

Submission of the

**University of New South Wales
Council for Civil Liberties**

to the

**NSW Attorney-General's Community Consultation
of the Draft**

Criminal Appeal Amendment (Double Jeopardy) Bill

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Acknowledgments

The draft Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW) has been heavily influenced by the Criminal Justice Bill¹ in the UK and law reform proposals in New Zealand.² As a consequence members of UNSWCCL have surveyed and drawn upon the debate in those countries to inform this submission.

This submission also acknowledges its indebtedness to the briefing paper released by the NSW Parliamentary Library Research Service.³ While that paper was useful for background information, it should be noted that UNSWCCL found many parts of it to be inaccurate and biased towards the pro-reform agenda.

¹ Criminal Justice Bill 2002 (UK), Pt 10, clauses 69-87.

² New Zealand Law Commission, *Acquittal Following Perversion of the Course of Justice*, Report 70 (2001).

³ Rowena Johns, *Double Jeopardy* (2003) NSW Parliamentary Library Research Service, Briefing Paper No 16/03

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1. Executive Summary

UNSWCCL has some grave concerns about the NSW government's draft Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW) ('the Draft Bill'). In summary, the Draft Bill reads like a prosecutor's wish-list, ignores the civil liberties of the citizens of New South Wales and fails to strike a satisfactory and just balance between the interests of the individual accused and the State.

UNSWCCL is concerned that permitting the Crown to re-open closed cases will render all acquittals of very serious offences conditional. This undermines the important legal principle of finality. It means that citizens who thought their ordeal was over – defendant, victims and their respective families alike – will have to live with a cloud hanging over their heads because they might have to relive the ordeal of a full criminal trial.

UNSWCCL does not support the retrospective operation of these conditional acquittals which, at one stroke of the pen, render all *past* acquittals conditional as well.

UNSWCCL is concerned that the Draft Bill sets the standards required of the prosecution upon appeal of an acquittal too low. These low standards do not reflect the principled asymmetry of the criminal justice system, but instead erode that asymmetry and radically alter the balance in favour of the Crown and against the individual defendant.

UNSWCCL is deeply concerned at the underlying assumption in the Draft Bill that there is an equivalence between wrongful convictions & wrongful acquittals. Such a view fails to recognise that wrongful convictions alone involve the unconscionable incarceration of an innocent by the State. Furthermore, such a view fails to acknowledge the disparity in power and resources between the individual defendant and the State.

Of all the provisions of this Draft Bill, the proposal concerning tainted acquittals is the only form of Crown appeal that UNSWCCL sees as potentially meritorious. However, before UNSWCCL could support such an appeal, the provisions as drafted would have to be heavily amended.

Of all the proposed forms of appeal in the Draft Bill, only tainted acquittal appeals have been instituted in the UK. All the other forms of acquittal proposed are still before the House of Lords. UNSWCCL is concerned that if New South Wales proceeds with these reforms, then it could be left in the embarrassing position of having passed legislation based on a British Bill that Westminster ultimately rejects because it is extreme and oppressive. UNSWCCL recommends severing the provisions relating to tainted acquittals from the rest of the NSW Draft Bill and introducing it separately.

Finally, given that the Model Criminal Code Officers Committee (MCCOC) will be releasing a discussion paper on double jeopardy reform in October 2003, UNSWCCL recommends that the NSW government not proceed with this legislation until the national consultation process has been completed and the MCCOC has reported back to the Standing Committee of Attorneys-General (SCAG).

2. Introduction

2.1 *general comments*

The rule against double jeopardy has existed in the common law since the Middle Ages, slowly evolving and attaining its contemporary legal status as fundamental tenet of our criminal justice system.⁴

It is important to remember that the rule against double jeopardy and the principle of finality serve not to protect the guilty, but to protect the innocent. The real danger of introducing appeals of acquittals lies in the increased risk of convicting the innocent. As a matter of simple mathematics the more times an innocent person is put to trial, the more likely she or he is to be convicted.

It is a grave injustice indeed to expose an innocent person to retrial: two wrongs don't make a right. UNSWCCL is concerned that Crown appeals of acquittals increase the risk of creating two victims: the victim of the original crime and the innocent accused put through a retrial after an acquittal, which should have been the end of his or her ordeal.

The inspiration for these proposals comes from cases outside of New South Wales: the Carroll case; and, potentially, the Domaszewicz case in Victoria. UNSWCCL is extremely concerned that this radical Draft Bill is not being used ultimately to remedy cases like Carroll, but rather to increase the power of police and the DPP *vis-à-vis* an acquitted individual. This legislation will significantly increase the tools at the disposal of police and prosecutors to harass individuals for a crime of which they have been finally acquitted.

Furthermore, Carroll's case is not an impetus for reform because the 'new' evidence adduced at his second trial was held to be unreliable and unconvincing. UNSWCCL is concerned about the motives behind the media campaign that is running this reform agenda. Bad cases make hard law, should look at this rationally and in a broader context.

To compensate for a disparity in power and resources between the individual defendant and the State, the criminal law includes several highly-evolved safeguards, including the presumption of innocence and the rule against double jeopardy. This weighting of factors in favour of the accused seeks to counterbalance the disparity in power and resources and has been described as 'principled asymmetry'. UNSWCCL is deeply concerned that the Draft Bill erodes that principled asymmetry, resulting in a system of appeals that is unfairly balanced against the appellant.

⁴ Jill Hunter, 'The Development of the Rule against Double Jeopardy' (1984) 5(1) *Journal of Legal History* 1.

2.2 Division 1 appeals

Division 1 of the Draft Bill proposes to permit the DPP to seek leave to retry a person acquitted of a very serious offence where there is now 'fresh and compelling' evidence that was not adduced at trial.

UNSWCCL is concerned that permitting the Crown to re-open cases will render all acquittals of very serious offences conditional, thereby undermining the important legal principle of finality. This will mean that acquitted people will have to live their lives with a cloud hanging over them; never knowing if the police will come knocking on their door.

UNSWCCL does not support the retrospective operation of these conditional acquittals which, at one stroke of the pen, render all *past* acquittals conditional.

UNSWCCL is not convinced that manslaughter fits comfortably within the definition of 'very serious offence'.

UNSWCCL is also deeply concerned that any decision by the Court of Criminal Appeal to quash an acquittal and order a re-trial on the grounds of 'fresh and compelling' evidence will greatly prejudice a defendant's retrial. Effectively the retrial will commence from a presumption of guilt, rather than innocence. Given the ubiquity of media coverage of such cases, it is hard to imagine circumstances under which a retrial could ever be fair.

UNSWCCL is also concerned that the appeal of tainted acquittals, as currently drafted, is flawed because the scope of the provision goes far beyond tainted acquittals and the commission of an administration of justice offence by the defendant. Of all the provisions of this Draft Bill, this is the only form of Crown appeal that UNSWCCL sees as potentially meritorious. However, before UNSWCCL could support such an appeal, the provisions as drafted would have to be heavily amended .

If the Attorney-General intends to proceed with this Bill, then UNSWCCL recommends that that citizens who are being asked to give up this important immunity should at the very least be appropriately compensated if falsely retried with a large compensation payment defined in statute.

Alternatively, the *Criminal Appeals Act* should be altered to allow for a defence appeal as of right to a conviction at a second trial on the grounds of law, fact or mixed fact and law. This might go some way to counterbalancing the prejudice of having the Court of Criminal Appeal concluding that inculpatory evidence is 'fresh and compelling'.

2.3 Division 2 appeals

Division 2 of the Draft Bill proposes the introduction of a right of Crown appeals to directed and non-jury acquittals on a question of law alone.

UNSWCCL is concerned that this Division is not limited to 'very serious offences', but will provide the Crown with an appeal right to all acquittals of indictable offences. On the other hand, UNSWCCL is relieved that the right of appeal will not be retrospective.⁵

⁵ s 91(6)

UNSWCCL rejects any need to provide the Attorney-General with a right to appeal acquittals. This leaves the way open for political interference in the judicial process. There is no safeguard to guarantee that such a power could not be used to harass citizens or to pursue political opponents.

Furthermore, UNSWCCL recommends that these types of appeal be made by leave, rather than as of right.

2.4 Division 3: miscellaneous provisions

UNSWCCL is disturbed by the fact that any reinvestigation of an acquitted person can be authorised retrospectively. UNSWCCL is also concerned that there is no time limit on reinvestigation, leaving an acquitted person vulnerable to police harassment indefinitely. The threat of reinvestigation could also be used by investigative officers to provoke a citizen to commit a crime such as assaulting a police officer or resisting arrest. This provision is no safeguard against police harassment, in fact it essentially legalises such behaviour.

2.5 Bill is vulnerable to legal, constitutional and international challenge

This Draft Bill is vulnerable to constitutional and legal challenge on the grounds that it violates the right to a fair trial and the immunities from retrospective criminal laws and double jeopardy.

The Draft Bill is also susceptible to challenge at the UN Human Rights Committee on the grounds that it violates international human rights standards.

2.6 DNA Evidence

Much of the impetus for reform comes from the desire to use new forensic technologies on old evidence in order to convict people who have been wrongfully acquitted of very serious offences. However, UNSWCCL is not aware of one case in New South Wales that falls within this category, which begs the question: why introduce this Bill?

UNSWCCL is concerned that too many people misunderstand the usefulness of DNA evidence. DNA evidence, for example, can be used to determinatively prove someone's innocence, but it cannot be used to determinatively prove their guilt.

Finally, UNSWCCL strongly encourages the Attorney-General to reinstate the NSW Innocence Panel and make it effective by providing innocent inmates with the resources necessary to prove their innocence.

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

It would be inhumane and unthinkable cruel to proceed with this Draft Bill without first reinstating the Innocence Panel.

3. Why double jeopardy should be retained

3.1 the importance of finality

It has been said that ‘finality is the fundamental value of double jeopardy’.⁶ Like Liberty UK, UNSWCCL is concerned that the proposed changes to the rule against double jeopardy are ‘a serious degradation of the principle of finality’.⁷

The principal of finality is an important aspect of our common law system. The legal doctrine of *res judicata* – that a judicial determination may not be revisited (except for limited avenues of appeal)⁸ – emphasises the importance of finality of the judicial process to the rule of law and society as a whole. The doctrine of *res judicata* underpins the rule against double jeopardy in criminal cases,⁹ and operates independently of the merits of the previous adjudication.¹⁰

At the most fundamental level, the proposed changes to the finality of criminal judgments would radically alter the very meaning of an acquittal: ‘those acquitted by a jury of a serious offence would be aware that their acquittal was, in effect, only conditional’.¹¹ These proposals amount to creating a new kind of acquittal – the conditional acquittal:

In denying the principle [of double jeopardy], we are creating something new. ...[W]e are creating the conditional acquittal. ...A person who stands trial will not be able to leave the court building sighing with relief. Many of us have had the experience of a client almost collapsing at the end of a trial, and we have been able to say to him or her, “It is over. You can rebuild your life”. We will not be able to say that any more.¹²

Significant emphasis should also be placed on the negative impact of changes to the rule against double jeopardy upon the acquitted individual. The potential for retrial results in a substantial lack of closure to the criminal proceedings¹³ and limits the acquitted

⁶ Thomas, ‘An elegant theory of double jeopardy’ (1988) 4 *Illinois Law Review* 827, 829

⁷ Jeannie Mackie, *Liberty’s briefing on the ‘Criminal Justice Bill’ for the House of Lords* (2003) Liberty UK, [40], <<http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2003/pdf-documents/crim-jus-lords-june-2003.pdf>> at 1 October 2003.

⁸ Mark Aronson and Jill Hunter, *Litigation: Evidence and Procedure* (5th ed, 1995) 466.

⁹ See eg *Davern v Messel* (1984) 155 CLR 21, 30 (Gibbs CJ): ‘Double jeopardy, properly understood, is best described in the phrase ‘no man should be tried twice for the same offence’.

¹⁰ For an overview, see Aronson & Hunter, above n 8, 466. See also *Samasivam v Public Prosecutor* [1950] AC 458 (Privy Council). The value placed upon the finality of judicial determinations can be seen in the historically consistent importance of the principle of *res judicata* to the pleas in bar of *autrefois acquit* and *autrefois convict*. Most notably see *Saraswati v R* (1991) 172 CLR 1, 4 (Deane J), citing *R v Miles* (1890) 24 QBD 423, 431 (Hawkins J): ‘that where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with malicious or wicked intent, or by reason that the commission of the offence was followed by serious consequences ...’ (emphasis added).

¹¹ Liberty UK, above n 7, [40].

¹² United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1061-2 (Baroness Kennedy of The Shaws).

¹³ Liberty UK, *Liberty’s response to the Home Office White Paper “Justice for All”* (2002) <<http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/oct-2002-cj-white-paper.pdf>> at 1 October 2003.

individual's opportunity to regain 'repose' following the trial.¹⁴ The principal of finality, as it currently stands, also ensures that such individuals, once acquitted, cannot be further subjected to the dramatic intrusion of the criminal justice system into their life.¹⁵

It is important not to equate wrongful convictions with wrongful acquittals. Considering that an individual's liberty is stake, it is desirable to allow an exception to the principle of finality in order to correct wrongful convictions.¹⁶ However, wrongful acquittals are conceptually different because they do not involve the unconscionable incarceration of an innocent and because they do not offend the principled asymmetry of the criminal law to the same extent as wrongful convictions.¹⁷

Importantly, the UK Law Commission has acknowledged the 'wider social value' of the principal of finality in both 'delineating the proper ambit of the power of the state'¹⁸ and as a symbol of the rule of law.¹⁹ This recognises the importance of finality in a wider social context, as well as to the rights of the individual before the law.²⁰

It is worthy of note that, in coming to that conclusion, the United Kingdom Law Commission had substantially changed its position from that set out in its initial assessment of changes to the rule against double jeopardy.²¹ In its final report the Law Commission recommended restricting changes to the rule against double jeopardy to the crime of murder.²² Arguably their policy analysis more naturally supports a retention of the current prohibition.

¹⁴ Paul Roberts, 'Double Jeopardy Law Reform: A Criminal Justice Commentary' (2002) 65(3) *Modern Law Review* 393, 405.

¹⁵ B. Fitzpatrick, "Tinkering or transformation? Proposals and principles in the White Paper, 'Justice for All'" [2002] 5 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/2002/issue5/fitzpatrick5.html>> at 1 October 2003. Also: UK Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 267 (2001). See also comment from the US Supreme Court in *Green v US* 355 US 184, 187 (1957) (Black J): quoted by Rowena Johns, above n 3, 3.

¹⁶ it has been suggested that criminal appeals of convictions only proceed as the result of the defendant's waiver of the protection of double jeopardy: see Rosemary Pattenden, *English Criminal Appeals 1844-1994: appeals against conviction and sentence in England and Wales* (1996) 286-7.

¹⁷ see "the Bill alters the principled asymmetry of criminal law", below on page 25. See also: Paul Roberts, above n 14, 408-10.

¹⁸ UK Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 267 (2001) [4.17]. See also, Roberts, above n 14, 406: finality 'draws attention to collective social interests, in addition to the welfare and rights of the individual accused'.

¹⁹ UK Law Commission, above n 18, [4.17]: 'The finality involved in the rule against double jeopardy ... represents an enduring and resounding acknowledgement by the state that it respects the principle of limited government and the liberty of the subject. The rule against double jeopardy is, on this view, a symbol of the rule of law and can have a pervasive educative effect. The rule serves to emphasise commitment to democratic values'.

²⁰ see UK Law Commission, above n 18, [4.12]-[4.13].

²¹ UK Law Commission, *Double Jeopardy*, Consultation Paper No 156 (1999) [5.29] (provisionally, all offences attracting a maximum penalty of three years or more).

²² UK Law Commission, above n 18, [4.42]

3.2 Carroll's case is not an impetus for reform

*The greater the hostility directed against a person...the greater the temptation to distort the fundamental precepts of our democracy by setting at naught the great principles of British justice.*²³

Sir Lawrence Street, Chief Justice of New South Wales

One of the reasons usually given for 'reforming' the rule against double jeopardy is to allow for the introduction of 'fresh and compelling' evidence that was not available at trial of an acquitted person. Particular mention is made of advances in forensic technology, especially DNA evidence.²⁴ The case usually cited to support this 'reform' is the case of Raymond John Carroll.²⁵

As lawyers are apt to remind us, hard cases make bad law, but this is particularly so in the case of Carroll. UNSWCCL is deeply concerned that the calls for double jeopardy reform centre around the Carroll case. The so-called 'new' evidence presented in that case is problematic. Many of the facts in the case are poorly understood in the community, where discussion goes little further than the emotional response to the brutal killing of an infant. UNSWCCL is also concerned that the legislative proposals to 'reform' double jeopardy would not remedy the problems with the Carroll case anyway.

An obvious point to be made is that the Carroll case is a Queensland case and will therefore not be effected by this NSW legislation. To the best of UNSWCCL's knowledge there is not one single case in NSW that would fall within the ambit of this legislation. This begs the question: why introduce the Bill at all?

One persistent myth that surrounds the Carroll case is that it involved DNA evidence – it did not. The expert opinion evidence adduced at both trials was from forensic dentists who examined photographs of a bite mark.²⁶

UNSWCCL is greatly disturbed by the way this case has been used by the media to create the political pressure being brought to bear for reform of the rule against double jeopardy.²⁷ The motives of the *Australian* newspaper in particular, by offering to fund civil litigation against Carroll, are unclear and disturbing.²⁸

Those who use the Carroll case to justify reform of the rule against double jeopardy should be challenged to go beyond their emotional response to facts of the crime involved. An examination of the so-called 'new evidence' should sober any rational mind.

The Queensland Court of Criminal Appeal found that the 'fresh' evidence presented at Carroll's perjury trial, concerning the bite marks on the victim's thigh, was not fresh at all, but rather a reinterpretation of *old* evidence by a 'fresh set of witnesses'.²⁹ Further, the Court found the new confession evidence unreliable because it involved a jailhouse confession³⁰ to which 'no weight at all could be attached'.³¹ In fact the Court said that

²³ *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372, 379 (Street CJ).

²⁴ eg Rowena Johns, above n 3, 1, 35.

²⁵ *The Queen v Carroll* [2002] HCA 55; *R v Carroll* [2001] QCA 394; *R v Carroll* [2000] QSC 308; *Carroll v R* (1985) 19 A Crim R 410. See also Rowena Johns, above n 3, 7-8.

²⁶ eg *R v Carroll* [2001] QCA 394 [55] (three forensic dentists at murder trial agreed bite marks were caused by upper teeth; four forensic dentists at perjury trial agreed bite marks were caused by lower teeth)

²⁷ see "power of the press" on page 23 below.

²⁸ see "power of the press" on page 23 below.

²⁹ *R v Carroll* [2001] QCA 394 [62] (Williams JA; McMurdo P & Holmes J agreeing)

³⁰ *R v Carroll* [2001] QCA 394 [28]-[34]

³¹ *R v Carroll* [2001] QCA 394 [65]

both the confession evidence and the odontological expert opinion evidence should never have got to the jury.³²

So the evidence that the Queensland DPP would have used at Carroll's retrial for murder, had double jeopardy not been a bar to prosecution, was neither fresh nor compelling at law. This means that the very case that sparked the calls for reform of double jeopardy would fail to satisfy the 'fresh and compelling' test laid out in this legislation.³³ This legislation purports to remedy cases like those of Carroll, but clearly does not.

To underline this point: even if the double jeopardy rule was abolished, Carroll would still go free at a second murder trial because the jailhouse confession and the 'new' expert opinion evidence is not admissible in court according to the Queensland Court of Criminal Appeal. Plainly, the reform of double jeopardy will change nothing in this case and will not satisfy the public's call for justice. All 'reform' will achieve is an erosion of safeguards, evolved over centuries, to protect the innocent.

³² *R v Carroll* [2001] QCA 394 [37] (confession evidence), [62] (opinion evidence)

³³ s 9D

4. Division 1: retrial after acquittal for very serious offences

4.1 introduction

Division 1 of the Draft Bill proposes the introduction of an exception to the rule against double jeopardy that allows the DPP to seek leave to retry a person acquitted of a very serious offence where there is now ‘fresh and compelling’ evidence that was not adduced at trial.

UNSWCCL is concerned that this procedure, if introduced, will render all acquittals of very serious offences conditional, thereby undermining the important legal principle of finality. This will mean that acquitted people will have to live their lives with a cloud hanging over them; never knowing if the police will come knocking on their door. Furthermore, UNSWCCL does not support the retrospective operation of these conditional acquittals.

UNSWCCL is not convinced that manslaughter fits well within the definition of ‘very serious offence’.

UNSWCCL is also concerned by the way this Division treats appeals of acquittals as equivalent to appeals of convictions, which is particularly evident in the extremely low standard set for Crown appeals of acquittals that undermines the principled asymmetry of the criminal law and fails to recognise the differential in resources and power between the accused and the state.

UNSWCCL is also deeply concerned that any decision by the Court of Criminal Appeal to quash an acquittal and order a re-trial on the grounds of ‘fresh and compelling’ evidence will greatly prejudice a defendant’s retrial. Effectively the retrial will commence from a presumption of guilt, rather than innocence. Given the ubiquity of media coverage of such cases,³⁴ it is hard to imagine circumstances under which a retrial could ever be fair.

UNSWCCL is also concerned that the appeal of tainted acquittals, as currently drafted, is flawed because the scope of the provision goes far beyond tainted acquittals and the commission of an administration of justice offence by the defendant.

³⁴ see also “media coverage and a fair trial” on page 22 below.

4.2 retrospectivity: all past acquittals rendered conditional

UNSWCCL is deeply disturbed by the proposed retrospective operation of the appeals in Division 1 of the Draft Bill.³⁵ The moment this Bill receives assent every single past acquittal of a very serious offence will be instantly rendered conditional. It is unimaginable that Parliament would allow the liberty of the individual to be so undermined as to visit a criminal retrial on a person acquitted *before* the commencement of this legislation. To remove such a fundamental right to finality and certainty is an abuse of state power.

Retrospective criminal legislation, whether it creates a new offence or not, is an extremely serious matter because it deals with the liberty of the individual. This is not retrospective taxation legislation which means that people must pay more tax. Retrospective criminal legislation has far greater consequences and should not therefore be entertained.

The reason generally given for making these appeals retrospective is so as to facilitate the reinvestigation of evidence using new forensic techniques, specifically DNA technology.³⁶ However, given that these techniques are now standard investigative procedure, these retrospective provisions will be redundant in a few year's time. There have been suggestions that a sunset clause would remedy this problem,³⁷ but the better view is that we have lived with the double jeopardy rule for centuries and never before felt the need to alter it when new forensic techniques became available, for example when fingerprinting was introduced. It would be dangerous to set a precedent now that allows the state to extinguish the rights of individuals under the guise of scientific advancement.

UNSWCCL is deeply disturbed by the fact that once all possible cases where re-examination of evidence with DNA techniques have been exhausted, the utility of the changes to the rule against double jeopardy will have disappeared, but the damage to the rule itself will remain. In other words, the state will maintain the power it has gained over individuals and citizens will be left more vulnerable to that power. UNSWCCL believes it is imperative that the rule not be modified because it will permanently diminish individual liberty.

Further, it is arguable that since 'very serious offences' are tried in the Supreme Court, a court covered by Chapter III of the Commonwealth *Constitution*,³⁸ that the High Court of Australia would strike down this aspect of the legislation on the grounds that retrospective criminal laws are unconstitutional, whether they create an offence or not. This is discussed in greater detail later in this submission.³⁹

Even if such a challenge were to fail in the High Court, anyone retried under this provision would be eligible to communicate with the United Nations Human Rights Committee to make a formal complaint that their fundamental human right to be free of retrospective criminal laws had been violated. This is discussed in greater detail later in this submission.⁴⁰

³⁵ s 9A(2)(b). UNSWCCL's concern that the Draft Bill creates a new kind of acquittal, the conditional acquittal, has already been expressed elsewhere in this submission: see "the importance of finality" on p 5.

³⁶ Rowena Johns, above n 3, 13. See also "DNA Evidence" on page 37 below.

³⁷ eg United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1071-2 (Earl Russell).

³⁸ *Kable v DPP (NSW)* (1996) 189 CLR 51. See also: Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 1296.

³⁹ see "constitutional challenge: aspects of the Bill are unconstitutional" on page 32.

⁴⁰ see "international challenge: the Bill violates international human rights standards" on page 35.

4.3 no one shall be thrice tried?

The proposed re-trial of an acquitted person amounts to a 'guarantee' that no one shall be *thrice* tried for the same offence.

The proposed 'safeguard' that only one application may be made to the Court of Criminal Appeal is a statutory limitation. There is nothing to stop a future Parliament, given media pressure and the right circumstances, from increasing that application limit to two, three or more.

The great risk with two or more trials is that a government could exhaust a defendant by retrial until he or she is found guilty, even though factually innocent, due to the greater resources of the state.⁴¹ Statistically speaking, increasing the number of trials a defendant faces for an offence, also increases the potential for convicting an innocent.

UNSWCCL does not see this statutory limit as a safeguard, given that it can be easily changed by a future Parliament. UNSWCCL recommends that the existing principle of double jeopardy be retained, ensuring that a citizen shall not be *twice* tried for the same offence.

4.4 very serious offence

For the purposes of defining a 'very serious offence', the Bill is technically correct to identify those crimes attracting life imprisonment. However, UNSWCCL does not agree that all crimes attracting life imprisonment should be exempted from the double jeopardy rule.

If the Attorney-General decides that changes to the double jeopardy rule are to proceed, then UNSWCCL agrees with the conclusion of the UK Law Commission that the changes should be limited to the offences of murder and genocide.⁴²

UNSWCCL is also very concerned by the inclusion of manslaughter in the list of very serious offences. Manslaughter is a very broad offence, ranging from the mere accident right up to murder.⁴³ Because of this large range of culpability, it is inappropriate to include manslaughter, which does not attract a punishment of life imprisonment,⁴⁴ in the definition of a 'very serious offence'.

⁴¹ William McAninch, "Unfolding the Law of Double Jeopardy" (1993) 44 *SCL Review* 411, 428 (citing *US v Scott* 437 US 83 (1978))

⁴² UK Law Commission, above n 18, [4.42]

⁴³ Mervyn Finlay, *Report: Review of the Law of Manslaughter* (2003) Criminal Law Review Division of the NSW Attorney General's Department, [6.1]-[6.3], [11.5].

⁴⁴ *Crimes Act 1900* (NSW) s 24 (maximum penalty: 25 years)

4.5 fresh and compelling evidence

4.5.1 fresh

‘Fresh’ does not mean ‘new’. Fresh only means that the evidence was not adduced at trial and could not have been adduced ‘with the exercise of reasonable diligence’.⁴⁵

UNSWCCL is concerned that the test of ‘reasonable diligence’ is insufficient. It will encourage sloppy investigation and prosecution. Leads that *could* have been followed up, but were not, will satisfy this criteria. The police and the DPP will get a second chance with a retrial; a chance to make up for sloppy investigation or prosecution.

The inadequacy of this standard of ‘reasonable diligence’ is taken up elsewhere in this submission.⁴⁶ It is sufficient to note here that, given the resources and power of the state, the police and DPP should be held to a higher standard of diligence than defence counsel. The Draft Bill, at face value, does not appear to do this.

4.5.2 compelling

According to the Draft Bill, compelling evidence is reliable, substantial and, in the context of the issues at trial, “highly probative”.⁴⁷

The inadequacy of the “highly probative” standard is taken up elsewhere in this submission.⁴⁸ At this point it should be noted that it is far too low a standard for the prosecution. The prosecution should be required to demonstrate that the evidence, in the context of all the evidence at trial, could likely have *eliminated all* reasonable doubt. The proposed “highly probative” test falls woefully short of that standard.

4.5.3 the evidence in Carroll’s case would not satisfy this test

As noted elsewhere in this submission, the Queensland Court of Criminal Appeal found fault with both the freshness of the expert opinion evidence and the reliability of the confession evidence presented at Carroll’s perjury trial.⁴⁹

Consequently the evidence at Carroll’s perjury trial would have been neither fresh nor compelling, using the definitions in this Draft Bill. Given that Carroll’s case sparked the calls for reform of the double jeopardy rule, it is of great concern to UNSWCCL that these ‘reforms’ will not satisfy the public calls for Carroll to be retried.

⁴⁵ s 9D(2)

⁴⁶ see “the Bill alters the principled asymmetry of criminal law” below on page 25.

⁴⁷ s 9D(3)

⁴⁸ see “the Bill alters the principled asymmetry of criminal law” below on page 25.

⁴⁹ see “

Carroll’s case is not an impetus for reform” above on page 7.

4.6 tainted acquittals

Pro-reformers express concern that the double jeopardy rule has led to a lack of public confidence in the criminal trial process.⁵⁰ The ‘tainted’ acquittals provisions outlined in the Draft Bill⁵¹ are similar to those that have operated in the United Kingdom since 1997.⁵² However, there are several ways in which section 9E of the Draft Bill may operate more broadly than the existing UK provisions to allow an appeal upon grounds not closely involved in the trial process itself or for which the trial process is adequately designed to deal with. These are detailed below.

4.6.1 ‘perversion of the course of justice’ is too broad

The UK ‘tainted’ acquittals provisions apply to administration of justice offences involving interference with or intimidation of a juror or a witness in any proceedings. The offences are restricted to interference or intimidation of a juror or witness in recognition that the extraordinary nature of the provisions deems that they should be so confined.⁵³

Although the reference to an administration of justice offence in the Draft Bill includes the ‘bribery of, or interference with, a juror, witness or judicial officer’, its operation is not restricted to that criminal behaviour. The definition of an ‘administration of justice’ offence in the Draft Bill includes the ‘perversion of the course of justice’.⁵⁴ This would include offences not closely involved in the trial, such as the removal of evidence from a crime scene.⁵⁵

4.6.2 the definition encompasses untainted acquittals

The Draft Bill definition of an administration of justice offence includes the perversion of the course of justice or the *conspiracy* to so pervert.⁵⁶ A re-trial may eventuate upon the mere conspiracy to pervert the course of justice without the actual perversion or ‘tainting’ of the trial taking place.

If the justification for a Prosecution right to appeal lies in the fact that the trial was ‘tainted’, the extension of that right cannot be justified here. This reform cannot arise solely from a concern with public confidence in criminal trials but rather seeks to establish a level playing field between the Prosecutor and the accused in contravention of the long-held principled asymmetry of the criminal law.⁵⁷

Furthermore, as noted by the UK Law Commission, it would be impossible in the case of conspiracy to satisfy the separate requirement that, but for the offence, the jury would have been more likely than not to have convicted the former accused.⁵⁸

It is possible that the drafters of this provision have confused ‘conspiracy’ and ‘complicity’. Conspiracy is usually charged when the act has not been committed, but the offence was planned.⁵⁹ Some form of complicity,⁶⁰ on the other hand, is charged when

⁵⁰ Rowena Johns, above n 3, 18.

⁵¹ Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW) s 9E

⁵² *Criminal Procedure and Investigations Act 1996* (UK) ss 54-57

⁵³ UK Law Commission, above n 21, [6.8]

⁵⁴ s 9E(5)(b)

⁵⁵ *Crimes Act 1900* (NSW) ss 315, 317

⁵⁶ s 9E(5)(b)

⁵⁷ see “the Bill alters the principled asymmetry of criminal law” below on page 25.

⁵⁸ s 9E(2)(b). UK Law Commission, above n 21.

⁵⁹ David Brown, David Farrier, Sandra Egger and Luke McNamara, *Criminal Laws* (3rd ed, 2001) 1278-1323.

⁶⁰ accessory (before or after the fact) and joint criminal enterprise (or ‘common purpose’)

the act has been committed and the accused, though he or she did not *personally* commit the act constituting the administration of justice offence, was *knowingly* involved in the act in some way.⁶¹

UNSWCCL fails to see how conspiracy would be sufficient to allow a retrial when there is no attain. This provision can only make sense if the drafters intended the definition to encompass complicity, rather than conspiracy.

4.6.3 the acquitted could be innocent of the tainting but still face re-trial

The ‘tainted’ acquittals provisions in the Draft Bill apply where an accused person or *another* person has been convicted of an administration of justice offence. This means that the acquitted person may face a re-trial for a perversion of the course of justice or the conspiracy to do so in which the accused was not involved.

In considering the possibility of introducing re-trials on grounds of ‘tainted’ acquittals, the New Zealand Law Commission recommended against this measure as punishing an act ‘for which the accused cannot be blamed’.⁶²

Extending the grounds for appeal from a ‘tainted’ acquittal in this way goes beyond the concern voiced by pro-reformers for doing justice by ensuring individual offenders are punished, because it effectively punishes the innocent for the crimes of others.⁶³

4.6.4 more than perjury should be required

The Draft Bill extends the grounds for appeal to perjury.⁶⁴ This ground is not supported in the UK. The UK Law Commission rightly argued that the trial process anticipates perjury and is consequently designed to expose perjury when and if it occurs.⁶⁵

Both the New Zealand and United Kingdom Law Commissions considered perjury in terms of the additional evidence needed to achieve a conviction. New South Wales law requires evidence from two or more witnesses to convict.⁶⁶ The New Zealand Law Commission recommended that this evidence be “substantial” and additional to the evidence available at the first trial.⁶⁷

However, the Draft Bill does not make specific provisions in relation to the nature of the evidence. The Bill does not require that the evidence which may support a re-trial of an acquitted person for the same offence on grounds of perjury falls within the meaning of “fresh” and “compelling”.

Consequently, the evidence may not be “highly probative” of the former case against the acquitted person. Instead, it must meet the lower statutory requirement of being “material” to the previous trial as required by the statutory offence of perjury.⁶⁸

⁶¹ Brown et al, above n 59, 1323-1370

⁶² New Zealand Law Commission, *Acquittal Following Perversion of the Course of Justice*, Report 70 (2001) [31].

⁶³ Rowena Johns, *Double Jeopardy* (2003) NSW Parliamentary Library Research Service, Briefing Paper No 16/03, 18.

⁶⁴ s 9E(5)(c)

⁶⁵ UK Law Commission, above n 21, [6.19].

⁶⁶ *R v Muldoon* (1870) 9 SCR (NSW) 116.

⁶⁷ NZ Law Commission, above n 62, [34].

⁶⁸ *Crimes Act 1900* (NSW) s 327.

4.6.5 other areas of concern

In addition to the above, there are several other areas of concern regarding the lack of limits placed on the operation of Prosecution appeals on grounds of a “tainted” acquittal as contained in sections 9E-9H. In particular:

- there is no time limit within which the Prosecution must commence an appeal from a “tainted” acquittal.
- unlike the UK provisions, the administration of justice offence need only have occurred “in *connection*” with the proceedings from which the person was acquitted as opposed to the UK requirement of having “*led to the acquittal*”.
- the UK provisions state that there must have been a “real possibility” that but for the offence the acquitted person would not have been acquitted. The Draft Bill requires the lower threshold of “more probable than not” be met. Given that the subject matter is criminal, it is preferable that the usual threshold “beyond reasonable doubt” be applied.

Finally, though the wording of section 9(2) closely follows the wording recommended by the NZ Law Commission, this provision ignores two very important recommendations of that Commission:

- the provision should not be retrospective,⁶⁹ and,
- an application for appeal should not be permitted until all avenues of appeal of the administration of justice offence have been exhausted.⁷⁰

4.6.6 recommendations

UNSWCCL does not support the introduction of this form of Crown appeal as it is currently drafted. It is ill-considered and far too broad in its scope.

There is a strong argument that people who demonstrate a contempt for the court by perverting their trials should be punished, however the case has not been made for the necessity of retrial. There are alternatives, such as increasing the penalties for offences relating to perjury and perversion of the course of justice. UNSWCCL is concerned that these do not appear to have been considered.

A more detailed and thorough inquiry, along the lines of that recently carried out by the New Zealand Law Commission,⁷¹ would be required before UNSWCCL would consider supporting the introduction of appeals of tainted acquittals.

However, if the Attorney-General intends to proceed with this form of Crown appeal, then UNSWCCL strongly recommends the terms of section 9E be tightened by ensuring that:

- the acquitted person must *personally* be convicted of an administration of justice offence – he or she should not be punished for the offences of others;
- all avenues of appeal from the administration of justice are exhausted before an appeal application can be brought;
- this provision not be retrospective;

⁶⁹ NZ Law Commission, above n 62, viii.

⁷⁰ NZ Law Commission, above n 62, [45].

⁷¹ NZ Law Commission, above n 62.

- conspiracy to pervert the course of justice not be included in the definition of ‘administration of justice’ – a verdict must be tainted *in fact* before it can be appealed;
- perjury be removed from the definition of ‘administration of justice’;
- a time limit be placed on when an application for appeal of an acquittal can be brought;
- the administration of justice offence must have *led to* the acquittal; and
- the standard for ‘but for’ test be the criminal standard of beyond reasonable doubt, not ‘more probable than not’ which is a civil standard.

4.7 interests of justice

UNSWCCL believes that the condition that a retrial be ordered only when it is ‘in the interests of justice’⁷² to do so is insufficient on its own.

In the case of an appeal of conviction, even though the appellant has demonstrated that a miscarriage of justice has occurred, the court must be further satisfied that that miscarriage of justice is *substantial*.⁷³ This condition is known as ‘the Proviso’.⁷⁴ The application of the Proviso is an open matter.⁷⁵

The Proviso is dealt with later in this submission,⁷⁶ but at this stage it is sufficient to note that Parliament has seen fit to instruct appeal judges to be satisfied that a conviction amounts to a *substantial* miscarriage of justice, and at the very least the same should be expected of an appeal of acquittal. As the Bill currently stands, only the new evidence need be *substantial*.⁷⁷

⁷² s 9C(2)

⁷³ *Criminal Appeal Act 1912* (NSW) s 6

⁷⁴ Brown et al, above n 59, 156-161, 318-9.

⁷⁵ *Heron v The Queen* [2003] HCA 17, [50] (Kirby J) (discussion of different approaches).

⁷⁶ “the Bill alters the principled asymmetry of criminal law” below on page 25.

⁷⁷ s 9D(3)(b)

5. Division 2: appeal of acquittals as of right

5.1 introduction

Division 2 of the Draft Bill proposes the introduction of a right of Crown appeals to directed and non-jury acquittals on a question of law alone.

UNSWCCL is concerned that this Division is not limited to ‘very serious offences’, but will provide the Crown with an appeal right to all acquittals of indictable offences. On the other hand, UNSWCCL is relieved that the right of appeal will not be retrospective.⁷⁸

An acquitted person will have to face a new trial if the Court of Criminal Appeal quashes the acquittal⁷⁹ and orders a re-trial.⁸⁰ By ordering a retrial, the defendant will be required to face the same charges again. As the Crown, like other litigants, is likely to appeal if they have lost the case, potentially all acquitted defendants will have to face a Crown appeal and second trial.

UNSWCCL is also concerned that this Division, like the rest of the Draft Bill, treats Crown challenge of acquittals as equivalent to a defendant’s challenge of conviction, which undermines the principled asymmetry of the criminal law and fails to recognise the differential in resources and power between the accused and the state.

UNSWCCL rejects any need to provide the Attorney-General with a right to appeal acquittals. This leaves the way open for political interference in the judicial process. There is no safeguard to guarantee that such a power could not be used to harass citizens or to pursue political opponents.

5.2 high risk of political interference

It is undesirable that the Attorney-General be allowed to appeal acquittals.⁸¹ Given that the Attorney-General is essentially a political figure, he or she could potentially appeal every politically sensitive or highly publicised acquittal. It would also be open to the Attorney-General to use this power for political advantage.

The merits of such appeals may be questionable. Although one can say that the Court of Criminal Appeal will reject unmeritorious appeals, nevertheless it is extremely unfair to innocent defendants to require them to face additional stress and harassment.

Furthermore, should the Court of Criminal Appeal reject the Attorney-General’s appeals of acquittal, the proposals in this Draft Bill increase the risk of the judiciary being labelled ‘soft on criminals’. Granting the Attorney-General a power to appeal any non-jury acquittal amounts to handing him or her a very effective tool for blame-shifting, whereby the government avoids criticism from the Opposition and the public.

Any criticism of the Court of Criminal Appeal for unpopular dismissal of appeals ultimately undermines public confidence in the integrity of the Supreme Court. UNSWCCL therefore recommends that the proposed appeal rights of the Attorney-General be removed from the Draft Bill.

⁷⁸ s 9I(6)

⁷⁹ s 9I(3)

⁸⁰ s 9I(4)

⁸¹ s 9I(2)

It is worth noting that the DPP has tenure in New South Wales and is therefore independent of the government. UNSWCCL is concerned that if, upon the incumbent's retirement, that tenure were to be legislated away, then the possibility of political pressure being placed bearing on the DPP to appeal acquittals could be great indeed. UNSWCCL believes that the independence of the DPP should be maintained in order to prevent unnecessary appeal so that court's time and taxpayers' money is not wasted.

Finally, the Attorney-General currently has a right to appeal an acquittal in the context of stated cases.⁸² This is very different from the proposals in the Draft Bill because the new provisions would affect the verdict of the court, whereas the existing appeal rights do not. Granting the Attorney-General an appeal as of right to non-jury acquittals gives the executive an interest in the outcome of individual cases, which amounts to an desirable interference in the judicial process.

5.3 these appeals should be by leave and not as of right

Alternatively, if appeals of acquittals are to be introduced, then in order to provide a greater safeguard they should be made by leave, not as of right.

The only Australian jurisdiction with appeals as of right to directed acquittals and judge-only acquittals is Western Australia.⁸³ Tasmania has an appeal of acquittal on a question of law, but it requires the leave of the court.⁸⁴ UNSWCCL submits that the Tasmanian position is preferable.

A convicted person has an appeal as of right on a question of law⁸⁵ because every citizen 'is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed'.⁸⁶ Any suggestion that the state also has such an entitlement is a misunderstanding of the relationship between the individual and the state. UNSWCCL is concerned that this is another example of an erosion of the principled asymmetry of the criminal law.⁸⁷

5.4 inherent unfairness

The acquitted person will be worse off if the Court of Criminal Appeal upholds an appeal and orders a re-trial.⁸⁸ This is because, in upholding the Crown's appeal, the Court of Criminal Appeal will unavoidably decide a point of law in favour of the Prosecution. In doing so, the chances for the acquitted person being convicted in the new trial increase. Hence, this unfavourable ruling poses an increased risk that an *innocent* person might be convicted.

Although, the Court of Criminal Appeal cannot convict or direct a lower,⁸⁹ the making of such an unfavourable ruling is highly prejudicial to a retrial. In effect, the acquitted person faces retrial with an unacceptable handicap: the presumption of guilt.⁹⁰

⁸² *Criminal Appeal Act 1912* (NSW) s 5A (point of law stated by judge). Note: that provision becomes s 9J under the Draft Bill.

⁸³ *Criminal Code 1913* (WA) ss 688(2)(b), 688(2)(ba) respectively. Section 688(2)(ba) also provides for Crown appeals of judge-only acquittals on questions of mixed law and fact *with leave*.

⁸⁴ *Criminal Code 1924* (Tas) s 401(2)(b)

⁸⁵ eg *Criminal Appeal Act 1912* (NSW) s 5(1)(a)

⁸⁶ *Mraz v The Queen* (1955) 93 CLR 493, 514 (Fullagar J)

⁸⁷ see "the Bill alters the principled asymmetry of criminal law" on page 25 below.

⁸⁸ s 9I(3)

⁸⁹ s 9I(5)

⁹⁰ eg Jeannie Mackie, above n 7, [41]

5.5 significant changes to the dynamic of judge-only trials

UNSWCCL is concerned about the adverse impact the proposed Crown appeal rights will have on the defence of an accused at trial.

Under certain circumstances, a defendant may opt, with consent of the DPP, for a judge-only trial.⁹¹ This is usually done when the crime is of an horrific nature or a technical legal defence is to be argued.⁹²

By providing a Crown appeal of judge-only acquittals, the dynamic of defending such cases shifts significantly. Defence counsel will have to face the dilemma of recommending a choice between a jury trial, in which the prejudicial nature of the offence means that a conviction is more likely but at least an acquittal will be final, and a judge-only trial, in which the danger of prejudice is reduced but an acquittal will be appealable thereby potentially prolonging the defendant's ordeal.

UNSWCCL is concerned that this proposal, by increasing the options available to the Crown, will significantly limit the options available to defence counsel. This amounts to an erosion of the principled asymmetry of the criminal law.

⁹¹ *Criminal Procedure Act 1986* (NSW) s 132

⁹² Brown et al., above n 59, 252.

6. Division 3: miscellaneous

6.1 introduction

UNSWCCL is disturbed by the fact that any reinvestigation of an acquitted person can be authorised retrospectively. UNSWCCL is also concerned that there is no time limit on reinvestigation, leaving an acquitted person vulnerable to police harassment indefinitely. The threat of reinvestigation could also be used by investigative officers to provoke a citizen to commit a crime such as assaulting a police officer or resisting arrest. This provision is no safeguard against police harassment, in fact it essentially legalises such behaviour.

UNSWCCL considers it impossible for an acquitted person to receive a fair re-trial given that the kind of cases likely to fall within the ambit of the Draft Bill will inevitably have a high profile in the media.

6.2 authorisation of police investigations

6.2.1 retrospective authorisation of police investigations

UNSWCCL contends that section 9K of the Draft Bill is not an effective safeguard against police harassment of citizens. On an initial reading the provision seems, reasonably, to require the written authority of the DPP before police can re-investigate an acquitted person.

On closer inspection, however, it becomes clear that this Bill authorises police to arrest, question, search, carry out any forensic procedure upon the acquitted person and to search or seize the acquitted person's property **without** the written consent of the DPP. That consent can be granted *retrospectively*.⁹³

UNSWCCL is deeply concerned that police will be able to harass an acquitted person under the guise of a re-investigation. In essence, this provision legalises police harassment. It will allow police to arrest, question, search, carry out forensic procedures, seize property and premises of an acquitted person in an attempt to provoke some kind of reaction for which they can arrest the acquitted on other charges, such as assaulting a police officer or resisting arrest.

6.2.2 'any forensic procedure'

UNSWCCL is concerned about the broad and open-ended definition of 'any forensic procedure'.

The forensic procedures authorised by this Draft Bill are those set out for suspects of crime in the *Crimes (Forensic Procedures) Act 2000* (NSW). This includes: the sampling of non-pubic hair, scrapings from toenails and fingernails, and external swabs.⁹⁴ Such procedures can be undertaken without the consent of the suspect.⁹⁵ Intimate forensic procedures⁹⁶ can be undertaken by order of a Magistrate.⁹⁷ It is important to remember

⁹³ s 9K(3)(b): "(whether before or after the start of the investigation)".

⁹⁴ *Crimes (Forensic Procedures) Act 2000* (NSW) s 3 ('non-intimate forensic procedure').

⁹⁵ *Crimes (Forensic Procedures) Act 2000* (NSW) pt 4 (non-intimate forensic procedures on suspects by order of senior police officer).

⁹⁶ eg taking of blood & saliva samples & pubic hair: *Crimes (Forensic Procedures) Act 2000* (NSW) s 3 ('intimate forensic procedure').

⁹⁷ *Crimes (Forensic Procedures) Act 2000* (NSW) s 25(b)

that the threat of obtaining such an order can be just as oppressive as obtaining one in fact.

Given the serious potential for the misuse of this power to reinvestigate, UNSWCCL considers that the forensic procedures sanctioned by this Draft Bill are far too broad and open-ended. UNSWCCL recommends limiting forensic procedures of suspects to finger-printing alone. If police have reasonable suspicion that the acquitted person is guilty, then they should charge that person with an offence. Until charges are laid, the intrusion of the criminal justice system into an acquitted person's life should be minimised.

6.2.3 there is no limit to number of re-investigations

UNSWCCL is concerned that there is no limit on the number of reinvestigations that can be undertaken. This means that the acquitted person could be harassed repeatedly by police. This only compounds the problems with retrospective authorisation.

No time limits have been placed on re-investigations, either. If such re-investigations are to be allowed, then in the interests of finality UNSWCCL recommends that a time limit of five years after the acquittal be placed on re-investigation. The acquitted person has a right to get on with their life and that would not be possible if the threat of police reinvestigation and harassment is not curtailed by some kind of temporal limitation.

6.2.4 there are insufficient safeguards

UNSWCCL is concerned that inadequate safeguards have been placed in this provision. A cursory look at the equivalent provision in the UK Bill⁹⁸ shows that when the provision was copied by the drafters of the NSW Bill they removed most of the safeguards.

For example, there is no requirement that the investigating officer conducting a reinvestigation have reasonable grounds to believe that new evidence is likely to be obtained as a result. Such a safeguard has been introduced into the UK Bill.⁹⁹

UNSWCCL is also concerned that no prohibition has been placed on the police who conducted the original investigation. It would appear that such a safeguard is left to the discretion of the DPP.¹⁰⁰ Such a safeguard is necessary to help guard against any conflict of interest or improper motive on the part of an investigating officer. For example, the police officer might feel the need to be vindicated in his or her conclusions made during the first investigation, which would unfairly prejudice the acquitted person's right to a fair and impartial investigation. This prohibition should be mandatory and not discretionary.

6.3 restrictions on publication

[W]hat will be the consequence of abolition of the double jeopardy rule? My prediction is that there will be hounding in the media of people who are acquitted in sensational, high-profile cases. The acquittal will not be final, and it will be up to anybody, including the press, to see what additional evidence they can rootle out so that there can be a second prosecution of the person who has been acquitted.¹⁰¹

Lord Neill of Bladen, former chairman of the UK Press Council

⁹⁸ Criminal Justice Bill 2002 (UK) s 78

⁹⁹ Criminal Justice Bill 2002 (UK) s 78(5)(b)

¹⁰⁰ s 9K(5): 'including the police officers authorised to conduct the investigations'

¹⁰¹ United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1060 (Lord Neill of Bladen).

UNSWCCL does not believe that it is possible to offer an acquitted person a fair retrial. One of the main reasons for this is the pervasive influence of the mass media in contemporary society. Any application for an appeal of acquittal will almost inevitably be preceded by a media campaign. For this reason UNSWCCL does not believe that any publication prohibition, ordered effectively *after* the horse has bolted, could remedy this problem.

The Draft Bill provides that at retrial ‘the prosecution is not entitled to refer to the fact the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence’,¹⁰² but such a safeguard is no safeguard in the world of a mass popular media that will undoubtedly run campaigns to have applications for retrials made.¹⁰³

6.3.1 media coverage and a fair trial

The right to a fair trial is one of the most important tenets of our legal system. It is a bulwark against state tyranny, and as such, has been repeatedly protected by courts at all levels of the Commonwealth.¹⁰⁴ It is also a fundamental plank of international treaties and conventions to which Australia is a party.¹⁰⁵ The right to a fair trial is significant not only on an individual level, but also as a moral and philosophical statement about the autonomy of the individual and the limits on State power.

The draft Bill recognises the importance of a fair trial. It places the possibility of a fair trial in the context of a broader “interests of justice” test.¹⁰⁶

There are several factors which could be relevant to the possibility of a fair trial. The first consideration in the draft Bill is whether a fair trial is unlikely “in the existing circumstances”.¹⁰⁷ The ‘existing circumstances’ are not defined, but they could include media coverage of the previous trial and acquittal of the accused, or alternatively, of the fact that the DPP has received and/or approved an application for a retrial.

The effect of widespread media coverage could be that any jury would be biased against the acquitted person, and reduce the real possibility of a verdict of not guilty. The effect could be of special concern where the jury knew that the DPP had determined that the accused should be retried because it was ‘highly likely’ that a guilty verdict would be handed down. In the UK there were concerns that this would be so prejudicial to the accused, that the Law Reform Commission recommended reporting restrictions, over and above the normal sanctions that apply for contempt of court.¹⁰⁸

The reporting restrictions in the Draft Bill are inadequate.¹⁰⁹ Cases falling within the scope of this legislation would be rare and would most likely be preceded, or even driven on by, mass media coverage. UNSWCCL is concerned that by the time the Court of Criminal Appeal comes to prohibit publication of a matter, the damage will have already been done. In effect, the horse will have already bolted.

¹⁰² s 9H(5)

¹⁰³ see “power of the press” on page 23.

¹⁰⁴ see *Dietrich v R* (1992) 177 CLR 292.

¹⁰⁵ see *International Covenant of Civil and Political Rights*, Article 14, which reads, in relevant part: “In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. Article 14(7) also contains an express prohibition on double jeopardy, see “international challenge: the Bill violates international human rights standards” below on page 35.

¹⁰⁶ s 9C(2)

¹⁰⁷ s 9F(a)

¹⁰⁸ UK Law Commission, above n 18, recommendation 9(1)

¹⁰⁹ s 9M

Finally, the damage done is more severe than could have been done at the original trial. Any prejudicial publicity at the original trial does not come with the imprimatur of the Court of Criminal Appeal deciding that there is 'fresh and compelling evidence'. A jury member at a retrial could easily deduce that the Court of Criminal Appeal had quashed the acquittal, otherwise the retrial would not be proceeding.

6.3.2 a jury direction would be inadequate

The High Court has recognised that modern media creates serious problems for managing the reporting of criminal proceedings.¹¹⁰ Yet, the current view is that any potential bias can be overcome by judicial directions to the jury to disregard any reports they may have heard.¹¹¹ Media organisations or journalists may be fined or even jailed for seriously prejudicial or even inflammatory comments about a defendant, but this does not necessarily mean that the trial will be stayed.

The most notorious instance of this concerned radio and television personality Derryn Hinch, who was jailed for his highly emotional attacks on a defendant.¹¹² Not only did the broadcasts potentially influence jurors (present and future), but the sensational jailing of Hinch himself reinforced public awareness of the allegations he had made.

UNSWCCL is concerned that judicial directions may not be adequate to prevent unfairness to an acquitted person facing a Crown appeal of acquittal. In fact, it may be that such directions actually result in reminding the jury of media reporting and thereby aggravate the problem that they were intended to solve.

6.3.3 effect of the passage of time

The second factor for the 'interests of justice' test is the length of time that has elapsed between trials.¹¹³ Ironically, where the time is significant, it may reduce the prejudicial effect of media reporting, provided that no new reporting of the proposed retrial occurs.¹¹⁴ However, it is well known that the passage of time can severely disadvantage defendants because the availability of witnesses and alibis can significantly decrease.¹¹⁵ This is particularly relevant to the present proposals because they are intended to make retrials possible where DNA or similar types of evidence emerge. As a practical matter, a retrial could be commenced on the basis of 'new' DNA evidence, in circumstances where the defendant's witnesses and alibis are no longer available. The potential for injustice is clear and alarming.

6.3.4 power of the press

Earlier this year, not long after the High Court decision in *Carroll*, the *Australian* newspaper ran a concerted campaign, determined that it would bring about reform of the rule against double jeopardy. The editor-in-chief of the newspaper took up the cause by funding legal advice on whether the victim's mother could take civil suit against Carroll, and by offering to pay for any such civil action.¹¹⁶

¹¹⁰ *Murphy v The Queen* (1989) 167 CLR 94.

¹¹¹ *The Queen v Glennon* (1992) 173 CLR 592

¹¹² *Hinch and Macquarie Broadcasting Holdings Ltd v Attorney-General (Vic)* (1987) 164 CLR 15.

¹¹³ s 9C(b)

¹¹⁴ *The Queen v Glennon* (1992) 173 CLR 592

¹¹⁵ *Longman v R* (1989) 168 CLR 79.

¹¹⁶ Jamie Walker, 'Body of Evidence', *Australian* (Sydney), 15 February 2003, 21. See also, Ashleigh Wilson, 'Mother's plea on jeopardy changes', *Australian* (Sydney), 11 April 2003, 11

This kind of media power should not be underestimated. This was pointed out in recent debate in the House of Lords:

[I]n the contemporary world, it is not just the policeman who can put his hand on one's shoulder; the press can do it, too. When a man or woman steps out of a courtroom acquitted in a particular kind of case, a campaign will immediately be mounted to have that person brought back before the court.¹¹⁷

6.3.5 conclusion

UNSWCCL does not believe that this safeguard, or realistically *any* safeguard, could render fair a retrial of an acquitted person. By the time the appeal reached the Court of Criminal Appeal it will be too late to correct the damage already done by adverse media publicity against the accused.

Given that cases that qualify for this retrial procedure will be rare and will attract media attention, it is unlikely that a fair trial could ever ensue. It would be almost impossible to find an unbiased jury, given the ubiquitous coverage of the popular mass media.

Finally, the whole process of the Court of Criminal Appeal granting a retrial order is enough to make any trial unfair, given that a jury might simply assume that if the learned judges of the Court of Criminal Appeal think the evidence is compelling, then it must be true.

6.4 bail

UNSWCCL submits that, unless the DPP can convince the court that the acquitted person is a flight risk, the punitive provisions of the *Bail Act* should not apply in the case of re-trial. The accused has been *acquitted* by a court of law, and remains *acquitted* until proven otherwise.

Obviously bail should not be granted to someone already serving sentence in prison or who is a flight risk, but given the extreme seriousness of re-trial and the media interest etc it is preferable that the accused be granted bail to allow him or her to prepare for re-trial. It is imperative that the accused have access to legal counsel, unfettered by the strictures imposed by remand. The accused will be under increased stress – conceivably even more than at the original trial – and should be allowed to prepare his or her case outside of prison.

¹¹⁷ United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1062 (Baroness Kennedy of the Shaws).

7. the Bill alters the principled asymmetry of criminal law¹¹⁸

7.1 introduction

This section examines the Draft Bill in the light of almost one hundred years of jurisprudence of criminal appeals of conviction. After examining this caselaw and extrapolating the appropriate standard for a Crown appeal of acquittal, this section concludes that the standards set in the Draft Bill fall way below expectations.

This section contends that wrongful acquittals cannot be equated with wrongful convictions. The Draft Bill attempts to level the playing field, to introduce into the criminal justice system a symmetry of appeals of convictions and appeals of acquittals. UNSWCCL believes that such attempts should be resisted because they undermine the principled asymmetry of the criminal law.

7.2 what is principled asymmetry?

*The underlying idea, one that is 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 offense, 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.*¹¹⁹

Justice Black of the US Supreme Court in *Green v United States*

It is well recognised that the State has many advantages over a defendant in a criminal trial. Many of those advantages are spelt out in the above quote from Justice Black. Other advantages include greater powers with which to investigate their case, for example the power to conduct searches, to seize property, to undertake electronic surveillance and the ability to offer witnesses immunity from prosecution.¹²⁰ There is also an imbalance in the greater resources available to the State, for example access to government-run forensics labs, databases and numerous experienced personnel.

In the courtroom itself the prosecution often begins with the advantage of having the jury on side.¹²¹ The jury might assume, for example, that the accused must be guilty if they have been brought to the court by the police. There has also traditionally been a perception, which to a certain extent has diminished over the years, that the prosecution are the 'good guys' and the defence are the 'bad guys'.¹²²

The criminal justice system seeks to rectify this imbalance by presuming that the defendant is innocent and by placing upon the prosecution the burden of proof in a criminal trial.¹²³ These are the most important of a number of safeguards built into the criminal justice system to counterbalance the unfair advantage enjoyed by the

¹¹⁸ this is an edited version of a draft paper being prepared by its author, Michael Walton.

¹¹⁹ *Green v United States* 355 US 184, 187 (1957) (Black J)

¹²⁰ see H. Richard Uviller, *The Tilted Playing Field: is criminal justice unfair?* (1999) 84.

¹²¹ Uviller, above n 120, 119.

¹²² Uviller, above n 120, 113.

¹²³ *Woolmington v DPP* [1935] AC 462 (House of Lords) (Lord Sankey)

prosecution. This system of counterweights is sometimes referred to as the principled asymmetry of the criminal law.¹²⁴ It amounts to a compromise in a civilised liberal society. As Justice Black pointed out in *Green*, it serves to protect the individual from the State.

One of the safeguards that goes to make up this principled asymmetry is the rule against double jeopardy. In the context of a criminal appeal, a convicted person is able to waive their immunity from double jeopardy by appealing their conviction and seeking a retrial.¹²⁵ This is essentially because it is considered absolutely necessary that a convicted innocent, deprived of their liberty by the State, should have at their disposal the means of proving his or her innocence.

However, this asymmetry has been criticised because it prohibits that the Crown from appealing an acquittal.¹²⁶ Those who favour symmetry in the criminal law consider it unconscionable that a guilty person can walk free from a court because of some technicality, lack of evidence, etc. The Draft Bill appears to belong to this line of criticism.

But this desire for symmetry in the law fails to recognise that wrongful acquittals are conceptually different from wrongful convictions because the former do not involve the unconscionable incarceration of an innocent by the State.¹²⁷ Furthermore, in a classic statement of principled asymmetry, it has been said 'that it is better that ten guilty persons escape, than that one innocent suffer'.¹²⁸

UNSWCCL is deeply concerned that the Draft Bill's attempt to level the playing field will only result in *more* miscarriages of justice by exposing factually innocent people to the risk of a second trial.

7.3 appeals of conviction

7.3.1 brief history

Criminal appeal is not a creature of the common law, but of statute.¹²⁹ The first Court of Criminal Appeal was instituted less than a century ago in England in 1907.¹³⁰ The New South Wales Court of Criminal Appeal followed shortly after in 1912.¹³¹

The impetus for statutory reform in the early Twentieth Century was a series of high profile miscarriages of justice in which two innocent people were convicted of crimes they did not commit.¹³² The present day amendments proposed by the Draft Bill

¹²⁴ see Paul Roberts, above n 14, 408-10.

¹²⁵ see Rosemary Pattenden, below n 130, 5-33. See also: Uviller, above n 120, 219-221.

¹²⁶ see Uviller, above n 120, 219-221, 226.

¹²⁷ see Paul Roberts, above n 14, 408-10.

¹²⁸ Blackstone, *Commentaries* (1769) (1966 reprint), bk 4, c 27 at 352, quoted in *The Queen v Carroll* [2002] HCA 55, [21] (Gleeson CJ and Hayne J)

¹²⁹ *Gipp v The Queen* (1998) 194 CLR 106 [117] (Kirby J)

¹³⁰ see Rosemary Pattenden, *English Criminal Appeals 1844-1994: appeals against conviction and sentence in England and Wales* (1996) 5-33.

¹³¹ *Criminal Appeal Act 1912* (NSW)

¹³² the two big miscarriage cases were those of Adolph Beck and George Edalji. For Beck's case, see: Pattenden, above n 130, 27-30; also, Jill Hunter and Kathryn Cronin, *Evidence, Advocacy and Ethical Practice: a criminal trial commentary* (1995) 394-5. For Edalji's case, see: Pattenden, above n 130, 30 (referring also to Sir Arthur Conan Doyle, who wrote several newspaper articles about Edalji's wrongful conviction).

proceed from a similar high profile miscarriage of justice in which it is said that the acquitted man is guilty.¹³³

7.3.2 current appeals by defence

Currently a convicted person has an appeal as of right against conviction on any ground involving a question of law alone.¹³⁴ There are other types of appeal, requiring leave, available to a convicted person:¹³⁵

- conviction on ground of fact alone;¹³⁶
- conviction on ground of mixed law and fact;¹³⁷
- sentence.¹³⁸

When determining an appeal, the Court of Criminal Appeal must first have regard to whether the guilty verdict at trial:¹³⁹

- (i) is unreasonable or cannot be supported on the evidence; or
- (ii) is the result of an error of law during the conduct of the trial; or
- (iii) amounts to a miscarriage of justice on any other ground whatsoever.

If one of these limbs is satisfied, then only if the Court of Criminal Appeal finds that there has been a *substantial* miscarriage of justice may the conviction be set aside.¹⁴⁰ The court may order a retrial.¹⁴¹ An appellant has 28 days to lodge an appeal from the date of conviction,¹⁴² though the court may grant an extension.¹⁴³

7.3.3 current appeals by Crown

There is also a limited set of appeals open to the Crown; none of which affect the trial verdict in the instant case. These appeals include:¹⁴⁴

- appeal after acquittal to determine a point of law;¹⁴⁵
- appeal against sentence;¹⁴⁶
- appeal against interlocutory judgments.¹⁴⁷

The Draft Bill proposes to add to the Crown's appeal repertoire by allowing the following appeals against acquittal:

1. an appeal with leave of a very serious offence where there is fresh and compelling evidence;¹⁴⁸

¹³³ see “

Carroll's case is not an impetus for reform” on page 7.

¹³⁴ *Criminal Appeal Act 1912* (NSW) s 5(1)(a)

¹³⁵ see generally, Brown et al, above n 59, 167.

¹³⁶ *Criminal Appeal Act 1912* (NSW) s 5(1)(b)

¹³⁷ *Criminal Appeal Act 1912* (NSW) s 5(1)(b)

¹³⁸ *Criminal Appeal Act 1912* (NSW) s 5(1)(c)

¹³⁹ *Criminal Appeal Act 1912* (NSW) s 6(1)

¹⁴⁰ *Criminal Appeal Act 1912* (NSW) s 6(1)

¹⁴¹ *Criminal Appeal Act 1912* (NSW) s 8

¹⁴² *Criminal Appeal Act 1912* (NSW) s 10(1)

¹⁴³ *Criminal Appeal Act 1912* (NSW) s 10(3)

¹⁴⁴ see generally, Brown et al, above n 59, 167.

¹⁴⁵ *Criminal Appeal Act 1912* (NSW) s 5A(2)(a) (“stated cases”)

¹⁴⁶ *Criminal Appeal Act 1912* (NSW) s 5D (Crown appeal of sentence)

¹⁴⁷ *Criminal Appeal Act 1912* (NSW) s 5F (Crown appeal of interlocutory judgments)

¹⁴⁸ s 9C

2. an appeal with leave of a very serious offence where the acquittal is tainted,¹⁴⁹
3. an appeal as of right from a directed verdict at a jury trial for any indictable offence;¹⁵⁰ and,
4. an appeal as of right (for any indictable offence) from an acquittal at a judge-only trial for any indictable offence.¹⁵¹

7.4 where the Draft Bill fails

The following sections examine the procedure and substance of the Draft Bill's proposals to allow Crown appeals of acquittals. The method taken is to first examine the standards required of the defence to succeed on appeal. In a criminal justice system of principled asymmetry the standard expected of the prosecution should be higher, but for the purposes of this study the defence standards are applied to the Crown as a bare minimum standard. Where appropriate a higher standard is also discussed. The provisions of the Draft Bill are then measured against the expected standard for the Crown on appeal.

Finally, some general comments are made about these proposals.

7.5 appeal as of right

As mentioned above, a convicted person currently has an appeal as of right against conviction on any ground involving a question of law alone.¹⁵² That right derives from the fact that every citizen 'is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed'.¹⁵³

UNSWCCL does not believe that a Crown appeal as of right which affects a verdict is appropriate. UNSWCCL considers it preferable for such an appeal to be by leave. This is discussed in more detail elsewhere in this submission.¹⁵⁴

7.6 fresh and compelling evidence

In an appeal of conviction, the introduction of fresh evidence falls under the 'whatsoever' limb of section 6 of the *Criminal Appeals Act*.¹⁵⁵ Fresh evidence must be credible and cogent.¹⁵⁶ Also, it 'is enough to show, on the fresh evidence, that there is a real possibility that, with it, the jury may have acquitted'.¹⁵⁷

At trial the defence need only raise a reasonable doubt.¹⁵⁸ So on appeal of conviction, in order to obtain a retrial, the new evidence must *raise* a reasonable doubt 'in the context of all the evidence given at the original trial'.¹⁵⁹

Recalling the burden of proof on the Crown, the standard required for an appeal of an acquittal should be higher than simply raising a doubt in the mind of the trier of fact. It

¹⁴⁹ s 9C

¹⁵⁰ s 9I

¹⁵¹ s 9I

¹⁵² *Criminal Appeal Act 1912* (NSW) s 5(1)(a)

¹⁵³ *Mraz v The Queen* (1955) 93 CLR 493, 514 (Fullagar J).

¹⁵⁴ see "these appeals should be by leave and not as of right" on page 18.

¹⁵⁵ *Gallagher v The Queen* (1986) 160 CLR 392, 407 (Brennan J)

¹⁵⁶ *Gallagher v The Queen* (1986) 160 CLR 392, [3]-[4] (Brennan J)

¹⁵⁷ *R v Drummond (No 2)* (1990) 46 A Crim R 408 (Kirby ACJ).

¹⁵⁸ defence does not have to *prove* anything (per *Woolmington*), but defence counsel will usually seek explicitly to raise a doubt in the minds of the jury, as well as presenting defences.

¹⁵⁹ *R v Hensley* (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Hunt CJ at CL, Smart and Studdert JJ, 8 December 1995) (Hunt CJ at CL)

must be likely that the new evidence could *eliminate all reasonable doubt in the mind of all the jurors* in the context of all the evidence at trial.

It is certainly not enough that the ‘fresh and compelling’ evidence makes the prosecution case stronger, it must be likely to eliminate all doubt.

Under the Draft Bill evidence is compelling if it is ‘reliable’,¹⁶⁰ ‘substantial’¹⁶¹ and ‘in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person’.¹⁶²

Curiously, ‘probative’ is an *evidential* burden on the balance of probabilities, taking into account the importance and gravity of the matters alleged.¹⁶³ A definition of ‘highly probative’ is not given in the Draft Bill and so becomes a matter of statutory interpretation. Prima facie it must mean evidence that could *highly* rationally affect the assessment of the probability of the existence of a fact in issue.¹⁶⁴ Given the seriousness of putting an individual through a re-trial, it is arguable that ‘highly probative’ must very nearly approach a burden of beyond reasonable doubt.

UNSWCCL is concerned that, again, the standards required of the Crown in an appeal of acquittal fall far short of the standard one would expect in the criminal law.

UNSWCCL recommends that the test of ‘highly probative’ be replaced with something like:

the Crown must demonstrate that the evidence, if available at trial, could likely¹⁶⁵ have *eliminated all* reasonable doubt.

7.7 reasonable diligence

On appeal of conviction the general rule is that if evidence was available at the time of the trial and the defendant chose not to adduce it, then there has been no miscarriage of justice.¹⁶⁶ This is not, however, a universal and inflexible rule.¹⁶⁷ An appellate court will usually treat evidence as fresh if it was not available to the defendant at trial and the defence team had exercised ‘reasonable diligence’ in identifying what evidence was available at the time of the trial.¹⁶⁸

Under the Draft Bill, evidence is fresh ‘if it was not adduced in the proceedings in which the person was acquitted’¹⁶⁹ and ‘it could not have been adduced in those proceeding with the exercise of reasonable diligence’.¹⁷⁰

¹⁶⁰ s 9D(3)(a)

¹⁶¹ s 9D(3)(b)

¹⁶² s 9D(3)(c)

¹⁶³ *Evidence Act 1995* (NSW) s 142 (standard of proof for admissibility)

¹⁶⁴ *Evidence Act 1995* (NSW) s 55 (relevance)

¹⁶⁵ ‘it is sufficient to show that it is *likely*, not that it is certain, that a different verdict would have been produced if the fresh evidence had been given’ (emphasis added): *Gallagher v The Queen* (1986) 160 CLR 392, [6] (Brennan J)

¹⁶⁶ *Lawless v The Queen* (1979) 142 CLR 659, 666 & 675

¹⁶⁷ *R v Hensley* (Unreported, Supreme Court of NSW, Court of Criminal Appeal, Hunt CJ at CL, Smart & Studdert JJ, 8 December 1995) (Hunt CJ at CL) quoting *Gallagher v The Queen* (1986) 160 CLR 392, 395.

¹⁶⁸ *R v Smith* [2000] NSWCCA 388 [49] (Smart AJ) quoting *Ratten v The Queen* (1974) 131 CLR 510, 517 (Barwick CJ)

¹⁶⁹ s 9D(2)(a)

¹⁷⁰ s 9D(2)(b)

To hold the Crown to the same standard as the defence again underscores how these proposed changes seek to erode the principled asymmetry of the criminal law.

The Crown has at its disposal all the resources of the DPP and of police. Given the disparity in access to resources between a defendant and the State. It is possible that a court could hold that the standard of 'reasonable diligence' would be much higher for the Crown on appeal of acquittal than for the defence on appeal of conviction. However, UNSWCCL recommends that this be made explicit by employing a term similar to 'professional diligence'.

7.8 the Proviso

As already mentioned, the Court of Criminal Appeal may only quash a conviction when the verdict amounts to a *substantial* miscarriage of justice.¹⁷¹ This is known as 'the Proviso'.¹⁷²

Parliament has seen fit to instruct appeal judges to be satisfied that a conviction amounts to a *substantial* miscarriage of justice, and at the very least the same should be expected of an appeal of acquittal.

No such Proviso exists for Crown appeals currently extant in the Act because currently no Crown appeals affect verdict. Both the appeals in Division 1 and Division 2 of the Draft Bill will affect verdict and so require some kind of guidance for determination.

Division 1 of the Draft Bill has an 'in the interests of justice'¹⁷³ condition that looks similar to a Proviso. Matters for particular consideration when determining what is in the interests of justice are listed in the Bill.¹⁷⁴ Ultimately, however, these considerations do not address the question of whether a *substantial* miscarriage of justice has resulted from the acquittal. (As the Bill currently stands, only new evidence need be substantial.¹⁷⁵)

There is no Proviso equivalent for Division 2 appeals at all.

If the Attorney-General is determined to proceed with appeals of acquittals, then UNSWCCL strongly suggests that a new section modelled on section 6 of the *Criminal Appeal Act* should be drafted for Crown appeals. It should look something like this:

- (1) The court on any appeal under sections 9C and 9I against acquittal may, notwithstanding that it is of opinion that the points raised in the appeal might be decided in favour of the Crown, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

7.8.1 impact on the presumption of innocence

UNSWCCL notes that the definition of 'substantial' becomes problematic when attached to appeals of acquittals.

¹⁷¹ *Criminal Appeal Act 1912* (NSW) s 6(1)

¹⁷² see Brown et al, above n 59, 156-161, 318-9.

¹⁷³ s 9D(2)

¹⁷⁴ s 9F(2)

¹⁷⁵ s 9D(3)(b)

For an appeal of conviction, a miscarriage of justice is substantial if the verdict was not inevitable, nor would the errors at trial reasonably have influenced the outcome, or when the evidence is weighed up it cannot be said that the appellant *must* be convicted.¹⁷⁶

Applying this standard to a Crown appeal, a substantial miscarriage of justice would arise when a conviction was inevitable, the errors at trial would reasonably have influenced the outcome, or when the evidence is weighed up it can be said that the appellant *must* be convicted.

This amounts to the Court of Criminal Appeal saying that they find it likely that the defendant is guilty. Ordering a retrial after such a finding amounts to proceeding on a presumption of guilt, rather than innocence. This is an affront to the principled asymmetry of the criminal law.

Further, UNSWCCL finds it difficult to see how a fair trial could be conducted when an appellate court will be required to effectively conclude that a conviction was inevitable. A jury would surely be influenced by such a finding.¹⁷⁷

7.9 conclusion

UNSWCCL is concerned that the Draft Bill sets the standards required of the prosecution upon appeal of an acquittal too low. These low standards do not reflect the principled asymmetry of the criminal justice system, but instead erode that asymmetry and radically alter the balance in favour of the Crown and against the individual defendant.

UNSWCCL cannot support these proposals while they continue to hold the Crown to the same standard as the defendant, when the disparity is so great between the access to power and resources of the two parties.

If the Attorney-General intends to proceed with this Bill, then UNSWCCL recommends that that citizens who are being asked to give up this important immunity should, if wrongfully retried, at the very least be appropriately compensated with a large statutory compensation payment.

Alternatively, the *Criminal Appeals Act* should be altered to allow for a defence appeal as of right to a conviction at a second trial on the grounds of law, fact or mixed fact and law. This might go some way to counterbalancing the prejudice of having the Court of Criminal Appeal concluding that inculpatory evidence is ‘fresh and compelling’.

¹⁷⁶ see *Heron v The Queen* [2003] HCA 17 at [50] per Kirby J

¹⁷⁷ see “power of the press” on page 23.

8. Draft Bill is challengeable

This Draft Bill is vulnerable to constitutional and legal challenge on the grounds that it violates the right to a fair trial and the immunities from retrospective criminal laws and double jeopardy.

The Draft Bill is also susceptible to challenge at the UN Human Rights Committee on the grounds that it violates international human rights standards.

8.1 constitutional challenge: aspects of the Bill are unconstitutional

Some have argued that it is unlikely that the High Court would look for or find an implied constitutional right preventing the proposed changes to the rule against double jeopardy in NSW.¹⁷⁸ However, it is possible to argue that such a right does exist, and can be located within the existing framework of NSW and Commonwealth law.

8.1.1 Commonwealth jurisdiction over the NSW Parliament

A preliminary question to be addressed involves the jurisdiction of the federal Constitution over state legislation.

The New South Wales Constitution does not contain the doctrine of the separation of powers,¹⁷⁹ although the independence of the judiciary is afforded constitutional protection.¹⁸⁰ As a consequence, legislation of the state Parliament government cannot be reviewed by the courts.¹⁸¹ However, the Supreme Court cannot be required to act in a manner which contradicts Chapter III of the federal Constitution – that is, to perform functions that are incompatible with Commonwealth judicial power.¹⁸² In essence, Chapter III throws a cloak around the state Supreme Courts, shielding them – and by extension the people – from the excesses of Parliament.

A *Kable* argument is likely to succeed in striking down a state law only where the impugned law is quite extreme.¹⁸³ Nonetheless, UNSWCCL submits that this incompatibility in combination with the right to a fair trial and the prohibitions against double jeopardy and retrospective criminal laws is invalid both constitutionally and at law.

8.1.2 retrospectivity

Judicial authority is unclear as to whether the federal Parliament has the power to legislate retrospective criminal law. *R v Kidman*,¹⁸⁴ which stated that such a power exists, was questioned in *Polyukhovich*, with the High Court divided on the question.¹⁸⁵ Justices

¹⁷⁸ Paul Pentony and Simon Rice, *When the Story Ends, Close the Book: Discussing the Double Jeopardy Rule* (2003) <<http://www.onlineopinion.com.au/view.asp?article=360>> at 3 October 2003.

¹⁷⁹ *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor* ('BLF Case') (1986) 7 NSWLR 372, 401 (Kirby P).

¹⁸⁰ *Constitution Act 1902* (NSW) s 7B(8), Pt 9 ('the judiciary')

¹⁸¹ contrast *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor* ('BLF Case') (1986) 7 NSWLR 372, 383-7 (Street CJ)

¹⁸² *Kable v DPP (NSW)* (1996) 189 CLR 51.

¹⁸³ eg *R v Wynbyne* (1997) 117 NTR 11 (*Kable* could not be used to strike down mandatory sentencing laws in the Northern Territory).

¹⁸⁴ *R v Kidman* (1915) 20 CLR 425

¹⁸⁵ Mason CJ, Dawson & McHugh JJ followed *Kidman*, Toohey, Gaudron & Deane JJ no longer considered *Kidman* good law. See George Williams, *Human Rights under the Australian Constitution* (1999) 216-7.

Deane and Gaudron found an implication prohibiting retrospective criminal laws in Chapter III of the Commonwealth Constitution.¹⁸⁶

If the federal Constitution does contain such an implication, then it arguably prevents the NSW Parliament from passing retrospective criminal laws that would be tried by the Supreme Court. This is because the New South Wales Supreme Court is a Chapter III court, protected by the federal Constitution.¹⁸⁷ The New South Wales Court of Criminal Appeal is a division of the Supreme Court and therefore also sits as a Chapter III court. The major assumption here is that *Kable* stands for the proposition that any court *capable* of exercising the judicial power of the Commonwealth falls under the protection of Chapter III whether it is exercising federal jurisdiction or not.¹⁸⁸

In the alternative, the High Court, as the highest appellate court in the land,¹⁸⁹ will sit on any appeal from the New South Wales Court of Criminal Appeal on these cases and will be protected by Chapter III absolutely. Provided that Chapter III carries an implication against retrospective criminal law, it is highly probable that at the very least the retrospective aspect of the Draft Bill will be struck down.

If this conclusion is correct, then it is conceded that the retrospective aspect is severable and will not lead to all of Division 1 of Part 3A of the Draft Bill being struck down, since it can operate without retrospective effect. However, as a matter of practicality and given that one of the major justifications for introducing these changes is to permit the retrospective operation of these provisions, UNSWCCL considers that the prospect of a successful constitutional challenge to the retrospective operation of Division 1 should be enough to demonstrate the futility of introducing the Draft Bill in the first place.

8.1.3 implied constitutional right to a fair trial

Some arguments suggest that the common law right to a fair trial is entrenched in the Constitution through the doctrine of the separation of powers. *Dietrich*¹⁹⁰ certainly supported the proposition that the right to a fair trial is fundamental to our criminal justice system, although the ultimate basis of this right is still subject to debate. *Dietrich* does not guarantee a fair trial, but a stay of proceedings if a fair trial cannot be provided. However, obiter would suggest that the principle was ‘entrenched by the Constitution’s requirement of the observance of judicial process and fairness’.¹⁹¹ If, as Professor Williams argues, ‘the common law in Australia...affords bare protection to...fundamental freedoms...where they have been abrogated by legislation’,¹⁹² there is a strong argument for the judicial protection of the rule against double jeopardy, insofar as it is a fundamental freedom and essential to a fair trial.

This argument is further strengthened by predictions that under the Draft Bill adverse media publicity¹⁹³ and the fact that a retrial proceeds from a presumption of guilt¹⁹⁴ will make it impossible to hold a fair retrial.

¹⁸⁶ *Polyukhovich v Cth* (1991) 172 CLR 501, 622 (Deane J), 704 (Gaudron J)

¹⁸⁷ *Kable v DPP (NSW)* (1996) 189 CLR 51

¹⁸⁸ *Polyukhovich v Cth* (1991) 172 CLR 501, 707 (Gaudron J). See also: *Australian Constitution* s 71 (“the judicial power of the Commonwealth shall be vested in...such other courts as [Parliament] invests with federal jurisdiction”) and *Judiciary Act 1903* (Cth) s 39. See also: Blackshield & Williams, above n 38, 1296.

¹⁸⁹ *Australian Constitution* s 73

¹⁹⁰ *Dietrich v The Queen* (1992) 177 CLR 292.

¹⁹¹ *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J).

¹⁹² George Williams, *Human Rights under the Australian Constitution* (1999) 16.

¹⁹³ see “media coverage and a fair trial” on page 22.

¹⁹⁴ see “inherent unfairness” on page 18.

8.1.4 double jeopardy as an implied constitutional immunity

Justice Dixon of the High Court has described the Constitution as enshrining 'many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed'.¹⁹⁵

UNSWCCL submits that the rule against double jeopardy is such a traditional assumption.

More recently, Justice Kirby has noted that:

...the contemporary realisation that the foundation of Australia's Constitution lies in the will of the Australian people has not yet been fully explored. It is not impossible that this conception would, in an extreme case, also reinforce the foregoing and affect judicial recognition of a purported 'State law' that was not, in truth, a 'law' at all.¹⁹⁶

UNSWCCL submits that, because the Draft Bill fundamentally realigns the balance between defendant and the state, this is 'an extreme affront masquerading as a State law'.¹⁹⁷

8.2 legal challenge: double jeopardy as a fundamental common law immunity

It has been widely suggested that the rule against double jeopardy is a fundamental entitlement. It is enshrined in international human rights law¹⁹⁸ and has a clear and significant basis in the common law.¹⁹⁹

Further, there is a line of authority for the proposition that some rights are so fundamental that they cannot be removed by statute. Although not binding on Australian courts, the judgment of Sir Robin Cooke in the New Zealand case of *Taylor v New Zealand Poultry Board*²⁰⁰ provides strong support for this view.²⁰¹ The High Court has not decided on this issue,²⁰² and therefore the question remains open whether the New South Wales Supreme Court could reject this Draft Bill.²⁰³

¹⁹⁵ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 192 (Dixon J).

¹⁹⁶ *Durham Holdings Pty Ltd v NSW* (2001) 177 ALR 436, 457 (Kirby J)

¹⁹⁷ *Durham Holdings Pty Ltd v NSW* (2001) 177 ALR 436, 458 (Kirby J)

¹⁹⁸ *International Covenant on Civil and Political Rights* (1966) Article 14(7)

¹⁹⁹ see *R v Carroll* [2002] HCA 55, [9] (Gleeson CJ & Hayne J), [91] (Gaudron & Gummow JJ), [128]-[137] (McHugh J).

²⁰⁰ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (Cooke P): 'Some common law rights...lie so deep that even Parliament could not override them'. See also *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 (Cooke P): '...some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them'.

²⁰¹ see also: *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372, 386-7 (Street CJ).

²⁰² *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (per curiam) (rejecting Street CJ's suggestion in *BLF case* that 'peace, welfare and good government' allow judicial review of NSW legislation): Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law...is another question which we need not explore.

²⁰³ see also *Durham Holdings Pty Ltd v NSW* (2001) 177 ALR 436, 440 (Gaudron, McHugh, Gummow & Hayne JJ):

UNSWCCL submits that the rule against double jeopardy is an immunity so fundamental at common law that it cannot be legislated away because it lies 'deeply rooted in our democratic system of government and the common law'.²⁰⁴

8.3 international challenge: the Bill violates international human rights standards

This Draft Bill is a 'double whammy' for human rights: it violates the prohibitions on retrospectivity *and* double jeopardy.²⁰⁵ UNSWCCL is deeply concerned that the Draft Bill amounts to a violation of international human rights standards and as such UNSWCCL condemns the Draft Bill in the strongest of terms.

The prohibition on double jeopardy is well established in human rights law.²⁰⁶ It also appears in many national constitutions and Bills of Rights.²⁰⁷ The principle in international law affords less protection than existing Australian law. For example, the UN Human Rights Committee has commented that the resumption of a criminal case may be justified "in exceptional circumstances", but that the reopening of a criminal case is strictly prohibited in accordance with the principle of *ne bis in idem*.²⁰⁸

The prohibition on retrospective criminal laws is also well established in human rights law. It also appears in many national constitutions and Bills of Rights.²⁰⁹

Australia has signed the *International Covenant on Civil and Political Rights* ('the ICCPR')²¹⁰ and has made no reservations concerning double jeopardy or retrospectivity. Australia is therefore obliged 'to respect and to ensure to all individuals within its territory...the rights recognised' in the ICCPR,²¹¹ including the prohibitions against double jeopardy and retrospectivity.

Australia has also signed the *First Optional Protocol* to the ICCPR, which allows an individual to take a complaint of a violation of the ICCPR to the UN Human Rights Committee.²¹² Any citizen who is prosecuted under this Draft Bill and who receives no relief from the High Court will have cause to communicate a breach of their rights under the ICCPR to the UN Human Rights Committee. While it is unclear whether a communication on the grounds of a breach of double jeopardy might not succeed, it is certain that a communication on the grounds of a breach of the prohibition on retrospective criminal laws would succeed.

Undoubtedly, having regard to the federal system and the text and structure of [a State's Constitution] there are limits to the exercise of the legislative powers conferred upon the parliament which are not spelled out in the constitutional text.

²⁰⁴ see above n 202.

²⁰⁵ *International Covenant on Civil and Political Rights* (1966) Articles 14(7) (double jeopardy) & 15(1) (retrospectivity).

²⁰⁶ for a thorough examination of international human rights law, see UK Law Commission, above n 21, [3.1]-[3.50]; also, UK Law Commission, above n 18, [1.13], [3.1]-[3.21].

²⁰⁷ eg *International Covenant on Civil and Political Rights* (1966) Article 14(7); *United States Constitution* Amendment V (1791); *Charter of Fundamental Rights of the European Union* (2000) Article 50; *Canadian Charter of Rights and Freedoms* (1982) s 11(h).

²⁰⁸ UN Human Rights Committee, *General Comment 13* (1984) [19].

²⁰⁹ eg *Universal Declaration of Human Rights* (1948) Article 11(2); *International Covenant on Civil and Political Rights* (1966) Article 15(2); *United States Constitution* Article 1 ss 9(3), 10(1); *Charter of Fundamental Rights of the European Union* (2000) Article 49(1); *Canadian Charter of Rights and Freedoms* (1982) s 11(g).

²¹⁰ 13 August 1980

²¹¹ *International Covenant on Civil and Political Rights* (1966) Article 2.

²¹² *First Optional Protocol to the International Covenant on Civil and Political Rights* (1966) signed by Australia on 25 September 1991.

UNSWCCL is deeply concerned that any Australian Parliament in the 21st Century would consider any legislation that so blatantly violates international human rights standards. These fundamental rights stand as guardians against the tyranny of the popular voice and offer protection for the most vulnerable in our society. It is deeply disturbing that the NSW Parliament would depart from these basic standards of civilisation, effectively abrogating internationally recognised human rights standards.

9. DNA Evidence

9.1 general comments

*DNA can provide absolute proof of innocence but it cannot provide proof of guilt.*²¹³

Stories of people being proved innocent by DNA testing are not uncommon in the media.²¹⁴ While it might seem natural to assume that DNA can also prove someone guilty, it is important to understand that there is no equivalence between DNA proving innocence and DNA proving guilt. This goes to the heart of understanding why appeals of acquittals based on new DNA evidence should be treated with the greatest of caution.

Recent advances in forensic science mean that we are living in an age of transition from a world without DNA testing to a world with it. Old evidence can now be re-evaluated with new technology. Police and prosecutors want to use these new techniques to retry people whom they consider to be guilty.²¹⁵ The only thing standing in their way is the legal rule against double jeopardy. Hence the push for 'reform'.

UNSWCCL is not aware of any cases that fall into this category in NSW. At most there will only be a limited number of cases that will ever fall into this category. Furthermore, such cases will soon cease to exist because DNA technology is now used during investigation and prosecution. In other words, the need to modify the rule will disappear in a few years time, but the damage done to the double jeopardy rule will remain.

DNA evidence is not determinative of guilt: it cannot prove all elements of an offence.²¹⁶ It does not *prove* that someone is guilty. First, it is not 100 per cent accurate. Second, it is susceptible to various interpretations by experts. Third, it is only one piece of evidence that goes to establishing the guilt of an accused.

DNA evidence, like all scientific evidence, is not one-hundred per cent accurate. A 'match' is defined by a probability level, not an absolute yes or no answer. A 'match' may not uniquely identify an individual.²¹⁷ For example, family members will be genetically similar and DNA profiling, which tests only a subset of information encoded in the DNA,²¹⁸ is best used to rule people *out* of an investigation.

Like all scientific evidence given in court, it is interpreted by experts. Those experts will not always agree. Those experts who prove to be the most persuasive witnesses will sway the jury. The convincing expert is not necessarily the expert with the right answer. The most famous example of an expert witness being absolutely convincing and also absolutely wrong is the expert who gave evidence about the "foetal blood" found in Lindy Chamberlain's car.²¹⁹

²¹³ United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1075 (Lord Lucas)

²¹⁴ eg 'DNA News', *Innocence Project* <<http://www.innocenceproject.org/dnanews/index.php>> at 3 October 2003

²¹⁵ eg Rowena Johns, above n 3, 2.

²¹⁶ for a thorough account of this proposition see: Barbara Hocking, Hamish McCallum, Alison Smith & Chris Butler, 'DNA, Human Rights and the Criminal Justice System' (1997) 3(2) *Australian Journal of Human Rights* 208.

²¹⁷ Greg Gardiner, *DNA Forensic Procedures: potential impacts on Victoria's Indigenous community* (2002) Parliamentary Library Information Paper, 10.

²¹⁸ Greg Gardiner, above n 217, 10

²¹⁹ see Brown et al, above n 59, 333

DNA evidence is only one piece in the jigsaw puzzle. A 'match' "establishes no more than that the accused could be the offender".²²⁰ Simply because an accused's DNA is found at a crime scene, it does not follow that he or she committed the crime. A jury must examine *all* of the evidence before them before reaching a verdict. At best it can place an accused at the scene of the crime.²²¹ Furthermore, like all evidence, DNA evidence can be contaminated, planted or otherwise rendered inaccurate.²²²

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

9.2 Innocence Panel should be reinstated

UNSWCCL strongly encourages the Attorney-General to reinstate the NSW Innocence Panel and make it effective by providing innocent inmates with the resources necessary to prove their innocence.

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

It is completely unacceptable that the resources of the state should be used to provide new and improved forensic technologies to retry the acquitted but not provided to prove the innocence of a wrongfully convicted inmate.

Whatever may be the real reason for suspending the Innocence Panel, it is unconscionable that innocent men and women are deprived of their liberty by the state when the means to prove their innocence could be provided to them.

It would be inhumane and unthinkable cruel to proceed with this Draft Bill without first reinstating the Innocence Panel.

²²⁰ *R v Pantoja* (1996) 88 A Crim R 554, 560 (Hunt CJ at CL & Hidden J)

²²¹ Barbara Hocking, Hamish McCallum, Alison Smith & Chris Butler, above n 216, 208.

²²² see ABC Television, 'DNA – A Shadow of Doubt', *Catalyst*, 27 June 2002, <<http://www.abc.net.au/catalyst/stories/s591803.htm>> at 3 October 2003. Broadcast examines cases of Lisoff (possible police planting of DNA evidence) and Renton (sample had DNA from multiple people & could have been used to implicate 94% of the Australian population).