the power to prosecute could be used by the executive as an instrument of oppression, and
 - finality is an important aspect of any system of justice.
4. This case sparked the recent debate on reform of the double jeopardy rule. In the case, the High Court found that the Crown’s attempt to prosecute an acquitted person for perjury on substantially the same facts as the initial trial for murder was an abuse of process.
- Raymond Carroll was acquitted of murder on appeal to the Queensland Court of Criminal Appeal. He was subsequently charged with perjury. The Crown alleged that he had given false evidence at the murder trial by testifying that he did not commit the murder.
5. The perjury trial was held in 2000 and the Crown relied on some new and stronger evidence, including an alleged confession by Carroll to a fellow inmate on remand before the murder trial. The jury found Carroll guilty of perjury but that conviction was also quashed on appeal and Carroll was acquitted. The Crown then sought leave to appeal to the High Court but the appeal was dismissed.
6. The High Court unanimously held that the proceedings for perjury were an abuse of process. Even though Carroll was not tried for the same offence twice, the prosecution for perjury sought to undermine the earlier acquittal for murder and this was an abuse of process.
7. This case prompted calls for the reform of the double jeopardy rule throughout Australia. The issue was put on the agenda of the 2003 meeting of the Standing Committee of Attorneys General (SCAG). At that meeting SCAG agreed that the Model Criminal Code Officers Committee should review the principle.
8. Elsewhere, the same debate has been taking place, most notably in the UK. A series of reviews and inquiries by UK government and UK parliamentary bodies led to the introduction of legislation to amend the application of the double jeopardy rule. This Bill, the *Criminal Justice Bill*, is currently before the House of Lords.
9. The process of review in the UK has been influential in Australia and the provisions of the NSW Bill closely follow those of the *Criminal Justice Bill*.

The Bill

10. The *Criminal Appeal Amendment (Double Jeopardy) Bill* proposes to amend the *Criminal Appeal Act 1912* (NSW) by inserting a new Part 3A to allow a person who has been acquitted of a “serious offence” to be retried in certain limited circumstances.
11. In doing this, the Bill tries to balance:
- (i) the values which underpin the principle relating to double jeopardy, and the associated rights of the accused; and

- (ii) competing values (most notably, society's expectation that the criminal prosecution process should produce *accurate* outcomes), and the associated rights of victims to justice in individual cases.
12. The Bill provides that a person can only be retried for a “**very serious offence**” [cl.9A]. Clause 9B defines “very serious offence” as murder or any other offence punishable by imprisonment for life or manslaughter. An offence punishable by imprisonment for life includes aggravated sexual assault in company and some drug offences (e.g. those relating to large commercial quantities).
 13. Significantly, the new Division operates *retrospectively*. It also applies to a person acquitted outside of NSW.
 14. Under the Bill there are three cases in which the Director of Public Prosecutions (DPP) can apply to the Court of Criminal Appeal (CCA) for a retrial of a previously acquitted person. These are:
 - (i) retrial after acquittal where there is “fresh and compelling evidence” against the acquitted person and it is in the interests of justice [clause 9C(2)(a)];
 - (ii) retrial after a “tainted acquittal” where it is in the interests of justice [cl. 9C(2)(b)]; and
 - (iii) prosecution appeal against acquittal on errors of law [cl. 9I].
 15. Clause 9D defines “**fresh and compelling evidence**”. Evidence is “fresh” if it was not led in the proceedings in which the person was acquitted *and* it could not have been led in those proceedings with the exercise of reasonable diligence.
 16. Evidence is “**compelling**” if it is reliable, substantial and highly probative of the case against the person.
 17. The requirements that the evidence be “fresh” and “compelling” are designed to set a relatively high threshold for the exercise of the Court of Criminal Appeal's power to order a retrial. The “fresh” requirement is primarily designed to ensure that the CCA's power to order a retrial cannot be relied upon where the original acquittal was the product of incompetence on the part of the police or prosecution.

Similarly, the “compelling” requirement is based on the view that removing double jeopardy is only justifiable if there is a strong prospect that the person is guilty on the facts and is likely to be convicted at retrial.
 18. The DPP can only make one application for a retrial in relation to an acquittal and a person who is acquitted on retrial cannot be retried a second time [cl 9C(3)].
 19. Clause 9E empowers the CCA to order a retrial where a person who has been acquitted of a “very serious offence” is convicted of an “administration of justice offence”. These include bribery or interference with a juror, witness or judicial officer, perverting the course of justice or perjury.

The CCA can order a retrial if it is satisfied that the commission of the administration of justice offence made it “more likely than not” that the accused was not convicted of the “very serious offence”.

20. The CCA may also order a retrial where “another person” has been convicted of an administration of justice offence [clause 9E(2)(a)]. However, there is *no requirement* to show that the acquitted person played any part in, or had any knowledge of, the commission of that offence.
21. Subclause 9E(3) provides that an acquittal may still be tainted even if the conviction for the administration of justice offence is still subject to appeal “so long as it appears that the conviction will stand”. If the appeal is successful, it is up to the person facing a retrial to apply to the Court for the order for retrial to be quashed.
22. The threshold established by the “fresh and compelling evidence” and “tainted acquittal” grounds is raised further by the requirement that the CCA be satisfied that a retrial is “in the interests of justice”.
23. Clause 9F contains a non-exhaustive list of factors to be taken into account by the CCA in making this decision:
 - the prospect of the person receiving a fair trial;
 - the time that has elapsed since the alleged commission of the offence; and
 - if there has been unreasonable delay by the police or prosecution in initiating the application for retrial.
24. Implicit in the requirement that the CCA consider these factors is recognition that the power to order a retrial in cases of “fresh and compelling evidence” and “tainted acquittal” has the potential to substantially trespass on the rights and liberties of persons acquitted of “very serious offences”.

This requires a balancing of competing interests, including a consideration of specific factors that may make a retrial unfair to the accused and therefore not in the “interests of justice”.

25. The third procedure introduced by the Bill is a broadening of the rights of the Attorney General or the DPP to appeal to the CCA against decisions on matters of *law* alone made by a trial judge which have resulted in an acquittal [clause 9I]³. In this case, the CCA can quash the conviction and order a retrial.
26. This right of appeal does not operate retrospectively [cl 9I(6)].
27. Under the Bill, there is no presumption that bail will be granted merely because a person in custody facing an application for retrial is an acquitted person. Clause 9L provides that if an acquitted person is in custody pending an application for a retrial,

³ Note that Western Australian law provides for a similar process. The CCA can order a new trial if the prosecution successfully appeals a judge’s decision to acquit or a judge’s direction to a jury that they acquit the defendant. Under Tasmanian law, the prosecutor can appeal against an acquittal on a question of law, but only with the leave of the CCA.

the fact that the person previously was acquitted of an offence is *not* to be taken into account by the Court as a reason for granting bail.

Comment

Trespasses unduly on individual rights or liberties

Right not to be tried twice for same crime

28. This Bill very clearly trespasses on personal rights and liberties – specifically, the right not to be subjected to criminal prosecution more than once in relation to the same conduct. The infringement of this long recognised right is not incidental to the Bill’s operation. The Bill is specifically designed to reduce the application of the principle under NSW law.
29. The effect of this is to diminish the scope and quality of the liberty enjoyed by any person acquitted of a crime covered by the Bill, even a person correctly acquitted because they were innocent. The freedom of acquitted persons to go about their affairs without fear of investigation, arrest or punishment is impinged upon by this Bill.
30. The extent of the trespass on personal rights and liberties is not the same in each of the three cases for retrial. For example, there may be a stronger justification for retrial where acquittal is the product of impropriety by the accused or someone else (ie, a tainted acquittal).
31. On the other hand, the ability of the Attorney General or the DPP to appeal an acquittal (and seek a retrial) against decisions on matters of *law* alone that have resulted in an acquittal [clause 9I] involves a substantial trespass on personal rights and liberties. In such a case, the accused is required to undergo a further trial as a result of an error made within the criminal justice process to which he or she has not contributed .
32. Further, no retrial may be ordered in cases where a judge may have misdirected a jury on a question of law and the jury has acquitted the accused (unless the judge directed the jury to acquit)⁴. Only in cases where an acquittal is based on an erroneous decision of law made by a *judge sitting alone* will a retrial be possible.
33. On the other hand, the fact that jury verdicts of acquittal are to be left undisturbed in all cases (other than where the judge has directed an acquittal) even if based on a misdirection on a point of law, recognises the importance of the finality of the verdict of a jury.

⁴ This situation is already covered by section 5A of the *Criminal Appeal Act* 1912. Section 5A(2) is to be re-enacted in clause 9J of the Bill.

- 34. The Committee notes the importance of the double jeopardy rule within both the common law tradition and as an internationally recognised human right. The Committee notes that erosion of this right leaves all persons who have been tried for a relevant offence and found to be not guilty vulnerable to investigation and retrial. This is an onerous burden for those who have been acquitted (including those correctly acquitted) and would compound what was likely to have been a significant trauma of enduring a trial and all that entails.**
- 35. The Committee is strongly of the view that any weakening of the double jeopardy rule should only be allowed if overwhelmingly in the public interest and only if there are appropriate and sufficient safeguards in place to prevent abuse.**

Retrospectivity

36. The adverse effect of these amendments on personal rights and liberties is exacerbated by the fact that they operate retrospectively. Under clause 9A(2)(b) the CCA's power to order a retrial may be exercised in relation to a person acquitted of a "very serious offence" at *any time at all before* the commencement of the provisions (as well as any time after).
37. The presumption against retrospectivity is an important component of the rule of law. It is generally considered to be inappropriate for a law to expose a person to adverse consequences in relation to conduct that they undertook prior to the enactment of the law. The proposed amendment would redefine the significance of a previous acquittal by declaring that it no longer affords the acquitted person the protection from retrial that it currently does. In fact, under this Bill, a person may face a retrial 50 years after the alleged crime was committed. This will undoubtedly have an enormous impact on people's lives. Persons acquitted of very serious offences will never be free of the possibility that they may face a second trial one day.
38. The fact that the amount of time that has passed is one of the "interests of justice" factors to be considered by the CCA in deciding whether to order a retrial does provide some balance. Nonetheless, the retrospective application, with no time limit whatsoever on the period that may lapse between the alleged commission of the offence or acquittal and the application for retrial, represents a significant trespass on rights.

- 39. The Committee notes that any retrospective provisions which adversely affect individuals are a trespass on personal rights. Adverse retrospective effects are particularly of concern in the criminal law where the State may deprive persons of their property and liberty. Adverse retrospective effects are of even greater concern when they exclude or limit legal protections for fundamental and internationally recognised rights.**
- 40. The Committee is strongly of the view that any retrospective application of the weakening of the double jeopardy rule should only be allowed if overwhelmingly in the public interest and only if there are sufficient safeguards in place to prevent abuse.**

Safeguards

41. The Bill does contain a number of conditions and safeguards in the Bill to minimise the trespass on rights. These include:

- The DPP can make only one application for a retrial after acquittal [9C(3)].
- An indictment for the retrial must be laid within two months from the CCA's order, unless the leave of the Court is obtained for an extension [clause 9H(1)]. This recognises that it would be unfair if the uncertainty and inconvenience imposed on the acquitted person was prolonged or open-ended.
- A person who is acquitted on retrial cannot be retried a second time for the same offence [cl 9C(3)].
- Clause 9K(3) minimises the risk of unjustified infringement of liberty by establishing that the police can only carry out an investigation of an acquitted person, with a view to possible retrial, with the approval of the DPP.
- The CCA has the *discretion* to prohibit publication of any matter "that would give rise to a substantial risk of prejudice to the administration of justice in a retrial". This is in recognition of the risk which the CCA's power to order a retrial poses to an acquitted person's right to a fair trial. Clause 9M enables the CCA to take steps to insulate potential jury members from the media attention that an order for retrial for a very serious offence would ordinarily attract. This necessarily involves prioritising the accused's right to a fair trial over the right to free speech and unrestricted media communication. The right to free speech is not an absolute right however and there are precedents for courts ordering restriction on the publication of information about ongoing criminal proceedings.
- Jury verdicts of acquittal are to be left undisturbed in all cases (other than where the judge has directed an acquittal) even if based on a misdirection on a point of law. This recognises the importance of the finality of the verdict of a jury [clause 9I(1)].

Possible additional safeguards

42. Despite these safeguards, on balance the Bill does significantly infringe individual rights. In some areas this could be ameliorated to an extent by the incorporation of further safeguards. Some of the ways in which this trespass might be lessened include:

- Requiring the DPP to wait for the outcome of any appeal against a conviction for an administration of justice offence before applying for a retrial on the grounds of a "tainted acquittal". The uncertainty and inconvenience for the acquitted person which is created by the retrial after acquittal procedure is exacerbated by the DPP's power to apply for, and the CCA to grant, a retrial order even where an appeal is pending in relation to the administration of justice conviction.
- Putting a time limit on the period that may lapse between the alleged commission of the offence or acquittal, and the application for retrial.
- Establishing a presumption in the Bill in favour of bail for an acquitted person facing a retrial. The state should be especially cautious about depriving acquitted persons of their liberty, not simply due to the presumption of innocence, to which all accused may lay claim, but because they can point to the fact that they have actually been found not guilty of the crime. Currently

clause 9L establishes that a person’s status as an acquitted person “is not to be taken into account as a reason for granting bail”.

- Strengthening protection of the acquitted person’s right to a fair retrial by setting the standard of proof to be used by the CCA in deciding whether to order a retrial sufficiently high to avoid unjustified infringement of the liberties of acquitted persons. At the same time, the standard of proof should not be so high that the CCA is perceived to be influencing the final decision on conviction or acquittal, which would impinge upon the right to trial by jury.⁵

Makes rights, liberties or obligations dependent on unclear administrative powers

43. Under clause 9K(4), the DPP cannot consent to a police investigation unless satisfied that the investigation is likely to yield sufficient new evidence and it is in the public interest for the investigation to proceed.
44. While the DPP must apply certain considerations before ordering an investigation under this Division, there are no such criteria prescribed for the DPP’s consideration before applying for a retrial.
45. Given the grave implications of the exercise of this power, it is appropriate that the circumstances and manner in which it is to be exercised by the DPP are spelt out in the legislation. Prescribing criteria that must be met before the DPP may apply to the CCA for a retrial will help to ensure that this significant power is exercised properly. At the very least, the DPP should consider the legal merits of the application and whether the retrial is in the interests of justice.

46. The Committee is strongly of the view that the power of the DPP to apply for a retrial is a significant power and should only be exercised in accordance with specified criteria. At the very least, these should include consideration of the legal merits of the case and whether it is in the public’s interest for the application to be made.

Clause 9K: Authorisation of police investigations

47. Clause 9K(3)(b) contemplates that the DPP’s consent may be given “after the start of the investigation” which appears to be inconsistent with the principle that prior authorisation is required. Clause 9K(6) allows the police to commence an investigation without DPP consent in circumstances of urgency, but it is unclear on the face of the Bill if clause 9K(3)(b) is intended to allow retrospective consent for investigations which are not urgent. This requires clarification.

⁵ The UK Bill sets the threshold for determining if evidence is compelling as “highly probable” that the person is guilty of the offence rather than “highly probative of the case against the acquitted person”. The UK wording minimises the likelihood of a retrial being ordered and maximises the liberty of acquitted persons. However, under such a standard, which is very similar to the criminal standard of “beyond a reasonable doubt” to be applied by a jury on retrial, it might be argued that if a jury was aware of the basis for the CCA’s decision, it might be very reluctant to disagree with it.

- 48. Requiring the DPP's consent before commencing an investigation is an important safeguard against trespasses to an acquitted person's right to privacy and freedom from interference and harassment by the State. For this reason, the Committee is of the view that exceptions to this rule should be very limited in number and scope. Proceeding with an investigation in an urgent situation (eg, to prevent destruction of evidence) may be an appropriate exception.**
- 49. The Committee is strongly of the view that the Bill should be clarified to make "urgent cases" the only exception to the rule. If other exceptions are contemplated, the Committee is of the view that these should be clearly set out and described in the Bill. These clarifications will help to ensure that the important safeguard in subclause 9K(3) is not unduly eroded.**

Makes rights, liberties or obligations dependent upon non-reviewable decisions

Appeal of an order by the CCA for retrial

50. Under the UK *Criminal Justice Bill* [clause 68], an appeal lies to the House of Lords, by the prosecutor or the acquitted person, from any decision of the Court of Appeal relating to an application for retrial of an acquitted person. No such provision is made in the NSW Bill. This is because the only avenue for appeal would be to the High Court⁶ and NSW cannot legislate to give appeal rights to the High Court.
51. However, interlocutory decisions relating to the application for a retrial made by a single judge of the CCA can be appealed to the full bench of the CCA [cl. 4 of the Bill and s 22 of the *Criminal Appeal Act 1912*].

- 52. The Committee notes with concern that the decision for a retrial is not reviewable, except by special leave of the High Court.**

⁶ An appeal to the High Court is possible under ss 35 and 35A of the *Judiciary Act 1903* (Cth), but it is not clear that the High Court would grant leave to appeal in these circumstances. Section 35A of the *Judiciary Act* sets out the grounds on which the High Court can grant special leave to appeal a decision from a State court:

In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:

- (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
 - (i) that is of public importance, whether because of its general application or otherwise; or
 - (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
- (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

Delegates legislative powers

Clause 2: Commencement

53. The Committee is of the view that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all. While there may be good reasons why such discretion may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

54. The Committee has written to the Minister seeking his advice as to the reason for commencement by proclamation and the likely commencement date of the Act.

55. The Committee notes that this Bill clearly trespasses on a number of personal rights fundamental to our system of justice, in particular the right not to be tried twice for the same conduct and the right not to be subjected to criminal prosecution on a retrospective basis.

56. The Committee acknowledges that the Bill contains some safeguards to minimise the adverse effects of these trespasses and to ensure that retrials are only carried out in very limited cases and only for very serious offences.

57. The Committee refers to Parliament the question of whether the safeguards in the Bill could better balance the objectives of the Bill against the protection of personal rights.

58. The Committee also refers to Parliament the question of whether the objectives of the Bill are so overwhelmingly in the public interest so as to not make these trespasses undue.

The Committee makes no further comment on this Bill.