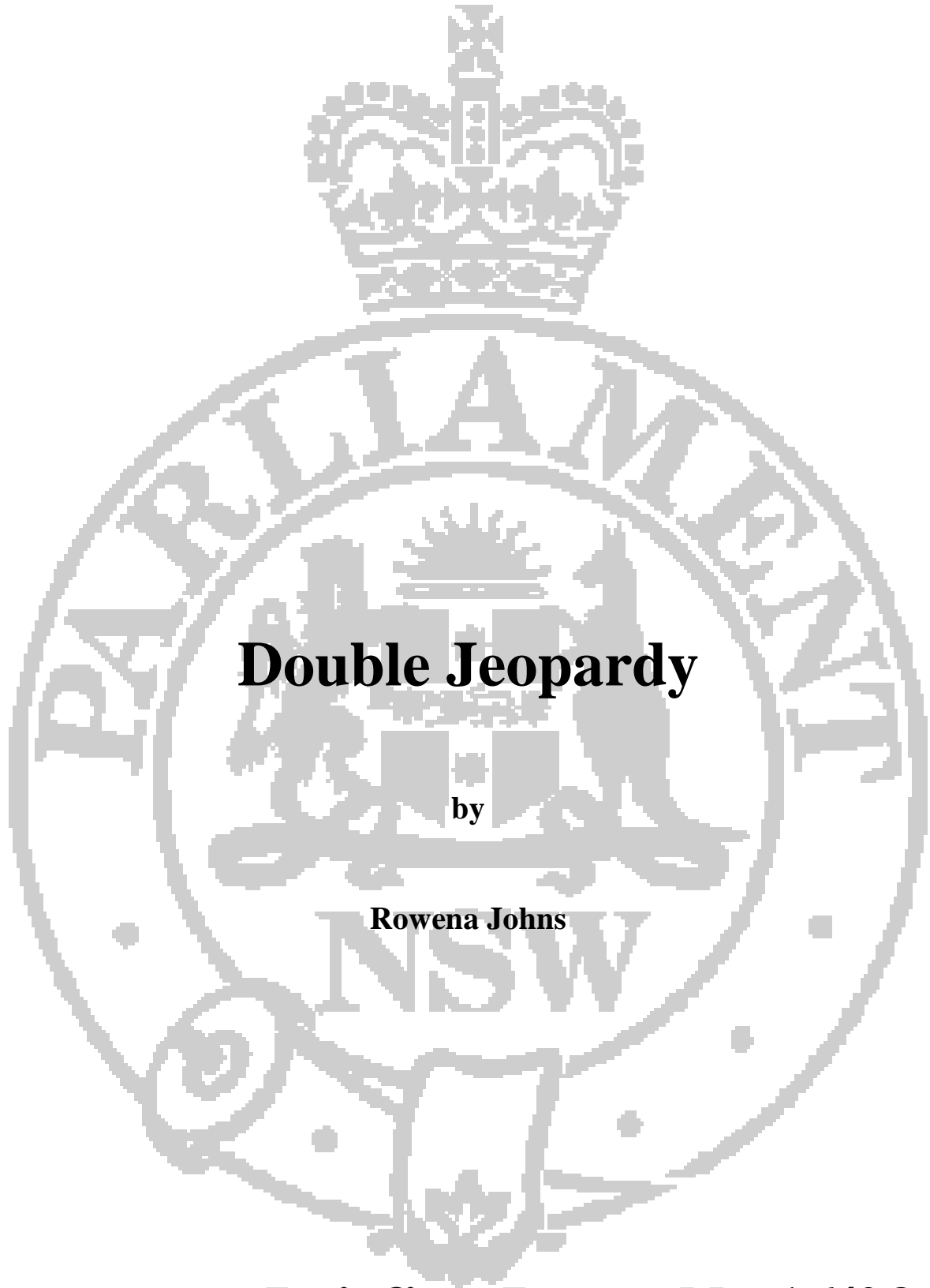


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Double Jeopardy

by

Rowena Johns

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EXECUTIVE SUMMARY

In February 2003, the Premier of New South Wales, Hon Bob Carr MP, advocated the introduction of new exceptions to the double jeopardy rule, which would allow the prosecution to appeal against a verdict of acquittal on the basis of fresh evidence. This briefing paper outlines the proposals, and provides general guidance on the doctrine of double jeopardy, its benefits and limitations. The influences of recent case law, developments in the United Kingdom, and advances in forensic science, are also explored.

Chapter 2 analyses the concept of double jeopardy, and its meaning at different stages of the criminal justice process. The exceptions to double jeopardy that are already allowed in New South Wales are explained. [Pages 2-6]

Chapter 3 examines the case of *R v Carroll* [2002] HCA 55; (2003) 194 ALR 1, in which the High Court found that the Crown's attempt to prosecute an acquitted man on substantially the same facts as his initial trial was an abuse of process. The case typifies the difficulties that can be caused by double jeopardy and, according to some critics, why the law should be changed. [Pages 7-8]

Chapter 4 focuses on the proposal revealed by Premier Carr in February 2003, to enable the Director of Public Prosecutions to apply to the Court of Criminal Appeal for a verdict of acquittal to be quashed and a retrial ordered if fresh evidence emerges and certain other requirements are met. Further legislative amendments would entitle the prosecution to appeal against a judge's directed verdict of acquittal, and would expand the capacity of the prosecution to appeal against interlocutory rulings to exclude evidence. [Pages 9-10]

Chapter 5 deals with the issues and consequences involved in reducing the scope of double jeopardy. Arguments for and against changing the law are outlined, and the views of a range of commentators, public figures, and interest groups are quoted. [Pages 11-19]

Chapter 6 briefly summarises the status of double jeopardy in Australian jurisdictions other than New South Wales. In April 2003, all States and Territories participated in discussions through the Standing Committee of Attorneys General of Australia. It was resolved that a review of double jeopardy will be undertaken by the Model Criminal Code Officers Committee. [Pages 20-23]

Chapter 7 traces recent developments in the United Kingdom, which have influenced the Carr Government's proposals. Findings are reproduced from reports published since the late 1990s by the Stephen Lawrence Inquiry, the Law Commission, the Home Affairs Committee of the House of Commons, the Auld Review, and the White Paper on the criminal justice system. These inquiries culminated in legislative amendments to the double jeopardy rule being introduced in late 2002 as part of the Criminal Justice Bill. The House of Lords will continue to debate the Bill when Parliament returns after the summer recess on 8 September 2003. [Pages 24-34]

Chapter 8 gives a progress report on DNA and other techniques that could supply new

evidence for particular cases to be retried if the double jeopardy rule was relaxed. Some of the topics covered in this chapter are: the DNA legislation in New South Wales; recent statutory reviews by the Legislative Council's Standing Committee on Law and Justice, the Attorney General's Department, and the Ombudsman; the Innocence Panel in New South Wales; recent statistics on DNA testing of suspects and prisoners; the Carr Government's proposals to expand the powers for DNA testing of repeat offenders; the National DNA database; and biometric methods of identification such as eye scanning, face mapping and digital finger printing. [Pages 35-48]

1. INTRODUCTION

The common law principle that a person who has previously been either acquitted or convicted of an offence cannot be prosecuted or punished for the same conduct is known as the rule against double jeopardy.

In New South Wales, like many other common law jurisdictions, legislation already provides some exceptions to the double jeopardy rule, such as Crown appeals against allegedly inadequate sentences. However, the Premier of New South Wales, Hon Bob Carr MP, announced in February 2003 an intention to grant the prosecution a new power to apply for an acquittal to be quashed and a retrial ordered where fresh evidence emerges in a case of murder, manslaughter or a crime punishable by life imprisonment, and other conditions are met. The prosecution would also be able to appeal against directed verdicts of acquittal and have greater scope to appeal certain judicial rulings during a trial. It was pledged that the Government would ‘consult widely during the drafting of these proposals’.¹

The Carr Government’s plans are modelled on legislative reforms in the United Kingdom, which have been passed by the House of Commons and are currently before the House of Lords. Also of influence are some recent Australian cases, particularly the High Court’s decision in *R v Carroll* [2002] HCA 55; (2003) 194 ALR 1 that it was an abuse of process for the prosecution to attempt, in substance, to relitigate an earlier acquittal. Another impetus for reviewing the law on double jeopardy is the advancement of DNA technology which may allow evidence to be re-tested and to incriminate a person who was previously acquitted of the crime.

This briefing paper covers developments that occurred up to 15 August 2003.

¹Premier of New South Wales, *News Releases*, ‘Carr Government to Overhaul “Double Jeopardy” Rule’ and ‘Carr Gives Prosecution New Powers’, 9 February 2003.

2. THE DOCTRINE AND OPERATION OF DOUBLE JEOPARDY

2.1 Principles and meanings

The rule against double jeopardy declares that a person shall not be convicted of, or punished for, a single crime twice. The double jeopardy principle in the English common law dates to the 12th Century.² It provides the foundation for the pleas of ‘autrefois acquit’ and ‘autrefois convict’, which can be entered when the accused has previously been acquitted or convicted of the same charge on the same facts.

The Fourth Edition of Blackstone’s *Commentaries on the Laws of England* in 1876 aptly described the context and purpose of the pleas:³

Special pleas in *bar*; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. There are four kinds: a former acquittal, a former conviction, a former attainder, or a pardon.

1. First, the plea of *auterfois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.

2. Secondly, the plea of *auterfois convict*, or a former conviction for the same identical crime, though no judgment was ever given, is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger for one and the same crime...

However, the double jeopardy doctrine extends beyond the formal pleas in bar. Irrespective of whether a defendant pleads *autrefois acquit*, a court has the inherent power to stay a prosecution that is an abuse of process. The principle that a person should not be tried for a second time on substantially the same facts because it is an abuse of process is known in the United Kingdom as the ‘Connelly principle’, after the case of *Connelly v Director of Public Prosecutions* [1964] AC 1254 in the House of Lords.⁴ The Connelly principle was recently

² M Friedland, *Double Jeopardy*, 1969, Clarendon Press: Oxford, p 6. See this text for earlier historical evidence of double jeopardy, including the Old Testament, Ancient Greece, and Roman Law, pp 5-16.

³ *The Commentaries on the Laws of England of Sir William Blackstone*, Adapted to the Present State of the Law by Robert Malcolm Kerr, 4th Edition, 1876, John Murray: London, Volume IV: Of Public Wrongs, pp 349-350. The spelling ‘auterfois’ appears in the text.

⁴ Lord Pearce stated at p 1364: ‘A man ought not to be tried for a second offence which is manifestly inconsistent on the facts with either a previous conviction or a previous acquittal. And it is clear

referred to by the High Court of Australia in *R v Carroll* [2002]HCA 55;(2003)194 ALR 1.⁵

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* (1957) 355 US 184 at 187:

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.

The Fifth Amendment to the Constitution of the United States of America provides: ‘nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb’. Double jeopardy is also recognised in international law, for example, Article 14(7) of the United Nations *International Covenant on Civil and Political Rights*,⁶ and Article 4(1) of Protocol 7 to the *European Convention on Human Rights*.⁷ However, Article 4(2) permits the original proceedings to be reopened in certain circumstances.⁸

In New South Wales today, the common law doctrine of double jeopardy can arise at various stages of the criminal justice process, such as when entering a plea to a charge, or as protection against further prosecution after an acquittal at trial, or as a consideration to be taken into account at sentencing. This was acknowledged by the High Court in *Pearce v The Queen* (1998) 194 CLR 610 per McHugh, Hayne and Callinan JJ:

The expression “double jeopardy” is not always used with a single meaning. Sometimes it is used to refer to the pleas in bar of *autrefois acquit* and *autrefois*

that the formal pleas which a defendant can claim as of right will not cover all such cases. Instead of attempting to enlarge the pleas beyond their proper scope, it is better that the courts should apply to such cases an avowed judicial discretion based on the broader principles which underly the pleas.’ At p 1365: ‘The court has, I think, a power to apply, in the exercise of its judicial discretion, the broader principles to cases that do not fit the actual pleas and a duty to stop a prosecution which on the facts offends against those principles and creates abuse and injustice.’

⁵ Per Gleeson CJ and Hayne J at paras 38-39, and McHugh J at paras 131-132.

⁶ ‘No one shall be liable to be tried or 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.’

⁷ ‘No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.’

⁸ ‘The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.’

convict; sometimes it is used to encompass what is said to be a wider principle that no one should be “punished again for the same matter”. Further, “double jeopardy” is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment.⁹

Similarly, Gummow J observed:

In Australia, concerns with “double jeopardy” have come to be expressed at common law in differing ways by an evolutionary process which has crossed what often in the legal system is a false divide between substance and procedure. Thus, even if a plea in bar is not available, successive prosecutions may be an abuse of process...[T]he principles involved in the notion of “double jeopardy” also apply at the stage of sentencing. They find expression in the rule of practice, “if not a rule of law”, against duplication of penalty for what is substantially the same act.¹⁰

At sentence, a judge may consider a course of criminal conduct by an offender, and may take into account the offender’s prior criminal record, but must ensure that the offender is not effectively re-punished for conduct that has already been penalised. The High Court in *Pearce v The Queen* (1998) 194 CLR 610 affirmed the principle that when the accused is convicted of two offences which have common elements and arise from the same set of facts, ‘it would be wrong to punish that offender twice for the commission of the elements that are common.’¹¹

Legislation in New South Wales also makes explicit reference to double jeopardy, although less comprehensively than those jurisdictions in Australia which have a Criminal Code: see ‘6. DOUBLE JEOPARDY IN OTHER AUSTRALIAN JURISDICTIONS’ on p 20. Section 156 of the *Criminal Procedure Act 1986* confirms the procedure for making a plea of *autrefois convict* or *autrefois acquit*:

- (1) In any plea of *autrefois convict*, or of *autrefois acquit*, it is sufficient for the accused person to allege that he or she has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment, without specifying the time or place of the previous conviction or acquittal.
- (2) The issue of *autrefois convict* or *autrefois acquit* is to be determined by the court without the presence of a jury.

The prospect of being punished for the same crime in different jurisdictions is addressed by s 20 of the *Crimes (Sentencing Procedure) Act 1999*, which provides that if a penalty has

⁹At p 614. Footnotes of quotations omitted. The appeal was against a decision of the Court of Criminal Appeal of New South Wales.

¹⁰At p 629. Footnotes omitted.

¹¹At p 623 per McHugh, Hayne and Callinan JJ.

been imposed on an offender by a law of another State, Territory or the Commonwealth, the offender is not liable to any penalty in respect of the offence under a law of New South Wales.

2.2 Current exceptions to the double jeopardy rule in New South Wales

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. Some of the main instances where the prosecution can seek an appeal or a review, or otherwise be exempted from strict adherence to the double jeopardy rule, are:

(i) *Crown appeals against sentence*

If the Crown considers a sentence that was imposed by a 'court of trial' to be inadequate, section 5D of the *Criminal Appeal Act 1912* enables the Director of Public Prosecutions (or the Attorney General) to appeal to the Court of Criminal Appeal. Similarly, the Director of Public Prosecutions is entitled to appeal to the District Court against a sentence imposed in the Local Court, for various categories of offences outlined by s 23 of the *Crimes (Local Courts Appeal and Review) Act 2001*.

There is an element of double jeopardy in Crown appeals against sentence because the offender is brought back before the court to face the prospect of being re-sentenced to a higher penalty. As a result of their serious consequences, Crown appeals are exercised relatively infrequently and must be lodged as promptly as possible. The Court of Criminal Appeal may decline to intervene, even if it finds a sentence to be 'manifestly inadequate',¹² while the District Court reserves a similar discretion in spite of determining a Magistrate's sentence to be inappropriate.¹³

When a court allows a Crown appeal, it directly substitutes a new sentence. The court usually adjusts the sentence to be more lenient than would be appropriate if passing sentence for the first time, in recognition of the double jeopardy suffered by the offender in being sentenced twice.¹⁴

(ii) *Interlocutory appeals*

The Director of Public Prosecutions or the Attorney General can appeal against a judge's ruling given in certain proceedings listed under s 5F of the *Criminal Appeal Act 1912*,

¹² *R v Holder* (1983) 3 NSWLR 245 at 255 per Street CJ. The Court might decline to interfere, for example, when a respondent has already served a substantial part of their sentence or has made excellent progress at rehabilitation.

¹³ *R v Longshaw* (1990) 20 NSWLR 554.

¹⁴ *R v Holder* (1983) 3 NSWLR 245 at 256 per Street CJ.

including trials in the District Court and Supreme Court. The exclusion of evidence by a trial judge is one of the judgments that the Crown can appeal against if substantially all the evidence to be led by the prosecution has been excluded. In February 2003 the Premier announced the Government's intention to broaden this power in favour of the prosecution. This topic is discussed in greater detail below at '**4.2 Prosecution appeals against rulings of judges**' on p 9.

(iii) Stated cases

A stated case is a type of appeal on a question of law. A prosecutor has a right to appeal to the Supreme Court on a ground that involves a question solely of law, against various orders made by the Local Court, including the dismissal of a matter, a stay of proceedings, or a sentence: s 56 of the *Crimes (Local Courts Appeal and Review) Act 2001*.¹⁵

Under s 5A(2) of the *Criminal Appeal Act 1912*, the Attorney General or Director of Public Prosecutions may, after the conclusion of a trial, submit for determination by the Court of Criminal Appeal, any question of law arising from a trial on indictment (ie. a trial in the District Court or Supreme Court). The Court of Criminal Appeal shall hear and determine the question submitted, but this does not affect or invalidate the verdict at the trial.¹⁶

(iv) Similar fact evidence

In a trial, the prosecution may be able to tender evidence of similar conduct by the accused on other occasions, including conduct for which the accused has previously been prosecuted. The purpose of this type of evidence is to show that the accused has a tendency to commit crimes using a similar method. Restrictions apply to the admissibility of this form of evidence, including that the acts in question must be substantially and relevantly similar, and the probative value of the evidence must substantially outweigh any prejudicial effect on the defendant: ss 98-101 of the *Evidence Act 1995*.

¹⁵The Act commenced on 7 July 2003 and most of its provisions were formerly found in the *Justices Act 1902* (repealed).

¹⁶Cf. section 5B of the *Criminal Appeal Act 1912* which enables a judge of the District Court (on their own initiative or at the request of the prosecution or other party to the proceedings) to submit to the Court of Criminal Appeal for determination a question of law arising at any appeal before the District Court. The Court of Criminal Appeal may 'make any such order or give any such direction to the District Court as it thinks fit.'

3. THE DECISION OF THE HIGH COURT IN CARROLL'S CASE

In December 2002, the High Court's judgment in *R v Carroll* [2002] HCA 55; (2003) 194 ALR 1 prompted calls for the reform of double jeopardy throughout Australia.

Raymond Carroll was charged with the murder of a 17 month old girl, Deidre Kennedy, whose body was found in Ipswich, Queensland, on 14 April 1973.¹⁷ The cause of Deidre's death was strangulation and her injuries included bruises on the left thigh that were identified by medical and dental experts as marks left by human teeth. Carroll pleaded not guilty and gave sworn evidence at his trial in 1985, claiming that he was attending a course at an RAAF base in South Australia at the time of the murder. The Crown's case included forensic odontology evidence that the marks on the victim's thigh were made by Carroll's teeth, and evidence that suggested he had left the RAAF course before its conclusion.

Carroll was convicted of murder but appealed to the Queensland Court of Criminal Appeal. On 27 November 1985 the Court allowed the appeal and entered a verdict of acquittal, finding that the evidence was insufficiently strong to sustain the conviction.

In 1999 Carroll was charged with perjury. The Crown alleged that Carroll had given false evidence at the murder trial by testifying that he did not kill Deidre Kennedy. The defence applied to stay the proceedings, arguing that they were an abuse of process and in contravention of the rule against double jeopardy, but the application was dismissed. The perjury trial was held in 2000 and the Crown relied on some new and stronger evidence: an alleged confession by Carroll to a fellow inmate on remand before the murder trial (although not reported to police until 1997); evidence of a woman who claimed that she had seen Carroll in Ipswich on the day of the murder; evidence from another woman who corroborated claims by Carroll's ex-wife that he had bitten the legs of his own daughter when she was a girl ('similar fact evidence'); and digital analysis of images scanned onto a computer to show that the marks on the victim's legs corresponded with a cast of Carroll's teeth. The jury found Carroll guilty of perjury. He appealed to the Court of Criminal Appeal which again quashed the conviction and entered a verdict of acquittal.

The Crown was granted leave to appeal to the High Court but the appeal was dismissed. The Court unanimously held 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: per Gleeson CJ and Hayne J (at para 51), with whom Gaudron, Gummow and McHugh JJ agreed.

Gleeson CJ and Hayne J in a joint judgment stated (at para 44):

¹⁷The High Court judgment does not particularise all the details of the case. Some aspects of the facts and evidence are taken instead from the judgment of the Supreme Court of Queensland in *R v Carroll* [2000] QSC 308 (refusal to grant stay of proceedings in perjury trial). The victim's name is sometimes spelt 'Deirdre' but usually 'Deidre' in the various judgments and newspaper reports that have been written on the case.

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.

Gaudron and Gummow JJ found (at para 114):

...the laying of that indictment [for perjury] was vexatious or oppressive in the sense necessary to constitute an abuse of process; in substance there was an attempt to relitigate the earlier prosecution.

McHugh J concurred (at para 118):

It is an abuse of process for the Crown to charge a person with an offence of perjury when proof of the charge necessarily contradicts or tends to undermine an acquittal of the accused in respect of another criminal charge. A perjury charge that has that effect is an abuse of process even if the evidence supporting the charge is different from the evidence that supported the prosecution case in respect of the charge on which the accused was acquitted. The long established policy of the law is that an acquittal is not to be contradicted or undermined by a subsequent charge that raises the same ultimate issue or issues as was or were involved in the acquittal. That is so even though the evidence proving perjury is unanswerable.

4. PROPOSAL TO REVIEW DOUBLE JEOPARDY RULE IN NSW

4.1 Applications to quash acquittals and order retrials

On 9 February 2003, the Premier of New South Wales, Hon Bob Carr MP, announced that the Government planned to reform the common law on double jeopardy to allow, in special cases, the retrial of a person acquitted of a criminal charge: 'Where compelling new evidence comes to light to solve a serious crime, criminals should not be able to hide behind a legal technicality.'¹⁸ The Premier acknowledged that the reforms would be modelled on the Criminal Justice Bill introduced by the Blair Government in the United Kingdom in 2002: see '**7.6 Criminal Justice Bill**' on p 30 of this briefing paper. Premier Carr also cited the High Court case of *R v Carroll*, which is discussed above on p 7, and advances in forensic technology (see Chapter 8 of this paper) as demonstrating why the double jeopardy rule needs to be reviewed.

The main features of the proposal, at the time of the initial announcement, were:¹⁹

- The double jeopardy principle would be relaxed for murder, manslaughter, and crimes that carry a maximum penalty of life imprisonment, such as gang rape in aggravated circumstances and major drug offences (eg. supplying a large commercial quantity of a prohibited drug).
- Where compelling fresh evidence emerges that strongly suggests guilt and could not reasonably have been available at the first trial, the Director of Public Prosecutions would be able to apply to the Court of Criminal Appeal to quash the acquittal.
- The Director of Public Prosecutions would need to give consent for the defendant to be re-investigated.
- The Court of Criminal Appeal would have the power to quash the acquittal and order a retrial where there is compelling evidence of guilt and it is in the interests of justice to do so.
- The new laws would operate retrospectively.
- Only one retrial would be permitted.

4.2 Prosecution appeals against rulings of judges

On 9 February 2003, Premier Carr also announced other new powers of appeal for the prosecution, which he revealed 'had been requested by the DPP'.²⁰ Firstly, the prosecution will be able to appeal to the Court of Criminal Appeal against a trial judge's decision to

¹⁸Premier of New South Wales, *News Release*, 'Carr Government to Overhaul "Double Jeopardy" Rule', 9 February 2003.

¹⁹Premier of New South Wales, *News Release*, 'Carr Government to Overhaul "Double Jeopardy" Rule', 9 February 2003.

²⁰Premier of New South Wales, *News Release*, 'Carr Gives Prosecution New Powers', 9 February 2003.

direct a jury to acquit an accused. 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. At present, the directed verdict cannot be appealed and the accused cannot be retried.

Secondly, the Premier foreshadowed that the prosecution’s powers to appeal the rulings of judges during the trial process would be expanded. Currently, there is scope for the prosecution to lodge an interlocutory appeal against certain rulings by trial judges, pursuant to s 5F of the *Criminal Appeal Act 1912*. For example, the prosecution can appeal against a judge’s ruling that a significant amount of the evidence is inadmissible if the ruling has effectively destroyed the substance of the Crown case, as opposed to merely weakening it: *R v Lisoff* [1999] NSWCCA 364 at paras 38, 46–47. This standard would be changed by the Government’s proposed amendments to the *Criminal Appeal Act 1912*. The Director of Public Prosecutions would be allowed to appeal during a trial when a judge’s decision to exclude evidence ‘substantially weakens’ the Crown case.

The Carr Government’s plan to increase the rights of the prosecution to lodge interlocutory appeals was influenced by the acquittal of Jason Van Der Baan. He was charged with the murder of his 39 year old aunt, Irene Wilson, at her home in 1995. She was found face down on a bed with her hands tied behind her back and a cord around her neck. In a pre-trial ruling in the Supreme Court of New South Wales, Justice Greg James excluded various aspects of the prosecution’s evidence as inadmissible, for example: Van Der Baan’s alleged confession to an undercover police officer in prison; two previous sexual assault convictions that allegedly demonstrated that Van Der Baan had a tendency to tie up his victims in the same manner as the deceased; allegations that Van Der Baan was obsessed with his aunt and had stolen and mutilated her underwear.²¹ The trial proceeded without the evidence and the jury acquitted Van Der Baan on 12 September 2002.

²¹The judge gave ‘short reasons’ verbally at the time of the ruling, but did not produce a separate, written statement of reasons, causing further controversy. The description of the alleged evidence has been reproduced instead from newspaper reports of the case: L Knowles, ‘Blind Justice’, *The Daily Telegraph*, 13 September 2002, p 1; Editorial, ‘How law got in the way of justice’, *The Daily Telegraph*, 14 September 2002, p 18; L Knowles, ‘Judge not talking on trial ruling’, *The Daily Telegraph*, 21 September 2002, p 2; A Kerr, ‘Six years jail for second rape’, *The Daily Telegraph*, 9 November 2002, p 15.

5. SHOULD DOUBLE JEOPARDY LAWS BE REFORMED?

5.1 Issues involved in restricting the operation of the double jeopardy rule

Numerous issues arise when considering whether to allow the reopening of acquittals, including: What offences should be affected? What type of evidence should be required to make an application? What criteria should be met before quashing an acquittal? What safeguards and restrictions should be imposed upon a retrial?

These and other questions are examined in this section, drawing mainly upon academic literature and the results of inquiries conducted in the United Kingdom. All references to the Criminal Justice Bill (UK) reflect the form in which it passed the House of Commons. At the time of writing the Bill was being debated in the House of Lords.

(i) *Scope of offences*

If the double jeopardy rule is relaxed, a major concern is what offences should be able to be re-tried. A narrow view is that only an acquittal on a charge of murder should be allowed to be appealed. This was the conclusion of the Law Commission in the United Kingdom in its *Report on Double Jeopardy and Prosecution Appeals*, published in March 2001.²² The UK Parliament's Home Affairs Committee, in its Third Report of the 1999-2000 Session, advocated that offences which carry a maximum penalty of life imprisonment should be eligible.²³ The Victim Support submission to that Committee was much broader in its suggestion that all arrestable offences be eligible.²⁴ The White Paper on *Justice for All*, released by the Home Office in 2002, nominated 'very serious offences' including murder, manslaughter, rape, and armed robbery.²⁵ The Criminal Justice Bill, as at May 2003 (when it passed the House of Commons), identified 31 qualifying offences such as murder, manslaughter, kidnapping, rape, serious drug offences, armed robbery, arson endangering life, and certain hijacking offences.

(ii) *Making an application for a retrial*

The application procedure that was favoured by the numerous inquiries in the United Kingdom, and was followed in the Criminal Justice Bill, involved the Director of Public Prosecutions applying to the Court of Appeal for an order quashing the defendant's

²²Law Commission, *Double Jeopardy and Prosecution Appeals*, Report No 267, March 2001, para 4.42. Accessed on the Law Commission website at <<http://www.lawcom.gov.uk/files/lc267.pdf>> on 23 June 2003.

²³United Kingdom Parliament, House of Commons, Home Affairs Committee, *The Double Jeopardy Rule*, Third Report of Session 1999-2000, May 2000, para 24.

²⁴*Ibid*, para 22.

²⁵White Paper, *Justice for All*, Presented to Parliament by the Secretary of State for the Home Department, the Lord Chancellor, and the Attorney General, July 2002, para 4.64.

acquittal and ordering a retrial. Before making an application, the Director of Public Prosecutions has to be satisfied of various criteria.

(iii) Test for granting the application

Most of the UK reports expected the standard of the new evidence to be ‘compelling’, which the Law Commission defined as making it highly probable that the defendant is guilty, in the opinion of the Court of Appeal. The Criminal Justice Bill modified the definition of compelling evidence to being reliable, substantial, and ‘highly probative of the case against the acquitted person’.

Other concerns may include whether quashing an acquittal is in the interests of justice and whether the circumstances make a fair second trial unlikely. Some proposals also suggest that a ‘due diligence’ test should be met, meaning that the court should consider whether the new evidence would have been available at the first trial if the investigation had been conducted with due diligence. The UK Law Commission nominated this as a factor to be taken into account by the Court of Appeal (although not a mandatory condition precedent to allowing a retrial), whereas the Home Affairs Committee of the House of Commons asserted that a due diligence test was not an appropriate requirement for a second trial.²⁶

(iv) Safeguards

One of the challenges of any proposal to relax the double jeopardy rule is how to maintain fairness for the accused, given the adverse publicity that is likely to have been generated. Furthermore, the need for the application to be approved by the Director of Public Prosecutions and a superior court, and the requirements that have to be met for a retrial to be granted, are likely to create an impression in the minds of the jurors that the case would only be re-opened if the authorities believed the accused to be guilty. Reporting restrictions are one of the strategies that can be employed to reduce the impact of publicity. The Criminal Justice Bill provides for the Court of Appeal to restrict publication from the time of receiving a notice of application, or earlier if requested by the Director of Public Prosecutions.

(v) Retrial without a jury?

One strategy for averting the problems of publicity and jury bias is to hear the retrial without a jury. Judge-alone trials are already permitted in New South Wales, pursuant to s 132 of the *Criminal Procedure Act 1986*, if the accused wishes to elect for this option and the Director of Public Prosecutions consents. An accused who faces trial for child sexual assault offences might, for example, opt for a judge-alone trial in the belief that jurors chosen from the general public will be more prone to be influenced by their emotions.

²⁶Law Commission, *Double Jeopardy and Prosecution Appeals*, Report No 267, March 2001, paras 4.83 and 4.90; Home Affairs Committee, Third Report of Session 1999-2000, *The Double Jeopardy Rule*, May 2000, para 38.

(vi) Should changes be retrospective?

If the double jeopardy rule was relaxed by legislation, the laws could take effect from the date of commencement or could be given retrospective force. The capacity to clear up unsolved cases in which the evidence could be re-tested using the latest forensic techniques is one argument for making changes to the double jeopardy rule retrospective. But some critics believe that retrospective laws would be an infringement of civil or human rights.

(vii) Should there be a time limit for making an application?

Imposing a time limit on applications to quash acquittals is sometimes suggested as a way of reducing the anxiety that defendants may suffer from the potential of facing a retrial. The Bar Council in the United Kingdom suggested that an application should have to be made within 10 years of an acquittal.²⁷ The Criminal Justice Bill did not impose a time limit. In New South Wales, the Public Defenders oppose changes to double jeopardy, but in the event that they happen, nominate a time limit of 5 years for reopening a case.²⁸

5.2 Arguments against changing laws on double jeopardy

Some of the common arguments against changing the double jeopardy principle are:²⁹

- **Importance of finality:** The efficient operation of the courts and the justice system depends on finality in the determination of proceedings. Public confidence in the administration of justice is also affected by the ability of the system to convict a defendant the first time.
- **Abuse of power by the State:** The State has greater resources and authority than the individual. It would be an abuse of the State's power to allow it to make multiple attempts to convict a person for the same act.
- **Emotional and psychological stress on the defendant:** The double jeopardy rule protects a person from the humiliation, expense, anxiety and uncertainty that could accompany the quashing of an acquittal and the subsequent retrial.

²⁷S Broadbridge, House of Commons Library, Research Paper 02/74, 'The *Criminal Justice Bill*: Double jeopardy and prosecution appeals', 2 December 2002, p 40.

²⁸A Haesler, 'The Rule Against Double Jeopardy: Its Tragic Demise in New South Wales, A Tale of Woe, Another Victim of the Law N' Order Regime', Paper presented to the Lawyers Reform Association Seminar on Double Jeopardy, Sydney, 18 June 2003.

²⁹Sources which discuss advantages and disadvantages include: C Corns, 'Retrial of acquitted persons: Time for reform of the double jeopardy rule?', *Criminal Law Journal*, Volume 27, Number 2, April 2003, p 80 at 86-87; UK Parliament, House of Commons, Home Affairs Committee, *The Double Jeopardy Rule*, Third Report of the 1999-2000 Session, May 2000, especially paras 18-19; B Fitzpatrick, 'Double Jeopardy: One Idea and Two Myths from the Criminal Justice Bill 2002', *Journal of Criminal Law*, Volume 67, Number 2, April 2003, p 149.

- **Competence of investigation and prosecution:** The double jeopardy rule encourages police investigations to be efficient and to marshal the best possible case from the start. Further opportunities to prosecute could tempt the police to be less fastidious with their initial investigation. Similarly, a trial should not commence until the prosecution has gathered all the evidence that it properly can.
- **Adverse publicity:** It would be very difficult for the accused to get a fair second trial because of public knowledge of the case from the first trial. It is likely that people form an opinion about a case that has been covered by the media over a long period of time. Notorious cases would have also attracted political comment.
- **Erosion of presumption of innocence:** There would be a real risk of the jury at the second trial assuming that the new evidence must be compelling enough for permission to be granted to re-open the case, and therefore that the accused must be guilty.

5.3 Arguments in favour of changing laws on double jeopardy

Some of the main arguments for allowing exceptions to the double jeopardy rule when new information emerges to incriminate an acquitted person are:

- **Justice:** Convicting those who are guilty serves justice and fosters public confidence in the legal system. The law is brought into disrepute if offenders evade conviction.
- **Victims' rights:** Victims, or the families of deceased victims, have the right to expect that offenders will be punished. The trauma and lack of finality experienced by victims when the accused cannot be prosecuted again, despite the uncovering of new evidence, is just as unfair as exposing the defendant to the emotional and financial strain of another trial.
- **Technological developments:** Scientific advances make it possible to provide new, stronger or clearer evidence than was available at the original trial. DNA evidence and other technology such as eye scanning, palm prints and digital photo analysis are explored more fully at '**8.5 Biometric methods of identification and other scientific developments**' on p 46.
- **Laws should evolve over time:** The law should adapt in response to the needs of society, rather than remaining static. The double jeopardy principle originated in a less sophisticated era when defendants had fewer protections in the trial process, limited rights of appeal, and could receive the death penalty as a consequence of conviction.
- **Safeguards:** Appropriate safeguards can be developed to guard against misuse of the power to reopen acquittals. New evidence would have to reach a high standard, and applications would go through a rigorous process before an acquittal could be quashed. During the retrial, judicial directions and reporting restrictions would reduce the dangers of prejudice to the defendant and negative publicity. The defendant could elect a trial with or without a jury.

5.4 Viewpoints on whether to restrict the double jeopardy rule

Debates about double jeopardy were prompted in early 2003 by the decision of the High Court in Carroll's case and by Premier Carr's announcement that legislation would be introduced in New South Wales to limit the double jeopardy rule. A selection of viewpoints is presented here, including those of public figures, legal practitioners, judges, academics and spokespersons for interest groups.

5.4.1 Supportive of change

Sir Anthony Mason, former Chief Justice of the High Court of Australia, 1987-1995

In December 2002, *The Sunday Telegraph* published an article written by Sir Anthony Mason on double jeopardy, in light of the High Court's decision in *R v Carroll*. He stated:

The interests of justice call for correct enforcement of criminal law against those who have committed offences. In this respect, technological advances and DNA evidence may now provide stronger evidence of a defendant's guilt. There is also the spectre of public disquiet, even outrage, when someone is acquitted of the most serious crime and new evidence, such as a confession, points strongly to guilt. These cases undermine public confidence in the administration of justice – and may do so in a damaging way.³⁰

It was also reported that another former Chief Justice, Sir Harry Gibbs, backed the idea of a review of double jeopardy.³¹

John Howard, Prime Minister

On 9 April 2003, the day before the Standing Committee of Attorneys General of Australia considered the issue of double jeopardy, Prime Minister Howard expressed his support for change:

...Mr Howard said justice was not served by “demented, dogmatic adherence” to legal principles simply because those principles had been around a long time...“I am very much in favour of changing things that don't work, and this rule doesn't work. I'm not in favour of totally throwing it out...but it does seem to me that this particular case [*R v Carroll*] is just horrific.”³²

³⁰Sir Anthony Mason, 'Double jeopardy and the limits of justice', *The Sunday Telegraph*, 22 December 2002, p 95.

³¹'Call for rule review', *The Sunday Telegraph*, 22 December 2002, p 2.

³²'PM backs double jeopardy reform', *The Australian*, 10 April 2003, p 6.

Nicholas Cowdery QC, Director of Public Prosecutions (NSW)

In February 2003, in a Letter to the Editor of *The Daily Telegraph*, the Director of Public Prosecutions, Nicholas Cowdery QC, stated:

In response to your report...that I could not endorse the Premier's proposal to change the prohibition against double jeopardy, I am not opposed to it, given the qualifications and safeguards included; but I am critical of the timing of the announcement and the lack of consultation before it was made.³³

Homicide Victims Support Group

The Daily Telegraph reported in February 2003 that: 'Martha Jabbour, head of the Homicide Victims Support Group, said her organisation first sought dropping the old law in a "wish list" handed to Premier Bob Carr in December 2001.'³⁴

Dr Chris Corns, School of Law and Legal Studies, La Trobe University

In an article in the April 2003 issue of the *Criminal Law Journal*, Dr Corns explored the principles and issues of double jeopardy at length, including *R v Carroll* and the developments in New South Wales. He stated:

...a case can be made for relaxing double jeopardy principles in Australia where significant and reliable fresh evidence has emerged post-acquittal, where an erroneous judicial direction to acquit has been given, and where there is significant and reliable evidence that the trial was "tainted". In these cases the legitimacy of the original verdict is called into question and a retrial is, in principle, justified in the public interest subject to rigorous criteria of which the Court of Appeal would have to be satisfied.³⁵

Dr Mirko Bagaric, School of Law, Deakin University

In the July 2003 issue of *Criminal Law News Victoria*, Dr Bagaric evaluated the arguments for and against the double jeopardy principle and concluded it is necessary to recognise exceptions to it:

...like all rights or protections which are properly enjoyed by citizens it [the double jeopardy rule] has its limits. It is fanciful to think that any right is so paramount that there cannot be circumstances in which it should yield to other

³³*The Daily Telegraph*, 14 February 2003, p 27.

³⁴A Peterson, 'Double jeopardy', *The Daily Telegraph*, 11 February 2003, p 17.

³⁵C Corns, 'Retrial of acquitted persons: Time for reform of the double jeopardy rule?', *Criminal Law Journal*, Volume 27, Number 2, April 2003, p 80 at 100-101.

interests. This is particularly so in relation to merely procedural rights. There are strong countervailing interests which weigh against the principle of double jeopardy. In relation to nearly all circumstances in which this rule applies a contrary good is punishing wrongdoers...[I]n some instances other countervailing interests also weigh against the application of the principle. An example is the principle that no person should benefit from his or her own wrongdoing.³⁶

5.4.2 Critical or cautious of change

Council for Civil Liberties (NSW)

The Daily Telegraph reported in February 2003 that:

President [of the Council for Civil Liberties] Cameron Murphy said at the very least, it [Premier Carr's proposal] infringes on the rights of citizens accused of a crime. "It is simply a long standing principle in the common law that goes back 800 years...A body of international and human rights law suggests the same thing. There are universal declarations on human rights which could have an application in the area." Mr Murphy has also warned police and prosecutors could get sloppy and fail to fully investigate a matter in the knowledge they would get a second chance if the defendant walked.³⁷

The Council for Civil Liberties is preparing a discussion paper on double jeopardy. More information and resources are available on the Council's website.³⁸

Law Society of NSW

The President of the Law Society of NSW, Robert Benjamin, launched the Law Society's Law and Order Policy Statement on 20 February 2003. One of the Statement's recommendations was:

As to the Double Jeopardy Rule, it should be noted that it preserves finality of justice for people acquitted of crimes, ensures that the best possible case is prepared by police and prosecution, and avoids continued persecution of individuals. It should not be changed without proper debate and consultation, outside of the heat of an election campaign.³⁹

³⁶M Bagaric and L Neal, 'Double Jeopardy: Time for a fundamental re-think?', *Bourke's Criminal Law News Victoria*, Volume 3, Number 4, July 2003, Butterworths, pp 33-34.

³⁷A Peterson, 'Double jeopardy', *The Daily Telegraph*, 11 February 2003, p 17.

³⁸Accessed at <www.nswccl.org.au/unswccl/issues/double%20jeopardy.php> on 27 June 2003.

³⁹Law Society of NSW, *Media Release*, 'Law and Order', 20 February 2003, pp 1-2.

NSW Young Lawyers

A media release by the NSW Young Lawyers in February 2003, quoted the opinions of Luke Brasch, a Committee Member and Barrister:

Mr Brasch said 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. If there was no rule against double jeopardy, an accused person could be subjected to embarrassment, expense and ordeal, and would live in a state of constant anxiety and insecurity of being retried.

Although Mr Carr's proposal has some safeguards...none of these safeguards could address the main reason for the rule's existence.

"A person is entitled to know that, once they have been tried by a jury of their peers in accordance with law on the evidence available against them at that time, and have been acquitted of a criminal offence, that they can go about their lives without the fear of retrial hanging over them."⁴⁰

Public Defenders

Andrew Haesler, a Public Defender, Barrister, and former Director of the Criminal Law Review Division of the Attorney General's Department (NSW), in June 2003 expressed the general view of defence counsel towards the double jeopardy rule:

The Public Defenders take the view that the arguments for change do not justify interference with long-standing and practical common law principles. The Bar has taken a similar position. Both have made their views known to the Government, in no uncertain terms.⁴¹

However, Haesler regards it as almost inevitable that, 'As the Government has already committed itself to the proposed 'reforms' there is little doubt that regardless of the result of the consultation it will implement them.'⁴² In these circumstances, Haesler advocates numerous restrictions upon changing the double jeopardy rule:⁴³

- Reopening of acquittals should apply only to the offence of murder - 'This would recognise the status of that offence and the particular moral wrong in appearing to [be]

⁴⁰NSW Young Lawyers, *Media Release*, 'NSW Young Lawyers opposes the government's proposal to abolish the rule against double jeopardy', 13 February 2003, p 1.

⁴¹A Haesler, 'The Rule Against Double Jeopardy: Its Tragic Demise in New South Wales, A Tale of Woe, Another Victim of the Law N' Order Regime', Paper presented to the Lawyers Reform Association Seminar on Double Jeopardy, Sydney, 18 June 2003, p 7. Available on the Public Defenders website at <www.lawlink.nsw.gov.au/pdo.nsf/pages/DoubleJeopardy>

⁴²Ibid, p 9.

⁴³Ibid, p 10.

“getting away with murder.”

- The new laws should not be retrospective – this would ‘clearly contradict’ the *International Covenant on Civil and Political Rights*.
- Intervention should only occur where there is strong evidence that the original trial was ‘tainted’.⁴⁴
- A time limit of 5 years, at most, should be imposed on reopening old acquittals – ‘Even for the most serious crimes an acquitted person must be able to resume or rebuild their life after trial without fear the past will be resurrected.’

⁴⁴Haesler cites the United Kingdom’s *Criminal Procedure and Investigations Act 1996* on this point. Sections 54-55 of the Act provide for the retrial of a defendant where the jury’s verdict of acquittal is the result, or largely the result, of fabricated evidence, or undue influence being exerted on a juror.

6. DOUBLE JEOPARDY IN OTHER AUSTRALIAN JURISDICTIONS

This section briefly considers the position of Australian jurisdictions other than New South Wales on the question of double jeopardy reform. The statutory provisions on double jeopardy in the main criminal legislation of each jurisdiction are noted, although there are other statutes which refer to double jeopardy that are not covered. For example, statutory interpretation legislation may clarify that a person who commits an offence under two different laws shall not be punished twice.⁴⁵

Exceptions to a strict application of the double jeopardy rule exist in all jurisdictions. Generally, the prosecution can appeal against the leniency of a sentence, and may have access to other types of appeals. Several jurisdictions allow a point of law to be referred after an acquittal to a Court of Appeal or Court of Criminal Appeal for an opinion, although this does not disturb the verdict of acquittal: eg. s 450A of the *Crimes Act 1958* (Vic); s 414(2) of the *Criminal Code* (NT); s 5A(2) of the *Criminal Appeal Act 1912* (NSW). Until now, Western Australia and Tasmania have given the greatest scope to the prosecution to appeal against an acquittal, allowing the court to order a retrial in some circumstances: see below at pp 21-22.

6.1 Commonwealth

At the meeting of the Standing Committee of Attorneys General of Australia on 10 April 2003, SCAG agreed to review the double jeopardy principle. The review will be undertaken by the Model Criminal Code Officers Committee, which is comprised of State, Territory and Commonwealth representatives and is chaired by Justice Howie QC of the Supreme Court of New South Wales.

Announcing the Commonwealth Government's support for the review, the Minister for Justice and Customs, Senator Chris Ellison, stated: 'I welcome the national approach to this issue because it would be undesirable for acquittals to be treated differently depending on where the person lived in Australia.'⁴⁶

The Commonwealth *Crimes Act 1914* clarifies that, where an act or omission constitutes an offence under two or more laws of the Commonwealth, or under both Commonwealth law and a law of a State, Territory, or the common law, the defendant shall not be liable to be punished twice for the same act or omission: s 4C.

6.2 Queensland

In the *Criminal Code* of Queensland the rule against double jeopardy appears as a general

⁴⁵Eg. s 51 *Interpretation of Legislation Act 1984* (Vic), s 50 *Acts Interpretation Act 1915* (SA), s 32 *Acts Interpretation Act 1931* (Tas), s 33F *Interpretation Act 1967* (ACT).

⁴⁶Minister for Justice and Customs, *Media Release*, 'Commonwealth backs review of double jeopardy rule', 11 April 2003.

principle (s 16), a defence (s 17) and a plea (s 598). Section 16 provides: ‘A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where...the person causes the death of another person, in which case the person may be convicted of the offence of which the person is guilty by reason of causing such death, notwithstanding that the person has already been convicted of some other offence constituted by the act or omission.’

The Queensland Attorney General, Hon Rod Welford MP, put the issue of double jeopardy on the agenda for the April 2003 meeting of the Standing Committee of Attorneys General and on the eve of the meeting stated: ‘We need to look seriously and carefully at what circumstances might be appropriate to allow charges to be relaid for the same offence. At the same time, the importance of the principles underpinning the double jeopardy rules should not be underestimated.’⁴⁷ However, *The Australian* newspaper reported that Mr Welford ‘said any change to Queensland law was unlikely to apply retrospectively to the Kennedy-Carroll case.’⁴⁸ The Premier, Hon Peter Beattie MP, was reported as saying, ‘It would be preferable to have a nationally consistent approach to dealing with double jeopardy.’⁴⁹

6.3 Victoria

The Premier of Victoria, Hon Steve Bracks MLA, indicated in February 2003 that in preference to abolishing the double jeopardy rule his Government would consider ‘other alternatives which can tighten the laws to ensure that if further evidence is found, that can be examined.’⁵⁰ The Attorney General, Hon Rob Hulls MLA, has been reported as expressing concerns about international treaty obligations.⁵¹

Section 394 of the *Crimes Act 1958* (Vic) provides the form of pleading for *autrefois convict* or *autrefois acquit*.

6.4 Western Australia

Western Australia already allows some departure from the double jeopardy principle, which is outlined in the *Criminal Code* as a defence (s 17) and a plea (s 616).⁵² Under s 688(2) of

⁴⁷ Attorney General and Minister for Justice, Hon Rob Welford MP, *Ministerial Media Statement*, ‘Attorneys to Consider Double Jeopardy’, 9 April 2003.

⁴⁸ ‘PM backs double jeopardy reform’, *The Australian*, 10 April 2003, p 6. See Chapter 6 of this briefing paper for a summary of Carroll’s case.

⁴⁹ J Camplin, ‘Twice the danger as ancient law goes on trial’, *The Australian*, 19 February 2003, p 12.

⁵⁰ A Crossweller and M Videnieks, ‘Bracks will retain double jeopardy’, *The Australian*, 13 February 2003, p 2.

⁵¹ Editorial, ‘Law of double jeopardy on trial at last’, *The Australian*, 10 February 2003, p 8.

⁵² The *Sentencing Act 1995* (WA) deals with the operation of the double jeopardy principle at sentence. Section 11 confirms that if the evidence necessary to establish that a person committed an offence under Western Australian law is also the evidence to establish they committed another

the Code, the prosecution may appeal to the Court of Criminal Appeal when a judge directs a jury to enter a verdict of acquittal at a trial, or when a judge delivers a verdict of acquittal at a judge-alone trial. If the Court allows the appeal it can order a new trial: s 690(3).

The Attorney General of Western Australia, Hon Jim McGinty MLA, remarked in April 2003: 'My personal view is that the risk of real injustice to victims of the most serious crimes such as murder and rape must outweigh virtually all other considerations.'⁵³

6.5 South Australia

When Premier Carr announced his intention to change the law of double jeopardy in New South Wales, the then South Australian Attorney General, Hon Michael Atkinson MP, was reported as saying that 'South Australia would wait and see how the NSW changes worked.'⁵⁴

Section 285 of the *Criminal Law Consolidation Act 1935* (SA) states the form of pleading for *autrefois convict* or *autrefois acquit*.

6.6 Tasmania

Section 401(2)(b) of the *Criminal Code* of Tasmania enables the Attorney General to appeal from a court of trial against an acquittal on a question of law only. Such an appeal is by leave of the Court of Criminal Appeal, or by the judge of the court of trial issuing a certificate. If the Court allows the appeal, it may order a retrial or enter a conviction: s 402(5).

The general principle of double jeopardy is found at s 11 of the Code, which stipulates that a person shall not be punished twice in respect of the same act or omission, unless the act or omission 'renders him guilty of unlawfully causing the death of any person, and such death occurs after he has been once punished.' Section 358 deals with the pleas of *autrefois acquit* and *autrefois convict*.

6.7 Australian Capital Territory

In April 2003, the Chief Minister and Attorney General of the ACT, Mr Jon Stanhope MLA, indicated that he was not in favour of changing the double jeopardy rule. Shadow Attorney General, Bill Stefaniak MLA, welcomed the review of double jeopardy by the

such offence, the person is not to be sentenced for more than one of the offences. Section 11 applies a similar principle to the commission of a crime that offends both Western Australian law and the law of another jurisdiction.

⁵³Hon Jim McGinty MLA, Attorney General, *Media Statement*, 'Double jeopardy laws under scrutiny', 11 April 2003.

⁵⁴J Ellicott and S Emerson, 'States split over bid to quash double jeopardy', *The Australian*, 10 February 2003, p 1. Hon Paul Holloway MLC became Attorney General of South Australia on 30 June 2003.

Standing Committee of Attorneys General.⁵⁵

The form of the pleas of *autrefois acquit* and *autrefois convict* is outlined by s 399 of the *Crimes Act 1900* (ACT).

6.8 Northern Territory

In a case where a defendant has been acquitted after a trial on indictment, s 414(2) of the *Criminal Code* of the Northern Territory enables the Crown to refer any point of law to the Court of Criminal Appeal for its consideration. After hearing argument from both sides, the Court shall furnish to the Crown Law Officer its opinion, but the opinion of the Court does not affect the acquittal.

Section 19 of the Code sets out the general principle that it is a defence to any charge to show that the accused has already been acquitted of an offence involving the same conduct, except where the act or omission causes death or grievous harm. In that situation, the accused may be found guilty by reason of the death or grievous harm, notwithstanding that he or she has already been found guilty of some other offence constituted by the act or omission. Sections 346-347 confirm the procedure for entering a plea of *autrefois convict* or *autrefois acquit*.

Table 1: Selection of criminal legislation on double jeopardy in Australia

JURISDICTION	LEGISLATION
New South Wales	Section 156 of the <i>Criminal Procedure Act 1986</i> . Section 20 of the <i>Crimes (Sentencing Procedure) Act 1999</i> .
Queensland	Sections 16, 17 & 598(2) of the <i>Criminal Code</i> .
Victoria	Section 394 of the <i>Crimes Act 1958</i> .
Western Australia	Sections 17 & 616 of the <i>Criminal Code</i> . However, note the power of the prosecution to appeal some acquittals under section 688(2). Section 11 of the <i>Sentencing Act 1995</i> .
South Australia	Section 285 of the <i>Criminal Law Consolidation Act 1935</i> .
Tasmania	Sections 11 & 358 of the <i>Criminal Code</i> . However, s 401(2) provides a limited power of appeal against an acquittal on a question of law.
ACT	Section 399 of the <i>Crimes Act 1900</i> .
Northern Territory	Sections 17-21, 346-347 of the <i>Criminal Code</i> .
Commonwealth	Section 4C of the <i>Crimes Act 1914</i> .

⁵⁵Canberra Liberals, *Media Release*, 'Stanhope Wrong on Double Jeopardy', 11 April 2003, accessed on <www.canberraliberals.org.au>, and B Stefaniak, '800 year old rule does need to be changed', *The Canberra Times*, online archives at <www.canberratimes.com.au>, 23 April 2003.

7. CHANGES TO DOUBLE JEOPARDY IN THE UNITED KINGDOM

A succession of reports and inquiries since the late 1990s on aspects of the criminal justice system in the United Kingdom made recommendations on the subject of double jeopardy. These findings and the consultation process undertaken by some of the inquiries contributed to the amendments introduced by the *Criminal Justice Bill* in 2002.

7.1 Macpherson Report on the Stephen Lawrence Inquiry

On 22 April 1993 an 18 year old black youth, Stephen Lawrence, was stabbed to death by a gang of white youths while waiting at a bus stop in a London suburb with a friend. After the police investigation stalled, Stephen's parents instigated a private prosecution against five suspects. Two were discharged at the committal stage in 1995, while the other three proceeded to trial in 1996. The trial judge ruled that the identification evidence of the prosecution's main witness was too unreliable to be admitted. The jury acquitted the three accused. Mr and Mrs Lawrence, who had complained of incompetence and racism by the police, campaigned for an inquiry into the case.

In July 1997 the Home Secretary, Rt Hon Jack Straw MP, announced that an inquiry would be conducted by Lord William Macpherson of Cluny, a former High Court judge. The term of reference was to inquire into the matters arising from the death of Stephen Lawrence, 'particularly to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes.'⁵⁶ The report of the inquiry was published in 1999. Among its 70 recommendations was Recommendation 38:

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

7.2 Law Commission publications on double jeopardy and prosecution appeals

On 2 July 1999, the Home Secretary issued a reference to the Law Commission to make recommendations on the laws of England and Wales relating to double jeopardy after acquittal, taking into account:

- Recommendation 38 of the Macpherson Report on the Stephen Lawrence Inquiry (see above);
- the powers of the prosecution to reinstate criminal proceedings; and
- the United Kingdom's international obligations.

A Consultation Paper was published in October 1999.⁵⁷ Its proposals included that, in

⁵⁶ *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, February 1999, para 3.1.

⁵⁷ Law Commission, *Double Jeopardy*, Consultation Paper No 156, October 1999.

certain circumstances, it should be possible to reopen an acquittal where new evidence has emerged. The Home Affairs Committee of the House of Commons investigated the issues raised: see further details on p 27 of this briefing paper.

On 24 May 2000, the Home Secretary requested the Law Commission to undertake a further review of the law governing prosecution appeals against judge-directed acquittals in criminal proceedings and other adverse rulings by judges which may lead to the premature ending of trials. The terms of reference of this review were to consider:

- whether any additional rights of appeal or other remedies should be available to the prosecution; and
- whether such appeals would be subject to procedural restrictions.

A separate Consultation Paper was released by the Law Commission on this topic.⁵⁸ Both Consultation Papers attracted a range of responses, including from the judiciary, government departments, police services, law societies, legal practitioners, academics and interest groups.

In March 2001, the Law Commission published its report on *Double Jeopardy and Prosecution Appeals*.⁵⁹ The report recommended that the rule against double jeopardy should be subject to an exception where new evidence is discovered after an acquittal, on the following conditions:⁶⁰

- **Offences** – only murder cases should be eligible, including genocide by killing (and ‘reckless killing’ if such an offence is created in line with recommendations by the Law Commission in 1996). The Commission’s rationale was that murder is the only offence attracting a life sentence that is ‘inherently serious enough to justify the application of a new evidence exception...The main reason for this conclusion is the widespread perception, which we share, that murder is not just more serious than other offences but qualitatively different...murder satisfies the test we have proposed for the scope of any new exception, namely whether a manifestly illegitimate acquittal sufficiently damages the reputation of the criminal justice system so as to justify overriding the rule against double jeopardy.’⁶¹
- **Consent of DPP** – it should be necessary to obtain the personal consent of the Director of Public Prosecutions before making an application for an acquittal to be quashed on grounds of new evidence.

⁵⁸Law Commission, *Prosecution Appeals Against Judges’ Rulings*, Consultation Paper No 158, June 2000.

⁵⁹Law Commission, *Double Jeopardy and Prosecution Appeals*, Report No 267, March 2001. Accessed on the Law Commission website at <<http://www.lawcom.gov.uk/files/lc267.pdf>> on 23 June 2003.

⁶⁰Ibid, Part VIII, pp 127-129.

⁶¹Ibid, paras 4.29-4.30.

- ***Standard for allowing a retrial*** – the Court of Appeal must be satisfied that the new evidence appears to be reliable and compelling. Evidence would be compelling if, in the opinion of the Court, the evidence makes it highly probable that the defendant is guilty. The Court must also be satisfied that, in all the circumstances of the case, it is in the interests of justice to grant a retrial, having regard to:
 - the time that has elapsed since the alleged offence;
 - whether a fair trial is likely to be possible;
 - whether it is likely that the new evidence would have been available at the first trial if the investigation had been conducted with due diligence; and
 - whether the prosecution has acted with reasonable despatch since the new evidence was discovered (or since the new exception came into force, whichever was the later).

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

- ***Retrospective*** – the changes should apply equally to acquittals which had already taken place before the legislation came into force.

- ***Court of Appeal*** – the Criminal Division of the Court of Appeal should be the court empowered to quash an acquittal on grounds of new evidence, and there should be no right of appeal against the Court’s decision.

- ***One application only*** – When an application for a retrial is rejected, or the defendant is acquitted at the retrial, no further application should be permitted.

- ***Reporting restrictions*** – There should be a prohibition on the reporting of the hearing of an application for a retrial until the application is dismissed or the retrial has finished. The Court of Appeal should have the power to make an order contrary to the general prohibition against reporting, if it is in the interests of justice to make such an order, or the defendant has no objection.

The Law Commission also made recommendations concerning prosecution appeals against certain rulings by judges.⁶² These included that the prosecution should have a right of appeal against an acquittal that arises from a ‘terminating ruling’ made by a judge during the trial (up to the conclusion of the prosecution evidence). A ‘terminating ruling’ means a ruling that is adverse to the prosecution and has the effect of terminating the trial. An example is a ruling that the indictment be stayed because it is an abuse of process, or a ruling that excludes evidence, causing the prosecution to offer no further evidence and the judge to direct a verdict of not guilty.⁶³ Various restrictions and criteria were recommended

⁶²Ibid, paras 7.20 to 7.143.

⁶³This definition is taken from the Law Commission’s Consultation Paper 158, *Prosecution Appeals*

to apply to this proposed new power.

Another area examined by the Law Commission was the tainted acquittal procedure available under ss 54-57 of the *Criminal Procedure and Investigations Act 1996*. This allows an acquittal to be set aside where it was gained through interference with a witness or juror. One of the Commission's recommendations was that the provisions should also apply to interference with or intimidation of a judge, magistrate or magistrate's clerk.⁶⁴

7.3 Home Affairs Committee report on double jeopardy

The Home Affairs Committee of the House of Commons, in its report on *The Double Jeopardy Rule* in May 2000,⁶⁵ supported the relaxation of the double jeopardy rule in the following circumstances:

- where a life sentence is available for the offence;
- where the Director of Public Prosecutions determines that it is in the public interest to apply to the High Court for the acquittal to be quashed;
- where the High Court finds there is new evidence that makes the previous acquittal unsafe.⁶⁶

The Committee found that a due diligence test (ie. whether the new evidence could have been adduced at the first trial if the investigation was conducted with due diligence) was not an appropriate requirement for a second trial. After all, 'A wrongful *conviction* can be overturned if a telling fact later emerges which a competent *defence* should have adduced at the trial.'⁶⁷ The Committee's opinion on the difficulty of obtaining a fair second trial was that the question of whether a particular case can be re-tried fairly should be argued before the court on each occasion.⁶⁸

The Committee also considered that the relaxation of the double jeopardy rule would not have an adverse impact on the quality of future police investigations.⁶⁹ Any relaxation of double jeopardy should, in the Committee's view, apply to past and future cases without a

Against Judges' Rulings, June 2000, para 4.3.

⁶⁴Law Commission, *Double Jeopardy and Prosecution Appeals*, Report No 267, March 2001, Part V.

⁶⁵United Kingdom Parliament, House of Commons, Home Affairs Committee, Third Report of the 1999-2000 Session, *The Double Jeopardy Rule*, HC 190, Ordered to be printed on 17 May 2000. Accessed at <<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/190/19002.htm>> on 29 May 2003.

⁶⁶*Ibid*, paras 24 and 41.

⁶⁷*Ibid*, paras 36, 38.

⁶⁸*Ibid*, para 44.

⁶⁹*Ibid*, para 48.

time limit.⁷⁰

The safeguards envisaged by the Committee to protect acquitted persons included: the High Court determining applications rather than a lower court; the Court considering whether it would be unfair to try the defendant again; the prosecution having to show that the new evidence was not available at the first trial; and only one retrial being permitted.⁷¹

7.4 Auld Review of the criminal courts of England and Wales

On 14 December 1999 the Lord Chancellor, the Home Secretary and the Attorney-General appointed Rt Hon Lord Justice Sir Robin Auld to conduct a review into the working of the criminal courts and to report within a year. The terms of reference were to inquire into:

...the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law.⁷²

A Review of the Criminal Courts of England and Wales was released in September 2001. Its recommendations included reforming the double jeopardy rule. Lord Justice Auld observed that double jeopardy ‘has its origin in harsher times when trials were crude affairs affording accused persons little effective means of defending themselves or of appeal, and when the consequence of conviction was often death.’⁷³

In support of modifying the rule, Lord Justice Auld reasoned:

If there is compelling evidence...that an acquitted person is after all guilty of a serious offence, then, subject to stringent safeguards of the sort proposed by the Law Commission, what basis in logic or justice can there be for preventing proof of that criminality? And what of the public confidence in a system that allows it to happen?⁷⁴

⁷⁰Ibid, paras 49-55.

⁷¹Ibid, para 45. Also listed as a safeguard was a test of the probability that a jury would convict at a retrial, eg. by requiring the prosecution to show that it was highly probable that a second jury would convict, or that the court had to be sure that a second jury would convict. But the Committee discredited such concepts at paras 39-41.

⁷²*A Review of the Criminal Courts of England and Wales*, by the Right Honourable Lord Justice Sir Robin Auld, September 2001, Foreword, para 1. Accessed at <<http://www.criminal-courts-review.org.uk>> on 28 May 2003.

⁷³Ibid, para 50.

⁷⁴Ibid, para 51.

The Review accorded with most of the Law Commission's proposals, but differed in two respects. Firstly, it disagreed with limiting the prosecution's right of appeal to cases of murder:

What principled distinction, for individual justice or having regard to the integrity of the system as a whole, is there between murder and other serious offences capable of attracting sentences that may in practice be as severe as the mandatory life sentence? Why should an alleged violent rapist or robber, who leaves his victim near dead, or a large scale importer of hard drugs, dealing in death, against whom new compelling evidence of guilt emerges, not be answerable to the law in the same way as an alleged murderer?⁷⁵

Rather, Lord Justice Auld's position on this point was closer to the Home Affairs Committee. He favoured identifying offences that attracted sentences 'up to a specified maximum', leaving the decision to Parliament to determine the appropriate offences.⁷⁶

Secondly, the safeguards recommended by the Auld Review went further than those of the Law Commission, by adopting the concept (submitted by the Law Society to the Home Affairs Committee) that the Director of Public Prosecution's consent should be required for the reopening of an investigation by the police. This principle was intended to recognise the anxiety and uncertainty that fresh investigations could cause to an acquitted person.⁷⁷

7.5 White Paper on the criminal justice system

A 'White Paper' entitled *Justice for All* was presented to Parliament in July 2002. The White Paper represents the Government's view on what should be done to modernise and improve the criminal justice system so its aims can be achieved more effectively. The recommendations for 'Delivering justice – fairer, more effective trials' include:⁷⁸

- introducing an exception to the double jeopardy rule in serious cases where there is compelling new evidence;
- allowing the prosecution a right of appeal where the judge makes a ruling that effectively terminates the prosecution case.

The White Paper's list of conditions to be satisfied in order to quash an acquittal and order

⁷⁵Ibid, para 60.

⁷⁶Ibid, para 61.

⁷⁷Ibid, para 63.

⁷⁸White Paper, *Justice For All*, Presented to Parliament by the Secretary of State for the Home Department, the Lord Chancellor and the Attorney General, July 2002 (Her Majesty's Stationery Office, CM 5563), para 0.12.

a retrial were:⁷⁹

- Fresh evidence would have to emerge that could not reasonably have been available for the first trial and that strongly suggests a previously acquitted defendant was in fact guilty.
- The Director of Public Prosecutions would need to personally give consent for the defendant to be re-investigated, and may indicate that another police force should conduct the investigation.
- Before submitting an application to the Court of Appeal, the Director of Public Prosecutions must be satisfied that: there is new and compelling evidence; an application is in the public interest; and a retrial is fully justified.
- The Court of Appeal would have the power to quash the acquittal where there is compelling new evidence of guilt, and the Court is satisfied that it is right in all the circumstances of the case for there to be a retrial.
- The offences that would be eligible for a retrial should be murder and other ‘very serious offences’ such as rape, manslaughter and armed robbery.
- Only one retrial would be permitted.
- The power should be retrospective, that is, applying to all acquittals which took place before the law changed, as well as those that occurred subsequently.

7.6 Criminal Justice Bill

The Criminal Justice Bill contains provisions granting the prosecution greater rights to appeal judicial rulings (Part 9 of the Bill) and to appeal against acquittals when new evidence is available (Part 10). The Bill was presented in the House of Commons by the Home Secretary, Rt Hon David Blunkett MP, on 21 November 2002. It passed the House of Commons on 20 May 2003 and was first read in the House of Lords on 21 May 2003. At the time of finalising this briefing paper, the Bill was still in the Committee stage in the House of Lords. **Parliament is now on summer recess until Monday 8 September 2003.**

Consequently, the following summary of the provisions relating to double jeopardy and prosecution appeals reflects the Criminal Justice Bill in the form in which it passed the House of Commons.

7.6.1 Interlocutory appeals

Part 9 of the Bill gives the prosecution the right to appeal against certain rulings made by a judge during a trial on indictment (ie. in the Crown Court) that are fatal to the prosecution

⁷⁹ibid, paras 4.63-4.66.

case, such as terminating rulings and rulings of ‘no case to answer’.⁸⁰ In addition, Part 9 entitles the prosecution to appeal against severance or joinder of counts,⁸¹ and against defendants’ applications to quash an indictment or stay proceedings on the ground of abuse of process at preparatory hearings.

7.6.2 Application to quash acquittal and order retrial

Part 10 changes the rule of double jeopardy to grant the prosecution a right of appeal against an acquittal when new evidence becomes available. The changes are wider than the recommendations of the Law Commission and the Auld Review, and would apply to the following circumstances:

- ***Serious offences*** – The eligible offences are outlined in Schedule 4. The current list is comprised of 31 offences that carry a maximum sentence of life imprisonment, including murder, attempted murder, manslaughter, rape, kidnapping, armed robbery, arson endangering life, serious drug offences, hijacking aircraft and ships, or conspiracy to commit any of the offences in Schedule 4. Not all crimes with a life penalty are included because ‘this would catch a number of common law offences which may not have such serious consequences, and for which a life sentence would rarely be imposed.’⁸²
- ***New and compelling evidence*** – To obtain a retrial, there must be new and compelling evidence. ‘New’ means it was not available or known to an officer or prosecutor at or before the time of the acquittal. 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’. Some types of new evidence could be DNA or fingerprint tests, or new witnesses who have come forward.
- ***DPP must give consent*** – 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) and for the making of an application to the Court of Appeal. 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

⁸⁰A termination ruling means a ruling that is made before the conclusion of the prosecution evidence and has the effect of terminating the trial. An example is a ruling that excludes the bulk of the Crown evidence as inadmissible. A ruling of ‘no case to answer’ occurs when the prosecution calls no evidence of one or more elements of the offence, also resulting in the termination of the trial.

⁸¹Severance of counts means that the accused is tried separately on each count. Joinder of counts unites on the same indictment charges that are based on the same facts or are part of a series of offences of similar character: E Martin (Ed), *Oxford Dictionary of Law*, 4th Edition, Oxford University Press, 1997.

⁸²United Kingdom Parliament, House of Lords, Criminal Justice Bill, *Explanatory Notes*, prepared 23 May 2003, para 43.

made if satisfied that the requirements for the evidence to be ‘new and compelling’ appear to be met (see previous bullet point), and it is in the public interest to apply.

- **One application** – Not more than one application may be made for an acquittal to be quashed.
- **Court of Appeal’s determination of an application** – The Court of Appeal must be satisfied that the requirements for new and compelling evidence and the interests of justice are met. 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** – 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, 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.
- **Retrial procedures** – There are requirements for the prosecution to act with due expedition in the retrial. For example, the defendant is to be arraigned⁸³ within two months of the order for a retrial, except where the Court of Appeal grants leave.
- **Right of appeal against determination** – 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** – Part 10 applies whether the acquittal was before or after the passing of the Act.

⁸³An 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.

Table 2: Summary of recommendations to quash acquittals in the United Kingdom, compared to Carr Government's proposal in New South Wales

	Scope of offences	Procedure for application	Test for granting application	Safeguards for fairness
Home Affairs Committee Report (May 2000)	Offences which carry a maximum penalty of life imprisonment.	DPP determines it is in the public interest to apply to High Court for the acquittal to be quashed.	High Court finds that the new evidence makes the previous acquittal unsafe. A 'due diligence' test is not appropriate.	Whether a case can be retried fairly should be argued before the court on each occasion. Only one retrial is allowed.
Law Commission Report (March 2001)	Murder.	Personal consent of DPP is required to apply to Court of Appeal for quashing of acquittal.	Court of Appeal must be satisfied: (i) new evidence is reliable and compelling, making it highly probable that the defendant is guilty; (ii) it is in interests of justice to grant a retrial, having regard to factors including due diligence of first investigation.	Whether a fair trial is likely to be possible is a factor within 'interests of justice'. Prohibition on reporting of hearing of application, and any retrial. Only one application to be permitted.
Auld Review (September 2001)	Offences with sentences up to a specified maximum, to be determined by Parliament.	Followed Law Commission's proposal.	Followed Law Commission.	Same as Law Commission, plus additional safeguard that the DPP's consent is required for police to reopen an investigation.
"Justice For All" White Paper (July 2002)	Murder, manslaughter, rape, robbery and other 'very serious offences'.	Before applying to Court of Appeal, DPP must be satisfied: (i) of new and compelling evidence; (ii) that the application is in the public interest; (iii) that a retrial is fully justified.	Court of Appeal must be satisfied that: (i) there is compelling new evidence of guilt; (ii) it is right in all the circumstances of the case to order a retrial.	DPP to personally give consent for defendant to be reinvestigated by police. Only one retrial permitted.
Criminal Justice Bill (2002-2003) [NOTE: This summary reflects the Bill as passed by the House of Commons. It is subject to amendment by the House of Lords.]	31 qualifying offences, including murder, manslaughter, rape, and armed robbery.	DPP must give personal consent for application to Court of Appeal, and must be satisfied that application is in the public interest and that evidence is new and compelling (meaning reliable, substantial, and appears highly probative).	Court of Appeal must be satisfied: (i) of new and compelling evidence; (ii) that in all the circumstances it is in the interests of justice to make an order.	Court of Appeal must, in addressing 'interests of justice', consider whether a fair retrial is unlikely. Defendant can appeal against grant of application to House of Lords. Retrial must be prosecuted with expedition. An order restricting publication can be made if it appears necessary in interests of justice, and if publication would

				give rise to a 'substantial risk of prejudice' to retrial. Only one application can be made.
cf. Proposal in New South Wales (as initially announced in February 2003)	Murder, manslaughter, and crimes with a maximum penalty of life imprisonment.	DPP can apply where compelling fresh evidence emerges that strongly suggests guilt and could not reasonably have been available at first trial.	Court of Criminal Appeal must be satisfied that there is compelling evidence of guilt, and it is in the interests of justice to quash the acquittal.	DPP must give consent for re-investigation. Limit of one re-trial.

8. RECENT DEVELOPMENTS IN DNA AND OTHER TECHNOLOGY

The capacity of DNA, biometrics, and other technology to assist in solving crimes is one of the main arguments raised in favour of restricting the operation of the double jeopardy rule.⁸⁴ New methods of gathering and testing evidence can point to the guilt of a person who has been acquitted of a crime. It is therefore worthwhile to briefly examine recent developments in DNA laws and practices, and identification techniques that affect criminal procedure in New South Wales.

8.1 DNA legislation and statutory reviews in New South Wales

8.1.1 *Crimes (Forensic Procedures) Act 2000*

The *Crimes (Forensic Procedures) Act 2000* commenced on 1 January 2001.⁸⁵ It enables police to conduct forensic procedures such as DNA testing on suspects, serious indictable offenders, and people who volunteer to participate.

Types of procedures: The Act classifies three types of procedures: intimate, non-intimate, and buccal swab.

- *Intimate forensic procedures* - activities listed as intimate forensic procedures include taking samples of blood, saliva, or pubic hair.
- *Non-intimate forensic procedures* – these include taking finger prints, samples of non-pubic hair, and scrapings from under finger nails.
- *Buccal swabs* - a separate category which refers to scraping the lining inside the mouth to collect cheek cells and saliva.

Forensic procedures on suspects: A suspect includes any person who is suspected on reasonable grounds by a police officer to have committed an offence. An officer may request a suspect to consent to a forensic procedure if there are ‘reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed an indictable offence’: s 12. If consent is not given, an order may be issued by a senior police officer for a non-intimate procedure to be performed on a suspect, except a child or ‘incapable person’. A Magistrate may order intimate or other forensic procedures to be carried out on any type of suspect, if satisfied of the matters under s 25.

Forensic procedures on serious indictable offenders: A non-intimate forensic procedure

⁸⁴For example, Premier Carr, when announcing his intention to review the double jeopardy principle, stated: ‘The law has to keep pace with science. Just as DNA evidence can expose wrongful convictions, it should also be available to convict the guilty.’ Premier of New South Wales, *News Release*, ‘Carr Government to Overhaul “Double Jeopardy” Rule’, 9 February 2003.

⁸⁵Part 8 of the Act, which regulates forensic procedures conducted on ‘volunteers’, was not proclaimed with the rest of the Act because of concerns that the term ‘volunteers’ could also apply to victims of crime. Part 8 (as amended by the *Crimes (Forensic Procedures) Amendment Act 2002*) commenced on 1 June 2003.

may be carried out on a serious indictable offender (someone who has been convicted of an offence that carries a maximum penalty of at least 5 years imprisonment) by informed consent or by order of a police officer. An intimate forensic procedure or buccal swab may be carried out on a serious indictable offender by informed consent or by court order.

Forensic procedures on volunteers: Persons who are not suspects or offenders may volunteer to have a forensic procedure carried out on them once they have given their informed consent. This category would apply to people who agree to take part in a mass screening.

Obtaining consent: Information must be provided when seeking consent from suspects, offenders and volunteers. This varies depending on the category. A suspect or offender must be given the opportunity to communicate with a legal practitioner.

Conducting forensic procedures: Numerous rules apply to carrying out forensic procedures. For example, a suspect must be cautioned before the procedure is undertaken. The Act specifies who may carry out different procedures (eg. medical practitioner, nurse, appropriately qualified police officer), and requires that certain intimate procedures are performed by a person of the same sex if practicable. Aboriginal or Torres Strait Islander people, children, and incapable persons should have an ‘interview friend’ present if practicable while a forensic procedure is being carried out.

Use of DNA evidence: DNA evidence that is obtained in contravention of the Act may be ruled inadmissible in court proceedings by the judge. Part 10 of the Act provides for the destruction of forensic material when a suspect is acquitted, their conviction is quashed, no conviction is recorded, evidence is ruled inadmissible, or proceedings are discontinued, unless an investigation into the person for another offence is pending. Part 11 regulates the supply of forensic material for the DNA database and the permissible matching of DNA profiles.

8.1.2 Review by Legislative Council’s Standing Committee on Law and Justice

The Law and Justice Committee of the Legislative Council conducted a review of the *Crimes (Forensic Procedures) Act 2000*, pursuant to s 123 of the Act. The unanimous report was tabled on 7 February 2002.⁸⁶

The Law and Justice Committee made 56 recommendations, including:

- The government should create a **State Institute of Forensic Sciences** to manage the use of technology in criminal investigations and prosecutions, and to further examine methods of calculating the significance of DNA matches [Recommendation 1].
- The **defence should be given access to crime scene samples** and samples provided

⁸⁶NSW Parliament, Legislative Council, Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000*, February 2002.

under the legislation, for independent analysis [Recommendation 9].

- A **request or order for a suspect to give a DNA sample** should be restricted to where there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a prescribed offence. The Act allows testing if it might produce evidence of the suspect's involvement [Recommendations 10-11].
- Incorporate specific provisions for **forensic procedures on victims** into the *Crimes (Forensic Procedures) Act 2000* [Recommendation 19].
- Proclaim the **volunteer provisions** in Part 8 of the Act as a matter of priority [Recommendation 20].
- Police should be unable to conduct **mass DNA screenings** such as the testing at Wee Waa in 2000 without a court order [Recommendation 23].
- **Remove the consent provisions for serious indictable offenders**, because 'the process of requesting consent from offenders is a mere procedural formality, since a test will be performed without consent in all cases where a request for consent is refused'⁸⁷ [Recommendation 25].
- Provide criteria by which an '**interview friend**' of a suspect or offender may be excluded or rejected by the police, for example, if the 'friend' is a suspected co-offender [Recommendation 34].
- **Child suspects** and victims aged 15 years and over should be able to give a sample without parental permission. The legislation prevents a person under 18 from volunteering to give a sample without a court order or their parents' consent [Recommendation 39].
- Address the potential danger that a **DNA sample provided by the relative of a missing person** for the purpose of the missing persons index⁸⁸ could be matched with the unsolved crimes index and thereby implicate the relative in a crime [Recommendation 44].
- **Samples and information taken from suspects should be destroyed** if their DNA profile does not match the crime scene, or no proceedings are commenced within 12 months, or there is an acquittal [Recommendations 48-50].

⁸⁷Ibid, para 5.127.

⁸⁸The missing persons index is an index of DNA profiles derived from the forensic material of persons who are missing, or their blood relatives who volunteer samples. If there is no sample from the missing person, a blood relative's sample may be useful due to their likely similarity to the missing person's profile.

- After a **DNA profile is ruled inadmissible**, no further DNA samples should be taken from the defendant for the purpose of prosecution of the same criminal act [Recommendation 52].
- **Drafting errors** and operational problems that have arisen in practice should be rectified [Recommendations 43, 53-56].

8.1.3 *Crimes (Forensic Procedures) Amendment Act 2002*

The Treasurer, Hon Michael Egan MLC, tabled the Government's response to the Law and Justice Committee's review on 28 August 2002.⁸⁹ The response specifically addressed 9 of the recommendations. Some of these – Recommendations 19, 20, 34, 35, 43 and 44 – were the subject of amendments by the *Crimes (Forensic Procedures) Amendment Act 2002*. The Government's response to the other recommendations was that 'the question of implementation is still being considered in the Attorney General's Department's current review of the Act.'⁹⁰ For more details of that review see p 39.

Introducing the Crimes (Forensic Procedures) Amendment Bill, the Attorney General, Hon Bob Debus MP, stated:

As a result of the report published by the standing committee [on Law and Justice] in February 2002 and discussions between officers of the Attorney General's Department, New South Wales police and other stakeholders as to the operation of the Act, it has become clear that a number of amendments are warranted.⁹¹

The *Crimes (Forensic Procedures) Amendment Act 2002* was assented to on 25 June 2002 but did not commence until 1 June 2003.⁹² Its amendments included:

- **Volunteer provisions** – The provisions in Part 8 dealing with persons who are not suspects but volunteer to undergo a forensic procedure (eg. in a mass DNA screening to help solve a crime) were amended to exclude victims from the definition of 'volunteer'.
- **Missing persons index** – A requirement was introduced that a relative of a missing person giving a sample for the purposes of the missing persons index must first be told that his or her DNA profile may be matched against any of the other indexes on the database. If there is a match that implicates the relative in the commission of another crime, the police must carry out a fresh forensic procedure according to the provisions

⁸⁹ *Response to the Standing Committee on Law and Justice's Recommendations in Relation to the Crimes (Forensic Procedures) Act 2000*, 28 August 2002.

⁹⁰ *Ibid*, p 1.

⁹¹ Second Reading Speech, Crimes (Forensic Procedures) Amendment Bill, *NSWPD*, 28 May 2002, p 2109.

⁹² *Government Gazette*, No 53 of 27 February 2003, p 3498.

of the Act dealing with suspects, to obtain an admissible sample.

- ***Interview friends*** – The grounds were expanded on which the police can exclude a person who is not considered suitable to act as an interview friend of an Aboriginal person, an incapable person, or a child.
- ***Inadmissible evidence*** – Evidence relating to a forensic procedure found by a court to be inadmissible (formerly to be destroyed as soon as practicable under section 89) should not be destroyed until after the end of all relevant proceedings, including any appeal period.
- ***Practical alterations, clarifications, drafting anomalies*** – For example, the class of police who are authorised to apply to a Magistrate for an order to carry out a forensic procedure was expanded.

8.1.4 Attorney General's Department Review

The Attorney General's Department is also required to review the *Crimes (Forensic Procedures) Act 2000*, pursuant to s 122, to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The review was to be undertaken as soon as possible after the period of 18 months from the date of assent, with a report of the outcome of the review to be tabled in Parliament within a further 12 months, that is, by 5 January 2003.

The Institute of Criminology at the University of Sydney conducted the review, with Professor Mark Findlay as principal investigator. The review took place in the second half of 2002, reporting to the Attorney General early in 2003.⁹³ However, the report had not been tabled at the time of writing.

8.1.5 Ombudsman's Review

Section 121 of the *Crimes (Forensic Procedures) Act 2000* requires the NSW Ombudsman to scrutinise and report on the functions conferred on police officers by the Act, for a period of 18 months after commencement. In December 2001, the Ombudsman released a Discussion Paper on 'The Forensic DNA Sampling of Serious Indictable Offenders Under Part 7 of the *Crimes (Forensic Procedures) Act 2000*'. The comments received from the community raised issues such as: the potential for DNA samples to be contaminated by police during collection; whether inmates and detainees understand the information they are given by police about DNA samples; whether inmates and detainees are being allowed to communicate with a lawyer of their choice; and the use of force to obtain samples.

To scrutinise these concerns, staff from the Ombudsman conducted focus groups with correctional officers and police testing teams, obtained information from the analytical

⁹³M Findlay and J Grix, 'Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials', *Current Issues in Criminal Justice*, Volume 14, Number 3, March 2003, p 269.

laboratories that process the samples for police, interviewed nearly 200 inmates who had been asked by police to provide a sample, and viewed video recordings of DNA samples being taken from over 250 serious indictable offenders.⁹⁴

The *Crimes (Forensic Procedures) Amendment Act 2002* extended the Ombudsman's review period to 2004. The latest *Annual Report* of the Ombudsman states:

The next phase of our review will focus on forensic procedures carried out on suspects and volunteers and will include comprehensive audits of police records. We will also continue to monitor the use and destruction of DNA profile information and the exchange of DNA information between police in NSW and other jurisdictions.⁹⁵

8.2 Update on DNA testing in New South Wales

8.2.1 Repeat offenders proposal

New laws were proposed by Premier Carr during the campaign for the State election in March 2003, to target repeat offenders. One of the features of the plan is to give police the power to obtain DNA from repeat offenders who are charged with an indictable offence and have been previously convicted of a serious indictable offence⁹⁶ but were released from prison before the DNA testing program began in January 2001. It is anticipated that the DNA initiative targeting repeat offenders will cost an additional \$6 million dollars over 4 years.⁹⁷

8.2.2 DNA testing rates

In March 2003, the Premier announced that 13,500 prisoners and 3,000 suspects had been tested since DNA testing laws began in 2001. Matches on the DNA database had led to 450 arrests and 186 convictions. As at 18 February 2003, the New South Wales DNA database had recorded 1571 'cold hits' to suspects or crime scenes, meaning that police had no other evidence identifying the perpetrator in these cases. DNA technology has also corroborated evidence against suspects in more than 1200 cases and eliminated more than 750 people from police inquiries.⁹⁸

⁹⁴NSW Ombudsman, *Annual Report 2001-2002*, pp 125-126.

⁹⁵*Ibid*, p 126.

⁹⁶Under the *Crimes Act 1900*, a 'serious indictable offence' means an offence that carries a maximum penalty of at least 5 years imprisonment.

⁹⁷Premier of New South Wales, *News Release*, 'Premier Carr Releases \$39.6 Million Plan Targeting Repeat Offenders', 6 March 2003, p 5. The 'Targeting Repeat Offenders' policy was Stage Two of Labor's Public Safety Plan.

⁹⁸Premier of New South Wales, *News Release*, 'Criminal Investigation and DNA Plan', 5 March 2003, p 2.

Looking specifically at results from DNA testing of prison inmates, by November 2002 inmates' samples had been linked to DNA found at 1254 'cold hit' crime scenes. There were 650 matches to 'warm hit' crime scenes, where police had suspicions of a person's involvement but insufficient evidence. Conversely, data collected had cleared about 300 inmates of suspected involvement in crimes.⁹⁹

8.2.3 Mass DNA screenings

DNA samples have been collected from large numbers of volunteers in several well known cases in an effort to narrow the field of potential suspects. In 2000 in the north-west NSW town of Wee Waa, 600 men between the ages of 18 and 45 years were requested to submit a DNA sample to assist police in investigating the sexual assault of an elderly woman. At the time of the Wee Waa project, legislation did not authorise the compulsory DNA testing of suspects. Among those tested was Stephen Boney, who agreed to give a swab of his saliva but confessed to the crime before a positive match was registered.¹⁰⁰ The case raises the issue of the indirect effects that DNA testing can have in a criminal investigation.¹⁰¹

Since Wee Waa, other cases in which mass DNA testing have been used include the investigation into the murder of Rachelle Childs, who was last seen at Bargo Hotel on 7 June 2001. Her body was found the next day at Gerroa. In 2003, men in the towns of Bargo, Camden and Gerroa volunteered to provide DNA samples at the request of police. The wide range of possible suspects included patrons of the hotel and employees at the victim's present and past workplaces. Mobile testing vans were used to administer buccal swab tests.¹⁰² More than 100 people gave DNA samples.¹⁰³

⁹⁹L Kennedy, 'Murder charge first for DNA data bank', *The Sydney Morning Herald*, 25 November 2002, p 5.

¹⁰⁰L Kennedy, 'Men asked for DNA in hunt for murderer', *The Sydney Morning Herald*, 26 May 2003, p 8.

¹⁰¹L Kennedy, 'Prime Suspect', *The Sydney Morning Herald*, 15 July 2000, p 36. The article suggests that the pressure Boney felt in facing detection resulted in other incriminating behaviour. For example, the police Sergeant who dealt with Boney observed that his hands were shaking as he filled out the questionnaire that accompanied the DNA test. Dr Jeremy Gans, a legal academic, argues that requests to voluntarily participate in DNA testing facilitate an additional form of surveillance which he calls 'DNA request surveillance'. Gans suggests that the introduction of DNA databases and the use of DNA request surveillance undermine the privilege against self-incrimination: J Gans, 'Something to Hide: DNA, Surveillance and Self-Incrimination', *Current Issues in Criminal Justice*, Volume 13, Number 2, November 2001, p 168.

¹⁰²L Kennedy, 'Men asked for DNA in hunt for murderer', *The Sydney Morning Herald*, 26 May 2003, p 8; L Kennedy, 'Country pub patrons line up for DNA swab over woman's murder', *The Sydney Morning Herald*, 27 May 2003, p 3.

¹⁰³'Canadian geographic profiler investigates NSW murder', ABC Illawarra Local Radio, 24 July 2003, accessed from ABC Online at <www.abc.net.au/illawarra/stories/s908848.htm>

8.3 NSW Innocence Panel

The concept of forming an independent review panel to consider applications from convicted persons for DNA testing to prove their innocence was announced in State Parliament in August 2000 by the then Police Minister, Hon Paul Whelan MP.¹⁰⁴

The Innocence Panel is not a statutory body but a purely administrative entity.¹⁰⁵ It does not exercise investigative functions nor judicial powers to determine guilt or innocence or to review convictions. Rather, its task is that of a facilitator. The Terms of Reference of the Innocence Panel are to:¹⁰⁶

- (a) receive applications from persons who believe they were wrongfully convicted of a serious offence and that DNA evidence may assist in proving their innocence;
- (b) consider whether those applications meet the criteria established by the Panel;
- (c) facilitate the location of any forensic material from the scene of the crime;
- (d) arrange the provision of that material, and DNA material obtained from the applicant, to the government laboratories for analysis;
- (e) provide information to the applicant on the outcome of the analysis;
- (f) advise the applicant on what further steps are available;
- (g) advise the Minister for Police on systems, policies and strategies for using DNA technology to facilitate the assessment of innocence claims;
- (h) report to the Minister for Police on any matter referred to the Panel by the Minister;
- (i) report to the Minister by 30 June each year on the Panel's performance and on the procedures put in place for its operation.

The members of the Innocence Panel first met in October 2001 but had to resolve various legal and technical problems before applications could start being accepted in November 2002.¹⁰⁷ The Innocence Panel was originally chaired by John Nader QC, who was succeeded by Mervyn Finlay QC. As at 5 August 2003, the other members were the Director of Public Prosecutions, the (Acting) Privacy Commissioner, an academic specialist in criminal law, and one representative each from the Ministry for Police, Legal Aid Commission, Public Defenders, NSW Health and the Victims Advisory Board.¹⁰⁸

The eligibility restrictions initially dictated that applications would only be accepted from

¹⁰⁴ Minister for Police, *Media Release*, 'DNA Justice Project to Help the Innocent', 16 August 2000.

¹⁰⁵ N Cowdery QC, 'DNA Innocence Panel – New Developments', Paper presented at a Continuing Professional Education Seminar, 'A Day of Criminal Law', College of Law, St Leonards, 14 June 2003.

¹⁰⁶ Supplied to the author by Nicole Rose, Executive Officer, NSW Innocence Panel. The wording has been paraphrased.

¹⁰⁷ B McDougall, 'Innocence panel to check DNA', *The Daily Telegraph*, 1 November 2002, p 9; Minister for Police, *Media Release*, 'Innocence Panel Applications', 1 November 2002.

¹⁰⁸ Nicole Rose, Executive Officer, NSW Innocence Panel, personal communication, 14 August 2003.

persons convicted in New South Wales of murder, manslaughter, serious sexual assault, or who are subject to the Serious Offenders Review Council, 'except in special circumstances'.¹⁰⁹ John Nader QC was reported as saying that the Panel would have the discretion to look at cases such as serious armed robbery.¹¹⁰ Serving inmates were to be given priority, but persons who are no longer in prison could also apply.¹¹¹ The applicant must specify the item(s) that he or she wishes to be searched for and tested for DNA to help prove the applicant's innocence.

After the Innocence Panel accepts an application, it asks NSW Police and NSW Health to undertake searches for the specified items or DNA samples already taken from those items. When samples exist, they are analysed to see whether a useable DNA profile can be extracted. If so, the DNA profile will be compared to the applicant's DNA.¹¹² Results which suggest innocence could be used by applicants to pursue the existing channels of review, for example, applying to the Supreme Court for an inquiry into conviction under Part 13A of the *Crimes Act 1900*. By August 2003 the Innocence Panel had received applications from 13 persons.¹¹³

On 11 August 2003, the Police Minister, Hon John Watkins MP, suspended the Innocence Panel from receiving fresh applications, although it is continuing to meet and deal with existing cases. Mr Watkins stated:

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.¹¹⁴

¹⁰⁹The Innocence Panel, Application Form No 09/02, accessed on the website at <www.nsw.gov.au/innocencepanel> on 25 July 2003.

¹¹⁰L Kennedy, 'DNA tests give jailed chance to prove innocence', *The Sydney Morning Herald*, 1 November 2002, p 3.

¹¹¹'The Innocence Panel', information sheet, available on the website at <www.nsw.gov.au/innocencepanel> on 25 July 2003.

¹¹²Ibid.

¹¹³Minister for Police, Hon John Watkins MP, *Media Release*, 'The Innocence Panel', 11 August 2003. In June 2003, the Director of Public Prosecutions, Nicholas Cowdery QC (who is a member of the Innocence Panel), observed that 11 applications had been received, 9 of them falling within the prescribed guidelines. Searches for items or samples were approved in 6 of those cases: N Cowdery QC, 'DNA Innocence Panel – New Developments', Paper presented at a Continuing Professional Education Seminar, 'A Day of Criminal Law', College of Law, St Leonards, 14 June 2003.

¹¹⁴Minister 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. Jamieson has lost appeals to the Court of Criminal Appeal and the High Court, but maintains that he was mistaken for another man. Jamieson applied to the Innocence Panel to have a scarf that was used to restrain Janine Balding tested for DNA evidence. Upper House Independent, Hon Peter Breen MLC, assisted Jamieson with the application. On 11 August 2003, Mr Breen announced: ‘They’ve done the testing apparently, they’re saying it’s unsuccessful, but I’m questioning the technology – whether they’ve used the latest state of the art technology...’¹¹⁵

The Chairman of the Innocence Panel, Mervyn Finlay QC, raised concerns with the Minister for Police about the Panel’s processes. Mr Finlay will review its framework and report in around 8 weeks on a range of issues including: whether there is a need for an Innocence Panel; its membership, structure and functions; eligibility requirements of applicants; what information should be disclosed by the Panel and to whom; safeguarding victims’ interests; whether the Panel should be able to refer matters directly to the Court of Criminal Appeal; and whether legislative provisions are needed to support the Panel.¹¹⁶

8.4 National DNA developments

8.4.1 National Criminal Investigation DNA Database

The first nationwide initiative for sharing police operational data was the National Exchange of Police Information, established in 1990.¹¹⁷ Its successor is CrimTrac, an Executive Agency created under the Commonwealth *Public Service Act 1999* in the Attorney-General’s portfolio on 1 July 2000. CrimTrac’s role is to support Australia’s police services through the provision of information and investigative tools that will: accelerate the identification of suspects of crimes; clear the innocent; shorten crime investigation times; and result in higher clearance rates.¹¹⁸ The agency is underpinned by an inter-governmental agreement signed by the Commonwealth Minister for Justice and Customs, and all the police ministers in Australia.¹¹⁹

¹¹⁵‘NSW Innocence Panel, which reviews criminal cases using DNA evidence, suspended’, story on ‘PM’ program, Radio National and local ABC radio, hosted by Mark Colvin, broadcast on 11 August 2003 at 18:34 hours. Transcript accessed from ABC Online at <www.abc.net.au/pm/content/2003/s922027.htm>

¹¹⁶Minister for Police, Hon John Watkins MP, *Media Release*, ‘The Innocence Panel’, 11 August 2003.

¹¹⁷E Abru, ‘Rubbing Out State Lines’, *Police News*, Volume 83, Number 3, March 2003, p 47 at 48.

¹¹⁸Information from the CrimTrac website at <www.crimtrac.gov.au> under the heading ‘About Us’.

¹¹⁹T Sherman, *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*, March 2003, ‘The CrimTrac Inter-Governmental Agreement’ from p 22. The Australasian Police Ministers’ Council is responsible for defining CrimTrac’s strategic directions and key policies, setting new initiatives, and appointing members to the CrimTrac board of management: ‘About Us’ on CrimTrac website at <www.crimtrac.gov.au>.

The establishment of a National Criminal Investigation DNA Database as part of CrimTrac's activities was intended to facilitate access for all police forces to DNA samples from interstate prisoners or unsolved crime scenes. The sharing of DNA profiles between jurisdictions can be effective in both incriminating and exculpating suspects.

CrimTrac was officially launched by the Prime Minister in Canberra on 20 June 2001. It was announced that 'the technology and hardware needed to set-up the DNA database is now on-line and operational. DNA samples in most States and Territories are now being taken and will be loaded onto the database in coming weeks. The system is expected to hold about 25,000 DNA profiles in the first year.'¹²⁰

Delays persist with implementing the National Criminal Investigation DNA Database because of the lack of uniformity throughout Australia in legislation and procedures governing DNA. New South Wales adopted the Model Forensic Procedures Bill created by the Model Criminal Code Officers Committee (to become the *Crimes (Forensic Procedures) Act 2000* (NSW)), and was the first jurisdiction to 'upload' its State DNA records to CrimTrac. But some other jurisdictions are yet to take these steps. There are still differences among the States and Territories in the categorisation of DNA samples, the powers of police to take samples, and the rules for matching and retaining samples. This can cause problems in court if DNA evidence is matched across borders.¹²¹

CrimTrac also administers a national finger print and palm print data base: see '**8.5.1 Digital finger printing and palm printing**' on p 47.

8.4.2 Review of Commonwealth forensic procedures legislation

Part 1D of the Commonwealth *Crimes Act 1914* deals with forensic procedures, particularly the use of DNA material for law enforcement purposes. It was inserted into the *Crimes Act* in 1998,¹²² and was based on the model forensic provisions developed by the Model Criminal Code Officers Committee (MCCOC) of the Standing Committee of Attorneys General. The primary purpose of Part 1D is to regulate the collection, storage and use of DNA samples and profiles.

An independent review of Part 1D of the Commonwealth *Crimes Act 1914* was conducted pursuant to s 23YV of the Act, and was published in March 2003.¹²³ Chaired by Tom

¹²⁰Senator Hon Christopher Ellison, Minister for Justice and Customs, *Media Release*, 'CrimTrac's new crime fighting systems switched on', 20 June 2001.

¹²¹N Cowdery QC, 'Where Did I Leave My DNA?', Paper delivered at World Police Medical Officers Conference, Sydney, 18 March 2002, '5. National DNA Databases'; and T Sherman, *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*, March 2003, 'The national DNA database system' from p 16, and Chapter 6 in general.

¹²²*Crimes Amendment (Forensic Procedures) Act 1998*, commencing on 23 January 1999.

¹²³T Sherman, *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*, March 2003.

Sherman AO (previously the Australian Government Solicitor and the Chairman of the National Crime Authority), the other members of the review were the Federal Privacy Commissioner, the Senior Assistant Ombudsman, General Manager of the Forensic Services branch of the Australian Federal Police, and Deputy Director of the Office of the Commonwealth Director of Public Prosecutions.

The report concluded:

The major deficiency identified by the Review is that the national system is not yet operational and only one jurisdiction (NSW) had loaded profiles onto the relevant CrimTrac database known as the National Criminal Investigation DNA Database (NCIDD). The Review calls for redoubled efforts on the part of the Commonwealth, the States and Territories to move quickly to negotiate the relevant arrangements which are necessary to make the system fully operational.

It follows that there has been relatively little experience of the operation of Part 1D to review...¹²⁴

Section 23YV(5) requires a further independent review to be undertaken within two years of the tabling of the first report.

8.4.3 Australian Law Reform Commission Report

On 29 May 2003, the Australian Law Reform Commission (ALRC) released a report entitled *Essentially Yours: The Protection of Human Genetic Information in Australia*.¹²⁵ The report is the product of a two year inquiry by the ALRC and the Australian Health Ethics Committee of the National Health and Medical Research Council, involving extensive research and widespread public consultation. The report makes 144 recommendations about how to deal with the ethical, legal and social implications of 'new genetics'. One of the inquiry's key recommendations in relation to DNA is that lack of harmonisation is threatening the effectiveness of any national approach to sharing DNA information for law enforcement purposes. It is recommended that Australian governments develop national minimum standards on the collection, use, storage, destruction and matching of DNA samples and profiles. Inter-jurisdictional sharing of information should not be permitted except in accordance with these minimum standards.

8.5 Biometric methods of identification and other scientific developments

The identification of people using their biological attributes may be referred to as 'biometrics'. Unique biological 'markers', such as digital finger prints, face mapping, eye scanning, and voice recognition are currently being used in areas such as workplace security.¹²⁶ They also have significant potential to contribute to the identification of

¹²⁴Ibid, Executive Summary.

¹²⁵Report ALRC 96. Accessed on the ALRC website at <www.alrc.gov.au> on 17 June 2003.

¹²⁶Supermarkets, airlines, and registered clubs are some of the employers which are already using

suspects in criminal cases. A selection of new techniques which have the capacity to test and verify evidence is summarised in this section.

8.5.1 Digital finger printing and palm printing

One of the systems operated by the Federal CrimTrac agency is the National Automated Fingerprint Identification System (NAFIS). Using digital and laser technology, this system scans finger prints and - for the first time - palm prints into a searchable national database. NAFIS has a capacity to hold around 2.5 million finger print records, 4.8 million palm print records and more than 180,000 prints from unsolved crimes. In the past, palm prints were unidentifiable, despite comprising about 20% of all prints taken from crime scenes.¹²⁷

At a State level, finger print scanners are being supplied to police stations to confirm the identity of prisoners who report on bail. The finger print scanners are linked to the COPS police computer database to create an automated bail reporting system. This alleviates the difficulty that may occur in matching the person who attends the police station with the Polaroid photo of the defendant that was taken at the time they were charged. All police stations were expected to be equipped with the scanners by December 2002.¹²⁸ In the campaign for the State election in March 2003, as part of the Criminal Investigation and DNA Plan, Premier Carr pledged the supply of 24 additional Livescan digital finger printing units, especially to country commands.¹²⁹

8.5.2 Eye scanning

Techniques referred to as eye mapping or iris, retina or cornea scanning, are being promoted as some of the most accurate mechanisms for individual identification available today. An iris scanning machine was launched by the Premier in March 2003. The stated purpose of its use was to make identification of prison inmates, staff and visitors easier. In particular, it was intended to identify banned visitors and assist prison guards to prevent contraband drugs entering prisons. The technology is to be tested at Silverwater Correctional Centre for one year.¹³⁰

8.5.3 Face mapping

Computer facial mapping can be used to analyse a photograph or film footage, in order to

biometric technology to identify staff and register their attendance times: S Nixon, 'School roll could be replaced with eye scan', *The Sydney Morning Herald*, 8 March 2003, p 3.

¹²⁷Senator Hon Christopher Ellison, Minister for Justice and Customs, *Media Release*, 'CrimTrac's new crime fighting systems switched on', 20 June 2001.

¹²⁸M Sun, 'Fingerprint scans for bailed prisoners', *The Daily Telegraph*, 25 December 2001, p 8.

¹²⁹Premier of NSW, *News Release*, 'Criminal Investigation and DNA Plan', 5 March 2003.

¹³⁰N O'Malley, 'Premier slips through the looking glass', *The Sydney Morning Herald*, 15 March 2003, p 10.

authenticate the identity of a person. The Department of Immigration and Ethnic Affairs has already been using this technique as a tool in verifying the identity of some applicants.¹³¹

Under the Criminal Investigation and DNA Plan, announced before the State Election in March 2003, Premier Carr pledged to provide Phototrac digital facial recognition technology by June 2005 to 110 police stations designated as having a 'high volume' of crime. This would help to identify offenders from surveillance and closed circuit television (CCTV) footage.¹³²

8.5.4 Ear printing

Databases of ear prints have been established and utilised by police in the United Kingdom, such as at the National Training Centre for Scientific Support to Crime Investigation in Durham County.¹³³ Ear prints are often left on windows and doors at crime scenes, as offenders press their ear against the surface to listen if anyone is at home before breaking in, to commit a robbery or other crime. Ear prints are unique because the cartilage and contours are never identical, even in twins. A print taken from a crime scene can be matched with a print taken or mould made from the ear of a suspect. The first instance of a murderer being convicted in the United Kingdom with the assistance of ear print evidence occurred in 1998. International ear experts gave evidence at the trial with regard to the distinctive nature of the ear print found on the window of the home of the elderly female victim who was murdered in Huddersfield, West Yorkshire, in 1996.¹³⁴

8.5.5 FRISC

Another election announcement by Premier Carr in March 2003 was the establishment of a Forensic Research Investigation and Science Centre (FRISC) at Westmead and the Sydney Police Centre at a cost of \$11.99 million over 4 years. When operational in 2004, FRISC will employ a total of 65 forensic scientists and staff. FRISC will provide NSW Police with additional forensic tools and speed up analysis of forensic evidence. Its specialist units will include forensic ballistics investigation, finger print examination, document examination, and forensic biology.¹³⁵

¹³¹M Owen-Brown, 'Face mapping used on refugee', *The Daily Telegraph*, 11 December 2002, p 17. In this case, the Department used facial mapping to support its conclusion that a photograph from Pakistan depicted the applicant and contradicted his claim to be a refugee from Afghanistan.

¹³²Premier of NSW, *News Release*, 'Criminal Investigation and DNA Plan', 5 March 2003, p 2.

¹³³'Police play it by ear', BBC News, BBC Online Network at <<http://news.bbc.co.uk>>, 2 January 1999.

¹³⁴'Ear print catches murderer', BBC Online News, 15 December 1998; 'Ere son – you're nicked!', BBC Online News, 20 February 1998.

¹³⁵Premier of NSW, *News Release*, 'Criminal Investigation and DNA Plan', 5 March 2003, p 1.

9. CONCLUSION

In February 2003, the Premier of New South Wales, Hon Bob Carr MP, announced that his Government would legislate changes to the common law doctrine of double jeopardy. One of the proposed reforms, as initially outlined, would allow the Director of Public Prosecutions to apply to the Court of Criminal Appeal to quash an acquittal for murder, manslaughter, or a crime that carries a maximum penalty of life imprisonment, where compelling fresh evidence emerges that strongly suggests guilt and could not reasonably have been available at the first trial. The Court of Criminal Appeal would have to be satisfied there is compelling evidence of guilt and that it is in the interests of justice to order a retrial. The prosecution would also be entitled to appeal against a verdict of acquittal directed by a judge, and have greater scope to appeal a judicial ruling that excludes prosecution evidence. The common theme to these proposals is the ability to challenge an acquittal (or a judicial ruling that would cause an acquittal), giving the Crown another chance to prosecute the defendant (or to continue the trial).

Some exceptions to the double jeopardy rule existed in New South Wales before the latest developments, for example, the Crown's right to appeal sentences it asserts are inadequate. Therefore, an expansion of prosecutorial rights would not be an unprecedented overthrow of the doctrine of double jeopardy in New South Wales. However, there is currently no power for the prosecution to apply to have a verdict of acquittal quashed on appeal, and such a change can be regarded as a significant departure from past procedure. A Draft Bill or some other consultation process was alluded to by the Government at the time of the original announcement.¹³⁶

It is not yet clear whether the changes that have been foreshadowed in New South Wales will be consistent with the findings of the Model Criminal Code Officers Committee which has been assigned to review double jeopardy by the Standing Committee of Attorneys General of Australia (SCAG). The comments of Premiers and Attorneys General, in connection with the SCAG meeting in April 2003, indicated that the majority favoured a national approach towards the issue of double jeopardy. The influence of the legislative amendments to double jeopardy in the United Kingdom also remains to be seen, as the provisions are yet to be passed by the House of Lords.

DNA and scientific developments could affect the number of cases where new evidence prompts the prosecution to apply for a retrial. Testing programs in New South Wales among prisoners and suspects led to 450 arrests and 186 convictions by March 2003.¹³⁷ But at a national level the lack of uniformity and co-ordination between the jurisdictions is hampering DNA information-sharing for law enforcement purposes.

¹³⁶Premier of New South Wales, *News Releases*, 'Carr Government to Overhaul "Double Jeopardy" Rule' and 'Carr Gives Prosecution New Powers', 9 February 2003. Both releases stated that, 'The Government will consult widely during the drafting of these proposals.'

¹³⁷Premier of New South Wales, *News Release*, 'Criminal Investigation and DNA Plan', 5 March 2003.

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