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**DNA Evidence, Wrongful
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by

Gareth Griffith and Lenny Roth

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DNA Evidence, Wrongful Convictions and Wrongful Acquittals

by

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EXECUTIVE SUMMARY

The retention of DNA and other forensic evidence following the completion of the trial process raises many issues for the criminal law. On one side, is 'fresh' DNA or other evidence to be used by the prosecution to mount an appeal against what is perceived to be a wrongful acquittal, thereby transgressing the rule against double jeopardy? Conversely, is such evidence to be used to prove the innocence of a wrongfully convicted person? The problems involved in equating wrongful acquittals and wrongful convictions are discussed. The paper's main findings are as follows:

- Both sides to the DNA evidence equation are live issues in the contemporary debate, federally and for the States. At the Commonwealth level, Attorney General Ruddock is reported to favour the abolition of the double jeopardy rule by the adoption of legislation making it mandatory for Crown law officers to preserve DNA evidence 'in serious cases even after the appeals process has been exhausted'. In 2003 the Australian Law Reform Commission recommended the 'long-term retention of forensic material found at the scene of serious crimes to facilitate post-conviction analysis'. Mr Ruddock is reported to be 'keen to have the recommendations implemented'. (p 2-3)
- At the State level, the NSW Attorney General Bob Debus has indicated that legislation is to be introduced affecting both sides of the DNA evidence equation, with a spokesman saying that 'the Government supports retention of DNA evidence after the appeals process has been exhausted, and the Government is also drafting legislation for the retrial of someone after a DNA review'. On 15 July 2006 it was confirmed that legislation would be introduced to re-establish the NSW Innocence Panel, which is to be called the 'DNA Review Panel'. (p 3-5)
- In the last 20 years, **DNA evidence** has increasingly been used in criminal investigations and trials in Australia and overseas. DNA profiling is often used to compare DNA deposited on a victim or at a crime scene with a DNA sample taken from a suspect. If the two samples do not match, they did not come from the same source. If the two samples do match, this is strong evidence that they came from the same source but it is not conclusive. It is also noted that the reliability of DNA evidence can be affected by contamination, lab error, and planting. (p 6-12)
- Laws were enacted in NSW in 2000 that allow police to take DNA samples from suspects, serious offenders and volunteers. These laws also allow DNA information to be stored on a DNA database, and for certain types of DNA information on the database to be matched (eg matching of a crime scene profile with the profiles of serious offenders). Since 1998, attempts have been made to establish a national DNA database but this has been delayed because of a lack of uniformity throughout Australia in laws governing the collection and use of DNA samples. (p 12-18)
- With reference to DNA exoneration cases, the term '**wrongfully convicted**' tends to refer to those who are 'factually innocent of the crimes for which they have been convicted'. Viewed in this light, wrongful conviction cases are a distinct class, not to be confused with the broader category of miscarriages of justice. (p 20-21)
- Miscarriages of justice and wrongful convictions alike are the products of many diverse causes, often unrelated to DNA evidence. DNA exoneration cases are but one class within the broader category of wrongful conviction cases. (p 21-22)
- As at 31 July 2006, 183 people have been exonerated in the United States due to DNA analysis. (p 22)

- The UK's Criminal Cases Review Commission's Annual Report in 2004-05 showed that since 1997, 6,842 convicted defendants (or in some cases, their relatives) had sought to use its services, resulting in 271 (or 4.4%) being referred back to the Court of Appeal; of these references, 135 (or 68%) resulted in convictions being quashed (68%). These figures are not strictly comparable with those for the United States. (p 26)
- Part 13A of the *Crimes Act 1900* (NSW) provides for the review of a criminal conviction or sentence. This applies where 'there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case'. (p 27-29)
- The now defunct **NSW Innocence Panel** was established in August 2000 as a non-statutory body reporting to the Minister for Police. Unlike the UK Criminal Cases Review Commissions, the task of the NSW Innocence Panel was not to investigate offences or review convictions. Rather, its role was that of a 'facilitator', that is, to arrange for searches to be conducted by Police for nominated items and for DNA testing and comparison to be carried out. (p 32-33)
- The **Finlay Review** of 2003 recommended that the Panel, which is to continue to focus on DNA evidence, should be given a legislative basis under the *Crimes (Forensic Procedures) Act 2000* providing for its membership, duties, powers and responsibilities. A DNA Review Panel along the lines suggested would be unique to NSW. Differentiating it from the model adopted in the UK, it would not be a vehicle for general inquiry into all alleged miscarriage of justice cases. Unlike the Innocence Projects in the United States, it would operate under government auspices, albeit in an independent capacity. If it is to operate effectively, it must be backed by legislation for the long-term storage, preservation and retention of forensic material. (p 35-37)
- The term '**wrongful acquittal**' is conceptually difficult. To find any person guilty, where this cannot be proved evidentially beyond reasonable doubt, or where the conviction is achieved by procedurally dubious means, would be a miscarriage of justice. Of course injustices occur. The actually innocent are convicted, just as the actually guilty are set free. It is in this context that the term 'wrongful acquittal' is used, often as the reverse side of the coin to 'wrongful conviction'. Both terms might be said to resonate more in popular than strictly legal language, which is not to say that the subjects they refer to are not real enough. (p 39)
- The rule against **double jeopardy** states that a person who has been acquitted (or convicted) of an offence may not subsequently be charged with the same offence again. It makes no difference that new evidence of guilt is discovered after an acquittal. Is this rule to be amended? (p 39)
- The issue of double jeopardy raises many questions of a technical nature, as well as underlying questions of principle that underpin the criminal justice system. For those who support reform of the double jeopardy rule, the argument is that a new 'balance' can be found in the criminal justice deal, one that continues to uphold the rights of the accused while at the same time recognising the impact made by scientific advances and applying these to bolster the rights of victims and the interests of society at large. Those who oppose reform might argue that the language of 'balance' is misplaced in this context, suggesting as it does that rights can be traded without loss to the individual accused and without impairment to civil liberties generally. (p 63-64)

1. INTRODUCTION

The retention of DNA and other forensic evidence following the completion of the trial process raises many issues for the criminal law. On one side, is ‘fresh’ DNA or other evidence to be used by the prosecution to mount an appeal against what is perceived to be a wrongful acquittal, thereby transgressing the rule against double jeopardy? Conversely, is such evidence to be used to prove the innocence of a wrongfully convicted person? In posing these questions this paper builds on and updates previous briefing papers on *Double Jeopardy* (Briefing Paper No 16/2003) and *DNA Testing and Criminal Justice* (Briefing Paper No 5/2000).

This paper is in three main parts. As DNA evidence is so pertinent to the current debate, a broad outline of the nature of DNA evidence and forensic procedure legislation is presented first. There follow commentaries on wrongful convictions and wrongful acquittals, the last focusing on recent laws and recommendations for the reform of the rule against double jeopardy.

2. EQUATING WRONGFUL ACQUITTALS AND WRONGFUL CONVICTIONS

By way of cautionary note, it should be emphasised that the one side to this DNA evidence equation does not presuppose the other. As a matter of legal drafting, the use of ‘fresh’ DNA or other evidence to retry certain verdicts of acquittal could be accomplished without amending the law on post-conviction review where a wrongful conviction is claimed. Likewise, a statutory process to consider applications for post-conviction review could be established without reference to the double jeopardy rule. Logically and legally, the two matters are distinct.

This distinction can be taken to a more conceptual level. The UNSW Council for Civil Liberties (UNSWCCL) describes the propensity to equate wrongful acquittals with wrongful convictions as a ‘desire for symmetry in the law’, adding that this desire ‘fails to recognise that wrongful acquittals are conceptually different from wrongful convictions because the former do not involve the unconscionable incarceration of an innocent person by the state’.¹ This distinction can be said to find practical expression. Thus, while the principle of ‘finality’ is applied rigorously to acquittals, treating them as ‘incontrovertibly correct’,² a less categorical approach is adopted in relation to convictions, where statutory arrangements are in place for miscarriages of justice to be set aside or quashed.³

From an evidentiary standpoint, UNSWCCL warns that ‘there is no equivalence between

¹ UNSWCCL, Submission to the NSW Attorney General’s Community Consultation of the Draft Criminal Appeal Amendment (Double Jeopardy) Bill, 15 October 2003, p 26.

² *Rogers v Queen* (1994) 181 CLR 251 at 273 (Deane and Gaudron JJ); *R v Carroll* (2002) 213 CLR 635 at para 35 (Gleeson CJ and Hayne J). As discussed later in this paper, while verdicts can be appealed by the prosecution, this process can be distinguished from retrials.

³ Part 13A of the *Crimes Act 1900* (NSW) is discussed later in this paper.

DNA proving innocence and DNA proving guilt'. As DNA evidence cannot prove all the elements of an offence, it cannot therefore *prove* of itself that someone is guilty beyond reasonable doubt.⁴ UNSWCCL commented:

In a criminal trial the prosecution must prove a criminal charge beyond reasonable doubt. This means that the defence need only raise a reasonable doubt to attain a verdict of not guilty. DNA evidence, based on an assessment of probabilities, can raise such a doubt, thereby proving 'innocence'. But it *cannot* possibly, standing by itself, prove the accused is guilty beyond reasonable doubt. UNSWCCL is concerned that politicians, the media and the general public had not grasped this concept.⁵

It is the case, however, that in its critique of the Carr Government's draft 2003 bill designed to permit the retrial of an acquitted person in certain defined circumstances, thereby striking down the rule against double jeopardy, the UNSWCCL itself brought the issues of wrongful acquittal and wrongful conviction together, practically if not conceptually. UNSWCCL argued it would be 'inhumane and unthinkable cruel' to proceed with the draft bill 'without first reinstating the Innocence Panel', stating:

It is a very serious situation indeed when the Attorney General proposes to use the vast resources of the state to put acquitted people through retrial on new forensic evidence, while at the same time denying the same resources to inmates who have been wrongfully convicted and who seek to use DNA evidence to prove their innocence.⁶

For political and practical reasons it is likely that a connection will be made between double jeopardy and wrongful convictions. So much is indicated in the proposals seemingly under consideration at State and Commonwealth levels. For these reasons alone these two sides of the DNA evidence equation are treated as related issues in this paper.

3. PROPOSALS AND RECOMMENDATIONS

3.1 Commonwealth

Both sides to the DNA evidence equation are live issues in the contemporary debate, federally and for the States. At the Commonwealth level, the Attorney General Philip Ruddock is reported to favour the abolition of the double jeopardy rule by the adoption of legislation making it mandatory for Crown law officers to preserve DNA evidence 'in serious cases even after the appeals process has been exhausted'.⁷ Reports indicate that he

⁴ UNSWCCL, n 1, p 37. Of DNA evidence, it was explained - 'First, it is not 100 per cent accurate. Second, it is susceptible to various interpretations by experts. Third, it is only one piece of evidence that goes to establishing the guilt of an accused'.

⁵ UNSWCCL, n 1, p 38.

⁶ UNSWCCL, n 1, p 4.

⁷ M Brown, 'New law will permit retrials', *SMH*, 14 July 2006, p 4.

intended to put his proposal to the Premiers' Conference in July 2006. This followed the release of the Model Criminal Code Officers Committee's (MCCOC) report on double jeopardy in March 2004 which, among other things, recommended 'retrial of the original or similar offence where there is fresh and compelling evidence',⁸ of which DNA evidence is said to be a 'typical example'.⁹

MCOCC's report was on the use of DNA evidence to mount appeals against acquittals. On the other hand, the Australian Law Reform Commission in its 2003 report on the protection of human genetic information focused on the part DNA evidence might play in overturning wrongful convictions. Recommended was the 'long-term retention of forensic material found at the scene of serious crimes to facilitate post-conviction analysis'. Also recommended was the establishment by the Commonwealth of 'a process to consider applications for post-conviction review from any person who alleges that DNA evidence may exist that calls his or her conviction into question'.¹⁰ In respect to this, a media adviser to the Commonwealth Attorney General is reported to have said that Mr Ruddock:

had taken the brief from the standing committees of the State Attorneys General, who had been looking at it, and was 'keen to have the recommendations implemented'.¹¹

3.2 New South Wales

At the State level, the NSW Attorney General Bob Debus has indicated that legislation is to be introduced affecting both sides of the DNA evidence equation. On 14 July 2006 a spokesman for Mr Debus said:

the Government supports retention of DNA evidence after the appeals process has been exhausted, and the Government is also drafting legislation for the retrial of someone after a DNA review.¹²

⁸ MCCOC, *Report: Chapter 2 – Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, March 2004. The report followed the publication of a discussion paper in November 2003.
[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/DF02560DFF8762DDCA256E61007BC55B/\\$FILE/Double+Jeopardy+Report+25+Mar.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/DF02560DFF8762DDCA256E61007BC55B/$FILE/Double+Jeopardy+Report+25+Mar.pdf)

⁹ MCCOC, Discussion Paper: *Chapter 2 – Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, November 2003, p iii.
[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/\(CFD7369FCAE9B8F32F341DBE097801FF\)~0+Double+Jeopardy+discusion+paper.pdf/\\$file/0+Double+Jeopardy+discusion+paper.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F32F341DBE097801FF)~0+Double+Jeopardy+discusion+paper.pdf/$file/0+Double+Jeopardy+discusion+paper.pdf)

¹⁰ ALRC and National Health and Medical Research Council, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Vol 2, Report 96, March 2003, pp 1124-1130.

¹¹ M Brown, 'Crime comes in from the cold', *SMH*, 15 July 2006, p 32.

¹² M Brown, 'New law will permit retrials', *SMH*, 14 July 2006, p 4.

On 15 July 2006 it was confirmed that legislation would be introduced to re-establish the NSW Innocence Panel, which is to be called the 'DNA Review Panel', to be answerable to the Attorney General, not the Police Minister. It is reported that the Panel is to have the power to 'disclose results of the review to victims' families and applicants',¹³ a proposal that is consistent with the views expressed by the President of the NSW Bar Association, Michael Slattery QC.¹⁴ The NSW Innocence Panel was established as an administrative, non-statutory body in October 2001. Its operations were suspended on 11 August 2003 by the then Police Minister, John Watkins, who said:

I'm suspending the operations of the Innocence Panel because I don't believe there are sufficient checks and balances to protect the victims of crime from further anguish...I believe the Panel needs legislative support to help it protect victims better. The Innocence Panel process, as it is, leaves too many questions unanswered. It should be more transparent for applicants, victims and their families.¹⁵

The issue of double jeopardy was debated in NSW in 2003, in the context of the release in September that year of the Draft Criminal Appeal Amendment (Double Jeopardy) Bill. This was never presented to Parliament, the Government agreeing to wait for the relevant MCCOC report. This strategy was consistent with the views expressed in November 2003 by Acting Justice Jane Mathews in her advice to the Attorney General, *Safeguards in Relation to Proposed Double Jeopardy Legislation*.¹⁶ In the event, when the MCCOC report was discussed by the Standing Committee of Attorneys-General (SCAG) in March 2004, the Minister for Justice and Customs, Senator Chris Ellison, said:

Whilst the Commonwealth, Queensland, New South Wales and Western Australia agreed that fresh and compelling evidence could provide an exception to the double jeopardy rule in strict circumstances, the remainder of the States and Territories could not agree on this issue.¹⁷

¹³ T Dick, 'DNA panel to give convicted another chance', *SMH*, 15 July 2006, p 7; 'Plan for DNA review body', *The Daily Telegraph*, 15 July 2006, p 19.

¹⁴ The NSW Bar Association, 'DNA evidence that shouldn't be ignored', 14 July 2006 - <http://www.nswbar.asn.au/database/show-mediarelease.php?id=166>

¹⁵ Minister for Police, Hon John Watkins MP, *Media Release*, 'The Innocence Panel', 11 August 2003. The Minister revealed that the decision was prompted by the Innocence Panel receiving an application from Stephen Jamieson, among the co-offenders convicted of the rape and murder of Janine Balding in 1988 - R Johns, *Double Jeopardy*, NSW Parliamentary Library Briefing Paper No 16/2003, p 44.

¹⁶ Acting Justice Mathews did not recommend this strategy as such. Rather, she commented that the suggestion had 'substantial merit' (page 4).

¹⁷ Commonwealth Minister of Justice and Customs, Senator Chris Ellison, 'Double jeopardy reform still on the agenda', *Media Release*, 22 March 2004 - <http://www.ag.gov.au/www/justiceministerHome.nsf/Web+Pages/C6FF6E5127873C12CA256E5E0081788C?OpenDocument>

On 4 November 2005 the Commonwealth Attorney General expressed his disappointment about the lack of agreement between some States and Territories to reconsider the reform of the legal principle of double jeopardy. Mr Ruddock stated:

The reform of the double jeopardy principle is too important an issue to remove from the agenda of the Standing Committee of Attorneys General... This issue is not going to go away. New South Wales has indicated its intention to reform this rule by introducing legislation into Parliament in the near future. I am disappointed that some of the States and Territories are not prepared, at a minimum, to consider the text of the NSW proposal to see whether these provisions could be used as the model for national uniformity.¹⁸

It is to this issue, as well as to the establishment of a statutory ‘Innocence Panel’, that the debate has now returned.

¹⁸ Commonwealth Attorney General, ‘States should at least consider double jeopardy’, *Media Release*, 4 November 2005.

4. DNA EVIDENCE

DNA evidence was first used in a criminal investigation in the *Pitchfork case* in England in 1986.¹⁹ Australia's first court case involving DNA evidence was in the Australian Capital Territory in 1989.²⁰ In the last 20 years, the science of DNA profiling has developed and it is increasingly being used in criminal investigations and trials in Australia and overseas.²¹ This paper gives only a brief outline of what is a complex and changing field.²²

4.1 What is DNA?

Deoxyribonucleic acid (DNA) is a long molecule that is found in every nucleated cell in the human body.²³ It has been referred to as the “blueprint for life” as it carries all of a person's genetic information.²⁴ It contains “information used in everyday metabolism and growth and influences most of our characteristics”.²⁵ DNA is inherited from a person's mother and father and it therefore passes genetic information from one generation to the next.²⁶ With the exception of identical twins, no two persons have the same DNA.²⁷

¹⁹ Legislative Council, Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000*, NSW Parliament, Report 18, February 2002, p6.

²⁰ J Gans and G Urbas, 'DNA Identification in the Criminal Justice System', Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice*, No. 226, May 2002, p5. The authors note that in the 1989 case of *Desmond Applebee* the accused was charged with sexual assault. He initially denied any contact with the victim but, after DNA evidence was admitted, changes his defence to consensual intercourse. He was convicted by a jury.

²¹ For a brief chronology of developments in the use of DNA evidence, see CrimTrac, 'Key Dates in the History of DNA Profiling', available at <http://www.crimtrac.gov.au/dnahistory.htm>.

²² For further reading, see L Wilson-Wilde, 'DNA Profiling and its Impact on Policing', in *Use of DNA in the Criminal Justice System*, papers from a public seminar presented by the Institute of Criminology, University of Sydney, Sydney University Law School, 11 April 2001; A Haesler SC, 'DNA for Defence Lawyers', 2005, available at: http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_dnadefencelawyers. Gans and Urbas, n 20; Legislative Council, Standing Committee on Law and Justice, n 19, especially Chapters 2 and 3; Australian Law Reform Commission and National Health and Medical Research Council, *Essentially Yours Report: The Protection of Human Genetic Information in Australia*, Report 96, March 2003, Vol 2, Part J; Victorian Parliament Law Reform Committee, *Forensic Sampling and DNA Databases in Criminal Investigations*, Victorian Parliament, March 2004.

²³ Wilson-Wilde, n 22, p2.

²⁴ L Wilson-Wilde, 'DNA Profiling in Criminal Investigations', in Freckelton and Selby, *Expert Evidence*, The Law Book Company, Volume 4, p80-2053.

²⁵ Biotechnology Online: <http://www.biotechnologyonline.gov.au/biotec/whatisdna.cfm>.

²⁶ Wilson-Wilde, n 22, p2. See also CrimTrac, 'What is DNA?', available at: <http://www.crimtrac.gov.au/dna.htm>.

²⁷ CrimTrac, 'What is DNA?', available at: <http://www.crimtrac.gov.au/dna.htm>.

4.2 How is DNA used to investigate crime?

There are three main ways in which DNA analysis is used in criminal investigations:

- (1) DNA deposited on a victim or at a crime scene is compared with a DNA sample taken from a person suspected of some involvement in the crime.²⁸
- (2) If there are no suspects, DNA deposited on a victim or crime scene can be compared with a DNA database containing DNA profiles of convicted offenders.²⁹ A match generated through this process is known as a ‘cold hit’.
- (3) If there are no suspects, DNA deposited on a victim or crime scene can be compared with the DNA samples volunteered by all members of a locality (ie a mass screening, as occurred in the NSW town of Wee Waa in 2000).³⁰

4.3 How are DNA samples obtained?

4.3.1 Obtaining DNA samples from crime scenes: DNA is found “in blood, semen, hair, skin, faeces, urine, vomit, bone marrow and cells present in saliva, sweat and tears”.³¹ It has been noted that crime scene samples:

...can be derived from many different materials and areas. It is possible to obtain samples of DNA from fabrics, cigarettes, tools and utensils as well as from minute amounts of biological material, even where this material has been deposited many years earlier, has been degraded or is not even visible to the naked eye.³²

However, the quantity and quality of biological samples affect DNA analysis and therefore not all samples found at a crime scene are forensically useful.³³

4.3.2 Obtaining DNA samples from suspects, offenders and volunteers: Laws enacted in NSW (and other jurisdictions) allow police to take DNA samples from suspects, serious offenders and volunteers. Different types of samples can be taken, including blood and saliva samples. These laws are outlined in more detail below.³⁴

²⁸ Victorian Parliament Law Reform Committee, *Forensic Sampling and DNA Databases in Criminal Investigations*, Victorian Parliament, March 2004, pxxix.

²⁹ DNA databases in Australia are discussed below in sections 4.9.2 and 4.11.

³⁰ Based on Gans and Urbas, n 20, p2-3.

³¹ Standing Committee on Law and Justice, n 19, p5.

³² VPLRC, n 28, p96 and see also at p98-99.

³³ Standing Committee on Law and Justice, n 19, p5.

³⁴ See section 4.9.

4.4 How are DNA samples compared?

Forensic experts use a process known as ‘DNA profiling’ to compare two DNA samples. This involves creating a DNA profile from each sample by using a number of specific sites along the DNA molecule. There are different methods of DNA profiling. In Australia:

All...forensic laboratories regularly involved in criminal casework use a profiling kit known as Profiler Plus. This kit uses the polymerase chain reaction method, involving extraction of DNA from the sample, amplification and analysis to create the DNA profile. The profile comprises a set of numbers and an indicator of sex. A typical example of a DNA profile looks like this: ‘XY 10,12 18,19 14,14 15,16 25,28 16,12 11,10 29,30 17,18’. The numbers indicate the number of short tandem repeats (STRs) found at nine sites, or loci, along the DNA molecule. There are two sets of numbers for each loci, one inherited from each parent.³⁵

The set of numbers in a DNA profile are generated from regions of the DNA molecule that do not contain genetic information (known as ‘non-coding regions’ or ‘junk DNA’).³⁶ DNA profiles therefore do not contain genetic information about a person, except for an indication of their gender (XY indicates a male, whereas XX indicates a female).³⁷

Once DNA profiles have been generated for each DNA sample, they can be compared to see if they match. The meaning of a match or non-match is discussed below.

4.5 What do profiling results (eg a match) mean?

Ms Wilson-Wilde, from the NSW Police Service, Forensic Services Group, has explained the significance of profiling results as follows:

...When two samples do not match this is a definitive exclusion – they do not come from the same source, but when two samples do match this means they **may** have come from the same source. It is not conclusive [but] it is extremely strong evidence.³⁸ (original emphasis).

Ms Wilson-Wilde noted that the reason why a match is not conclusive is because DNA profiling only looks at a number of specific sites rather than looking at the entire DNA code (which would take years because the DNA molecule is so large).³⁹

³⁵ Australian Law Reform Commission and National Health and Medical Research Council, *Essentially Yours Report: The Protection of Human Genetic Information in Australia*, Report 96, March 2003, p974.

³⁶ VPLRC, n 28, p 52-53, p97.

³⁷ Wilson-Wilde, n 22, p3.

³⁸ Wilson-Wilde, n 22, p5.

³⁹ Wilson-Wilde, n 22, p5.

In other words, there is a possibility that two DNA profiles match purely by coincidence and that they do not in fact come from the same source. Thus, it has been said that it is misleading to talk of DNA profiling as “genetic fingerprinting”.⁴⁰

Forensic scientists have developed statistical models for calculating the significance of a DNA profile match. In criminal trials, scientists often present their statistical calculations in terms of ‘match probability’.⁴¹ Match probability is:

...the probability that a person other than the suspect, randomly selected from the population, will have the same profile as that found at the crime scene. The smaller the probability, the greater the likelihood that the two samples came from the same person.⁴²

Often match probability is expressed as being one in several million, or even billion. In Victoria, match probability is generally given as 1 in 98 million.⁴³ This does not mean that there is a 1 in 98 million chance that a person other than the suspect/defendant: (a) left the DNA sample at the crime scene; or (b) is guilty of the crime. To state the statistical evidence in these terms is known as the ‘prosecutor’s fallacy’.⁴⁴

One of the problems with this statistical evidence is that the jury draw improper inferences of guilt. The Australian Law Reform Commission has stated:

The use of match probabilities has been criticised on the basis that jurors, as ordinary members of the community, generally do not understand probabilities and infinitesimal match probabilities (eg ‘one in 90 billion’) will so dazzle jurors that they will not be able to evaluate the evidence fairly and critically.⁴⁵

It is also important to note that the calculation of match probabilities is based on a number of assumptions.⁴⁶ One contentious area is the validity of using a general population

⁴⁰ B Hocking et al, ‘DNA, Human Rights and the Criminal Justice System’ (1997) 3(2) *Australian Journal of Human Rights* 2, quoted in Standing Committee on Law and Justice, n 19, p26.

⁴¹ ALRC, *Essentially Yours*, n 35, p1096.

⁴² ALRC, *Essentially Yours*, n 35, p1096

⁴³ Victorian Parliament Law Reform Committee Report, n 28, p107, p351.

⁴⁴ A Haesler SC, ‘DNA for Defence Lawyers’, 2005, at p10: available at: http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_dnadefencelawyers. See also G Hazlitt, ‘DNA Statistical Evidence: Unravelling the Strands’, (2002) 14(9) *Judicial Officers Bulletin* 66. See also Justice Wood, ‘Forensic Sciences from the Judicial Perspective’, paper presented at 16th International Symposium on Forensic Sciences, Canberra, 13-17 May 2002. Justice Wood’s paper cites the following judicial decisions that have recognised the prosecutor’s fallacy: *R v GK* (2001) 53 NSWLR 317, *R v Galli* (2001) 127 A Crim R 493, and *R v Keir* (2002) 127 A Crim R 198.

⁴⁵ ALRC, *Essentially Yours*, n 35, p1097.

⁴⁶ See A Haesler, n 44, p9.

database to calculate probabilities in cases where the accused comes from an ethnic group. According to one view, there is a higher chance of a match between members of an ethnic group and calculations based on the general population may therefore underestimate the probability.⁴⁷ Some jurisdictions have developed separate databases for ethnic groups.⁴⁸

A coincidental match of DNA profiles occurred in 1999 in the United Kingdom:

...a man was charged with a break-and-enter offence after being matched via the UK database to a crime scene profile. The match odds were given as one in 37 million. The man suffered from Parkinson's disease, could not eat or dress himself without assistance, couldn't drive and was confined to a wheelchair. The break and enter took place on a second floor apartment that was 200 miles from his home. The man simply had the same six loci DNA profile as the actual perpetrator. He was later excluded with more discriminating tests [ie: comparison at ten loci].⁴⁹

4.6 Are DNA profiling results otherwise reliable?

Some other issues relating to the reliability of DNA profiling results are noted below.

4.6.1 Contamination and lab error: A 2003 report by the Australian Law Reform Commission notes that:

Laboratory staff could make errors in conducting DNA analysis, in interpreting or reporting the results of the analysis, or in entering the resulting DNA profile into a DNA database system. This might result from the failure to comply with an established procedure, misjudgement by the scientist, or some other mistake.⁵⁰

An article published in 2005 by Kirsten Edwards, senior lecturer in law at the University of Technology, Sydney, and Director of UTS Innocence Project, outlines "ten things about DNA contamination and lab error that lawyers should know".⁵¹ Four of these things are "it happens a lot", "it happens in Australia", "it can and does happen at every stage of the evidentiary process", and "sometimes it cannot be detected".⁵²

⁴⁷ See Legislative Council Standing Committee, n 19, p28-30.

⁴⁸ VPLRC, n 28, p354. See also A Haesler, n 44, p8.

⁴⁹ K Edwards, 'Ten things about DNA contamination that lawyers should know', (2005) 29(2) *Criminal Law Journal* 71 at 76.

⁵⁰ ALRC, *Essentially Yours*, n 35, p1094.

⁵¹ K Edwards, n 49, p71.

⁵² K Edwards, n 49, p71. See also A Haesler, n 44, p6-7.

4.6.2 *Planting and tampering:* The Law Reform Commission's report also states that:

A suspect's DNA profile might match the profile found at a crime scene as a result of tampering with the crime scene, or subsequent substitution of DNA samples. This might occur where the actual offender, a police investigator, or another person deliberately leaves a suspect's genetic sample at the crime scene. Alternatively, it is possible that a suspect's sample might later be substituted for the actual crime scene sample to falsely implicate the suspect in the offence.⁵³

4.7 Do DNA profiling results establish guilt and innocence?

Even if the possibilities of coincidental match, lab error, contamination and tampering are discounted, a DNA profile match does not necessarily establish guilt beyond reasonable doubt. This is because there may still be the possibility that the defendant's DNA sample was *innocently* left at the crime scene before, during or immediately after the offence.⁵⁴ Of course, other evidence in the case may negate this possibility.

As noted above, if there is no match between a suspect's DNA profile and the profile of a crime scene sample, this categorically excludes the defendant as the source of that DNA. However, it does not always necessarily follow from this that the defendant is innocent or more correctly, that there is a reasonable doubt about his or her guilt.⁵⁵ Other evidence in the case might nevertheless establish guilt beyond reasonable doubt.

4.8 Using DNA evidence to overturn a wrongful conviction

There has been one case in Australia where DNA evidence has been used to overturn a wrongful conviction. This was the case of Frank Button, who served 10 months of a 7-year sentence for the rape of a 13-year-old girl in Queensland in 1999, before having his conviction overturned by the Queensland Court of Appeal.⁵⁶ As Kirsten Edwards reports:

The girl initially denied knowing the rapist and provided a description of the man to police. She then changed her original statement and nominated Frank Button as the rapist. DNA evidence was not used in the trial. A rape kit was prepared and vaginal swabs obtained from the rape victim had revealed the presence of spermatozoa, but testing failed to yield a conclusive DNA profile. Sheets and pillowcases from the victim's bed were also sent to the [lab] but were not tested at all. Button was convicted and sentenced to seven years prison.

⁵³ ALRC, *Essentially Yours*, n 35, p1095.

⁵⁴ See ALRC, *Essentially Yours*, n 35, p1094. See also VPLRC, n28, p384. See also A Haesler, 'DNA for defence lawyers', (2006) 72 *Precedent* 8 at 9, as to the possibility of a suspect's DNA being innocently transferred to the crime scene.

⁵⁵ Gans and Urbas, n 20, p3.

⁵⁶ 'Crime comes in from the cold', *Sydney Morning Herald*, 15/7/06. The decision of the Queensland Court of Appeal is *The Queen v Frank Allan Button* [2001] QCA 133.

[He] lodged an appeal that raised the absence of scientific evidence in his case. Only then did the lab test the bedding from the girl's room. A semen stain was discovered on the complainant's bed sheet and it revealed a DNA profile, but the profile did not match Frank Button. Alarmed, the lab tested the vaginal swabs again. This time the lab found a male DNA profile. This profile also did not match Button. In fact, it was the same profile found on the sheets. The profile was run through the Queensland convicted offender database and matched the DNA profile of a convicted rapist who met the victim's initial description of the offender and lived in the same community. Frank Button was released after serving ten months in jail where he was bashed and sexually assaulted. The Queensland Court of Criminal Appeal described the case as "a black day in the history of criminal justice administration in Australia".⁵⁷

4.9 Laws authorising forensic procedures and DNA matching

4.9.1 Australia: Since 1997, all Australian jurisdictions, including the Commonwealth, have passed laws that allow for the carrying out of forensic procedures (including procedures to collect DNA samples) on suspects, certain offenders and volunteers.⁵⁸ The laws in most, if not all, jurisdictions also allow DNA profiles to be placed on a DNA database and permit database information to be shared between jurisdictions. To varying degrees, the laws in each jurisdiction (except in the Northern Territory) have been based on model forensic procedure laws developed by the Model Criminal Code Officers Committee.⁵⁹ The model bill was released in 1994, it was redrafted in 1995 and 1999 and it was finalised in 2000.

4.9.2 New South Wales: The NSW Government introduced forensic procedures laws in 2000. The *Crimes (Forensic Procedures) Act 2000*, which closely follows the Model Bill, commenced on 1 January 2001.⁶⁰ In 2002, the Government made a number of amendments to the Act⁶¹ following a review of the Act by the Law and Justice Committee of the Legislative Council.⁶² Before outlining the Act's provisions it is relevant to note that other reviews of the Act have been conducted. In March 2002, Professor Mark Findlay was asked to conduct an independent review of the Act on behalf of the Attorney General. Professor Findlay's report was tabled in Parliament in November 2003.⁶³ In August 2004,

⁵⁷ K Edwards, n 49, p73.

⁵⁸ See ALRC, *Essentially Yours*, n 35, p982.

⁵⁹ For a brief summary of how closely the laws in the various jurisdictions follow the model bill, see ALRC, *Essentially Yours*, n 35, p982.

⁶⁰ However, Part 8 of the Act, which regulates forensic procedures conducted on volunteers, did not commence until 1 June 2003.

⁶¹ *Crimes (Forensic Procedures) Amendment Act 2002* (NSW).

⁶² Standing Committee on Law and Justice, n 19.

⁶³ M Findlay, *Independent Review of the Crimes (Forensic Procedures) Act 2000*, April 2003 (tabled in Parliament on 19 November 2003).

the NSW Ombudsman published a report dealing with the sampling of serious indictable offenders under the Act.⁶⁴ The **key elements of the Act** (in its current form) are:

- Police may carry out forensic procedures on:
 - *Suspects*: meaning a person whom a police officer suspects on reasonable grounds has committed an offence.
 - *Serious offenders*: meaning a person who is serving a sentence of imprisonment for a serious indictable offence (ie an offence that is punishable by imprisonment for a term of 5 years or more).
 - *Volunteers*: meaning a person who volunteers to undergo a forensic procedure (eg for the purposes of a mass screening).

- There are three types of forensic procedures:
 - (i) *Intimate*: for example, taking samples of blood, saliva or pubic hair.
 - (ii) *Non-intimate*: for example, fingerprints, samples of non-pubic hair, and scrapings from under fingernails.
 - (iii) *Buccal swabs*: these involve scraping the lining inside the mouth to collect saliva and cells from the inner-cheek lining.

- Intimate forensic procedures and buccal swabs can only be carried out on suspects and serious offenders with informed consent or if authorised by court order.

- Police must comply with a number of rules when carrying out forensic procedures: eg with respect to privacy, who may carry out the procedure, and the use of force.

- Evidence obtained in breach of the provisions in the Act is not admissible in court proceedings unless the court exercises its discretion to admit the evidence.

- Forensic material obtained from suspects, convicted offenders and volunteers must be destroyed in certain circumstances: eg if a suspect is acquitted.

- DNA profiles may be stored on a DNA database (see NSW DNA database below).

- Arrangements may be made with participating Australian jurisdictions for the sharing of information on DNA databases (see national DNA database below).

- Forensic procedure orders made in participating Australian jurisdictions may be enforced in NSW in accordance with the rules in the Act.

⁶⁴

NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, August 2004.

4.9.3 Provisions relating to NSW DNA database: The Act provides for a DNA database containing the following indexes of DNA profiles:

- (i) A crime scene index
- (ii) A missing persons index
- (iii) An offenders index
- (iv) A suspects index
- (v) An unknown deceased persons index
- (vi) A volunteers (limited purpose) index
- (vii) A volunteers (unlimited purposes) index.⁶⁵

A DNA database may also contain information that may be used to identify the person from whose forensic material each DNA profile was derived.⁶⁶

The Act allows information on the database to be used for the purposes of matching certain DNA profile indexes.⁶⁷ For example, the crime scene index can be matched against the serious offenders index. The matching rules are outlined in the Table below.⁶⁸

	Crime scene	Suspects	Volunteers (limited)	Volunteers (unlimited)	Offenders	Missing persons	Unknown deceased
Crime scene	Yes	Yes	No	Yes	Yes	Yes	Yes
Suspects	Yes	No	No	No	Yes	No	Yes
Volunteers (limited)	Only within purpose	No	No	No	Only within purpose	Only within purpose	Only within purpose
Volunteers (unlimited)	Yes	No	No	No	Yes	Yes	Yes
Offenders	Yes	Yes	No	No	Yes	Yes	Yes
Missing persons	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Unknown deceased	Yes	Yes	Yes	Yes	Yes	Yes	No

Information may also be accessed for a limited number of other purposes listed in the Act: for example, when reviewing a conviction under Part 13A of the *Crimes Act 1900*.⁶⁹

⁶⁵ Section 90.

⁶⁶ Section 90.

⁶⁷ Sections 92(2)(a) and 93.

⁶⁸ This table is taken from Section 93.

⁶⁹ See section 92(2).

As noted above, the Act requires forensic material taken from suspects etc to be destroyed in certain circumstances: for example, if a suspect is acquitted, or if an offender's conviction is quashed. Consistent with these provisions, the Act requires identifying information about a person to be removed from the DNA database as soon as practicable after the time when the person's forensic material must be destroyed.⁷⁰

4.10 Data on DNA testing and matching in NSW

There is no publicly available complete set of data on DNA testing and outcomes of testing from the time when the laws came into effect until the present time. NSW Police annual reports provide data on DNA testing and cold hits but only from 1 July 2002 until 30 June 2005.⁷¹ On 9 June 2005, the Police Minister, Hon Carl Scully MP, reported that, "in the first four years of DNA testing, DNA samples have been taken from 26,400 people, including more than 7,600 suspects. The rest were prison inmates".⁷²

On 9 June 2005, the Minister also reported that there had been 3,710 'warm hits' and 7,853 'cold hits'.⁷³ A warm hit is when the DNA of a suspect is linked with a crime scene sample; a cold hit is when the DNA of a person who was not a suspect is linked to a crime-scene sample.⁷⁴ As to outcomes from cold hits, the NSW Police annual report for 2004/05 shows that prior to 30 June 2005, charges were laid in relation to 3,182 cold-linked crime scenes (3,680 offences); and convictions were recorded in relation to 2,250 offences.⁷⁵

4.11 The national DNA database

4.11.1 Launch of the national DNA database: In 1998, the Federal Government announced the establishment of CrimTrac, a new national law enforcement information agency.⁷⁶ CrimTrac was given the task of establishing a national DNA database to facilitate the exchange of DNA information between Australian jurisdictions. In 2001, the Federal Government enacted laws to create a broader forensic procedures and a framework for the national DNA database.⁷⁷ When the new laws came into force in June 2001, the

⁷⁰ Section 94.

⁷¹ See NSW Police, *Annual Report 2003/04*, p81; NSW Police, *Annual Report: 2004/05*, p92.

⁷² Hon Carl Scully MP, *NSW Parliamentary Debates*, 9/6/05, p16, 913. For earlier reports of data by the Government, see Hon John Watkins MP, 'DNA Report Card: 2070 arrests; 1342 convictions', *Media Release*, 14/11/04; Hon John Watkins MP, 'More than 5,400 hits on DNA Database means new leads in thousands of crimes', *Media Release*, 26/11/03; and Premier of NSW, 'Criminal Investigation and DNA Plan', *Media Release*, 5/3/03.

⁷³ Hon Carl Scully MP, *NSW Parliamentary Debates*, 9/6/05, p16, 913.

⁷⁴ M Findlay, n 63, p15, footnote 35. See also NSW Police, *Annual Report: 2004/05*, p92.

⁷⁵ NSW Police, *Annual Report: 2004/05*, p92.

⁷⁶ CrimTrac, 'Key Dates in the History of DNA Profiling', n 21.

⁷⁷ *Crimes Amendment (Forensic Procedures) Act 2001* (Cth). A limited regime for forensic procedures was enacted in 1998: see *Crimes Amendment (Forensic Procedures) Act 1998*

Government launched the national DNA database, known as the National Criminal Investigation DNA database (NCIDD).⁷⁸ At this time, the technology was in place for jurisdictions to upload DNA profiles onto the national database.⁷⁹ However, information on the database could not be shared between jurisdictions until relevant legislation and Ministerial agreements were put into place and CrimTrac's requirements were met.⁸⁰ CrimTrac does not allow inter-jurisdictional matching to take place on the national DNA database unless the exchanging jurisdictions have met four conditions:

Firstly, both jurisdictions have to have an endorsed [Memorandum of Understanding] with CrimTrac. Secondly, they need to provide CrimTrac with the relevant interjurisdictional matching table. Thirdly, they need to be able to notify [CrimTrac] of their ability to commence interjurisdictional matching via the NCIDD, which requires an endorsed bilateral [Ministerial Agreement]. Fourthly, they need to have entered all of their data onto the NCIDD.⁸¹

4.11.2 Delays with implementing the national DNA database: The implementation of the national database has been delayed, primarily because of the lack of uniformity throughout Australia in laws governing the collection and use of DNA samples.⁸² One of the problems with States having different laws regulating the collection and use of DNA samples is that:

... a law enforcement agency in one State may have access to forensic information obtained in another jurisdiction to which they would not have had access if they were limited to information collected, used and destroyed in accordance with their own State legislation.⁸³

Only a few jurisdictions currently carry out inter-jurisdictional matching on the national database. On 10 June 2005, matching commenced between Queensland and Western Australia pursuant to a bilateral agreement.⁸⁴ Since then, the Northern Territory has

(Cth).

⁷⁸ Hon Senator Christopher Ellison, 'CrimTrac's new crime fighting systems switched on', *Media Release*, 20/6/01.

⁷⁹ Hon Senator Christopher Ellison, 'CrimTrac's new crime fighting systems switched on', *Media Release*, 20/6/01.

⁸⁰ See J Norberry, *Crimes Act Amendment (Forensic Procedures) Bill (No. 1) 2006*, Australian Parliamentary Library, *Bills Digest*, No. 164, 2005-06, 30 June 2006, p5.

⁸¹ B McDevitt, Chief Executive Officer, CrimTrac, Senate Legal and Constitutional Legislation Committee, *Budget Estimates Hansard*, 25/5/06, p122.

⁸² See R Johns, *Double Jeopardy*, NSW Parliamentary Library Research Service, *Briefing Paper No. 16/03*, August 2003, p 45. See ALRC report, n 35, Ch 40. See also The Senate Legal and Constitutional Legislation Committee, *Crimes Act Amendment (Forensic Procedures) Bill (No. 1) 2006*, Parliament of Australia, August 2006, p4-6.

⁸³ National Legal Aid, Submission, dated 19 February 2003, quoted in ALRC, *Essentially Yours*, n 35, p996.

⁸⁴ CrimTrac, *Annual report: 2004/05*, p20.

commenced matching with Queensland and Western Australia.⁸⁵ The Federal Government has also recently agreed to commence matching with Queensland and Western Australia.⁸⁶ In June 2006, following concerns expressed by some States and Territories about Federal laws, the Federal Government introduced a bill to ensure there are no legal impediments to matching between the Federal Government and States/Territories.⁸⁷

On 28 July 2006, in a meeting of the Standing Committee of Attorneys-General, discussions were held about delays in implementing the national DNA database. Senator Chris Ellison, reported on these discussions as follows (in part):

...the SCAG Working Group has agreed to prepare a report addressing all outstanding matters for the November meeting, in order to progress the operation of the database to allow for the exchange of DNA information.⁸⁸

Senator Ellison commented further that the States and Territories would determine whether legislative change was required and that current bilateral Ministerial arrangements would be re-negotiated.⁸⁹ Senator Ellison concluded that “while there are issues to be resolved and clarified before NCIDD can be used for full inter-jurisdictional matching, parties remain committed to inter-jurisdictional matching”.⁹⁰

4.11.3 Information on the national DNA database: The information that jurisdictions load onto the national DNA database is the DNA profile, a unique identification number, the category of sample (eg, suspect), and the date the profile must be removed from the database.⁹¹ The information on the database cannot be used to identify a person. Only “the forensic laboratory in the police agency that supplied the identifier can identify individual names and circumstances associated with the profiles”.⁹² DNA profiles are automatically

⁸⁵ Senate Report, n 82, p 5, para 2.12.

⁸⁶ Senator Hon Christopher Ellison, ‘Minister Commends Progress on National DNA Database’, *Media Release*, 28/7/06.

⁸⁷ *Crimes Act Amendment (Forensic Procedures) Bill (No. 1) 2006*. This bill was introduced in the Senate on 21 June 2006. In August 2006, the Legal and Constitutional Legislation Committee recommended that the bill be passed. As at 17 August 2006, the bill had not been passed by the Senate.

⁸⁸ Senator Hon Christopher Ellison, ‘Minister Commends Progress on National DNA Database’, *Media Release*, 28/7/06.

⁸⁹ Senator Hon Christopher Ellison, ‘Minister Commends Progress on National DNA Database’, *Media Release*, 28/7/06.

⁹⁰ Senator Hon Christopher Ellison, ‘Minister Commends Progress on National DNA Database’, *Media Release*, 28/7/06.

⁹¹ J Mobbs, ‘The National Criminal Investigation DNA Database – An Investigative Tool for the Future’, in *Use of DNA in the Criminal Justice System*, papers from a public seminar presented by Institute of Criminology Sydney, Sydney University Law School, 11 April 2001.

⁹² CrimTrac, *Annual Report: 2004/05*, p19.

removed from the database on the dates specified.⁹³

The national DNA database was ready in June 2001 but by 30 June 2002, NSW was the only jurisdiction that had uploaded DNA profiles.⁹⁴ By 30 June 2004, over 50,000 records had been uploaded and by 30 June 2005, more than 150,000 records had been uploaded. This included over 58,000 suspects' profiles, 40,000 crime scene profiles, 38,000 offenders' profiles, and 14,000 volunteers (unlimited purpose) profiles.⁹⁵

4.12 Preservation of crime scene DNA evidence

The preservation of crime scene DNA evidence after the conclusion of criminal proceedings is an important issue, both in relation to wrongful convictions and wrongful acquittals. As noted above, the Government has recently indicated that it "supports retention of DNA evidence after the appeals process has been exhausted".⁹⁶

There are currently no laws in NSW regulating the preservation of forensic material found at a crime scene. It is a matter of police procedure and it appears that, prior to 2002, police were not required to retain crime scene samples or exhibits on a long-term basis.⁹⁷ On 11 January 2002, then Deputy Commissioner of NSW Police, Ken Moroney, reportedly issued a moratorium on the destruction of all crime scene exhibits relating to sexual assaults and serious indictable offences.⁹⁸ In 2003, it became apparent that this directive had not been observed in two instances prior to appeals and it was then re-issued.⁹⁹ It is not known whether this directive remains in force, and if so, the extent to which it is observed.

Innocence projects in Australia and overseas have noted that crime scene evidence has been lost or destroyed in many cases.¹⁰⁰ For example, Lynne Weathered, has reported that:

Neufeld & Scheck suggest that in approximately 75% of old cases in the United States, evidence has either been lost or destroyed...

The experience of the New South Wales Innocence Panel highlights this point for Australia...As at July 2003, the NSW Innocence Panel had received 13 applications, only two of which had crime scene evidence still in existence. Of

⁹³ CrimTrac, *Annual report 2004/05*, p19.

⁹⁴ J Norberry, n 80, p4.

⁹⁵ CrimTrac, *Annual Report 2004/05*, p21.

⁹⁶ See Section 3.2.

⁹⁷ See Hon M Finlay QC, *Review of the NSW Innocence Panel*, September 2003, p18ff. See also ALRC, *Essentially Yours*, n 35, p1118; and VPLRC, n 28, p432-433.

⁹⁸ M Finlay, *Review of the NSW Innocence Panel*, n 97 p19.

⁹⁹ M Finlay, *Review of the NSW Innocence Panel*, n 97, p19.

¹⁰⁰ See ALRC, *Essentially Yours*, n 35, p1120, See also VPLRC, n 28, p432-433.

these two, only one contained a DNA profile.¹⁰¹

A number of organisations have expressed support for laws to be enacted requiring the long-term retention of forensic material found at crime scenes.¹⁰² On the other hand, police services and others have expressed concerns about the resource implications that would be associated with such a proposal, particularly if there was a requirement for permanent retention.¹⁰³ In addition, concerns have been raised about the “privacy of victims and third parties whose belongings or DNA samples are considered crime scene samples”.¹⁰⁴

The Australian Law Reform Commission’s 2003 report on the protection of human genetic information and the 2003 Finlay review of the NSW Innocence Panel both recommended that laws be enacted to require the long-term retention of forensic material at the scene of serious crimes.¹⁰⁵ A 2004 report by the Victorian Parliament Law Reform Committee recommended laws, based on the US model, which would allow a serious offender to apply for a court order for the preservation of relevant crime scene DNA evidence.¹⁰⁶

A number of questions arise about the specifics of any such legislation. These include, for example, what offences should be covered? How long should forensic samples be stored? Should police retain all crime-scene exhibits (eg an entire car) or should it only retain samples from surfaces of exhibits? If the latter, should police be required to inspect all surfaces of an exhibit? How should privacy concerns be addressed?¹⁰⁷

One further point to note about this issue is that it has been argued that, in addition to legislative provisions requiring police to preserve crime scene evidence, there should also be provisions to give convicted offenders the right to access this evidence.¹⁰⁸

¹⁰¹ L Weathered, ‘A Question of Innocence: Facilitating DNA-Based Exonerations in Australia’, (2004) *Deakin Law Review* 13. This paper was accessed online version at: <http://search2.austlii.edu.au/au/journals/DeakinLRev/2004/13.html>. The quote above appears on p8 of the online version as printed.

¹⁰² See, for example, ALRC, *Essentially Yours*, n 35, p1120.

¹⁰³ See, for example, ALRC, *Essentially Yours*, n 35, p1121ff.

¹⁰⁴ ALRC, *Essentially Yours*, n 35, p1123.

¹⁰⁵ ALRC, *Essentially Yours*, n 35, Recommendation 45-1, p1124; M Finlay, *Review of the NSW Innocence Panel*, n 97, p40

¹⁰⁶ VPLRC, n 28, Recommendation 13.3, p435.

¹⁰⁷ Most of these questions are sourced from ALRC, *Essentially Yours*, n 35, pp1120-1123.

¹⁰⁸ See L Weathered, n101.

5. WRONGFUL CONVICTIONS

5.1 Miscarriages of justice and the wrongful conviction of the innocent

Unlike the natural sciences, where the proof of a theory must satisfy strict tests of falsification, in the criminal law guilt or non-guilt is a matter of probability, tested to the standard of ‘beyond reasonable doubt’. According to Michael Naughton of the University of Bristol, under the adversarial system of justice:

Criminal trials are not a consideration of factual innocence or factual guilt. They determine if defendants are ‘guilty’ or ‘not guilty’ according to the evidence before the Court, governed by the prevailing principles of due process.¹⁰⁹

Running through the criminal law is the presumption of innocence. Strictly speaking, however, an acquittal in the form of a finding of ‘not guilty’ is not equivalent to a finding of actual innocence. An appellate court may overturn the conviction of a person for many reasons, such as if the court finds that the judge erroneously directed the jury, or that the judge should have excluded evidence as inadmissible (for example, for being illegally or improperly obtained, or prejudicial). In this situation, the appellate court could order a retrial, or alternatively could decide to acquit the accused. The latter ruling is not a declaration of the accused’s innocence but may, for instance, be due to practical or logistical matters, including the length of time that has passed since the offence, the time that the defendant has already served in custody, a lack of surviving witnesses, and so on.

The criminal law is informed by the principles of due process as to what constitutes a fair trial. A major concern of the courts is with the integrity of that process, with what might be called ‘the safety of convictions’. It is argued that in this context a distinction emerges between miscarriages of justice, on one side, and the wrongful conviction of an innocent person, on the other. Naughton maintains that a miscarriage of justice occurs whenever a conviction is found to be unsafe. That is, while actual innocence may not be established, it is shown that the conviction was attained on grounds that give serious cause for anxiety about its safety, to use the language preferred by the English courts, or where there is unease or a sense of disquiet in allowing the conviction to stand, to adopt the formulation preferred in NSW.¹¹⁰ In the High Court of Australia, Gaudron and Gummow JJ commented ‘there is a “miscarriage of justice” if a verdict is unreasonable or not supportable on the evidence or is attended by a real doubt as to whether it is “safe of just”’.¹¹¹

Following this logic, miscarriages of justice can be contrasted with cases of ‘wrongful conviction’ of innocent persons, where someone was convicted of a crime they did not commit. Lynn Weathered, Director of the Griffith University Innocence Project, writes that

¹⁰⁹ M Naughton, ‘Wrongful convictions and innocence projects in the UK: help, hope and education’ [2006] *Web Journal of Current Legal Issues* - <http://webjcli.ncl.ac.uk/2006/issue3/naughton3.html>

¹¹⁰ *R v Rendell* (1987) 32 A Crim R 243; *Varley v A-G (NSW)* (1987) 8 NSWLR 30.

¹¹¹ *R v Carroll* (2002) 213 CLR 635 at para 111.

‘Such cases are sometimes classified and referred to as “actual innocence” cases’.¹¹²

For Naughton, the distinction can be illustrated by reference to the UK case of the Cardiff Three. He writes:

A case that starts to unearth the wrongful conviction of the innocent and separates it from miscarriages of justice is the Cardiff Three. But, the Cardiff Three, convicted for the murder of Lynette White in 1988, did not overturn their convictions in 1992 because they were innocent. On the contrary, in line with all successful appeals they had to get the CACD [Court of Appeal (Criminal Division)] to agree that a lack of integrity in the way that their convictions were obtained rendered them unsafe. This was achieved when Lord Taylor quashed the convictions asserting that whether Steven Miller’s admission to the murder of Lynette White were true or not was ‘irrelevant’, as the oppressive nature of his questioning (he was asked the same question 300 times) required the interview to be rejected as evidence. It was a breach of due process, more specifically the rules of evidence under the Police and Criminal Evidence Act (1984) (PACE)...In keeping with the general uncertainty that results from successful appeals, doubts prevailed for the next decade about whether or not the Cardiff Three were involved in the murder until the case made British legal history and the real killer of Lynette White, Jeffrey Gafoor, who had been traced by the National DNA Database, was convicted for her murder in July 2003....¹¹³

Taking this example as a guide, it was only at this last stage that the Cardiff Three case could be said to be one of the wrongful conviction of the innocent. Problematic in some respects as the distinction suggested by Naughton may be, its relevance to the present debate is that, with reference to DNA exoneration cases, the term ‘wrongfully convicted’ tends to refer to those who are ‘factually innocent of the crimes for which they have been convicted’.¹¹⁴ Viewed in this light, wrongful conviction cases are a distinct class, not to be confused with the broader category of miscarriages of justice.

5.2 DNA evidence and wrongful convictions

Proof of the innocence of the Cardiff Three was based on scientific developments in the application of forensic DNA evidence. In line with this, the current debate in NSW centres on the specific relationship between DNA evidence and the overturning of wrongful convictions, where DNA evidence is used to prove the innocence of a convicted person beyond reasonable doubt. The proposed ‘DNA Review Panel’ is to be established to facilitate this particular purpose, as was the now defunct NSW Innocence Panel.

¹¹² L Weathered, ‘A question of innocence: facilitating DNA-based exonerations in Australia’ [2004] Deakin Law Review 13 - <http://www.austlii.edu.au/au/journals/DeakinLRev/2004/13.html>

¹¹³ M Naughton, n 109.

¹¹⁴ K Swedlow, ‘A State by State review of “post-conviction DNA testing” statutes’ (January 2003) 1(1) *Online Journal of Justice Studies*.

Again, it needs to be stressed that the exclusive concern with DNA evidence in this context carries certain difficulties. As Professor Mark Findlay commented in his review of the *Crimes (Forensic Procedures) Act 2000* (NSW):

By inextricably linking the concepts of DNA testing and innocence, there is a danger that it will be forgotten that DNA evidence is but one piece in the jigsaw puzzle, not the puzzle itself. Consequently offenders who claim their innocence on non-DNA grounds may be regarded as somehow ‘less innocent’ than those who have a DNA-basis for their claim (notwithstanding the fact that only certain types of offences and cases depend on DNA evidence). Furthermore, international experience with miscarriages of justice institutions show that problems with forensic evidence may be just one small feature of the miscarriage picture.¹¹⁵

The fact is that miscarriages of justice and wrongful convictions alike are the products of many diverse causes, often unrelated to DNA evidence. These diverse causes might include: mistaken eyewitness identification; forensic fraud or error; false or coerced confessions; police or prosecutorial misconduct or the ‘tunnel vision’ pursuit of one suspect to the exclusion of all others; inadequacy of defence representation; or reliance on prison informants. Indeed, the Director of the UTS Innocence Project, Kirsten Edwards, indicated to the Findlay Review that ‘very few cases brought to her attention in fact have a contested DNA dimension’.¹¹⁶ To add a further level of refinement, therefore, DNA exoneration cases are but one class within the broader category of wrongful conviction cases.

5.3 DNA evidence and wrongful convictions in the United States

The focus on DNA wrongful conviction cases is certainly to be found in the United States. There the Innocence Project at the Benjamin N Cardozo School of Law in New York, founded in 1992, has spearheaded the work to exonerate the wrongfully convicted through post-conviction DNA testing. The Project claims only to handle cases where post-conviction DNA testing can yield conclusive proof of innocence. As at 31 July 2006, 183 people have been exonerated due to DNA analysis.¹¹⁷ In the most recent case a man called Johnny Briscoe who had spent 23 years in prison for rape was freed after DNA evidence proved that he did not commit the crime. A cigarette butt containing DNA was found at the crime scene, which testing confirmed belonged to another man, who is already serving a life term for another rape.¹¹⁸

Based on the Cardozo School of Law model, in recent years several other Innocence Projects have been established in the United States, forming the Innocence Network. These are typically based at universities where, as in the case of the California Innocence project,

¹¹⁵ Findlay Report, n 63, p 91.

¹¹⁶ M Finlay, *Review of the NSW Innocence Panel*, n 97, Schedule G, p 91.

¹¹⁷ <http://innocenceproject.org/>

¹¹⁸ ‘Innocent man free after 23 years’ - <http://www.smh.com.au/articles/2006/07/20/1153166494221.html>

law students work alongside practicing defence lawyers to seek the release of those prison inmates who maintain their factual innocence. The work of these Innocence Projects has contributed in turn to institutional and legislative developments at the State and federal level. Federally, the National Commission on the Future of DNA Evidence has been established, not to investigate specific cases of possible wrongful conviction, but as a peak research body, operating under the auspices of the National Institute of Justice, to maximise the value of DNA evidence in the criminal justice system.¹¹⁹ Independent Innocence Commissions have also been introduced in some States. These do not appear to be governmental bodies. In the case of the Innocence Commission of Virginia, this body is sponsored by three separate non-government agencies and its work, to date, has concentrated on a retrospective review of 11 wrongful conviction cases occurring in the jurisdiction between 1982 and 1990, with a view to improving the processes at work in the criminal justice system.¹²⁰ Similarly, the North Carolina Actual Innocence Commission was established to provide a forum for education and dialogue among prosecutors, defence attorneys, judges and others with a view to developing procedures to decrease the possibility of conviction of the innocent in that jurisdiction.¹²¹

The exoneration of so many innocent people has also resulted in legislative reform. It was reported in 2003 that ‘over two dozen different jurisdictions around the United States have enacted statutes to allow convicted prisoners access to DNA testing’. According to Kathy Swedlow, Associate Professor of Law and Deputy Director of the Innocence Project, Thomas M Cooley Law School:

Generally speaking, these statutes set forth circumstances under which testing may be requested and standards by which requests for testing should be evaluated and by which relief should be granted. There is no doubt that these statutes are revolutionary: they create a realistic hope for some of the ‘wrongfully convicted’, erect brand new legal avenues for relief, and demand a new level of accuracy from the criminal justice system.¹²²

Swedlow does, however, point to the deficiencies in these statutes, including their varying provisions for the preservation of evidence.¹²³ According to the Benjamin N Cardozo School of Law Innocence Project website, no fewer than 39 States now provide convicted persons access to DNA testing, although it adds that ‘many of these testing laws are very

¹¹⁹ <http://www.ojp.usdoj.gov/nij/topics/forensics/dna/commission/welcome.html>

¹²⁰ http://www.wcl.american.edu/innocenceproject/ICVA/full_r.pdf?rd=1

¹²¹ http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html

¹²² K Swedlow, ‘A State by State review of “post-conviction DNA testing” statutes’ (January 2003) 1(1) *Online Journal of Justice Studies*. For a comparison of US State post-conviction testing see - <http://www.ncsl.org/programs/health/genetics/DNAchart.htm>

¹²³ But note that the Finlay Review of the NSW Innocence Panel did consider as a model the relevant provisions of the Code of Virginia - M Finlay, M Finlay, *Review of the NSW Innocence Panel*, n 97, p 37 and Schedule H.

limited in scope and substance'.¹²⁴

State initiatives were backed up in 2004 by the federal Innocence Protection Act,¹²⁵ which provides rules and procedures for federal inmates under a sentence of imprisonment or sentence of death applying for DNA testing. It requires:

- The applicant must assert under penalty of perjury that he or she is “actually innocent” of either the federal offense for which the applicant is imprisoned or on death row; or
- In death penalty cases, that he or she is “actually innocent” of another federal or state offense if exoneration of the offense would entitle the applicant to a reduced sentence or a new sentencing hearing;
- The specific evidence to be tested must not have been previously tested, except that testing using a newer and more reliable method of testing may be requested;
- The proposed DNA testing may produce new evidence raising a reasonable probability that the applicant did not commit the offense;
- The applicant must provide a current DNA sample for purposes of comparison with existing evidence.¹²⁶

Further, the 2004 Act creates the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program and authorises \$25 million over five years to help States pay the cost of post-conviction DNA testing.¹²⁷ A further \$75 million is allocated each year over the same time period to train lawyers to defend and prosecute death penalty cases. To access this money, the States must provide meaningful post-conviction DNA review. Specifically, a State must: (a) provide post-conviction DNA testing under a statute that ensures ‘a reasonable process for resolving claims of actual innocence’, or the State must enact a statute similar to the federal post-conviction legislation; and (b) preserve biological evidence and secure it under a statute which is comparable to the federal law.

In the opinion of the Benjamin N Cardozo School of Law Innocence Project, a model post-conviction DNA testing statute must contain the following 11 elements:

- Include a reasonable standard of proof at the testing stage;
- Allow access to DNA testing wherever it can establish innocence, including cases where the defendant pleaded guilty;
- Not include a ‘sunset provision’ or absolute deadline when such access will expire;

¹²⁴ http://www.innocenceproject.org/docs/Model_DNA_Factsheet.pdf

¹²⁵ Title IV of the Justice for All Act - HR 5107.

¹²⁶ <http://www.deathpenaltyinfo.org/article.php?scid=40&did=1234>

¹²⁷ Kirk Bloodsworth was the first death row inmate to be exonerated by DNA testing.

- Require State officials to account for evidence in their custody;
- Require States to preserve biological evidence for a reasonable period of time;
- Explicitly exempt DNA testing motions and related proceedings from the procedural bars that govern other forms of post-conviction relief;
- Allow convicted persons to appeal from orders denying DNA testing;
- Mandate full, fair, and prompt proceedings once the DNA testing motions have been filed;
- Include no unfunded mandates, providing the money to back up the initiatives it creates;
- Focus on currently available DNA technology, not its ‘availability’ at time of trial; and
- Provide flexibility in where, and how, DNA testing is conducted.¹²⁸

5.4 Miscarriages of justice in the United Kingdom

An Innocence Network also exists in the UK, based again on university law department initiatives. However, the mechanisms in place to facilitate post-conviction appeals can be said to pre-date the establishment of Innocent Projects at the University of Bristol and elsewhere. In the UK, this process was not driven so much by the potential of DNA evidence to overturn wrongful convictions, but by the spate of high-profile ‘miscarriage of justice’ cases, notably the Birmingham Six, the Guilford Four and the Maguire Seven. The result was that a Royal Commission on Criminal Justice was set up in 1991. It reported in 1993 and led to the Criminal Appeal Act of 1995, under which the Criminal Cases Review Commission was established in 1997. As summarised by Bron McKillop:

The Commission consists of no fewer than 11 members, of whom at least one third must be sufficiently legally qualified. The Commission may refer a conviction on indictment to the Court of Appeal and such reference is to be treated as an appeal.¹²⁹ Any reference must be on the basis that the Commission considers there is a ‘real possibility’ that the conviction would not be upheld if the reference were made because of an argument or evidence not previously raised or adduced, and an appeal has already been determined or leave to appeal refused’. Exceptional circumstances may also justify a reference.¹³⁰

The Criminal Cases Review Commission is, in effect, an independent public body set up to investigate possible miscarriages of justice in England, Wales and Northern Ireland (a separate body operates in Scotland). The miscarriages of justice it is authorised to investigate refer to convictions, verdicts, findings or sentences, where there is a ‘real possibility’ that one or more of these elements ‘would not be upheld’.¹³¹ As such, its remit

¹²⁸ http://www.innocenceproject.org/docs/Model_DNA_Factsheet.pdf

¹²⁹ Note that provision is also made for the review of cases dealt with summarily – *Criminal Appeal Act 1995* (UK), s 11 and s 12.

¹³⁰ B McKillop, ‘The new French jury court of appeal’ (2006) 28 *Sydney Law Review* 343 at 354.

¹³¹ *Criminal Appeal Act 1995* (UK), s 13(1)(a).

is broader than that of the DNA Review Panel proposed in NSW, in that the Commission is not limited to those cases where fresh DNA evidence is likely to prove the innocence of a wrongfully convicted person. Nor are its terms of reference restricted to convictions. The Commission's remit, rather, is to investigate all potential miscarriages of justice occurring in the trial or sentencing process.

The Commission's Annual Report in 2004-05 showed that since 1997, 6,842 convicted defendants (or in some cases, their relatives) had sought to use its services, resulting in 271 (or 4.4%) being referred back to the Court of Appeal; of these references, 135 (or 68%) resulted in convictions being quashed (68%). In the same period, 19 (90%) of sentences referred were reduced and 2 (10%) were upheld. This resulted in an overall success rate of 70% for those appellants who can persuade the Commission to refer their cases back to the courts.¹³² As at 30 June 2006 the Commission had referred 283 cases to the Court of Appeal (from a total of 8769 applications), of which 196 (69.3%) convictions were quashed and 87 (30.7%) upheld.¹³³ While these figures reveal the potential for miscarriages of justice in the criminal justice system, at least as this applies to England, Wales and Northern Ireland, it is important to emphasise that they are not comparable with the US cases where, as at 31 July 2006, post-conviction DNA has resulted in the exoneration of 183 people. As noted, in the United States Innocence Project applicants must claim actual innocence, rather than applying in respect to aspects of their trial or sentence.

The statutory Scottish Criminal Cases Review Commission,¹³⁴ which has operated since 1999, is established on a similar basis and for the same purposes as its English equivalent, that is, to review and investigate cases where it is alleged that a miscarriage of justice may have occurred in relation to conviction, sentence or both. Its remit only extends to those cases where the conviction and sentence were imposed by a Scottish court (the High Court, the Sherriff Court or the District Court), and when the appeal process has been exhausted. The statistics show that, from 1 April 1999 to 31 January 2006, of 749 applications, 33 cases had been referred to the High Court, of which 20 appeals were successful, 10 were unsuccessful and 3 were abandoned.¹³⁵ Again, these figures are not comparable with those for DNA exoneration cases in the United States.

5.5 Criminal Appeal Amendment (Review of Criminal Cases) Bill 1997 (NSW)

On 19 June 1997 the then Leader of the Opposition in the Legislative Council, John Hannaford, introduced the Criminal Appeal Amendment (Review of Criminal Cases) Bill. Its principal function was to establish a Criminal Cases Review Commission, along the

¹³² JR Spencer, 'Does our present criminal appeal system make sense?' (August 2006) *The Criminal Law Review* 677 at 679.

¹³³ A further two cases were 'reserved' - http://www.ccr.gov.uk/cases/case_44.htm

¹³⁴ The Commission was established by s 194A of the *Criminal Procedure (Scotland) Act 1995* (as amended by s 25 of the *Crime and Punishment (Scotland) Act 1997*). The power to refer summary cases was extended by statutory instrument on 31 March 1999.

¹³⁵ <http://www.sccrc.org.uk/legislation/case-statistics.htm>

lines of the equivalent body in England, to investigate and, where appropriate, to refer cases of possible miscarriages of justice and wrongful conviction or sentence to the relevant appellate court. Cases initially handled in the Local Court would be referred to the District Court, while cases from higher courts would be referred to the Court of Criminal Appeal. Under the Bill, a referral could be made in response to an application by or on behalf of a convicted person, or on the Commission's own motion.

Criteria for referring a conviction or sentence to the relevant court were set out in clause 23D, as follows:

- the Commission had to be of the opinion that 'there is a real possibility that the conviction or sentence would not be upheld' and
- in the case of a conviction, because of an argument or evidence that was not previously raised, an appeal against the conviction had been determined or leave to appeal had been refused.¹³⁶

The Bill also made provision for the compensation of those wrongfully convicted. Despite opposition from the Government, it passed the Second Reading (21 votes to 18) and Committee stages in the Upper House on 7 May 1998,¹³⁷ but subsequently lapsed in the Legislative Assembly.

5.6 Review of convictions in NSW – Part 13A of the Crimes Act 1900 (NSW)

Part 13A of the *Crimes Act 1900* provides for the review of a criminal conviction or sentence. This applies where 'there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case'.¹³⁸ A review may therefore be conducted where mitigating circumstances or new evidence emerge following a trial, to cast doubt on the safety and justness of the conviction.

In summary, the Court of Criminal Appeal can review and, where appropriate, quash a conviction or reduce a sentence in a case referred to it:

- directly by the Attorney General following a petition to the Governor (s 474B); or
- by a judicial officer who conducted a 'section 474 inquiry' pursuant to a person's application, or on the Court's own motion (s 474D); or
- on the application of a convicted person who has been granted a pardon (s 474J).

The test for ordering an inquiry under s 474C (consideration of petitions) or s 474E (consideration of applications to the Supreme Court) is whether the judge considering the matter feels 'unease or a sense of disquiet' in allowing the conviction or sentence to

¹³⁶ However, exceptional circumstances could justify a referral.

¹³⁷ *NSWPD*, 7 May 1998, p 4604. The crossbenches were divided on the Bill, with Kirby and the Niles voting against, and Arena, Cohen, Corbett, Jones, and Tingle voting for.

¹³⁸ *Crimes Act 1900*, s 474C(2) and s 474E(2).

stand.¹³⁹

The Finlay Review of the NSW Innocence Panel commented that Part 13A ‘has proved an effective provision of the criminal law in this State to handle cases of alleged miscarriages of justice’.¹⁴⁰ The following statistical information was also provided:

Between 1994 and the present date [September 2003], the Supreme Court received 69 applications under s 474D [applications to the Supreme Court] in Part 13A of the *Crimes Act 1900*. Most were refused, some were discontinued or withdrawn. 7 cases were referred to the Court of Criminal Appeal. In 7 cases an inquiry was directed and/or heard. 6 applications await hearing. In 5 cases those applications under Part 13A of the *Crimes Act 1900* resulted in the convictions being quashed by the Court of Criminal Appeal and 1 re-trial has been ordered.¹⁴¹

Writing in 2005, the Director of Public Prosecutions, Nicholas Cowdery QC, reported:

In the three year period 2000-2002 (selected because applications in later years are still to be resolved), there were 17 applications made under either s 474B or s 474D in connection with matters prosecuted by my office. Eight did not have an inquiry directed or were not referred to the Court of Criminal Appeal. Two were dismissed by the Court of Criminal Appeal. Six applications were upheld (one having been conceded by the Crown). One is still outstanding.

In five of the six successful applications there was new evidence of police impropriety discovered by the Police Royal Commission, the Police Integrity Commission, Police Internal Affairs or the Independent Commission Against Corruption.¹⁴²

The Director of Public Prosecutions went on to comment:

At least two lessons may be drawn from this experience. One is that the ancillary mechanisms of complaint and investigation operated effectively to cast the conduct of police in its proper light. The second is that the number of successful challenges by these means (averaging two a year) is exceedingly low, given that the Office of the Director of Public Prosecutions alone presently processes about 17,000 matters a year throughout the State.¹⁴³

¹³⁹ *R v Rendell* (1987) 32 A Crim R 243; *Varley v A-G (NSW)* (1987) 8 NSWLR 30.

¹⁴⁰ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 12.

¹⁴¹ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 13. The Registry of the NSW Court of Appeal advises that, from 2000 to date, 59 applications have been received under s 474D, of which 8 were referred to the Court for determination.

¹⁴² N Cowdery, ‘Wrongful conviction and double jeopardy’ (May 2005) 17(4) *Judicial Officers’ Bulletin* 27 at 29.

¹⁴³ N Cowdery, n 142, p 29.

The Judicial Commission advises that, in 2005, three cases of appeal against conviction were heard under all the provisions of Part 13A of the *Crimes Act 1900*, all three of them initiated by petition (s 474B).¹⁴⁴ None of these cases appeared to involve fresh DNA evidence. Each of these cases is discussed below, together with one case heard in 2004, for which judgment was handed down the following year.

5.7 Four cases under Part 13A of the Crimes Act 1900 (NSW)

In *R v Pollock*,¹⁴⁵ an appeal against conviction initiated by petition, the appellant's case was founded on fresh evidence bearing upon the credibility of three detectives involved in investigating the original case. The appropriate test for the determination of an appeal on the grounds of fresh evidence was founded on the decision of Mason CJ in *Mickelberg v The Queen*,¹⁴⁶ where his Honour said in part:

The final matter concerns the appropriate test to be applied by an appellate court in deciding whether to set aside a conviction on the ground of fresh evidence. It is established that the proper question is whether the court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before the trial.¹⁴⁷

Based on this test, the appeal in *R v Pollock* was dismissed, with Court of Criminal Appeal concluding that to the extent that the fresh evidence would be admissible, it would and could not 'have affected the outcome of the trial'.¹⁴⁸

In *R v McVittie*,¹⁴⁹ a second appeal against conviction initiated by petition, the issue centred squarely on police misconduct, occurring in NSW and Western Australia. In 2004, evidence had been given to a Western Australian Royal Commission into corrupt conduct by police, to the effect that a firearm had been planted on McVittie and a fabricated confession had been obtained. In these circumstances the Crown conceded that two convictions on counts of armed robbery should be set aside. The appeal was allowed therefore, the convictions quashed and a judgment of acquittal in each case entered. Simpson J concluded:

It is quite plain that although the tainted evidence was not the only evidence led in the trial against Mr McVittie, it contaminated the proceedings beyond repair. The

¹⁴⁴ A fourth case involved an appeal against sentence – *Regina v Suey* [2005] NSWCCA 22.

¹⁴⁵ [2005] NSWCCA 316.

¹⁴⁶ (1989) 167 CLR 259.

¹⁴⁷ (1989) 167 CLR 259 at 273.

¹⁴⁸ [2005] NSWCCA 316 at para 81.

¹⁴⁹ [2005] NSWCCA 267.

convictions which resulted from the contaminated trial are a miscarriage of justice. They should be set aside. In all the circumstances it would be inappropriate to order a new trial.¹⁵⁰

More involved is *Regina v Catt*,¹⁵¹ where a miscarriage of justice was claimed on eight counts, including police misconduct. In the event, the appeal was upheld on 6 of these 8 counts and the conviction was quashed in each case. However, indicating the technical complexities of the criminal justice system, a verdict of acquittal was only ordered in one instance, with a re-trial being ordered in relation to the other 5 counts. The appeal was dismissed in relation to the remaining 2 counts. Discussed were the appropriate test for the determination of an appeal on the grounds of fresh evidence, with reference being made to the judgments in *Mickelberg v The Queen*¹⁵² (including that of Mason CJ as discussed above). Toohey and Gaudron JJ were quoted with approval to this effect:

There is no very precise formulation of the quality which must attach to fresh evidence before it will ground a successful appeal. It has been said that it must be ‘credible’, ‘cogent’, ‘relevant’, ‘plausible’...In essence, the fresh evidence must be such that, when viewed in combination with the evidence given at trial, it can be said that the jury would have been likely to entertain a reasonable doubt about the guilt of the accused if all the evidence had been before it...or, if there be a practical difference, that there is ‘a significant possibility that the jury, acting reasonably, would have acquitted the [accused]’.¹⁵³

*R v Rix*¹⁵⁴ is an example of an appeal initiated by application to the Supreme Court (s 474E). Again police misconduct was at issue, based on evidence heard before the Police Integrity Commission. The appeal was upheld, with Hulme J commenting that, once the evidence of two police officers had been discredited, ‘there remains no evidence upon which a jury could reasonably be satisfied beyond reasonable doubt of the Appellant’s guilt. He is entitled to a verdict of acquittal’.¹⁵⁵

¹⁵⁰ [2005] NSWCCA 267 at para 7.

¹⁵¹ [2005] NSWCCA 279.

¹⁵² (1989) 167 CLR 259.

¹⁵³ [2005] NSWCCA 279 at para 161, quoting (1989) 167 CLR 259 at 301-302.

¹⁵⁴ [2005] NSWCCA 31.

¹⁵⁵ [2005] NSWCCA 31 at para 26.

5.8 Innocence Projects in Australia

Following the United States example, university-based Innocence Projects have been established on a similar basis in Australia, including the UTS Innocence Project, at the Law School of the University of Technology, Sydney, and the Australian Innocence Project, based at Griffith University, Queensland.¹⁵⁶ Of the UTS Innocence Project, Findlay wrote that it:

does not focus exclusively on DNA, but seeks to examine more broadly whether a person may have been erroneously convicted. If, for example, an offender alleges that they have been convicted on the basis of ‘planted’ DNA evidence, a further DNA test will not serve to exonerate the person, as it will only confirm that the results of the earlier DNA test were correct, an issue the offender would not contest.¹⁵⁷

Of the Griffith University Project, Findlay stated that it:

deals principally with cases where the DNA evidence relied on at trial was questionable and/or where there was no DNA evidence at the trial and its use could bring about a fresh evidence point, but it may also investigate ‘other situations of potential injustice with the goal to correct or educate the public on injustices that occur within the criminal justice system.’¹⁵⁸

5.9 DNA and post-conviction review in Victoria

In its 2004 report *Forensic Sampling and DNA Databases in Criminal Investigations*, the Law Reform Committee of the Victorian Parliament recommended a post-conviction review process for serious offenders who claim that DNA evidence may exist that calls their conviction into question. According to the report, at that time there had been no Victorian cases in which fresh DNA evidence had led to the quashing of a conviction. There was nonetheless unanimous support in principle among those participating in the inquiry for some form of post-conviction review process. Victoria Police supported the concept of innocence panels, stating:

In the same manner that the prosecution may seek to use DNA sampling to provide evidence for a prosecution, convicted persons may seek to use the same technology to search for new evidence in regard to a past conviction.¹⁵⁹

¹⁵⁶ A Western Australian Innocence Project has also been established - <http://www.innocenceprojectwa.com/about.html>

¹⁵⁷ Findlay Report, n 63, p 88.

¹⁵⁸ Findlay Report, n 63, p 88.

¹⁵⁹ Victorian Parliament, *Forensic Sampling and DNA Databases in Criminal Investigations*, 2004, p 427.

5.10 The NSW Innocence Panel

Reports suggest that the current proposal is to establish a 'DNA Review Panel'. This would build on the now defunct NSW Innocence Panel, which was established in August 2000 as a non-statutory body reporting to the Minister for Police. Until his resignation in June 2003, the Panel was chaired by the John Nader QC, retired Judge of the District Court, who described it as 'one of the first Government-initiated bodies of its kind in the world, if not the first'.¹⁶⁰ As at 5 August 2003 the Panel membership comprised: Mervyn Finlay QC (Chairman); Howard Brown (Victims Advisory Board); Anne Cossins (academic specialist); Nicholas Cowdery QC (DPP); Doug Humpheys (Legal Aid Commission); Chrissa Loukas (Public Defender); Maureen Tagney (Acting Privacy Commissioner); Les Tree (Director General, Ministry for Police); and Ross Vining (Institute of Clinical Pathology and Medical Research, NSW Health). As noted, its operations were suspended on 11 August 2003 by the then Police Minister, John Watkins.

Unlike the UK Criminal Cases Review Commissions, the task of the NSW Innocence Panel was not to investigate offences or review convictions. Rather, its role was that of a 'facilitator', that is, to arrange for searches to be conducted by Police for nominated items and for DNA testing and comparison to be carried out. The terms of reference for the NSW Innocence Panel were as follows:

- (a) To receive applications from persons who claim to have been wrongfully convicted of a serious indictable offence and believe that DNA evidence may assist in proving this;
- (b) To consider whether those applications meet the criteria established by the Panel from time to time;
- (c) To facilitate the location of any forensic material from the scene of the crime for which the applicant was convicted;
- (d) To facilitate the provision of that material, and DNA material obtained from the applicant, to the Division of Analytical Laboratories for analysis;
- (e) To provide information to the applicant on the outcome of any analysis of DNA material or inform the applicant that DNA material connected with the crime scene is not in existence;
- (f) To advise the applicant on what steps are available to him or her upon receipt of this information;
- (g) To provide advice to the Minister for Police on systems, policies and strategies for using DNA technology to facilitate the assessment of innocence claims;
- (h) To report to the Minister for Police on any matter relevant to its functions referred to it by the Minister;
- (i) To report to the Minister by 30 June each year on its performance and on the procedures and processes put in place for its operation.¹⁶¹

The NSW Innocence Panel was therefore an administrative body, dealing exclusively with

¹⁶⁰ Quoted in Findlay Report, n 63, p 88.

¹⁶¹ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 42.

matters relevant to DNA evidence. Unlike the Criminal Cases Review Commissions in the UK, it had no power to investigate claims or allegations of wrongful conviction. Rather, it was a conduit for the further consideration of such matters. The application process was confidential, even to the extent that the identity of an applicant was not disclosed to the Panel.¹⁶² Access to the Panel was limited at the start-up phase to persons convicted of serious offences, such as murder, manslaughter and serious sexual assault, and where a person was subject to the Serious Offenders Review Council. In special circumstances, however, the Panel may have accepted applications from persons convicted of other offences. Priority was given to currently serving inmates, but persons no longer in prison could also apply. Applicants had to specify the items it wished the Innocence Panel to search for that could assist in proving their innocence. A \$20 fee applied, which could be waived in some circumstances.¹⁶³

As explained by the Australian Law Reform Commission:

Under the Panel's procedures, the applicant must specify the items that could assist in establishing his or her innocence. If an application is approved, the Panel asks the New South Wales Police (and NSW Health, if relevant) to conduct a search for the crime scene sample or exhibit. If the item is found, it is forwarded to the Division of Analytical Laboratories for analysis (or to another laboratory where the applicant has queried initial test results). The Panel then forwards the results to the applicant, suggesting that he or she seek legal advice on how to pursue judicial review of the conviction.¹⁶⁴

The Panel held its first meeting on 17 October 2001. It received its first application in November 2002. As at 18 July 2003, the Panel had received 13 applications. In only two cases were nominated crime scene items found. In only one was a DNA profile found on analysis.¹⁶⁵

5.11 The Findlay Review of the Crimes (Forensic Procedures) Act 2000

Professor Mark Findlay's comments on the NSW Innocence Panel figured in his 2003 review of the *Crimes (Forensic Procedures) Act 2000*. Discussed were the following issues in respect to the Panel:

- ***Independence and objectivity***: the fact that the Innocence Panel sat within the Minister for Police's portfolio raised concerns about its independence from NSW Police. Further, critics argued that it contained a range of interests which might be implicated in innocence challenges and therefore it was not objective.

¹⁶² Findlay Report, n 63, p 90.

¹⁶³ NSW Innocence Panel, *The Innocence Panel Brochure*, NSW Government 2002. See also M Finlay, *Review of the NSW Innocence Panel*, n 161, pp 16-18.

¹⁶⁴ ALRC, *Essentially Yours*, n 35, p 1119.

¹⁶⁵ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 10.

- **Conflict of interest:** one conflict of interest issue concerned the role played by the Division of Analytical Laboratories, NSW Health (DAL), where the process involved DAL retesting samples they had previously tested – ‘It is not inconceivable that a DAL scientist would be embarrassed to discover that his or her earlier results, or those of a colleague, were inaccurate’. For this reason, the review recommended the establishment of a ‘truly independent’ State Institute of Forensic Sciences, as recommended by the LC Standing Committee on Law and Justice.¹⁶⁶
- **Limited role:** since the Panel did not function as an advocate for the applicant, it was unable to assist the applicant even by way of explaining any DNA analysis. Its role, rather, was merely to provide information to the applicant on the outcome of any DNA analysis and advising them on the available steps.
- **No referral powers:** as the Panel had no referral powers, it could be seen as ‘a somewhat ineffectual body with no statutory basis’.
- **Unwieldy and unnecessary:** Critics claimed that the Panel was ‘too big and unwieldy’ and that, a Panel of ‘experts’ was unnecessary where its function was ‘largely limited to determining whether to recommend further police investigations’. One commentator suggested that providing access for prisoners to retesting of DNA material could be facilitated by an Executive Officer.
- **Retention of forensic samples:** the work of the Panel would, in any event, be frustrated in the absence of ‘a best practice approach to the storage, retention and archiving of forensic samples’.
- **DNA evidence only:** the Panel was restricted by its terms of reference to dealing only with those cases where DNA may play a role in proving someone’s innocence. Other grounds for claiming innocence were therefore ignored. As noted, the Findlay review was informed by the Director of the UTS Innocence Project that ‘very few cases brought to her attention in fact have a contested DNA dimension’.

From this review of the issues, Findlay recommended that ‘at the very least’:

- the Innocence Panel should be brought under the auspices of the *Crimes (Forensic Procedures) Act 2000*, and therefore within the Attorney General’s portfolio; and
- the Panel should be provided with a power to refer cases to the Court of Criminal Appeal.

The Findlay Review also expressed a preference for extending the role of the Innocence Panel in the ‘direction of a wider Criminal Cases Review Commission’, as in the United Kingdom, ‘to examine all cases of wrongful conviction of innocence people, irrespective of whether DNA evidence formed part of the case’.¹⁶⁷

¹⁶⁶ Legislative Council, Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000*, Report 18, February 2002, p 33.

¹⁶⁷ Findlay Report, n 63, pp 88-92.

5.12 UTS Innocence Project – critique of NSW Innocence Panel

A similar preference has been expressed on behalf of the UTS Innocence Project, with its Director Kirsten Edwards writing that:

- the Innocence Panel either be reformed into a proper Criminal Cases Review Commission or cease to exist altogether; and
- if proper legislation about the custody, storage, retention and access to forensic samples is made there may be no need for any Panel.¹⁶⁸

Edwards also raised similar issues for consideration as those found in the Findlay review of the *Crimes (Forensic Procedures) Act 2000*. An additional concern related to whether the decisions of the Panel, which were administrative in nature, were subject to judicial review for procedural fairness. It was also asked whether the Innocence Panel was intended to cover the field, or could prisoners and independent innocence projects petition the Supreme Court for access to samples if the Panel application is denied or one is not lodged?

5.13 The Finlay Review of the NSW Innocence Panel

Similar issues were canvassed in the more broad ranging review of the Innocence Panel, conducted by Mervyn Finlay QC, the Panel's chairman at the time of its disbandment. Completed in September 2003, this review compared the position in NSW with that in the United States, where certain features of the justice system are very different, prompting Finlay to arrive at the conclusion that the number of 'expected exonerations in NSW' may be no higher than 'one or two'. To this, Finlay adds, 'Of course one or two miscarriages of justice are that many too many!'¹⁶⁹

Broadly, the Finlay Review supported the retention of an Innocence Panel, albeit in statutory form and re-named 'the DNA Reference Panel' or 'DNA Review Panel'. Other findings included:

- ***Extension of functions rejected:*** The question whether the Panel's functions should be similar in scope to those of Criminal Cases Review Commission was the source of some difference of opinion amongst the members of the Innocence Panel. Some were decidedly opposed to the idea, whereas others thought it best to leave the matter open for another time.¹⁷⁰ The consensus seems to have been that the specialist functions undertaken by the Panel make it 'unnecessary' to follow the path of the Criminal Cases Review Commission,¹⁷¹ as do the existing arrangements

¹⁶⁸ Submission of UTS Innocence Project - M Finlay, *Review of the NSW Innocence Panel*, n 97, Schedule F.

¹⁶⁹ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 14.

¹⁷⁰ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 12.

¹⁷¹ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 42.

under Part 13A of the Crimes Act for the review of convictions in NSW.¹⁷²

- **Advantages over Innocence Projects:** It was also argued that a Government based Innocence Panel has certain advantages over university Innocence Projects. These advantages included: the wide range of relevant experience in its membership, which extends to advisory groups for victims; and the accountability of the Panel's performance, procedures and processes by required report to the relevant Minister.¹⁷³

In summary, the Finlay Review's recommendations were as follows:

- **Statutory body:** the Panel, which is to continue to focus on DNA evidence, should be given a legislative basis under the *Crimes (Forensic Procedures) Act 2000* providing for its membership, duties, powers and responsibilities.
- **Public interest test:** as a statutory safeguard, particularly for victims of crime, when exercising its functions the Panel is not to exercise its powers at large, but in consideration of the public interest. The term 'public interest' in this context is to include consideration of victims and their families, as well as the maintenance of public confidence in the administration of criminal justice.
- **Eligibility of applicants:** the statute must identify those persons eligible to apply to the Panel. Consideration must be given in this context to the *nature of the offences*, usually defined as those carrying a maximum sentence of not less than 20 years imprisonment, but with a discretionary power to receive applications from persons convicted of other crimes. The issue of *custodial status* must also be considered, with the Finlay review recommending that persons no longer serving a sentence should be eligible to apply. Usually, applications are to be received within 20 years from commencement of sentence.¹⁷⁴
- **Referral power:** the Panel should have the power to refer cases directly to the Court of Criminal Appeal, that is, where it considers that fresh scientific evidence raises 'a reasonable probability' that the Court would quash the conviction or order a new trial. No consequential amendments to Part 13A of the *Crimes Act 1900* were envisaged for this purpose.
- **Disclosure and privacy provisions:** statutory expression is to be given to appropriate provisions stating what information is to be disclosed by the Panel and to whom, concerning the results of DNA testing. Conversely, prohibitions against the inappropriate disclosure of such information are also to be included.
- **Review procedure:** provision is to be made for the Panel to report to the Attorney General, and for its performance to be adequately monitored. Consideration is also to be given for the review of the Panel's decisions by the Administrative Decisions Tribunal and/or for investigation by the NSW Ombudsman of the Panel's exercise or failure to exercise its functions.

¹⁷² M Finlay, *Review of the NSW Innocence Panel*, n 97, p 32.

¹⁷³ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 42.

¹⁷⁴ M Finlay, *Review of the NSW Innocence Panel*, n 97, pp 46-47.

- ***Retention of forensic material:*** the review recognises the critical role played by the retention of forensic material. It recommends legislation to require the long term storage, preservation and retention of forensic material found at the scene of serious crimes to facilitate post-conviction-analysis. Recommended in this context by Finlay was the model suggested by the UTS Innocence Project for legislation to include: (a) collection of samples; (b) chain of custody protocols; (c) storage of samples – including which samples are to be preserved and not destroyed during forensic testing; and (d) access to exhibits. Further, legislation must provide independent audits and integrity tests to ensure compliance with those standards and provide penalties for breaches.¹⁷⁵

Should long-term retention of all forensic material from serious crime scenes prove either impractical or too costly, a fall-back position is also discussed by Finlay. Suggested is the model in place in the US State of Virginia, where long-term preservation and retention is required by court order, but only following application by or on behalf of a convicted person within a specified time period.¹⁷⁶

Oversight and regulation of NSW Police practice: the destruction or return of crime scene exhibits by NSW Police should be regulated by legislation.¹⁷⁷ Further, the Government should oversight the introduction by NSW police of ‘a best practice approach to the storage, retention and archiving of forensic samples’. This recommendation was based on a finding that, contrary to directions, NSW Police had destroyed crime scene material. Finlay commented:

‘The recent destruction of crime scene material by police after a supposed direction that it not be destroyed would suggest that the advice of the Review “*that a best practice approach to the storage, retention and archiving of forensic samples needs to be settled and instituted as a matter of priority*”, has not yet been achieved. This, the Panel suggests, requires urgent attention’.¹⁷⁸

5.14 The NSW Bar Association and the Innocence Panel

The re-establishment of an Innocence Panel in some form seems to be generally supported by the legal fraternity, if only reluctantly by some who would prefer a more wide ranging post-conviction review model based on the United Kingdom model. Speaking on behalf of the NSW Bar Association and calling on the Government to implement the recommendations of the Finlay Review, Michael Slattery QC has lent his support to the reinstatement of the Innocence Panel, stating:

¹⁷⁵ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 40.

¹⁷⁶ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 36.

¹⁷⁷ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 19.

¹⁷⁸ M Finlay, *Review of the NSW Innocence Panel*, n 97, p 32.

Those who have been convicted of an offence, and who believe that they will be proved innocent if their DNA is tested against forensic material found at the scene of the crime, should be able to lodge an application to have the Innocence Panel re-examine that evidence.¹⁷⁹

Slattery went on to say that such a Panel must be independent of the police and have the power to:

- disclose the results of DNA testing to applicants and other persons, such as victims and their families; and
- refer cases directly to the NSW Court of Criminal Appeal if the new evidence raises a question as to the convicted person's guilt.

5.15 Comment

Reports suggest that the current reform proposal is based on the concept of a statutory Panel, reporting to the Attorney General, and to be called the 'DNA Review Panel'. According to a spokesman for the Attorney General, it will have 'the power to disclose results of the review to the victims' families and applicants'. A power to refer cases directly to the Court of Criminal 'would be considered'.¹⁸⁰

For the Opposition, the Shadow Attorney General, Chris Hartcher, said the re-introduction of an Innocence Panel was 'worth having a look at', but it was not one of the main law and order issues facing the State.¹⁸¹

A DNA Review Panel along the lines suggested would be unique to NSW. Differentiating it from the model adopted in the United Kingdom, it would not be a vehicle for general inquiry into all alleged miscarriage of justice cases. Unlike the Innocence Projects in the United States, it would operate under government auspices, albeit in an independent capacity. If it is to operate effectively, it must be backed by legislation for the long-term storage, preservation and retention of forensic material. Politically, it will have to negotiate the complex and sensitive issues at work in this area, where those who have been convicted of the worst categories of crimes continue to plead their innocence. A version of the public interest test suggested by the Finlay Review may assist the Panel in this respect. The challenge will be to apply such a test in a manner that confirms the independence of the Panel from government influence or interference.

¹⁷⁹ The NSW Bar Association, 'DNA evidence that shouldn't be ignored', *Media Release*, 14 July 2006.

¹⁸⁰ T Dick, 'DNA panel to give convicted another chance', *SMH*, 15 July 2006, p 7.

¹⁸¹ T Dick, 'DNA panel to give convicted another chance', *SMH*, 15 July 2006, p 7.

6. WRONGFUL ACQUITTALS

6.1 What is a wrongful acquittal?

The term ‘wrongful acquittal’ is conceptually difficult. To find any person guilty, where this cannot be proved evidentially beyond reasonable doubt, or where the conviction is achieved by procedurally dubious means, would constitute a miscarriage of justice. The rules of the criminal justice system apply equally to the ‘objectively’ or actually guilty, just as much as they do to the ‘objectively’ or actually innocent. It is for the prosecution to prove its case, in accordance with due process and to the standard of beyond reasonable doubt. Where the prosecution fails to meet these standards, which operate to protect the integrity of the criminal justice process, a verdict of acquittal is attained as of right. Put another way, the right to a fair trial belongs as much to the actually guilty as it does to the actually innocent.

As Gleeson CJ and Hayne J said in *R v Carroll*,¹⁸² many of the rules developed for the conduct of criminal trials reflect two propositions: that the power and resources of the state as prosecutor are much greater than those of the individual accused; and the consequences of convictions are very serious. Gleeson CJ and Hayne J comment that ‘Blackstone’s precept “that it is better that ten guilty persons escape, than one innocent suffer” may find its roots in these considerations’.¹⁸³

Of course injustices occur. The actually innocent are convicted, just as the actually guilty are set free. It is the inevitable consequence, one might say, of a decision making process that deals in probabilities, not certainties, one in which the procedural rules and requirements can be as abstruse as they are rigorous. The processes are complex and the outcomes uncertain, working sometimes against the innocent and for the guilty. It is in this context that the term ‘wrongful acquittal’ is used, often as the reverse side of the coin to ‘wrongful conviction’. Both terms might be said to resonate more in popular than strictly legal language, which is not to say that the subjects they refer to are not real enough.

6.2 DNA evidence, wrongful acquittals and double jeopardy

The rule against double jeopardy states that a person who has been acquitted (or convicted) of an offence may not subsequently be charged with the same offence again. It makes no difference that new evidence of guilt is discovered after an acquittal. Is this rule to be amended?

It is a fact that fresh and compelling evidence can emerge after the completion of the trial process. If it does not ‘prove’ innocence or guilt in an absolute sense, it may tip the balance one way or another, away from or towards beyond reasonable doubt. In recent years much of the focus has been on DNA evidence, both as a powerful tool in exonerating persons wrongfully convicted of criminal offences, as well as in demonstrating or confirming guilt.

¹⁸² (2002) 213 CLR 635 at para 21.

¹⁸³ Cited in W Blackstone, *Commentaries* (1769) (1966 reprint), Bk 4, c 27, p 352.

On this last point the Australian Law Reform Commission commented:

DNA testing also can confirm guilt, removing doubt about a prisoner's guilt despite long-running campaigns alleging a miscarriage of justice. For example, in May 2002, the English Court of Appeal held that DNA evidence proved beyond reasonable doubt that James Hanratty was guilty of the murder for which he had been hanged 40 years previously.¹⁸⁴

Just as a link is drawn between the use of DNA evidence to exonerate the innocent, it is also connected to the conviction of the guilty. It is this focus on the power of DNA evidence that has fueled recent debate on the double jeopardy principle. The linkages were made in the relevant MCCOC Discussion Paper of November 2003, advocating reform of the rule against double jeopardy. This occurred in the context of a discussion on the emergence of 'fresh and compelling evidence' after an acquittal, which has the 'effect of casting significant doubt on the integrity of the original verdict'. The Discussion Paper went on to say:

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.¹⁸⁵

The traditional case on behalf of the retention of the double jeopardy rule was made by Gibbs CJ in *Davern v Messel*, where its purpose was said to 'ensure fairness to the accused'. Gibbs CJ observed:

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 fact 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...¹⁸⁶

¹⁸⁴ ALRC, *Essentially Yours*, n 35, p 1118; *Hanratty v R* [2002] EWCA Crim 1141.

¹⁸⁵ MCCOC, Discussion Paper, n 9, p 109.

¹⁸⁶ (1984) 155 CLR 21 at 29-30.

6.3 Wrongful acquittals and the principle of finality

The criminal law is a decision making process that deals in probabilities, not certainties, with the result that its outcomes are, to a degree, uncertain. However, the necessary fiction underlying the criminal law is that verdicts of acquittal are ‘treated as incontrovertibly correct’.¹⁸⁷ Policy considerations require that ‘Judicial determinations need to be final, binding and conclusive if the determinations of the courts are to retain public confidence’.¹⁸⁸ For practical purposes, therefore, probable outcomes are treated as certain outcomes. This approach to the certainty of acquittals is founded on the ‘finality’ principle, which lies at the heart of the rule against double jeopardy, preventing as it does the prosecution from having a second try at proving a person’s guilt. It finds expression in Article 14(7) of the *International Covenant on Civil and Political Rights*:

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. (emphasis added)

The rationale behind the finality principle was expressed by Lord Wilberforce in *The Amptill Peerage* legitimacy case:

Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. *That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth...and these are cases where the law insists on finality.* (emphasis added)¹⁸⁹

After quoting this statement with approval in *R v Carroll*, Gleeson CJ and Hayne J offered these further reflections on the conflicting interests at issue:

To pursue what is thought to be the objectively correct outcome of criminal proceedings is inconsistent with finality. As the Law Commission of England and Wales recognised in its report on *Double Jeopardy and Prosecution Appeals*, finality is a value which finds its roots in personal autonomy, and which serves to delineate the proper ambit of the power of the State by the State acknowledging

¹⁸⁷ *R v Carroll* (2002) 213 CLR 635 at para 35 (Gleeson CJ and Hayne J).

¹⁸⁸ *R v Carroll* (2002) 213 CLR 635 at para 128 (McHugh J). Unless set aside or quashed, McHugh J observed, the decisions of the courts ‘must be accepted as incontrovertibly correct’.

¹⁸⁹ [1977] AC 547 at 569.

‘that it respects the principle of limited government and the liberty of the subject’.¹⁹⁰

6.4 Conflicting interests

Just as the criminal law is procedurally complex, so too are its fundamental underpinnings. On one side, the rules associated with double jeopardy reflect the view that, without safeguards, the power to prosecute could be used by the state as an instrument of oppression.¹⁹¹ A classic statement of the rationale behind the double jeopardy rule – often cited in case law and academic articles – was made by Black J in the Supreme Court of the United States in the case of *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 offence, 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.¹⁹²

Discussing these matters in its 2001 report on *Acquittal Following Perversion of the Course of Justice*, the New Zealand Law Commission commented:

A consequence of the rule against double jeopardy is protection of the administration of justice itself. By preventing harassment and inconsistent results it promotes confidence in court proceedings and the finality of verdicts. A clear corollary of the rule is that occasionally the guilty will escape punishment, but that is inevitable in any system of justice that must accommodate conflicting interests and finite resources.¹⁹³

The other side to the criminal law equation is that, in the words of the NSW Director of Public Prosecutions, ‘The community has an interest in seeing that those who should be convicted, particularly of serious offences, are convicted’.¹⁹⁴ The argument was expressed

¹⁹⁰ *R v Carroll* (2002) 213 CLR 635 at para 49 (Gleeson CJ and Hayne J). The Law Commission of England and Wales dissected the principle of finality into four sub-interests: finality as an antidote to distress and anxiety; finality and individual liberty; finality and the interests of third parties; and finality as a wider social value –for a summary see the MCCOC Discussion Paper, n 9, pp 3-4.

¹⁹¹ *R v Carroll* (2002) 213 CLR 635 at para 22 (Gleeson CJ and Hayne J).

¹⁹² (1957) 355 US 184 at 187.

¹⁹³ New Zealand Law Commission, *Acquittal Following Perversion of the Course of Justice*, Report 70, March 2001, pp 5-6.

¹⁹⁴ N Cowdery, n 142, p 30.

by Gleeson CJ and Hayne J as follows:

At the very root of the criminal law system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it. It follows that those who are guilty of a crime for which they are held responsible should, in the absence of reason to the contrary, be prosecuted to conviction and suffer just punishment.¹⁹⁵

It is said that the double jeopardy rule forms part of ‘the criminal justice deal’ in a liberal democracy.¹⁹⁶ Embedded in that ‘deal’ are the conflicting interests in this debate, on one side safeguarding the individual accused against oppression by the Executive, on the other promoting society’s expectation that the criminal prosecution process should produce accurate outcomes, consistent with the rights of victims in particular cases.

6.5 Finality and prosecution appeals

To state, as Article 14(7) of the *International Covenant on Civil and Political Rights* does, that ‘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’ begs the question of what constitutes ‘finally’ in the context of the criminal law? It does not preclude prosecution appeals against acquittals. Indeed, the MCCOC Discussion Paper points out that 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.¹⁹⁷

In Briefing Paper No 16/2003 it was said that:

In New South Wales, like many other common law jurisdictions, defendants can already be exposed to double jeopardy by the prosecution’s limited rights to appeal certain decisions. However, there is currently no power for the prosecution to apply to overturn a verdict of acquittal entered at trial.¹⁹⁸

¹⁹⁵ *R v Carroll* (2002) 213 CLR 635 at para 23 (Gleeson CJ and Hayne J).

¹⁹⁶ P Roberts, ‘Double jeopardy law reform: a criminal justice commentary’ (2002) 65 *Modern Law Review* 393.

¹⁹⁷ MCCOC, Discussion Paper, n 9, p 1.

¹⁹⁸ R Johns, n 82, p 5. Also discussed in the Briefing Paper are ‘stated cases’ and ‘similar fact evidence’.

6.5.1 Crown appeals against ‘inadequate’ sentence:¹⁹⁹ The paper proceeded to discuss instances where the prosecution can seek an appeal or review. These include Crown appeals against sentence under s 5D of the *Criminal Appeal Act 1912* and s 23 of the *Crimes (Local Courts Appeal and Review) Act 2001*. In *R v Dawes*, the Court of Criminal Appeal confirmed:

Crown appeals against sentence are relatively infrequent. The High Court has said that such appeals ‘should be a rarity’. One reason for this is the element of double jeopardy that is involved in such appeals. Rules designed to safeguard against double jeopardy are deeply embedded in our system of criminal justice.²⁰⁰

Established principles require Crown appeals to be dealt with in a certain way. This includes the principle that ‘The Court has a residual discretion, even in the case of error, to refuse to intervene and in so doing should have regard to the double jeopardy that a convicted person faces as a result of a Crown appeal’.²⁰¹ In *R v Bang Hunt* CJ at CL stated:

It is this element of double jeopardy involved in successful Crown appeals which results in the fresh sentence imposed by this Court usually being less than that which ought to have been imposed at first instance...the distress occasioned to a respondent to a Crown appeal by twice being put in jeopardy usually requires a discount to be applied by this Court. Indeed, so important is this consideration in Crown appeals that this Court will not infrequently exercise its discretion to dismiss the appeal because of the unfairness or injustice which would otherwise be occasioned to the respondent by reason of his double jeopardy.²⁰²

The *Crimes Legislation Amendment Act 2003* inserted s 7(1A) into the *Criminal Appeal Act 1912*. This allows the Court of Criminal Appeal, when quashing or varying a sentence the subject of a Crown appeal, to quash or vary other sentences passed in connection with the same indictment.

6.5.2 Interlocutory appeals: Also discussed in Briefing Paper No 16/2003 are interlocutory appeals against judgments or orders under s 5F of the *Criminal Appeal Act 1912*. This provision was amended by *Crimes Legislation Further Amendment Act 2003*. The Minister in his Second Reading speech explained the nature and purpose of this amendment as follows:

¹⁹⁹ For a commentary on this issue see – G Brignell and H Donnelly, *Crown Appeals Against Sentence*, Research Monograph No 27, NSW Judicial Commission 2005; N Cowdery and M O’Mahony, ‘Crown appeals against sentence’ (September 2005) 17(8) *Judicial Officers’ Bulletin* 63.

²⁰⁰ [2004] NSWCCA 363 at para 4; quoted in *R v Allpass* (1993) 72 A Crim R 561 at 562-563.

²⁰¹ *R v AA* [2006] NSWCCA 55 at para 27.

²⁰² (unreported, NSWCCA, 1 September 1992) at 255-256; quoted with approval in *R v AA* [2006] NSWCCA 55 at para 17.

Under section 5F(2) of the *Criminal Appeal Act 1912*, the Director of Public Prosecutions or the Attorney General may currently appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in proceedings to which section 5F applies. The Court of Criminal Appeal has held that an evidentiary ruling by a trial judge that effectively excludes the entire Crown case is a judgment or order for the purposes of section 5F(2) of the Act because the ruling effectively stays the Crown case. However, a ruling excluding Crown evidence which *weakens but does not destroy* the Crown case has been held not to be a judgment or order, and is therefore not appellable under the existing section 5F(2).

This amendment amends the Criminal Appeal Act to allow the Crown to appeal against an evidentiary ruling which substantially weakens the Crown case. If an acquittal results from an erroneous evidentiary ruling, the Crown has no avenue of appeal against the acquittal. The Crown should therefore be able to test the correctness of such a ruling made during the trial, so that an accused may not derive benefit of an acquittal as a result of an erroneous evidentiary ruling.

It is not desirable that criminal trials be unnecessarily disrupted for the purpose of appealing evidentiary rulings. It is therefore anticipated that the Crown would exercise this new appeal power only sparingly.²⁰³

Prior to the enactment of these amendments, in November 2003, the MCCOC Discussion Paper commented that the interlocutory power to appeal by the prosecution along the lines of s 5F, ‘as proposed to be expanded, is right in principle’.²⁰⁴

6.6 Finality and double jeopardy – a question of principle or re-definition?

Clearly, the principle of finality, as this finds expression in Article 14(7) of the *International Covenant on Civil and Political Rights* ‘leaves a great deal to interpretation’.²⁰⁵ The UK Law Commission pointed out that:

Article 14(7) read literally would prohibit an appellate court from quashing a conviction and ordering a retrial, and drew attention to the United Nations Human Rights Committee’s view that reopening criminal proceedings ‘justified by exceptional circumstances’ did not infringe the principle, but also to the Committee’s distinction between ‘resumption’ of criminal proceedings, and ‘retrial’ which was expressly forbidden.²⁰⁶

²⁰³ NSWPD, 20 November 2003, pp 5427-5428. As discussed in Briefing Paper No 6/2003 (page 10), the amendment was influenced by the acquittal of Jason Van Der Baan who was acquitted in September 2002.

²⁰⁴ MCCOC, Discussion Paper, n 9, p 81.

²⁰⁵ MCCOC, Discussion Paper, n 9, p 1.

²⁰⁶ S Broadbridge, *The Criminal Justice Bill: Double jeopardy and prosecution appeals*, House of Commons Research Paper 02/74, p 42.

As discussed in the MCCOC Discussion Paper, on one view all double jeopardy reform achieves is a re-definition of ‘finally’.²⁰⁷ In effect, what is contemplated is a shift in the position of Crown appeals, further down the procedural track of the criminal justice system. The alternative view is that, as Deane and Gaudron JJ said in *Rogers v The Queen*, ‘the principles which operate in this area are fundamental’.²⁰⁸ To treat matters of principle as if they were ones of degree is to commit a categorical error. If the rule against double jeopardy is to be reformed, the argument should be put on a proper foundation. Admittedly, as indicated by the discussion of prosecution appeals, the criminal law does allow some practices which impinge on certain aspects of the rule of double jeopardy. These are, however, different in kind to the fundamental changes contemplated in the Draft Criminal Appeal Amendment (Double Jeopardy) Bill 2003 and elsewhere, changes that would permit the prosecution to revisit a verdict after it had been finally and conclusively determined by the courts. However difficult this may be to define,²⁰⁹ the suggestion is that the distinction between the ‘resumption’ of criminal proceedings and ‘retrial’ should be treated as fundamental in nature. In effect, reform of the double jeopardy rule is a recognition that ‘an acquittal is no longer incontrovertible’.²¹⁰

6.7 Double jeopardy - the plea of *autrefois acquit*

To this point, double jeopardy has been spoken of in broad terms, as if it were a single rule with one meaning. In fact the position is more complex. As Gummow and Hayne JJ said in *Island Maritime Ltd v Filipowski*:

‘Double jeopardy’ is an expression that is not always used with a single meaning. It is an expression used in relation to several different stages of the process of criminal justice: prosecution, conviction and punishment. It describes values which underpin a number of aspects of the criminal law, rather than a rule than can be stated as the premise for deductive reasoning.²¹¹

The essence of those values was said to be threefold:

- it is society’s interest that there be an end to litigation;
- what is adjudicated is taken as the truth; and
- no one should twice be vexed for one and the same cause.

²⁰⁷ MCCOC, Discussion Paper, n 9, pp 1-2.

²⁰⁸ (1994) 181 CLR 251 at 278.

²⁰⁹ For a commentary on what is meant by ‘conviction’ see – ‘Is there power for the court to discharge a defendant despite an earlier conviction?’ (2006) 7(5) *NSW Courts Review* 447.

²¹⁰ MCCOC Discussion Paper, n 9, p 127.

²¹¹ (2006) 80 ALJR 1168 at para 41; [2006] HCA 30.

Gummow and Hayne JJ added:

It is these values that underpin the rule that evidence is inadmissible where, if accepted, it would overturn or tend to overturn an acquittal.²¹²

Historically, double jeopardy was associated with the pleas of *autrefois convict* and *autrefois acquit*, which can be pleaded to protect persons who had already been convicted or acquitted of an offence. It is the plea of *autrefois acquit* that is most relevant for the present discussion, in relation to which Gummow and Hayne JJ said:

[In] Australia the values encompassed by double jeopardy require that the plea of *autrefois acquit*, and the analogous principle applied in summary jurisdiction, be available whenever *all of the elements of one offence* (of which an accused stands, or stood, in jeopardy) are included in the other offence of which that accused stands, or stood, in jeopardy, and that the plea be available, and the analogous principle applied, no matter the order in which the offences are charged.²¹³ (emphasis added)

These pleas find expression in s 156 of the *Criminal Procedure Act 1986*. In *R v Stone*, Hunt AJA said they provide that no person tried by a competent court for a criminal offence and either convicted or acquitted ‘shall again be tried for that offence or for any other offence of which he could have been convicted at the trial for that offence’.²¹⁴ His conclusion on this occasion was that the judge’s ruling that the plea of *autrefois convict* had been made out, although erroneous:

was a final decision which disposed of the proceedings against the respondent. It amounted to an acquittal. No Crown appeal lies from that ruling whether pursuant to s 5F of the Criminal Appeal Act or otherwise.²¹⁵

6.8 Double jeopardy – abuse of process and the *Carroll* case

As McHugh J observed in *R v Carroll*, the pleas of *autrefois convict* and *autrefois acquit* ‘do not protect the accused against prosecutorial harassment in many cases that, in substance but not in form, offend the double jeopardy principle’.²¹⁶ To remedy such defects

²¹² (2006) 80 ALJR 1168 at para 41; [2006] HCA 30.

²¹³ (2006) 80 ALJR 1168 at para 63; [2006] HCA 30 (Kirby J agreed at paras 88 and 91, as did Callinan J at para 95). The MCCOC Discussion Paper points out (page 26) that the term ‘elements of the offence’ was used in *R v Carroll* by the High Court to refer to *factual* elements, such as whether D killed V or not. The reference is not to the *legal* elements of the offence, which would be entirely different for perjury and murder, to take one example. However, as the *Carroll* decision shows, the factual allegations underlying these legal elements may be identical, thus raising issues relevant to double jeopardy:

²¹⁴ *R v Stone* [2005] NSWCCA 344 at para 23 (Hunt AJA).

²¹⁵ *R v Stone* [2005] NSWCCA 344 at para 71.

²¹⁶ (2002) 213 CLR 635 at para 130.

the courts also intervene ‘to protect the accused by staying proceedings that they consider are an abuse of their processes’.²¹⁷

R v Carroll is a case in point. In that instance, the same *legal* elements were not at issue in the later perjury trial, as in an earlier trial for murder. However, the *factual* elements were identical in that Carroll was charged with perjury in 1999, the Crown alleging that he had given false evidence at a previous murder trial, in respect to which the Queensland Court of Criminal Appeal had entered a verdict of acquittal, finding that the evidence was insufficiently strong to sustain a conviction. The High Court ruled that the proceedings for perjury should have been stayed because they were an abuse of process. Even though Carroll was not tried for the same offence twice, the prosecution for perjury sought to controvert or undermine the earlier acquittal on the charge of murder. Gleeson CJ and Hayne J stated:

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.²¹⁸

The ruling was controversial, calling for the reform of double jeopardy throughout Australia. In early 2003, the then Premier of NSW promised to change the law so that a decision such as Carroll could not happen.²¹⁹ DNA evidence was not at issue in the case. The Crown did, however, rely on new and stronger evidence, including an alleged confession by Carroll to a fellow inmate when on remand before the murder trial (but not reported to police until 1997).²²⁰

6.9 Double jeopardy and tainted acquittals

Raised by the *Carroll* case is the issue of tainted acquittals, that is, where an acquittal is attained by the commission of an administration of justice offence, be it perjury, the intimidation of witnesses or some other perversion of the course of justice. In Australia, at present, under the *Carroll* ruling, not only can the person not be retried for the original offence, nor can they be tried for the administration of justice offence – at least not where any evidence, if accepted, will overturn or tend to overturn the original verdict.

Prior to the reform of double jeopardy in the UK under the *Criminal Justice Act 2003*, an exception had already been made to this principle. This was enacted in the *Criminal*

²¹⁷ (2002) 213 CLR 635 at para 131. For a commentary on the term ‘abuse of process’ see – Judge M Sidis, ‘Abuse of process’ (August 2006) 7(5) *Direct Link* 1.

²¹⁸ (2002) 213 CLR 635 at para 44. For a more detailed account of the case see – R Johns, n 82, p 7.

²¹⁹ MCCOC Discussion Paper, n 9, p 27.

²²⁰ For a more detailed account see R Johns, n 82, p 7; *R v Carroll* (2000) 115 A Crim R 164.

Procedure and Investigations Act 1996 (ss 54 and 55). Under the ‘tainted acquittals’ procedure, a defendant’s acquittal can be quashed by the High Court and he or she can be retried, if someone has subsequently been convicted of an ‘administration of justice offence’²²¹ involving interfering with or intimidating a witness or juror, and it appears to the High Court likely that he or she was acquitted as a result of that offence. Unlike the ‘tainted acquittals’ provisions of the NSW Draft Criminal Appeal (Double Jeopardy) Bill 2003, the UK Act does not have retrospective application.

6.10 New Zealand Law Commission Report and the Criminal Procedure Bill

6.10.1 Tainted acquittals: These were considered by the New Zealand law Commission in its report of 2001, *Acquittal Following Perversion of the Course of Justice*. This followed the case of *R v Moore*²²² where the accused was acquitted of murder, only to be later convicted of conspiracy to defeat the course of justice because he procured a witness in the first trial to provide the court with a false alibi. The Law Commission recommended reform of the double jeopardy rule in the limited circumstances where the accused had been convicted of an administration of justice offence and where the crime for which the person was originally acquitted carries a penalty of 14 years imprisonment or more. In contrast to the Draft Bill in NSW, the Law Commission concluded that the commission of an administration of justice offence by a third party – ‘another person’ – without the involvement of the acquitted person, should not justify application for retrial.²²³

Based on this proposal, a tainted acquittal exception to the double jeopardy rule was proposed in the Criminal Procedure Bill, first introduced in 2004 and which is yet to be passed into law. In these circumstances a retrial for a ‘specified offence’ may be ordered by the High Court where it is satisfied that: (a) the administration of justice offence was a ‘significant contributing factor’ in the acquittal; (b) no appeal in relation to the administration of justice offence is pending; and (c) the retrial is in the interests of justice (proposed s 378A(2)). In line with the recommendations of the Law Commission, the proposed section is not to apply retrospectively.

The Parliamentary Select Committee on Law and Order commented that, in his report to the Parliament, the Attorney General acknowledged that the tainted acquittal exception was a breach of s 26(2) (double jeopardy prohibition) of the Bill of Rights Act but was justified under s 5 (justified limits clause) and:

²²¹ This term is defined by s 54(6) to mean: (a) the offence of perverting the course of justice; (b) the offence under s 51(1) of the Criminal Justice and Public Order Act 1994 (intimidation etc. of witnesses, jurors and others); and (c) an offence of aiding, abetting, counseling, procuring, suborning or inciting another person to commit an offence under s 1 of the Perjury Act 1911.

²²² [1999] 3 NZLR 385.

²²³ New Zealand law Commission, *Acquittal Following Perversion of the Course of Justice*, Report 70, March 2001, p 11. For a commentary see - Acting Justice J Mathews, *Advice to the Attorney General - Safeguards in relation to proposed double jeopardy legislation*, 27 November 2003, p 11.

is consistent with New Zealand's international and domestic obligations. This is because a tainted acquittal is not legally a legitimate verdict but a nullity, therefore a rule relating to a retrial of such an acquittal is not an exception to the double jeopardy rule.²²⁴

6.10.2 Retrial where there is 'new and compelling evidence': This further exception to the double jeopardy rule was not supported by the New Zealand Law Commission which stated: 'No case has been established in New Zealand for a "new evidence" exception to the rule against double jeopardy'.²²⁵

A different view is taken in the Criminal Procedure Bill where a 'new and compelling' evidence exception to double jeopardy is proposed, that is, in circumstances where evidence that was not available at the time of the first trial indicates with a high degree of probability that the accused is guilty of the offence for which he was acquitted (proposed s 378D).

The Attorney General's report to Parliament stated that the 'new and compelling evidence' exception was a prima facie breach of s 26(2) of the Bill of Rights Act, and that it could not be justified under s 5. This was because of the disproportionately wide range of offences caught by the 14 year penalty threshold.²²⁶ A majority of the Select Committee on Law and Order took the view that this exception was:

a principled balancing of the two competing interests of finality and justice in the criminal system. Where new evidence emerges after an acquittal undermining its legitimacy from a factual perspective, most of us consider it is in the interests of justice to retry the acquitted person, but only with respect to the most serious of offences.²²⁷

6.11 Criminal Justice Act 2003 (UK)

The background to this statute was discussed in detail in Briefing Paper No 16/2003, including overviews of various Law Commission publications on double jeopardy, the Home Affairs Committee report of 2000 and, from a year later, the Auld review of the criminal courts of England and Wales. This was followed in July 2002 by the presentation

²²⁴ New Zealand Parliament, Select Committee on Law and Order, *Report on the Criminal Procedure Bill*, July 2005, p 6.

²²⁵ New Zealand Law Commission, n 223, p viii.

²²⁶ The independent role played by the New Zealand Attorney General as Chief Law Officer of the Crown is discussed in – G Huscroft et al, *The New Zealand Bill of Rights*, Oxford University Press 2003, p 198 and D McGee, *Parliamentary Practice in New Zealand*, 3rd ed, Dunmore Publishing Ltd 2005, pp 345-346. For the Attorney General's report see - <http://www.clerk.parliament.govt.nz/Content/Parliamentary-Papers/E.63CriminalProcedures.pdf>

²²⁷ New Zealand Parliament, Select Committee on Law and Order, *Report on the Criminal Procedure Bill*, July 2005, p 7.

to Parliament of a ‘White Paper’ entitled *Justice for All*. Also provided in the Briefing Paper is a table showing the differences between the recommendations of the various pre-legislative inquiries and the Bill as passed by the House of Commons.

Part 10 of the *Criminal Justice Act 2003* is titled ‘Retrial for serious offences’. In summary, it provides:

- **Qualifying offences:** For England and Wales 29 serious offences are currently listed in Schedule 5 of the Act, including murder, kidnapping, rape, certain drug offences, and hostage taking. Also included is manslaughter.
- **New and compelling evidence:** By s 78, to obtain a retrial, there must be new and compelling evidence. ‘New’ means 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). Evidence is ‘compelling’ if it is reliable, substantial, and in the context of the outstanding issues it appears ‘highly probative of the case against the acquitted person’.
- **DPP must give consent** – By s 76(3), the personal consent of the Director of Public Prosecutions must be given, both for the police to investigate the commission of a qualifying offence by the acquitted person (except where investigative action is a matter of urgency – s 86) and for the making of an application to the Court of Appeal. By s 85(6), the Director may not consent to a re-investigation unless satisfied that there is ‘sufficient new evidence’ (or there is likely to be, as a result of the investigation) and it is in the public interest for the investigation to proceed. The Director may only give consent to an application being made if satisfied that the requirements for the evidence to be ‘new and compelling’ appear to be met, and it is in the public interest to apply.
- **One application** – By s 76(5), not more than one application may be made for an acquittal to be quashed.
- **Court of Appeal’s determination of an application** – By s 77(1), the Court of Appeal must be satisfied that the requirements for new and compelling evidence and the interests of justice are met. By s 79, the interests of justice are to be determined having regard in particular to: whether existing circumstances make a fair trial unlikely; the length of time since the offence was allegedly committed; whether it is likely that the new evidence would have been adduced in the earlier proceedings but for a failure by an officer or a prosecutor to act with due diligence or expedition; whether, since those proceedings (or, if later, since the commencement of Part 10) any officer or prosecutor has failed to act with due diligence or expedition.
- **Publication restrictions** – By s 82(1), the Court of Appeal can make an order restricting publication where it would give rise to a ‘substantial risk of prejudice to the administration of justice in a retrial’ and the making of an order appears to be necessary in the interests of justice. After the Court receives notice of an

application to quash an acquittal, by s 82(5) the Court may make an order restricting publication on its own motion or on the application of the Director of Public Prosecutions. An order can also be applied for by the DPP at an earlier stage if a reinvestigation of the acquitted person has commenced (s 82(6)).

- ***Retrial procedures*** – There are requirements for the prosecution to act with due expedition in the retrial. For example, by s 84(2) the defendant is to be arraigned²²⁸ within two months of the order for a retrial, except where the Court of Appeal grants leave.
- ***Right of appeal against determination*** – By s 33(1B) of the *Criminal Appeal Act 1968*, an appeal lies to the House of Lords, at the instance of the acquitted person or the prosecutor, from any decision of the Court of Appeal on an application for a retrial for a qualifying offence.
- ***Retrospective*** – By s 75(6), Part 10 applies whether the acquittal was before or after the passing of the Act.

According to Robert L Weinberg, Adjunct Professor at George Washington University law School, resistance in Parliament to the repeal of the double jeopardy rule was ‘surprisingly limited’. Weinberg stated:

The argument that repeal advanced the protection of victims’ rights carried the day, overcoming civil liberties concerns that had underlain the guarantee as a fundamental right of Englishmen for eight centuries.²²⁹

On a more technical note, Weinberg commented:

The ‘new and compelling’ evidence that triggers a retrial need not really be new at all, or even newly discovered. The Act simply states: ‘Evidence is new it was not adduced in the proceedings in which the person was acquitted’. As Lord Neill of Bladen pointed out: ‘It is a lower test than is used habitually in civil cases. In a civil case, one would have to show that the new evidence was not reasonably available on the previous occasion. There is no such requirement here’.

6.12 Draft Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW)

With some modification, this Draft Bill was based on its UK equivalent. Again, detailed accounts are found in Briefing Paper No 16/2003 and in the Draft Report of the Legislation

²²⁸ An arraignment is the occasion on which the indictment is formally read to the accused in court, the accused is asked how he or she pleads, and the accused enters a plea to the charge(s) on the indictment.

²²⁹ ‘A transatlantic contrast: England abandons US Fifth Amendment guarantees’ - <http://www.lse.ac.uk/collections/alumniRelations/reunionsandevents/reportsandphotos/ATransatlanticContrast.htm>

Review Committee on the Consultation Draft Bill – Criminal Appeal Amendment (Double Jeopardy) Bill 2003. In essence, the Draft Bill allowed for acquittals to be re-opened in three circumstances:

- Where there was ‘fresh and compelling evidence’ provided after acquittal;
- Where the acquittal appeared to be tainted; and
- Where the prosecution appeals on the basis of an error of law.

For this purpose a new Part 3A was to be inserted into the *Criminal Appeal Act 1912*. The first two exceptions to the double jeopardy rule were set out in Division One of proposed Part 3A, the last in Division Two. In summary, Division One – relating to those circumstances *where there is ‘fresh and compelling evidence’ provided after acquittal*, and *where the acquittal appears to be tainted* – provided as follows:

- **Qualifying offences:** The application of Division One was restricted to ‘very serious offences’, comprising murder or any other offence punishable by imprisonment for life, or manslaughter (clause 9B).
- **Fresh and compelling evidence:** To obtain a retrial there must appear to be ‘fresh and compelling evidence’ against the person acquitted of a very serious offence. Evidence is ‘fresh’ if it was not adduced or led in the proceedings in which the person was acquitted *and* it could not have been adduced or led in those proceedings with the exercise of reasonable diligence (clause 9D). By preferring the requirement of ‘fresh’ evidence to the ‘new’ evidence required under the UK equivalent, the Draft Bill was setting a higher standard for retrial, effectively barring an order for retrial where the acquittal was the product of incompetence on the part of the police or prosecution. Evidence was defined to be ‘compelling’ if it was reliable, substantial and highly probative of the case against the acquitted person.
- **Tainted acquittal:** Modeled on the UK’s *Criminal Procedure and Investigations Act 1996* (ss 54 and 55), the Court of Criminal Appeal could also order a retrial where a person who was acquitted of a ‘very serious offence’ was later convicted of an ‘administration of justice offence’, which would include perjury and interference with jurors or witnesses. A retrial could be ordered where the Court of Criminal Appeal was satisfied that ‘it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted’ (clause 9E(2)).

But note that this provision did not directly overturn the High Court’s decision in the *Carroll* case, where it was held that a conviction for perjury would be prohibited by the double jeopardy rule. In other words, while the Draft Bill contemplated the conviction of a person for an administration of justice offence, including perjury, the High Court’s decision would still have precluded prosecution for that offence, at least where any evidence, if accepted, would overturn or tend to overturn the original verdict. As discussed by MCCOC, prosecution for perjury is likely to attack the legitimacy of the original acquittal and would therefore still be

barred by the double jeopardy rule.²³⁰ That situation would not have altered under the terms of the Draft Bill.

Note that the Draft Bill extended its reach to apply to where ‘*another person*’ had been convicted of an administration of justice offence. But as the Legislation Review Committee noted, ‘there is no requirement to show that the acquitted person played any part in, or had any knowledge of, the commission of that offence’.²³¹ According to Acting Justice Jane Mathews, the tainted acquittals provisions of the UK’s *Criminal Procedure and Investigations Act 1996* similarly extend to third parties.²³² Unlike its UK equivalent, however, the Draft Bill does restrict the offences which might be reopened following an acquittal.

Note, too, that the tainted acquittal provision applied even if the conviction for the administration of justice offence was still subject to appeal ‘so long as it appears that the conviction will stand’. If the appeal succeeded, it would be up to the person facing a retrial to apply to the Court for the order for retrial to be quashed (clause 9E(3) and (4)).

- ***Interests of justice:*** A retrial could only be ordered where the Court of Criminal Appeal was satisfied that it was in the interests of justice for the order to be made (clause 9C(2)). The interests of justice were to be determined having regard in particular to: whether existing circumstances made a fair trial unlikely; the length of time since the offence was allegedly committed; whether any police officer or prosecutor had failed to act with reasonable diligence or expedition in connection with a retrial of the acquitted person.
- ***One application:*** The DPP could only make one application for a retrial and a person acquitted on retrial could not be retried a second time (clause 9C(3)).
- ***Other safeguards:*** Similar restrictions on publication were to apply as in the UK in respect to any matter ‘that would give rise to a substantial risk of prejudice to the administration of justice in a retrial’ (clause 9M). Further, an indictment for the retrial had to be laid within two months from the Court of Criminal Appeal’s order, unless the leave of the Court was obtained for an extension (clause 9H(1)).
- ***DPP’s consent:*** As in the UK, the consent of the Director of Public Prosecutions had to be given, both for the police to investigate the commission of a qualifying offence by the acquitted person (except where investigative action is a matter of urgency – clause 9K(6)) and for the making of an application to the Court of Appeal.
- ***Retrospective:*** Division One of the Draft Bill was to operate retrospectively and to persons acquitted outside NSW.

²³⁰ MCCOC Discussion Paper, n 9, p 89.

²³¹ Parliament of NSW, Legislation Review Committee, *Consultation Draft Bill: Criminal Appeal Amendment (Double Jeopardy) Bill 2003*, Draft Report, 24 October 2003, p 4.

²³² Acting Justice J Mathews, *Advice to the Attorney General - Safeguards in relation to proposed double jeopardy legislation*, 27 November 2003, p 11.

In summary, Division Two of proposed Part 3A to the *Criminal Appeal Act 1912*— relating to *where the prosecution appeals on the basis of an error of law* – provided as follows:

- **Extending appeal rights of Attorney General or DPP:** an extension of the rights of the Attorney General and DPP to appeal to the Court of Criminal Appeal against acquittals by trial judges on any grounds ‘that involve a question of law alone’. (clause 9I). This would include directed verdicts of acquittal, that is, ‘an acquittal by a jury at the direction of the trial Judge’. As explained in Briefing Paper No 16/2003, ‘This can occur if, at the close of the Crown case, counsel for the accused requests the judge to direct an acquittal on all or some of the charges, on the basis that there is no *prima facie* case. A verdict may be directed “only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty”’: *Doney v The Queen* (1990) 171 CLR 207 at 215. If the judge directs the jury to acquit an accused, the jury must comply’.
- **The Court of Criminal Appeal’s powers:** Where an acquittal was quashed, the Court could order a retrial, for which purpose ‘the Court may (subject to the Bail Act 1978) order the detention or return to custody of the accused person in connection with the new trial’ (clause 9I(4)).
- **Not retrospective:** The right of appeal under Division Two was not to operate retrospectively (clause 9I(6)).
- **Jury verdicts not affected:** Other than where the trial judge directed an acquittal, jury verdicts of acquittal were not affected under the Draft Bill, even if based on a misdirection on a point of law. As the Legislation Review Committee commented, ‘This recognises the importance of the finality of the verdict of a jury’.²³³

6.13 Legislation Review Committee Draft Report

In its Draft Report of October 2003 the Committee expressed several concerns. In respect to the retrospective operation of the Draft Bill, for example, it said that this should ‘only be allowed if overwhelmingly in the public interest and only if there are sufficient safeguards in place to prevent abuse’.²³⁴ Suggestions were made for possible additional safeguards, including 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.²³⁵ The Committee’s concluding comments were as follows:

- 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.

²³³ Legislation Review Committee, *Consultation Draft Bill: Criminal Appeal Amendment (Double Jeopardy) Bill 2003*, n 231, p 7.

²³⁴ Legislation Review Committee, *Consultation Draft Bill: Criminal Appeal Amendment (Double Jeopardy) Bill 2003*, n 231, p 6.

²³⁵ Legislation Review Committee, *Consultation Draft Bill: Criminal Appeal Amendment (Double Jeopardy) Bill 2003*, n 231, p 7.

- 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.
- 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.
- 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.

6.14 Submission of UNSWCCL

UNNSWCCL's submission to the Attorney General is too wide ranging to recount at length in this paper.²³⁶ It constitutes an informed critique of all aspects of the Draft Bill, in principle and in detail. The concerns expressed include:

- **Conditional acquittals:** permitting the Crown to re-open cases will render all acquittals of very serious offences conditional.
- **Retrospective:** the retrospective operation of the Draft Bill would render all past acquittals conditional.
- **Presumption of guilt:** a retrial on the grounds of 'fresh and compelling' evidence will greatly prejudice the defendant. Effectively the retrial will commence from a presumption of guilt, rather than innocence.
- **Tainted acquittals:** this was the only proposal supported in principle by UNSWCCL, but only if the draft provision were heavily amended. Concern was expressed about the provision's breadth, extending as to the commission of an administration of justice offence by the accused and by *another person*. The argument was also put that, as in the UK, the provision should be restricted to administration of justice offences involving interference with or intimidation of a juror or a witness.
- **Compensation:** if falsely retried a person should be compensated 'with a large compensation payment defined in statute'.
- **Acquittals on basis of error of law alone:** one concern was that this provision was not limited to 'very serious offences'. Another was that, by granting a further right to appeal to the Attorney General, the Draft Bill 'leaves the way open for political interference in the judicial process'. On the other hand, UNSWCCL was relieved that this right of appeal would not be retrospective in operation.
- **Carroll's case unaffected:** UNSWCCL questioned whether the 'new' evidence in that case would amount to 'fresh and compelling' evidence as required by the Draft Bill and wondered, in any event, whether it would remedy the problem with the *Carroll* case. It was argued that the case did not involve DNA evidence, but expert opinion from forensic dentists who examined photographs of a bite mark. This was not 'fresh' evidence, it was argued, 'but rather a reinterpretation of old evidence by

²³⁶

Submission to the NSW Attorney General's Community Consultation of the Draft Criminal Appeal Amendment (Double Jeopardy) Bill, 15 October 2003.

a “fresh set of witnesses”²³⁷.

A broader concern expressed by UNSWCCL was that the Draft Bill altered the principled asymmetry of the criminal law, which serves to protect the individual from the oppressive might of the state. It is argued that the reform of double jeopardy seeks to arm the prosecution with the same rights of appeal against acquittal, as a convicted person has against their conviction. As noted earlier, UNSWCCL describes the propensity to equate wrongful acquittals with wrongful convictions as a ‘desire for symmetry in the law’, adding that this desire ‘fails to recognise that wrongful acquittals are conceptually different from wrongful convictions because the former do not involve the unconscionable incarceration of an innocent by the state’.²³⁸

6.15 Advice of Acting Justice Jane Mathews

The brief of Acting Justice Jane Mathews was not to consider the policy question whether the double jeopardy rule should be abolished. Rather, her terms of reference were limited to advising the Attorney General on: (a) whether the safeguards contained in the Draft Bill ‘adequately protect individual rights’; and (b) whether any further safeguards should be included to ensure adequate protection of individual rights. For this purpose, the safeguards relating to the first two elements of the Draft Bill - the exception relating to fresh and compelling evidence and the exception relating to tainted acquittals - were considered together. Alongside drafting amendments of a more technical nature, the recommendations included:

- ***Manslaughter omitted:*** Given the large number of offences it covers, this should not be included as a ‘very serious offence’. It was argued that ‘Manslaughter is a crime which potentially involves an extremely wide range of culpability, more so than virtually any other statutory offence’. It was noted that this would not preclude a person who had been acquitted of manslaughter from later being retried for murder.²³⁹
- ***Tainted acquittals offences broadened:*** Conversely, as suggested by the MCCOC Discussion Paper, the number of offences which might be included in the tainted acquittals exception could be extended. Her general view was that ‘there is much to be said for imposing more rigorous safeguards on the fresh evidence exception than in relation to tainted acquittals’.²⁴⁰
- ***Restrictions on tainted acquittals:*** Nonetheless, it was also felt that some aspects of the tainted acquittals exception went too far. Specifically in relation to the tainted acquittal exception, Acting Justice Mathews recommended the deletion of the reference to ‘another person’ from clause 9E(2)(a), which would have permitted the

²³⁷ UNSWCCL, n 1, p 7. For a detailed account of the new and stronger evidence adduced by the Crown see – R Johns, n 82, p 7; *R v Carroll* (2000) 115 A Crim R 164.

²³⁸ UNSWCCL, n 1, p 26.

²³⁹ Acting Justice Jane Mathews, n 232, p 17.

²⁴⁰ Acting Justice Jane Mathews, n 232, p 4.

retrial of an individual even where the administration of justice offence had been committed by a third party. Also recommended for deletion were the provisions enabling an order for retrial to be made even when a conviction for an administration of justice offence is under appeal. It was pointed out that no equivalent provisions are found in either the UK legislation or the recommendations of the New Zealand Law Commission.

- **Restrictions on publication:** In the interests of a fair retrial, a total prohibition was recommended on publication in relation to: any authorisation of a police investigation; and any application to the Court of Criminal Appeal seeking an order that an acquitted person be retried; and any resulting retrial.
- **Role of the DPP:** The DPP had expressed in his submission concerns about conferring on his Office a ‘gate keeping and supervisory role’ in respect to authorisation of police investigations. The DPP submitted this ‘would be inappropriate, given that he has always been vigilant to maintain a separation of functions between himself as a prosecuting authority and the police as an investigating authority’. While recognizing the difficulties involved, Acting Justice Mathews could see ‘no realistic alternative to nominating the DPP as the person who must consent to police investigations under the proposed legislation’.²⁴¹
- **Retrospective:** On one side it was said that, with the possibility of introducing newly available forensic evidence, ‘particularly DNA evidence’, there was a ‘real argument for allowing a degree of retrospectivity’. On the other, it was recommended that a time limit of seven years should be imposed in respect to the exception relating to fresh and compelling evidence. No such time limit was recommended for the tainted acquittals exception.²⁴²

With reference to appeals against acquittals on questions of law, it was noted that at least one submission had suggested that ‘if prosecution appeals are to be permitted, they should be by leave rather than by right. It was pointed out that only one Australian State, Western Australia, allows for prosecution appeals as of right’. Acting Justice Mathews said she ‘strongly’ endorsed this proposal, suggesting that s 401(2) of the Tasmanian Criminal Code (1924) could provide a model for an amended provision. Under that section, the Attorney General can appeal to the Court of Criminal Appeal against an acquittal on a question of law ‘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’.²⁴³

The suggestion in several submissions that the NSW legislation should be delayed until after MCCOC had reported on double jeopardy was said to have ‘substantial merit’.²⁴⁴

²⁴¹ Acting Justice Jane Mathews, n 232, p 24. But note that the deletion of clause 9K(5) was recommended, a provision designed to enable the DPP to impose conditions on the conduct of the police investigation’, as having ‘the capacity to involve the DPP in the investigatory process in a way which is inconsistent with his or her role as a prosecutor’.

²⁴² Acting Justice Jane Mathews, n 232, pp 27-28.

²⁴³ Acting Justice Jane Mathews, n 232, p 34. For a jurisdictional review see – MCCOC Discussion Paper, n 9 ,pp 28-43.

²⁴⁴ Acting Justice Jane Mathews, n 232, p 4.

6.16 The MCCOC Discussion Paper

Released in November 2003, the MCCOC Discussion Paper suggested model provisions for the reform of double jeopardy, taking on board the ongoing debates in the UK, New Zealand and NSW. Four exceptions to the double jeopardy rule are contemplated:

- Prosecution for an administration of justice offence connected to the original trial - where there is ‘fresh’ evidence of the commission of an administration of justice offence.
- Retrial of the original or similar offence where the acquittal is tainted.
- Retrial of the original or similar offence where there is ‘fresh and compelling’ evidence.
- Prosecution appeals against directed jury acquittals or acquittals in trials without juries.

6.16.1 Prosecution for an administration of justice offence connected to the original trial - where there is ‘fresh’ evidence of the commission of an administration of justice offence: The MCCOC Discussion Paper proposal needs to be distinguished from the approach to ‘tainted acquittals’ found in the NSW Draft Bill of 2003. In the Draft Bill a person could be retried for a ‘very serious offence’ after that person (or another person) had been convicted of an administration of justice offence. The provision presupposed therefore that a conviction for the administration of justice offence had already occurred (or was or could be subject to appeal). As noted, the tainted acquittal exception of the Draft Bill of 2003 would not have affected the outcome in the *Carroll* case, for the reason that a conviction for perjury would still have been prohibited by the double jeopardy rule.

The MCCOC proposal, on the other hand, addresses the possibility of a prosecution for an administration of justice offence itself where ‘fresh’ evidence of such an offence emerges. As such ‘in the context of perjury it involves directly overturning the High Court’s *Carroll* decision’.²⁴⁵ In other words, taking the *Carroll* case as an example, this exception would permit, not a retrial, but a trial for perjury (or some other administration of justice offence) committed in connection with the proceedings for the original or primary offence for which he was acquitted.

The exception for administration of justice offences *would not operate retrospectively* (clause 2.8.2). On the other hand, as in the Draft Bill of 2003, convictions for tainted acquittals *would extend to ‘another person’*, that is, to a person other than the one who had committed the original offence (clause 2.8.7).

One ‘safeguard’ is that ‘fresh’ evidence is required that an administration of justice offence had been committed. A second ‘safeguard’ is that, under the MCCOC proposal, where there is a tainted acquittal, the prosecution must elect either to retry the person for the same offence (or a similar substantive offence), or alternatively to prosecute the person for the administration of justice offence. But note that this second ‘safeguard’ has a limited

²⁴⁵ MCCOC Discussion Paper, n 9, p 97.

application. Specifically, it is limited to where the administration of justice offence ‘directly attacks the legitimacy of the original acquittal’, something that would have to be determined on a case by case basis. MCCOC comments that it is ‘most likely’ to arise in the context of perjury.²⁴⁶ A person could not therefore be: (a) tried and acquitted for an offence; (b) convicted of an administration of justice offence, ‘*if a finding that the person committed the administration of justice offence would, in effect, contradict the person’s acquittal*’; and (c) later retried for the original or primary offence (or a similar substantive offence).

6.16.2 *Retrial of the original or similar offence where the acquittal is tainted:* In respect to tainted acquittals, a retrial for a very serious offence could occur following a conviction for an administration of justice offence, but only where that conviction does not go to the heart of the acquittal for the primary offence.

6.16.3 *Retrial of the original or similar offence where there is ‘fresh and compelling’ evidence:* The proposal is restricted to ‘very serious offences’, which is defined to mean ‘any indictable offence punishable by imprisonment for life or for a period of 15 years or more’ (clause 2.8.1). Clarified by the Discussion Paper is that it is the retrial that has to be for a ‘very serious offence’, which may or may not be exactly the same offence as the subject of the original acquittal. MCCOC explains:

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 prosecution (subject to stringent procedural safeguards) even though common assault is not a very serious offence.²⁴⁷

Defined by MCCOC are the words ‘fresh’ and ‘compelling’ evidence (clause 2.8.6). Following the Draft Bill of 2003, ‘fresh’ is preferred to the UK usage of ‘new’ on the grounds that ‘new’ evidence is simply evidence that was not presented at the original proceedings (for whatever reason). On the other hand, ‘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’.²⁴⁸

It is proposed that this exception to the double jeopardy rule *would operate retrospectively*. This again is consistent with the Draft Bill of 2003. However, by way of a safeguard, under the ‘interests of justice’ provision the Draft Bill did require the Court to have particular

²⁴⁶ MCCOC Discussion Paper, n 9, p 89.

²⁴⁷ MCCOC Discussion Paper, n 9, pp 92-93.

²⁴⁸ MCCOC Discussion Paper, n 9, p 109.

regard to ‘the length of time since the acquitted person allegedly committed the offence’ (clause 9F(2)(b)). A similar tack is taken by MCCOC. Recognising that ‘even limited retrospectivity here may be controversial’, the Discussion Paper proposed a more forthright statement of this principle, providing in clause 2.8.8(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.

The Discussion Paper commented:

Incorporated into the ‘interests of justice’ test...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 in, 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.²⁴⁹

In addition, the ‘interests of justice’ test requires the Court of Appeal to have particular regard to: (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; and (c) whether the person was acquitted before or after the commencement of this Division’.

6.16.4 Prosecution appeals against directed jury acquittals or acquittals in trials without juries: This proposed exception to the double jeopardy, which would have the effect of widening the interlocutory power to appeal by the prosecution, is modeled directly on the NSW Draft Bill of 2003 – ‘Appeals on questions of law.’ The Discussion Paper commented: ‘The Committee is...of the opinion that the powers of appeal against an acquittal proposed in the NSW *Consultation Draft Bill* are worthy of approval and recommends accordingly’. It added:

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. (emphasis added)²⁵⁰

The Discussion Paper went on to say:

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

²⁴⁹ MCCOC Discussion Paper, n 9, p 105.

²⁵⁰ MCCOC Discussion Paper, n 9, p 81

retrial if a jury's verdict can be attributed to a wrong direction or ruling by a trial judge.²⁵¹

6.17 The MCCOC Report

Released in March 2004, the MCCOC report on Double Jeopardy²⁵² considered the submissions it had received in response to its Discussion Paper. Specific recommendations included:

- ***Tainted acquittals distinguished:*** It was recognised that the fresh and compelling evidence exception should be recognised as raising different issues from the tainted acquittals exception. The report commented: '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'.
- ***Retrospective:*** All the proposed provisions should apply retrospectively.
- ***Positive construction on interests of justice requirement:*** On the other hand, the requirement in clause 2.8.8(2) of the model provisions that the Court consider the length of time since an offence was committed or a person was acquitted should be reworded positively to read 'The Court of Criminal Appeal must be satisfied that an order for the retrial of a person is in the interests of justice...'
- ***DPP authorisation of investigations:*** The concerns about the DPP acting as a gatekeeper in the sense of requiring DPP authorisation for conducting a re-investigation with a view to re-opening an acquittal were revisited.²⁵³ The report argued that this gatekeeper role 'is not incompatible with the true function of the DPP' and recommended that role in the proposed scheme should remain as proposed in the Discussion Paper. It was argued that 'Modern criminal trial reform initiatives emphasise the need for a closer alliance between investigating police and prosecutors. 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'.
- ***Qualifying offences distinction:*** Whereas the 36 'very serious offences' listed at Appendix B of the Discussion Paper should continue to apply in relation to the tainted acquittals exception, a more limited list of qualifying offences should apply to the 'fresh and compelling evidence' exception – murder, manslaughter, serious drug offences (where life imprisonment applies), aggravated rape and armed robbery. Note that, contrary to the advice received by the NSW Attorney General from Acting Justice Mathews, manslaughter is included on this list.
- ***Time for lodging an application:*** The NSW DPP objected to the proposal that the

²⁵¹ MCCOC Discussion Paper, n 9, p 127.

²⁵² MCCOC Report, n 8.
[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/DF02560DFF8762DDCA256E61007BC55B/\\$FILE/Double+Jeopardy+Report+25+Mar.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/DF02560DFF8762DDCA256E61007BC55B/$FILE/Double+Jeopardy+Report+25+Mar.pdf)

²⁵³ As discussed by Acting Justice Mathews, these concerns were raised by the NSW DPP.

DPP file an application to the Court of Criminal Appeal no more than 2 business days after a previously acquitted person is charged. The report agreed that a time limit of 10 business days would be more appropriate.

- ***Appeals against acquittals***: There should be a 28 day time limit on appeals against acquittals with power to apply to extend.

In other respects, it was said, the model provisions ‘are suitable for implementation’.

6.18 Comment

From the foregoing discussion it is clear that the issue of double jeopardy raises many questions of a technical nature, as well as underlying questions of principle that underpin the criminal justice system. Among the technical questions are whether:

- manslaughter should be categorised as a very serious offence for this purpose, as favoured by the MCCOC Discussion Paper, but not by Acting Justice Mathews?
- should the list of qualifying offences be wider for the ‘tainted acquittals’ exception, than for the ‘fresh and compelling evidence’ exception, as recommended in the MCCOC report?
- should prosecutions for tainted acquittals apply retrospectively, as recommended in the MCCOC report, or only prospectively, as in the UK and proposed under the New Zealand Criminal Procedure Bill?
- similarly, should prosecution for an administration of justice offence in respect to a trial at which a person was acquitted (the *Carroll* situation) operate retrospectively, the view favoured in the MCCOC report but not in the earlier Discussion Paper. UNSWCCL commented that the MCCOC Report ‘recommends the unconstitutional retrospective operation of its proposals’.²⁵⁴
- should the tainted acquittals provision extend to ‘another person’, that is, to a person other than the one who had committed the original offence, as proposed by MCCOC and in the Draft NSW Bill, but opposed by Acting Justice Mathews?
- is the proposed ‘gatekeeper’ role of the DPP problematic in that it undermines the separation between prosecution and investigative functions, as maintained by the NSW DPP?
- should retrial be an option in all cases of tainted acquittals, where very serious offences are at issue, as proposed in the NSW Draft Bill of 2003, or should this be limited in some way, as suggested by MCCOC? As noted, MCCOC recommended that, in respect to tainted acquittals, a retrial for a very serious offence could occur following a conviction for an administration of justice offence, but only where that conviction does not go to the heart of the acquittal for the primary offence.

It was said earlier in this paper that the issues at stake in the reform of double jeopardy should be considered ones of principle not degree. It is the case, however, that a retrial following a tainted acquittal may be less problematic than a retrial on the grounds of ‘fresh and compelling’ evidence. UNSWCCL argues that the latter will ‘greatly prejudice the

²⁵⁴

UNSWCCL, Double jeopardy and federal law -

http://www.nswccl.org.au/nswccl/issues/double_jeopardy_cth.php

defendant. Effectively the retrial will commence from a presumption of guilt, rather than innocence'. Both the arguments for and against reform can be formulated in many ways. For the New Zealand Law and Order Committee, the 'new and compelling evidence' exception represents a 'principled balancing of the two competing interests of finality and justice in the criminal system'. In a similar vein, the New Zealand Minister of Justice, Phil Goff, commented:

there is strong argument for an exception to be made when a person has been acquitted of a very serious offence and subsequently new evidence is discovered pointing to strong evidence of guilt. In such a case, double jeopardy principles are outweighed by a higher public interest in holding the individual to account for the offence. Not to do so would represent a major injustice to any victims, and would potentially undermine public confidence in the criminal justice system.²⁵⁵

From this standpoint, the hope is expressed that, with the availability of DNA evidence and other advances in the forensic sciences, there will be an opportunity to correct the wrongful acquittals of the past. Against this is the view that the principle of finality is of fundamental importance as it embodies one of the main restrictions on state power in a democracy. The double jeopardy rule is said to form part of 'the criminal justice deal' in a liberal democracy.²⁵⁶ The view is expressed that 'the values that the rule protects outweighs the desirability of obtaining a slightly higher conviction rate for the offences that will be caught by the new evidence exception'.²⁵⁷

For those who support reform of the double jeopardy rule, the argument is that a new 'balance' can be found in the criminal justice deal, one that continues to uphold the rights of the accused while at the same time recognising the impact made by scientific advances and applying these to bolster the rights of victims and the interests of society at large. Those who oppose reform might argue that the language of 'balance' is misplaced in this context, suggesting as it does that rights can be traded without loss to the individual accused and without impairment to civil liberties generally. The terms of engagement are familiar enough.

²⁵⁵ P Goff, Minister of Justice (NZ), 'Exceptions to double jeopardy to be introduced', *Media Release*, 15 May 2004.

²⁵⁶ P Roberts, 'Double jeopardy law reform: a criminal justice commentary' (2002) 65 *Modern Law Review* 393.

²⁵⁷ C Parkinson, 'Double jeopardy reform: the new evidence exception for acquittals' (2003) 26(3) *UNSW Law Journal* 603 at 605.

7. CONCLUSION

Advances in the field of forensic science, especially those associated with DNA evidence, have prompted calls for both the law relating to wrongful convictions and wrongful acquittals to be revisited. Some of the problems with and limitations of DNA evidence for the criminal justice system have been considered in this paper, as have the technical problems involved in establishing a fully functioning national DNA database. The paper has also discussed the spectacular impact that such ‘fresh’ evidence can make, in particular in relation to the innocence projects in operation in the United States. Developments of this kind have led to calls for legislative reform, both for the preservation of crime scene evidence and for the re-establishment of the NSW Innocence Panel, under the new title of the ‘DNA Review Panel’. They have also spearheaded reconsideration of the rule against double jeopardy, with a view to applying DNA and other forensic evidence to challenging wrongful acquittals. As noted, major issues of principle are involved, based on the competing interests of finality and justice. It is also argued that a distinction needs to be drawn between wrongful convictions and wrongful acquittals, as logically and legally distinct matters. The connections between the two in the contemporary debate, where they are often discussed as the two sides of a single coin, can also be acknowledged.

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