

Submission of the

New South Wales Council for Civil Liberties

and the

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

to the

Model Criminal Code Officers' Committee's

***Issue Estoppel, Double Jeopardy and
Prosecution Appeals Against Acquittals***

17 February 2004

Authors:	Roslyn Cook David Poole Michael Walton (editor) Kathryn Wilson Francis Wong
-----------------	---

Contents

1. EXECUTIVE SUMMARY.....	2
2. THE INCONTROVERTIBILITY OF AN ACQUITTAL	4
2.1 THE IMPORTANCE OF FINALITY	4
3. PROPOSED CHANGES ARE CHALLENGEABLE.....	6
3.1 CONSTITUTIONAL CHALLENGE: ASPECTS OF THE BILL ARE UNCONSTITUTIONAL	6
3.2 LEGAL CHALLENGE: DOUBLE JEOPARDY AS A FUNDAMENTAL COMMON LAW IMMUNITY	7
3.3 INTERNATIONAL CHALLENGE: INTERNATIONAL HUMAN RIGHTS STANDARDS	8
4. CARROLL’S CASE IS NOT AN IMPETUS FOR REFORM	10
4.1 THESE REFORMS WOULD NOT RESULT IN CARROLL STANDING RETRIAL	10
4.2 CARROLL’S CASE DID NOT INVOLVE DNA EVIDENCE	11
4.3 CARROLL’S CASE HAS BEEN MANIPULATED BY THE MEDIA	11
5. DIVISION 1: DEFINITIONS (2.8.1).....	12
5.1 PERVERSION OF COURSE OF JUSTICE SHOULD NOT BE INCLUDED	12
5.2 CONSPIRACY TO PERVERT COURSE OF JUSTICE SHOULD NOT BE INCLUDED	12
5.3 PERJURY SHOULD NOT BE INCLUDED	13
5.4 VERY SERIOUS OFFENCE: THE DEFINITION IS TOO BROAD	14
6. DIVISION 2: DOUBLE JEOPARDY	16
6.1 GENERAL RULE	16
6.2 EXCEPTION FOR ADMINISTRATION OF JUSTICE (2.8.2).....	16
6.3 THE “EITHER/OR” PROVISION (2.8.3).....	16
7. DIVISION 3: RETRIAL AFTER ACQUITTAL	17
7.1 CASES THAT MAY BE RETRIED (2.8.4) [RETROSPECTIVITY]	17
7.2 CCA MAY ORDER RETRIAL (2.8.5).....	18
7.3 FRESH & COMPELLING EVIDENCE (2.8.6).....	18
7.4 TAINTED ACQUITTALS (2.8.7)	24
7.5 IN THE INTERESTS OF JUSTICE (2.8.8)	27
7.6 APPLICATION FOR RETRIAL (2.8.9).....	28
7.7 RETRIAL (2.8.10)	29
7.8 AUTHORISATION OF POLICE INVESTIGATIONS (2.8.11)	30
7.9 RESTRICTIONS ON PUBLICATION (2.8.12).....	32
7.10 OTHER APPEAL OR REVIEW (2.8.13).....	34
7.11 DIRECTED ACQUITTALS & JUDGE-ONLY ACQUITTALS (2.8.14).....	34

1. Executive summary

The NSW Council for Civil Liberties and the UNSW Council for Civil Liberties ('the Councils for Civil Liberties') have some grave concerns about the Model Criminal Code Officer Committee's (MCCOC) proposals to introduce appeals of acquittals. In summary, the proposals read like a prosecutor's wish-list, ignore the civil liberties of Australians and fail to strike a satisfactory and just balance between the interests of the individual accused and the State.

The Councils for Civil Liberties are 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.

The Councils for Civil Liberties do not support the retrospective operation of these conditional acquittals which, at one stroke of the pen, render all *past* acquittals conditional as well. This retrospectivity is most probably unconstitutional.

The Councils for Civil Liberties do not believe that it is possible to introduce appeals of acquittals without substantially damaging the principle of the presumption of innocence, which is fundamental to our concept of justice, or increasing the power of the State over the individual, which constitutes an unacceptable curtailing of civil liberty.

The Councils for Civil Liberties are concerned that the MCCOC proposals set the standards required of the prosecution upon appeal of an acquittal too low. These low standards radically alter the balance in favour of the Crown and against the individual defendant.

The Councils for Civil Liberties are deeply concerned at the underlying assumption in the proposals 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.

Proposals to introduce an appeal of acquittal proceed from the mistaken belief that there is a moral and/or legal equivalence between appeals of acquittals and appeals of convictions. This could only be the case if, in a criminal trial, the defence and prosecution bore equal burdens of proof – which is not the case.

It is for the *prosecution* to prove beyond reasonable doubt all the elements of an offence and to negative all defences raised by the accused (beyond reasonable doubt).¹ If appeals of acquittal and appeals of conviction are to be treated equally, as the MCCOC proposals would do, then this would radically alter this 'golden thread' of the criminal law. The presumption of innocence, which underpins this 'golden thread', would be significantly eroded. This is unconscionable if justice is to be served.

¹ the only exceptions being the defence of insanity and express statutory exception: *Woolmington v DPP* [1935] AC 462.

It is worth stating that the Councils for Civil Liberties do not take the positions they take in order to protect the guilty, but rather to guarantee the liberty of all citizens from oppression. No one likes the thought that factually guilty people walk free. But justice requires that the factually innocent are not placed in peril of double jeopardy.

Of all the proposals, the proposal concerning tainted acquittals is the only form of Crown appeal that the Councils for Civil Liberties see as potentially meritorious. However, before the Councils could support such an appeal, the provisions as drafted would have to be heavily amended.

Ultimately, the Councils for Civil Liberties do not believe that it is possible to offer an acquitted person a fair retrial. For this reason, the Councils cannot support the MCCOC proposals to retry acquitted people. Only where an acquittal has been obtained dishonestly by the acquitted person can the Councils see merit in retrying people who have been acquitted by a duly constituted court of law.

2. The incontrovertibility of an acquittal

The Committee's recommendations for reform of the double jeopardy principle are predicated on an acceptance that an acquittal is no longer incontrovertible.²

This quote from the MCCOC's Discussion Paper goes to the very heart of the proposals for reform of the rule against double jeopardy. The quote appears on the last page of the Discussion Paper, and there is no justification for this attack on the principle of finality in all the pages that precede it.

The case has not been made out that we have reached a fault line in legal history and acquittals have somehow moved from being incontrovertible to controvertible. Not one *actual* case is offered to illustrate the need for this radical erosion of personal liberty. Raymond John Carroll would not be subject to retrial under these proposals – and the Discussion Paper admits as much.³

To infer that an unpopular acquittal like Carroll's undermines public confidence in the administration of justice is trite. What could undermine public confidence in the administration of justice more than the MCCOC's own assertion that an acquittal is no longer incontrovertible? That a judicial determination of 'not guilty' is no longer final, but should be considered provisional? That the High Court of Australia was wrong to suggest that an attack on the incontrovertibility of a verdict of acquittal is an abuse of process? How can the public have any confidence in courts that cannot deliver finality in their judgments?

2.1 the importance of finality

The Councils for Civil Liberties are concerned that the proposed changes to the rule against double jeopardy will seriously erode the principle of finality. The Councils are concerned that these proposals would introduce a new kind of verdict, the conditional acquittal, which would increase the power of the State at the expense of civil liberty.

The principal of finality is an important aspect of our common law system. The legal doctrine of *res judicata*⁴ emphasises the importance of finality of the judicial process to the rule of law and society as a whole.⁵ The doctrine of *res judicata* underpins the rule against double jeopardy in criminal cases⁶ and operates independently of the merits of the previous adjudication.⁷

² Model Criminal Code Officers Committee, *Discussion Paper, Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals* (November 2003) 127.

³ MCCOC, n 2, 61.

⁴ see Mark Aronson and Jill Hunter, *Litigation: Evidence and Procedure* (5th ed, 1995) 466.

⁵ *The Queen v Carroll* [2002] HCA 55, [22] & [49] (Gleeson CJ & Hayne J), [86] (Gaudron & Gummow JJ), [128] & [145] (McHugh J). See also, 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.

⁶ 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'.

⁷ for an overview, see Aronson & Hunter, above n 4, 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

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'.⁸ These proposals amount to creating a new kind of verdict – 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.⁹

It is also important not to equate wrongful convictions with wrongful acquittals. Considering that an individual's liberty is at stake, it is desirable to allow an exception to the principle of finality in order to correct wrongful convictions.¹⁰ However, wrongful acquittals are conceptually different because they do not involve the unconscionable incarceration of an innocent.

Importantly, the UK Law Commission has acknowledged the 'wider social value' of the principle of finality in both 'delineating the proper ambit of the power of the state'¹¹ and as a symbol of the rule of law.¹² This recognises the importance of finality in a wider social context, as well as to the rights of the individual before the law.¹³

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 committal of the offence was followed by serious consequences ...*' (emphasis added).

⁸ Liberty UK, above n 5, [40].

⁹ United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1061-2 (Baroness Kennedy of The Shaws).

¹⁰ 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.

¹¹ UK Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 267 (2001) [4.17]. See also: Paul Roberts, 'Double Jeopardy Law Reform: A Criminal Justice Commentary' (2002) 65(3) *Modern Law Review* 393, 406 (finality 'draws attention to collective social interests, in addition to the welfare and rights of the individual accused').

¹² UK Law Commission, LC 267, n 11, [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'.

¹³ see UK Law Commission, LC 267, n 11, [4.12]-[4.13].

3. Proposed changes are challengeable

This changes proposed by MCCOC to the principle of double jeopardy are vulnerable to constitutional and legal challenge on the grounds that they violate the right to a fair trial and the immunities from retrospective criminal laws and double jeopardy.

The changes are also susceptible to challenge at the UN Human Rights Committee on the grounds that they violate international human rights standards.

3.1 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.¹⁴ However, it is possible to argue that such a right does exist, and can be located within the existing framework of State and Commonwealth law.

3.1.1 retrospectivity

Judicial authority is unclear as to whether the federal Parliament has the power to legislate retrospective criminal laws. *R v Kidman* stated that such a power exists.¹⁵ However, in the case of *Polyukhovich* the High Court was divided on the question.¹⁶ Justices Deane and Gaudron found an implication prohibiting retrospective criminal laws in Chapter III of the Commonwealth Constitution.¹⁷

If the federal Constitution does contain such an implication, then it would bind the federal Parliament. Arguably, the State Parliaments would be similarly prevented from passing retrospective criminal laws that would be tried by their Supreme Courts. This is because the Supreme Courts are cross-vested with federal judicial power, making them Chapter III courts protected by the federal Constitution.¹⁸ A Court of Criminal Appeal is usually a division of a State's Supreme Court¹⁹ and therefore also sits as a Chapter III court.

It is highly probable that at the very least the retrospective aspect of the proposed changes would be struck down.

3.1.2 implied constitutional right to a fair trial

It could be argued that the common law right to a fair trial is entrenched in the Constitution through the doctrine of the separation of powers. *Dietrich*²⁰ certainly supported the proposition that the right to a fair trial is fundamental to our criminal

¹⁴ 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.

¹⁵ *R v Kidman* (1915) 20 CLR 425

¹⁶ 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.

¹⁷ *Polyukhovich v Cth* (1991) 172 CLR 501, 622 (Deane J), 704 (Gaudron J)

¹⁸ *Kable v DPP (NSW)* (1996) 189 CLR 51.

¹⁹ e.g. *Criminal Appeals Act 1912* (NSW) s 3.

²⁰ *Dietrich v The Queen* (1992) 177 CLR 292.

justice system and is 'entrenched by the Constitution's requirement of the observance of judicial process and fairness'.²¹

Given that the retrial of an acquitted person is likely to attract adverse media publicity²² and proceed from a presumption of guilt,²³ it appears that it will be impossible to hold a fair retrial.²⁴ This suggests that the retrial of acquitted persons violates this implied constitutional right.

3.1.3 double jeopardy as an implied constitutional immunity

High Court Justice Sir Owen Dixon once 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'.²⁵

Given the long lineage of the principle of double jeopardy,²⁶ the rule could be interpreted as such a traditional assumption.

3.2 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 law²⁷ and has a clear and significant basis in the common law.²⁸

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*²⁹ provides strong support for this view.³⁰ The High Court has not decided this issue,³¹ and therefore the question remains open whether the courts could strike down any attempt to challenge the incontrovertibility of an acquittal.³²

²¹ *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J).

²² see "power of the press" on page 33.

²³ see "inherent unfairness" on page 36.

²⁴ see also, "conclusion: it is not possible to hold a fair retrial" on page 23.

²⁵ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 192 (Dixon J).

²⁶ see *Pearce v The Queen* [1998] HCA 57, [74]-[75] (Kirby J).

²⁷ e.g. *International Covenant on Civil and Political Rights* (1966) Article 14(7).

²⁸ see *R v Carroll* [2002] HCA 55, [9] (Gleeson CJ & Hayne J), [91] (Gaudron & Gummow JJ), [128]-[137] (McHugh J).

²⁹ *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'.

³⁰ 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).

³¹ *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.

³² see also *Durham Holdings Pty Ltd v NSW* (2001) 177 ALR 436, 440 (Gaudron, McHugh, Gummow & Hayne JJ):

It might be possible to argue 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'.³³

3.3 international challenge: international human rights standards

These proposals are a 'double whammy' for human rights: they violate the prohibitions on retrospectivity *and* double jeopardy.³⁴

The prohibition on double jeopardy is well established in human rights law.³⁵ It also appears in many national constitutions and Bills of Rights.³⁶ The principle in international law affords less protection than existing Australian law.

The UN Human Rights Committee has commented that the resumption of a criminal case may be justified "in exceptional circumstances", but that the retrial of a criminal case is strictly prohibited in accordance with the principle of *ne bis in idem*.³⁷ The MCCOC proposals clearly contravene this principle by contemplating a retrial.³⁸

Furthermore, in our accusatorial system, as opposed to the European inquisitorial system, it is difficult to see how a criminal trial could be 'resumed', given that it is highly unlikely the original jury, judge and counsel could be brought together again to examine the new evidence.

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.³⁹

Australia has signed the *International Covenant on Civil and Political Rights* ('the ICCPR')⁴⁰ 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,⁴¹ including the prohibitions against double jeopardy and retrospectivity.

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.

³³ see n 31.

³⁴ *International Covenant on Civil and Political Rights* (1966) Articles 14(7) (double jeopardy) & 15(1) (retrospectivity).

³⁵ for a thorough examination of international human rights law, see Michael Kirby, n 53. See also UK Law Commission, CP 156, n 86, [3.1]-[3.50]; and, UK Law Commission, LC 267, n 11, [1.13], [3.1]-[3.21].

³⁶ 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).

³⁷ UN Human Rights Committee, *General Comment 13* (1984) [19].

³⁸ see MCCOC, n 2, s 2.8.10. See also: Michael Kirby, n 53, 243.

³⁹ 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).

⁴⁰ 13 August 1980

⁴¹ *International Covenant on Civil and Political Rights* (1966) Article 2.

If the changes to double jeopardy proposed by the MCCOC are introduced, it is highly likely that they would be in violation of Australia's international human rights commitments.

Any citizen who is retried after being acquitted 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.⁴² While it is unclear whether a communication on the grounds of a breach of double jeopardy would succeed, it is certain that a communication on the grounds of a breach of the prohibition on retrospective criminal laws would succeed.

It is worrying 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 government oppression and offer protection for the most vulnerable in our society. It is deeply disturbing that the MCCOC would depart from these basic standards of civilisation, effectively abrogating internationally recognised human rights standards.

⁴² pursuant to *First Optional Protocol to the International Covenant on Civil and Political Rights* (1966) signed by Australia on 25 September 1991.

4. 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.*⁴³

Sir Lawrence Street, Chief Justice of New South Wales

The case of Raymond John Carroll is often cited by those who advocate retrial of acquitted persons when 'fresh and compelling' evidence becomes available.⁴⁴ However, it is paramount in this debate to acknowledge that the legislative proposals to 'reform' double jeopardy would not fix the problems with this infamous case.

4.1 these reforms would not result in Carroll standing retrial

Many of the facts in the Carroll case are poorly understood in the community, where discussion rarely goes beyond the emotional response to the brutal killing of an infant. However, those who use the Carroll case to justify reform of the rule against double jeopardy should be challenged to go beyond this emotional response and to examine the problematic nature of the so-called 'fresh' evidence in Carroll's case.

Two types of 'fresh' evidence were presented to the court in Carroll's perjury trial: the expert opinion evidence of four forensic dentists who examined photographs of bite marks on the victim's thighs,⁴⁵ and, an alleged confession. On appeal, the Queensland Court of Appeal found that the 'fresh' evidence of the forensic dentists was not fresh at all, but rather a reinterpretation of *old* evidence by a 'fresh set of witnesses'.⁴⁶ Further, the Court found the new confession evidence unreliable because it involved a jailhouse confession⁴⁷ to which 'no weight at all could be attached'.⁴⁸ In fact the Court said that both the confession evidence and the odontological expert opinion evidence should never have been presented to the jury.⁴⁹

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 has sparked the calls for reform of double jeopardy would fail to satisfy the 'fresh and compelling' test laid out in these proposals,⁵⁰ which purport to remedy cases like those of Carroll, but which clearly do not – and the MCCOC Discussion Paper admits as much.⁵¹

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 'fresh'

⁴³ *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372, 379 (Street CJ).

⁴⁴ *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, MCCOC, n 2, 19-27. See also Rowena Johns, n 93, 7-8.

⁴⁵ 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).

⁴⁶ *R v Carroll* [2001] QCA 394 [62] (Williams JA; McMurdo P & Holmes J agreeing).

⁴⁷ *R v Carroll* [2001] QCA 394 [28]-[34].

⁴⁸ *R v Carroll* [2001] QCA 394 [65].

⁴⁹ *R v Carroll* [2001] QCA 394 [37] (confession evidence), [62] (opinion evidence).

⁵⁰ MCCOC, n 2, s 2.8.6 (fresh & compelling evidence – meaning).

⁵¹ MCCOC, n 2, 61.

expert opinion evidence are not admissible in a court of law, according to the Queensland Court of 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 civil liberties and of safeguards, evolved over centuries, to protect the innocent.

In short, the problems with Carroll's case have *nothing* to do with double jeopardy, and everything to do with a lack of legally admissible evidence capable of convicting Mr Carroll.

Finally, it is worth pointing out that if these proposals were adopted in Queensland, it is unlikely Mr Carroll would stand retrial because he would, effectively, be placed in an untenable position of *triple* jeopardy. He has already faced trials for murder and perjury, and it is hard to imagine that it is in the public interest for the state to expend more resources to try him for a third time. Furthermore, the MCCOC has expressed its distaste for the thought of triple jeopardy.⁵²

4.2 Carroll's case did not involve DNA evidence

It is also important to note that the 'fresh' evidence in Carroll's case did not involve DNA evidence.

A pubic hair was found on the victim's body, but it was lost prior to the introduction of DNA analysis technology.⁵³ This is usually portrayed as robbing the Crown of the evidence to convict Carroll. However, given that Mr Carroll has consistently maintained his innocence, the loss of that evidence has, very significantly, robbed him of an opportunity to definitively prove his innocence.⁵⁴

4.3 Carroll's case has been manipulated by the media

The Councils for Civil Liberties are greatly disturbed by the way this case has been used by the media to create the political pressure being brought to erode the rule against double jeopardy.⁵⁵ The motives of the *Australian* newspaper in particular, by offering to fund civil litigation against Carroll, are unclear and disturbing.⁵⁶ Its media campaign is as ill-informed as it is well-resourced.

Similar concern is expressed in the Discussion Paper.⁵⁷ His Honour Mr Justice Michael Kirby has also written about this worrying development.⁵⁸ Journalist and legal commentator Richard Ackland was scathing of the *Australian's* campaign.⁵⁹

⁵² MCCOC, n 2, 111. Also, s 2.8.5(3): only one application for retrial may be made.

⁵³ Michael Kirby, 'Carroll, double jeopardy and international human rights law' (2003) 27 *Criminal Law Journal* 231, 238.

⁵⁴ for a discussion of DNA evidence generally, see "DNA Evidence" on page 21 below.

⁵⁵ see "power of the press" on page 33 below.

⁵⁶ see "power of the press" on page 33 below.

⁵⁷ MCCOC, n 2, 27.

⁵⁸ Michael Kirby, n 53, 238-9.

⁵⁹ see MCCOC, n 2, 27; and, Michael Kirby, n 53, 239.

5. Division 1: definitions (2.8.1)

5.1 perversion of course of justice should not be included

The 'tainted' acquittals provisions proposed by MCCOC⁶⁰ are similar to those that have operated in the United Kingdom since 1997.⁶¹ The UK provisions only apply to administration of justice offences involving interference with or intimidation of a juror or a witness in any proceedings.⁶²

Although the reference to an administration of justice offence in the MCCOC proposal 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 includes the 'perversion of the course of justice'.⁶³ This would include offences not closely involved in the trial, such as the removal of evidence from a crime scene.⁶⁴

The Councils for Civil Liberties recommend that 'perversion of the course of justice' be removed from the definition of an administration of justice offence under these proposals because it is too broad and goes beyond the conduct of a trial.

5.2 conspiracy to pervert course of justice should not be included

The MCCOC's definition of an administration of justice offence includes the perversion of the course of justice and the *conspiracy* to so pervert.⁶⁵ 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.

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 accused person.⁶⁶

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.⁶⁷ Some form of complicity,⁶⁸ on the other hand, is charged when 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.⁶⁹

⁶⁰ MCCOC, n 2, s 2.8.1(1).

⁶¹ *Criminal Procedure and Investigations Act 1996* (UK) ss 54-57.

⁶² UK Law Commission, CP 156, n 86, [6.8].

⁶³ MCCOC, n 2, s 2.8.1(1)('administration of justice offence')(b).

⁶⁴ e.g. *Crimes Act 1900* (NSW) ss 315 & 317.

⁶⁵ n 63.

⁶⁶ MCCOC, n 2, s 2.8.7(2)(b). See also, UK Law Commission, CP 156, n 86.

⁶⁷ David Brown, David Farrier, Sandra Egger and Luke McNamara, *Criminal Laws* (3rd ed, 2001) 1278-1323.

⁶⁸ accessory (before or after the fact) and joint criminal enterprise (or 'common purpose').

⁶⁹ Brown et al, n 67, 1323-1370

The Councils for Civil Liberties fail to see how conspiracy would be sufficient to allow a retrial when there is, in fact, no attaint.

If the Standing Committee of Attorneys-General choose to proceed with the inclusion of the perversion of the course of justice as an administration of justice offence, then the Councils recommend that the reference to *conspiracy* to so pervert be removed from the definition because it would allow retrial for untainted acquittals.

5.3 perjury should not be included

The case for including perjury in appeals against 'tainted' acquittals is very weak.

If an acquitted person, during his or her original trial, procured the perjury of a witness, then this would fall within the scope of bribery of, or interfering with, a witness. This is already catered for by the second limb of the proposed definition of administration of justice offence and does not require the inclusion of a separate limb of perjury.

If an acquitted person has benefited from the perjury of a witness which the accused did not procure and of which the accused had no knowledge at the time of his or her trial, then it is unfair to punish him or her for the crime of another. It would be wrong to allow a retrial in such circumstances where there is no *mens rea* element of the offence.⁷⁰

If the accused himself or herself is accused of perjury, then we are dealing with a very special case. The MCCOC proposal to include perjury could theoretically result in an application for retrial on the grounds that the acquitted person spoke the words "I am innocent" at their trial.⁷¹ What else would you expect from someone who has pled not guilty to the charges on the indictment? In the words of High Court Justices Gaudron and Gummow:

The recognition of perjury as a general exception for "fraud" would enable the State, by the expedient of laying such a charge, to controvert an earlier acquittal in any case in which the accused had given evidence affirming a plea of not guilty.⁷²

While the New Zealand Law Commission recommended including perjury as an administration of justice offence,⁷³ the English Law Commission recommended that it should not.⁷⁴ The Councils for Civil Liberties are more persuaded by the English Law Commission's argument that "the trial process itself is designed to determine which witnesses are telling the truth and which are lying",⁷⁵ particularly the process of cross-

⁷⁰ see "the acquitted could be innocent of the tainting but still face re-trial" on page 24. It is the standard practice of the MCCOC to include a note that an offence is one of strict or absolute liability: MCCOC, *Model Criminal Code: Chapters 1 & 2 – General Principles of Criminal Responsibility* (Dec 1992), 31. See also *Model Criminal Codes* 6.1 and 6.2. It should also be noted that perjury, as an administration of justice offence in the *Model Criminal Code*, has a required fault element: MCCOC, *Model Criminal Code Chapter 7 – Administration of Justice Offences* (Jul 1998), 13-17.

⁷¹ this is effectively what the *Carroll* case was about. Mr Carroll, protesting his innocence under oath, spoke words to the effect of "I did not kill that little girl".

⁷² *The Queen v Carroll* [2002] HCA 55, [113] (Gaudron & Gummow JJ).

⁷³ New Zealand Law Commission, *Acquittal Following Perversion of the Course of Justice*, Report 70 (2001), [32].

⁷⁴ UK Law Commission, LC 267, n 11, [5.6]-[5.7]. Also UK Law Commission, CP 156, n 86, [6.19-6.20].

⁷⁵ UK Law Commission, CP 156, n 86, [6.19].

examination. In other words, the trial process already takes the possibility of perjury into account.

This also extends to the perjury of witnesses other than the accused. “[An] attempt to reopen an acquittal on the basis that the defence witnesses...were not telling the truth would amount to a simple refusal to accept the verdict”.⁷⁶ Consequently, there is no need to define perjury as an administration of justice offence under these proposals.

The MCCOC argues that not including perjury amounts to “conferring a licence on accused persons to lie on oath”.⁷⁷ This fails to recognise that, as discussed above, the trial process already takes the possibility of perjury into account and tests whether an accused person is lying or not.

In fact, if any licence is conferred, it is the licence granted by this proposal to the State, when unwilling to accept a verdict of acquittal, to retry an acquitted person for perjury on the grounds that the accused pled not guilty at trial. Such licence is oppressive and would undermine public confidence in the effective administration of justice.

The MCCOC also expresses concern that a defendant should not be exposed to triple jeopardy and recommends that the DPP should elect either to indict for an administration of justice offence or to make an application for retrial.⁷⁸ This problem would be remedied by simply not including perjury in the definition of an administration of justice offence.

Besides, if new evidence has surfaced to demonstrate that the accused has lied at trial, then this should be dealt with on the grounds of the “fresh and compelling evidence” rather than a “tainted acquittal”.⁷⁹

The Councils for Civil Liberties recommend that perjury should not be included in the definition of an administration of justice offence.

If the Standing Committee of Attorneys-General decides to include perjury as an administration of justice offence, then the Councils for Civil Liberties recommend that only perjury of which the acquitted person had personal knowledge should constitute a tainted acquittal.

5.4 very serious offence: the definition is too broad

The proposed MCCOC definition of a ‘very serious offence’ is even broader than the one introduced in the UK. Appendix B of the Discussion Paper lists thirty-six offences attracting the penalty of fifteen years or more, whereas the UK reforms list only thirty qualifying offences.⁸⁰ This is the only substantial departure from the NSW proposals, where only manslaughter and offences attracting imprisonment were suggested.⁸¹

⁷⁶ UK Law Commission, CP 156, n 86, [6.20].

⁷⁷ MCCOC, n 2, 91.

⁷⁸ MCCOC, n 2, 74.

⁷⁹ see also UK Law Commission, CP 156, n 86, [6.20].

⁸⁰ *Criminal Justice Bill 2003 (UK)* Sch 4.

⁸¹ *Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW)* s 9B.

Recommending such a penalty-based definition effectively undermines the MCCOC's attempts to achieve national consistency in double jeopardy reform.⁸² This is because the same offence can attract different maximum penalties throughout the country. For example, the basic offence of kidnapping would be retriable in Victoria, where it attracts a maximum of twenty-five years,⁸³ but not in New South Wales, where the offence attracts only fourteen years imprisonment.⁸⁴

The UK Law Commission recommended limiting retrial to the offences of murder and genocide.⁸⁵ There is much merit in this recommendation, because only those offences which involve the death of the victim could possibly outweigh the public interest in maintaining the double jeopardy principle.

It is worthy of note that, though the UK Law Commission originally thought that all offences attracting a maximum penalty of three years should be retriable,⁸⁶ in its final report the Law Commission recommended restricting changes to the rule against double jeopardy to the crime of murder and genocide.⁸⁷

As with the NSW proposals, the Councils for Civil Liberties are 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.⁸⁸

Because many of the other offences captured by the fifteen year limit also exhibit a similar large range of culpability, it is inappropriate to include them in the definition of a 'very serious offence'.

If the Standing Committee of Attorneys-General decides to proceed with these changes to the principle of double jeopardy, the Councils for Civil Liberties recommend that only murder and genocide be subject to an appeal of acquittal.

⁸² MCCOC, n 2, iv.

⁸³ *Crimes Act 1958* (Vic) s 63A.

⁸⁴ *Crimes Act 1900* (NSW) s 86(1).

⁸⁵ UK Law Commission, LC 267, n 11, [4.42]

⁸⁶ UK Law Commission, *Double Jeopardy*, Consultation Paper No 156 (1999) [5.29] (provisionally, all offences attracting a maximum penalty of three years or more).

⁸⁷ UK Law Commission, LC 267, n 11, [4.42].

⁸⁸ 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].

6. Division 2: double jeopardy

6.1 general rule

The Councils for Civil Liberties acknowledge that MCCOC requires more time to refine a satisfactory definition of the principle of double jeopardy in the criminal law.

The Councils only remark that public consultation of the final definition should be undertaken before it is incorporated in the *Model Criminal Code*.

6.2 exception for administration of justice (2.8.2)

The Councils for Civil Liberties accept that the principle of double jeopardy should not preclude an acquitted person from being tried for an administration of justice offence connected to the proceedings in which he or she was acquitted.

However, the Councils do not accept that perjury should be considered an administration of justice offence.⁸⁹

The Councils for Civil Liberties believe that an acquittal is incontrovertible. The Councils take support for this position from all the members of the High Court in the *Carroll* decision.

The Councils for Civil Liberties do not support the MCCOC proposal that a trial for an administration of justice offence be permitted to controvert an earlier acquittal.

6.3 the “either/or” provision (2.8.3)

The Councils for Civil Liberties, as a matter of principle, reject the MCCOC proposal that perjury be included in the definition of an administration of justice offence.⁹⁰

Consequently, the Councils for Civil Liberties do not support the MCCOC proposal that the DPP elect to try a person for an administration of justice offence that contradicts a person’s earlier acquittal.⁹¹

⁸⁹ see “perjury should not be included” on page 13.

⁹⁰ see “perjury should not be included” on page 13.

⁹¹ MCCOC, n 2, s 2.8.3(3).

7. Division 3: retrial after acquittal

7.1 cases that may be retried (2.8.4) [retrospectivity]

The Councils for Civil Liberties are deeply disturbed by the proposed retrospective operation of the appeals in Division 3 of these proposals.⁹² The moment these proposals are implemented, 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, in the form of imprisonment, 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.⁹³ 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,⁹⁴ 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 accommodating scientific advancement.

It is deeply disturbing 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.

The Councils for Civil Liberties are opposed on principle to the introduction of appeals of acquittals because they will permanently erode individual liberty.

If the Standing Committee of Attorneys-General is determined to introduce appeals of acquittals, then the Councils for Civil Liberties strongly recommends that the civil rights of acquitted persons be respected by making these changes prospective only.

⁹² CCL's concerns that the proposals create a new kind of acquittal, the conditional acquittal, has already been expressed elsewhere in this submission: see "the importance of finality" on p 4.

⁹³ MCCOC, n 2, 109. See also Rowena Johns, *Double Jeopardy* (2003) NSW Parliamentary Library Research Service, Briefing Paper No 16/03, 13. See also "DNA Evidence" on page 21 below.

⁹⁴ eg United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1071-2 (Earl Russell).

Further, it is arguable that since ‘very serious offences’ are tried in state Supreme Courts, courts covered by Chapter III of the Commonwealth *Constitution*,⁹⁵ that the High Court of Australia would strike down this aspect of any legislation on the grounds that retrospective criminal laws are unconstitutional, whether they create an offence or not. This is discussed in greater detail elsewhere in this submission.⁹⁶

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 has been violated. This is discussed in greater detail elsewhere in this submission.⁹⁷

7.2 CCA may order retrial (2.8.5)

As a matter of principle, the Councils for Civil Liberties are against the retrial of people who have been acquitted. However, with some reservations the Councils can see merit in the retrial of a tainted acquittal procured intentionally by an acquitted person.⁹⁸

The great risk is that the well-resourced state could exhaust an acquitted person, both emotionally and financially, by retrying them, even though he or she may be factually innocent.⁹⁹ Statistically speaking, increasing the number of trials a defendant faces for an offence, also increases the potential for convicting an innocent person.

7.2.1 one application only (2.8.5(3))

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 proposal, especially given media pressure and the right circumstances, from increasing that application limit to two, three or more.

The Councils for Civil Liberties do not see the statutory limit of one application for retrial as a safeguard at all, given that it can be easily changed by any future Parliament. The better view is to leave the common law rule against double jeopardy in place.

7.3 fresh & compelling evidence (2.8.6)

There are two questions to be examined when granting an appeal on fresh evidence. The first is a question of the cogency of the evidence and its admissibility. The second is an assessment of the probative value of the evidence to determine whether it constitutes a substantial miscarriage of justice, thereby warranting a retrial.

⁹⁵ *Kable v DPP (NSW)* (1996) 189 CLR 51. See also: Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 1296.

⁹⁶ see “constitutional challenge: aspects of the Bill are unconstitutional” on page 6.

⁹⁷ see “international challenge: international human rights standards” on page 8.

⁹⁸ see “tainted acquittals (2.8.7)” on page 24 ff.

⁹⁹ William McAninch, “Unfolding the Law of Double Jeopardy” (1993) 44 *SCL Review* 411, 428 (citing *US v Scott* 437 US 83 (1978))

7.3.1 the question of admissibility

The rules for adducing fresh evidence in an appeal of a conviction are well settled.¹⁰⁰ To qualify as fresh evidence, the evidence must not have been available at the original trial, during which the defence team must have exercised ‘reasonable diligence’ in identifying what evidence was in fact available.¹⁰¹ Fresh evidence may only be admitted if it is credible and cogent.¹⁰²

The MCCOC proposals for appeal of acquittals where there is ‘fresh & compelling’ evidence mirror the burden placed upon the defence in appeal of conviction. The evidence must be fresh (not available at trial despite the exercise of reasonable diligence) and compelling (reliable and substantial in the context of the issues in dispute at trial).¹⁰³

7.3.2 the question of probative value

Additionally, the MCCOC proposals require the evidence to be ‘highly probative of the case against the acquitted person’.

‘Probative’ is an *evidential* burden, on the balance of probabilities, taking into account the importance and gravity of the matters alleged.¹⁰⁴ The MCCOC proposals do not offer a definition of ‘*highly* probative’ and so it becomes a matter for statutory interpretation.

Prima facie ‘highly probative’ must mean evidence that could *highly* rationally affect the assessment of the probability of the existence of a fact in issue.¹⁰⁵ Given the seriousness of putting an acquitted individual through a retrial and placing them in jeopardy a second time, it is likely that the courts will interpret ‘highly probative’ as placing upon the prosecution an evidentiary burden very nearly approaching beyond reasonable doubt.

In other words, the probative value of the evidence must be of such a high standard that, when related to the other evidence in the trial, “there is no rational explanation of the prosecution case that is consistent with the innocence of the accused”.¹⁰⁶

The ‘highly probative’ formula was chosen by MCCOC because it is said to be less prejudicial to the accused than the test originally considered, which was “whether the evidence is such as to make it highly probable that the accused is guilty of the offence”.¹⁰⁷

The Councils for Civil Liberties submit that that conclusion is misguided because ultimately the two tests amount to the same thing: retrial of an acquitted person from the position of a presumption of guilt, based on a finding of a higher court that there is enough evidence to find the accused guilty.

¹⁰⁰ e.g. *Criminal Appeals Act 1912* (NSW) s 6. Fresh evidence falls under the ‘whatsoever’ limb: *Gallagher v The Queen* (1986) 160 CLR 392, 407 (Brennan J).

¹⁰¹ *R v Smith* [2000] NSWCCA 388 [49] (Smart AJ) quoting *Ratten v The Queen* (1974) 131 CLR 510, 517 (Barwick CJ). See also *Lawless v The Queen* (1979) 142 CLR 659, 666 & 675.

¹⁰² *Gallagher v The Queen* (1986) 160 CLR 392, [3]-[4] (Brennan J)

¹⁰³ MCCOC, n 2, s 2.8.6.

¹⁰⁴ *Evidence Act 1995* (Cth) s 142 (standard of proof for admissibility)

¹⁰⁵ *Evidence Act 1995* (Cth) s 55 (relevance)

¹⁰⁶ *Pfennig v R* (1995) 182 CLR 461 (McHugh J); *Shepherd v R* (1990) 170 CLR 573 (Dawson J). It has been said that this test is ‘no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt’: *Shepherd v R* (1990) 170 CLR 573 (Dawson J). Courts are familiar with this standard in the context of circumstantial and propensity evidence: see *Evidence Act 1995* (Cth) s 101.

¹⁰⁷ MCCOC, n 2, 75.

7.3.3 ordering a retrial on the grounds of fresh evidence

In order to obtain a retrial in an appeal of conviction, it 'is enough to show, on the fresh evidence, that there is a real possibility that, with it, the jury may have acquitted'.¹⁰⁸ Furthermore, the new evidence must *raise* a reasonable doubt 'in the context of all the evidence given at the original trial'.¹⁰⁹

Even if this is demonstrated and an appellate court finds that there has been a miscarriage of justice, this is still not enough. The miscarriage of justice must be *substantial*, otherwise the conviction cannot be quashed and a retrial cannot be ordered.¹¹⁰

The Council for Civil Liberties are concerned that, again, the standards proposed by MCCOC fall far short of the standard one would expect in the criminal law.

Recalling the burden on the prosecution imposed by the 'golden thread' of our criminal law, the standard required for an appeal of an acquittal should be higher than simply raising a reasonable doubt in the mind of the trier of fact, as is the case for an appeal of conviction. It is certainly not enough that the 'fresh and compelling' evidence makes the prosecution case stronger.

Applying the prosecutorial standard of proof to the test used in appeals of convictions, it must be likely that on appeal of an acquittal the fresh evidence could *eliminate all reasonable doubt in the mind of all the jurors* in the context of all the evidence at trial.

In other words, the 'highly probative' test should be replaced with a test similar to:

the Crown must demonstrate that the evidence, if available at trial, could likely¹¹¹ have eliminated all reasonable doubt.

Sending a previously acquitted person to retrial for anything *less* would be oppressive. However, sending a previously acquitted person to retrial under these conditions violates their presumption of innocence and is itself oppressive. This contradiction reflects the difficulties with tampering with the rule against double jeopardy.

7.3.4 a retrial should not be a remedy for a sloppy investigation

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.¹¹² This is not, however, a universal and inflexible rule.¹¹³ An appellate court will usually treat evidence as fresh if it was not available to the defendant at trial and the

¹⁰⁸ *R v Drummond (No 2)* (1990) 46 A Crim R 408 (Kirby ACJ).

¹⁰⁹ *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). This is because at trial the defence need only raise a reasonable doubt.

¹¹⁰ The so-called 'proviso': e.g. *Criminal Appeal Act 1912* (NSW) s 6(1).

¹¹¹ '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)

¹¹² *Lawless v The Queen* (1979) 142 CLR 659, 666 & 675.

¹¹³ *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.

defence team had exercised 'reasonable diligence' in identifying what evidence was available at the time of the trial.¹¹⁴

The MCCOC proposals for appeal of acquittals mirror these rules for appeal of conviction.¹¹⁵ Arguably, leads that *could* have been followed up by investigators, but were not, could satisfy this criteria.

Given the resources and power of the State, the police and DPP should be held to a much higher standard of diligence than defence counsel.¹¹⁶ Otherwise this standard will encourage sloppy investigation and prosecution.

The Councils for Civil Liberties recommend that the definition of 'fresh' evidence be narrowed to read:

[2.8.6](2) Evidence is *fresh* if it was not, and could not have been, adduced by the Crown in the proceedings in which the person was acquitted.

7.3.5 the evidence in Carroll's case would not satisfy this test

As noted elsewhere in this submission,¹¹⁷ 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.

Consequently the evidence at Carroll's perjury trial would have been neither fresh nor compelling, using the MCCOC definitions.

Given that Carroll's case sparked the calls for reform of the double jeopardy rule, it is of great concern to Councils of Civil Liberties that these 'reforms' will not satisfy the public calls for Carroll to be retried.

7.3.6 DNA Evidence

*DNA can provide absolute proof of innocence but it cannot provide proof of guilt.*¹¹⁸

The use of new forensic techniques to interpret old evidence, especially DNA evidence, is often cited as an example of 'fresh and compelling' evidence.¹¹⁹

Stories of people being proved innocent by DNA testing are not uncommon in the media.¹²⁰ 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

¹¹⁴ *R v Smith* [2000] NSWCCA 388 [49] (Smart AJ) quoting *Ratten v The Queen* (1974) 131 CLR 510, 517 (Barwick CJ).

¹¹⁵ MCCOC, n 2, ss 2.8.6(2)(a) ('it was not adduced in the proceedings in which the person was acquitted') & 2.8.6(2)(b) ('it could not have been adduced in those proceedings with the exercise of reasonable diligence').

¹¹⁶ presumably the courts will do this as a matter of statutory interpretation.

¹¹⁷ see "Carroll's case is not an impetus for reform" above on page 10.

¹¹⁸ United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1075 (Lord Lucas)

¹¹⁹ eg MCCOC, n 2, 109; also, Rowena Johns, n 93, 1, 35.

¹²⁰ eg 'DNA News', *Innocence Project* <<http://www.innocenceproject.org/dnanews/index.php>> at 3 October 2003. See also MCCOC, n 2, 109.

innocence and DNA ‘proving’ guilt. This goes to the heart of understanding why appeals of acquittals based on fresh 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.¹²¹ The only thing standing in their way is the legal rule against double jeopardy. Hence the push for ‘reform’.

It is worth remembering at this point that, despite what is popularly believed, the second trial of Raymond John Carroll had nothing to do with DNA evidence.¹²² Indeed, the Councils for Civil Liberties are not aware of any cases in New South Wales that would see any acquitted person put under suspicion by newly-developed DNA techniques. Even if such cases should arise they will be few in number.

More significantly, with respect to the retrospective operation of this proposed change, such cases will soon cease to exist because the investigations of any new crimes will employ DNA technology from the start. 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.¹²³ 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 circumstantial 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’. A ‘match’ may not uniquely identify an individual.¹²⁴ For example, family members will be genetically similar and DNA profiling, which tests only a subset of information encoded in the DNA,¹²⁵ 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.¹²⁶

DNA evidence is only one piece in the jigsaw puzzle. A ‘match’ “establishes no more than that the accused could be the offender”.¹²⁷ 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

¹²¹ eg Rowena Johns, above n 93, 2.

¹²² see “Carroll’s case did not involve DNA evidence” on page 11 above.

¹²³ 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.

¹²⁴ Greg Gardiner, *DNA Forensic Procedures: potential impacts on Victoria’s Indigenous community* (2002) Parliamentary Library Information Paper, 10.

¹²⁵ Greg Gardiner, above n 124, 10

¹²⁶ see Brown et al, above n 67, 333

¹²⁷ *R v Pantoja* (1996) 88 A Crim R 554, 560 (Hunt CJ at CL & Hidden J)

must examine *all* of the evidence before them before reaching a verdict. At its highest, DNA evidence can place the accused at the scene of the crime.¹²⁸ Furthermore, like all evidence, DNA evidence can be contaminated, planted or otherwise rendered inaccurate.¹²⁹

In a criminal trial the prosecution must prove a criminal charge beyond reasonable doubt. As a consequence, the burden upon the defence is to raise a reasonable doubt in order to obtain 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.

The Council for Civil Liberties are concerned that politicians, the media and the general public have not grasped this very important distinction between the function of circumstantial evidence in existing appeals of conviction and the proposed appeals of acquittal. With an understanding of this distinction, it is easy to see that it is unfair to an acquitted person to submit them to re-trial on the basis of only one piece of circumstantial evidence.

7.3.7 conclusion: it is not possible to hold a fair retrial

Ultimately, the Councils for Civil Liberties submit that it is not possible to appeal an acquittal on the grounds of fresh and compelling evidence without prejudicing the acquitted person's retrial. Because of this the Councils do not support the introduction of appeals of acquittals where there is 'fresh and compelling' evidence.

Any mention before the jury of the fact that the retrial is the result of such a finding by a superior court, despite the 'safeguard' of forbidding the prosecution to mention it,¹³⁰ will result in a mistrial. Furthermore, given that most cases falling under these proposals will be notorious cases and widely publicised in the media,¹³¹ it will be practically impossible to empanel a jury that will not be in a position to infer that the superior court has made such a prejudicial finding, despite any restriction on the reporting of the appeal.¹³²

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

¹²⁸ Barbara Hocking, Hamish McCallum, Alison Smith & Chris Butler, above n 123, 208.

¹²⁹ 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).

¹³⁰ MCCOC, n 2, s 2.8.10(5).

¹³¹ See "restrictions on publication (2.8.12)" on page 32 ff.

¹³² MCCOC, n 2, s 2.8.12.

7.4 tainted acquittals (2.8.7)

Subject to certain modifications,¹³³ the Councils for Civil Liberties can see merit in the introduction of this exception to the principle of double jeopardy.

7.4.1 *the acquitted could be innocent of the tainting but still face re-trial*¹³⁴

If an administration of justice offence has been committed by someone other than the accused, it is important that the accused not be retried unless it can be shown that:

- (a) the accused has benefited from the offence ('but for the commission of the administration of justice offence...'); and,
- (b) the accused *knew* about the commission of the offence at the time.

This second condition is necessary to avoid the unconscionable consequence of the accused being punished for the crime of another of which he or she was unaware. If the accused has not procured the offence or has no knowledge of it, then it is wrong to allow a retrial under such circumstances.

The 'tainted' acquittals provisions proposed by MCCOC 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'.¹³⁵

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.¹³⁶

The Councils for Civil Liberties recommend that only those administration of justice offences of which the acquitted person had personal knowledge should constitute a tainted acquittal.

¹³³ the removal of perjury from the definition of an administration of justice offence: see "perjury should not be included" on page 13. Also the removal of the perversion of the course of justice and/or the removal of conspiracy to so convert from the definition: see "perversion of course of justice should not be included" on page 12, and "conspiracy to pervert course of justice should not be included" on page 12.

¹³⁴ see also "perjury should not be included" on page 13.

¹³⁵ New Zealand Law Commission, *Acquittal Following Perversion of the Course of Justice*; Report 70 (2001) [31].

¹³⁶ Rowena Johns, n 93, 18.

7.4.2 *other areas of concern*

The Councils for Civil Liberties are also concerned that:

- there is no time limit within which the Crown 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 in which the accused 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 MCCOC proposal requires the lower threshold of “more likely 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 the MCCOC proposal 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;¹³⁷ and,
- an application for appeal should not be permitted until all avenues of appeal of the administration of justice offence have been exhausted.¹³⁸

¹³⁷ NZ Law Commission, n 135, viii.

¹³⁸ NZ Law Commission, n 135, [45].

7.4.3 recommendations

The Councils for Civil Liberties do not support the introduction of Crown appeal of tainted acquittals as it is currently drafted. With heavy modifications, there could be merit in the proposal.

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. The Councils for Civil Liberties are 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,¹³⁹ would be required before the Councils would consider supporting the introduction of appeals of tainted acquittals.

If the Standing Committee of Attorneys-General intend to proceed with this form of Crown appeal, then the Councils for Civil Liberties strongly recommend the terms of the proposal 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;
- perversion of the course of justice be removed from the definition of an ‘administration of justice offence’, or at the very least that conspiracy to pervert the course of justice not be included in the definition – 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 likely than not’ which is a civil standard.

¹³⁹ NZ Law Commission, n 135.

7.5 in the interests of justice (2.8.8)

The Councils for Civil Liberties believe that the condition that a retrial be ordered only when it is 'in the interests of justice'¹⁴⁰ 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*.¹⁴¹ This condition is known as 'the Proviso'.¹⁴² The application of the Proviso is an open matter.¹⁴³

Parliament has seen fit to instruct appeal judges to be satisfied that a conviction amounts to a *substantial* miscarriage of justice before the verdict may be quashed. At the very least the same should be expected of an appeal of acquittal. As the MCCOC proposals currently stand, only the compelling evidence need be substantial.¹⁴⁴

If the Standing Committee of Attorneys-General is determined to proceed with appeals of acquittals, then the Councils for Civil Liberties strongly recommend that a new section modelled on the Proviso be drafted for Crown appeals. It should look something like this:

The court on any appeal under this Division 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.

¹⁴⁰ MCCOC, n 2, ss 2.8.5(2) & 2.8.8.

¹⁴¹ e.g. *Criminal Appeal Act 1912* (NSW) s 6

¹⁴² Brown et al, n 67, 156-161, 318-9.

¹⁴³ *Heron v The Queen* [2003] HCA 17, [50] (Kirby J) (discussion of different approaches).

¹⁴⁴ MCCOC, n 2, s 2.8.6(3)(b).

7.6 application for retrial (2.8.9)

According to the MCCOC discussion paper, the application of the DPP for retrial is strengthened as a procedural safeguard by the requirement of DPP approval for the commencement of police investigation.¹⁴⁵ Unfortunately this claim is undermined by the fact that DPP approval for any police investigation into an acquitted person can be made retrospectively.¹⁴⁶ Another problem with this 'safeguard' is that the DPP would now have a conflict by being involved in both the investigation and prosecution of the case, which is discussed in greater detail below.¹⁴⁷

Given that the principle of finality which underpins the rule against double jeopardy is being seriously eroded by these proposals, the Councils for Civil Liberties recommend that a statutory limitation period be placed on DPP for bringing an application for retrial of an acquitted person. The Councils would recommend a period of two years, but certainly no more than five years should be contemplated.

This will ensure that acquittals for very serious offences will not be conditional forever. Instead, there will come a time when a citizen can be certain that his or her life will no longer be intruded upon by the State a second time for the same offence.

¹⁴⁵ MCCOC, n 2, 117.

¹⁴⁶ MCCOC, n 2, s 2.8.11(3)(b). See also, "retrospective consent: 2.8.11(3)(b)" on page 31 below.

¹⁴⁷ see "DPP as authorising agent for reinvestigation" on page 30.

7.7 retrial (2.8.10)

When an application is successfully made to set aside an order for retrial,¹⁴⁸ the Councils for Civil Liberties recommend that an application should also be available for compensation for the acquitted person.

The purpose of such compensation is to redress the damage caused by the intrusion of the State into the life of an already acquitted person. Compensation would also serve to dissuade the State from making an application for retrial unless there is a very strong case indeed.

The safeguard of forbidding the Crown at trial from referring to the fact that the Court of Criminal Appeal has granted an application for retrial¹⁴⁹ may very well be no safeguard at all. This is because of the nature of the kind of cases that will come before the CCA for retrial applications. It is more likely than not that an application would be preceded by a media- or politically-driven public campaign for retrial.¹⁵⁰ This is certainly true in the case of Raymond John Carroll. It will be extremely difficult to find a jury that will not be capable of inferring that the Court of Criminal Appeal has decided that there appears to fresh and compelling evidence against the acquitted person.

Under these circumstances it will not be possible to offer the acquitted person a fair retrial.

If the MCCOC proposals for retrial of acquitted persons are introduced, then the Councils for Civil Liberties recommend that the acquitted person be given a statutory guarantee of legal representation at retrial.

The Councils for Civil Liberties also recommend that if an acquitted person is again acquitted at retrial, then that person should be provided with considerable statutory compensation.

Again, this serves to ensure that the DPP will only pursue the strongest of cases and that the acquitted person is compensated for the damage caused by the intrusion of the State into their life for a second time for the same offence.

¹⁴⁸ MCCOC, n 2, s 2.8.10(3).

¹⁴⁹ MCCOC, n 2, s 2.8.10(5).

¹⁵⁰ see "restrictions on publication (2.8.12)" on page 32 ff.

7.8 authorisation of police investigations (2.8.11)

The Councils for Civil Liberties are deeply concerned that police will be able to harass an acquitted person under the guise of a re-investigation. In essence, this proposal 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.

7.8.1 there should be a limit to the number of re-investigations

As currently drafted, the MCCOC proposals do not place a limit on the number of reinvestigations that can be undertaken. This means that the acquitted person could be harassed repeatedly by police. This problem is compounded by the fact that authorisation of such investigations can be given retrospectively.¹⁵¹ Furthermore, no time limits have been placed on reinvestigations, leaving those acquitted of very serious offences open to reinvestigation until the day they die.

This is outrageously oppressive if one considers the possibility that many acquitted people will be factually innocent. It is even more worrying when one considers the fact that all decisions concerning the criminal investigation and prosecution of individuals are exempt from judicial review.¹⁵² To curb this avenue for oppression, limits must be placed on re-investigation.

The Councils for Civil Liberties recommend that the number of authorised reinvestigations of acquitted persons be limited to one. The Councils further recommend that a statutory time limit of two years be placed on such reinvestigations.

At the very least, the time limit should not exceed five years. Though it is usually the case in the criminal law that there is no statutory limitation period, it should be remembered that these proposals contravene the principle of double jeopardy and could be used to oppress individuals who have already faced one trial and been acquitted.

Every acquitted person has a right to get on with their life and that would simply not be possible if the threat of police reinvestigation and harassment is not curtailed by some kind of numerical and temporal limitation.

7.8.2 DPP as authorising agent for reinvestigation

There are several problems with appointing the DPP to authorise reinvestigations of acquitted persons.

First, there is the breaching of the important separation of the investigatory and prosecutorial arms of the criminal justice system.¹⁵³ The Wood Royal Commission into

¹⁵¹ see "retrospective consent" on page 31.

¹⁵² *Administrative Decisions (Judicial Review) Act 1977* (Cth) Sch 2 (e): exempting 'decisions relating to the administration of criminal justice' from section 13 (the right to reasons for an administrative decision).

¹⁵³ see Brown et al, n 67, 196-8.

the New South Wales Police Force recommended that these two arms be separated to ensure the “principles of independence and impartiality”.¹⁵⁴

By bringing these two roles together in the DPP, the DPP is put in an untenable position where he or she will be open to accusations of perceived or actual bias. This is because the DPP will have been involved in the first trial and could be accused of being too keen to ‘correct’ the acquittal of the first trial. By authorising a re-investigation, the DPP will also be open to the accusation that he or she has a vested interest in proceeding to prosecution at all costs in order to vindicate that authorisation.

Second, the DPP is not an appropriate authority to authorise police re-investigations because courts are traditionally loathe to review decisions of the DPP.¹⁵⁵ In fact, all decisions concerning the criminal investigation and prosecution of individuals are exempt from judicial review.¹⁵⁶ While this is necessary for the effective administration of criminal justice, it muddies the waters when the DPP is open to accusations of authorising a ‘second bite of the cherry’.

Finally, if the DPP does not have tenure, then this power in the hands of the DPP leaves him or her in the awkward position of being open to accusations of authorising reinvestigations to ensure the renewal of their contract or to appease undue political pressure.

The suggestion has been made that a judicial officer is a more appropriate independent authority to authorise a police reinvestigation of an acquitted person. A judicial officer, who was not involved in the original acquittal, will have the required training to apply the proposed statutory test in section 2.8.11(3).

However, there may be constitutional problems with this arrangement, given that the authorising of a reinvestigation is an executive act and may be incompatible with Commonwealth judicial power under Chapter III of the Constitution.¹⁵⁷ On the other hand, a judge authorising a reinvestigation may be operating as *persona designata*, providing the legislation requires the judge’s consent.¹⁵⁸

This is a suggestion worthy of the MCCOC’s further consideration.

7.8.3 retrospective consent: 2.8.11(3)(b)

Ensuring that reinvestigation of acquitted persons is performed by an authority independent of police is not an effective safeguard against police harassment of citizens.

On an initial reading of the MCCOC proposal, the provision seems, reasonably, to require the written authority of the DPP before police can re-investigate an acquitted person.

¹⁵⁴ Royal Commission into the New South Wales Police Service, *Final Report: Volume 2 – Reform* (1997) [3.331].

¹⁵⁵ see e.g. *DPP (SA) v B* [1998] HCA 45, [65] (Kirby J). See also: Paul Roberts, ‘Justice for all? Two bad arguments (and several good suggestions) for resisting double jeopardy reform’ (2002) 6(4) *International Journal of Evidence and Proof* 197, 202, citing *R v DPP ex parte Kebilene* [2002] for the same position in the UK.

¹⁵⁶ *Administrative Decisions (Judicial Review) Act 1977* (Cth) Sch 2 (e): exempting ‘decisions relating to the administration of criminal justice’ from section 13 (the right to reasons for an administrative decision).

¹⁵⁷ *Wilson v Minister for ATSIA* (1996) 189 CLR 1.

¹⁵⁸ *Grollo v Palmer* (1995) 184 CLR 348, 364-5 (Brennan CJ, Deane, Dawson & Toohey JJ).

On closer inspection, however, it becomes clear that the proposals authorise 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. This is because that consent can be granted *retrospectively*.¹⁵⁹

7.8.4 must not allow same police to investigate: 2.8.11(5)

If reinvestigations are to be authorised, then they should only be carried out by police officers who were not involved in any prior investigations of the offence. This is because a police officer who is certain that the acquitted person is guilty and who is not willing or able to accept the acquittal will not be seen to approach a reinvestigation with the impartiality required at the investigative stage. This could lead to a perception that the individual's police officer or officers are harassing the acquitted person. This is what happened in the case of Raymond John Carroll.

The Councils for Civil Liberties recommend that all police officers who have previously worked on the case to be re-investigated should be subject to mandatory exclusion from any re-investigation of the offence.

7.9 restrictions on publication (2.8.12)

*[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.*¹⁶⁰

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

The Councils for Civil Liberties do 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 the Councils for Civil Liberties do not believe that any publication prohibition, ordered effectively *after* the horse has bolted, could fix this problem.

The MCCOC proposals provide 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',¹⁶¹ 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.¹⁶²

7.9.1 a jury direction would be inadequate

The High Court has recognised that modern media creates serious problems for managing the reporting of criminal proceedings.¹⁶³ Yet, the current view is that any

¹⁵⁹ MCCOC, n 2, s 2.8.11(3)(b): "(whether before or after the start of the investigation)".

¹⁶⁰ United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1060 (Lord Neill of Bladen).

¹⁶¹ MCCOC, n 2, s 2.8.10(5). See also "retrial (2.8.10)" on page 29 above.

¹⁶² see "power of the press" on page 33.

¹⁶³ *Murphy v The Queen* (1989) 167 CLR 94.

potential bias can be overcome by judicial directions to the jury to disregard any reports they may have heard.¹⁶⁴

But 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 aggravating the problem that they were intended to solve.

7.9.2 effect of the passage of time

One of the proposed factors for the 'interests of justice' test is the length of time that has elapsed between trials.¹⁶⁵ 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.¹⁶⁶ However, it is well known that the passage of time can severely disadvantage defendants because the availability of witnesses and alibis can significantly decrease.¹⁶⁷

This is particularly relevant to the present proposals because they are intended to make retrials possible where DNA or similar types of circumstantial 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.

7.9.3 power of the press

In early 2003, 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.¹⁶⁸

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.¹⁶⁹

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.

¹⁶⁴ *The Queen v Glennon* (1992) 173 CLR 592

¹⁶⁵ MCCOC, n 2, s 2.8.8(2).

¹⁶⁶ *The Queen v Glennon* (1992) 173 CLR 592

¹⁶⁷ *Longman v R* (1989) 168 CLR 79.

¹⁶⁸ 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. See also, "Carroll's case has been manipulated by the media" on page 11 above.

¹⁶⁹ United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, 1062 (Baroness Kennedy of the Shaws).

The most notorious instance of this concerned radio and television personality Derryn Hinch, who was jailed for his highly emotional attacks on a defendant.¹⁷⁰ 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.

7.9.4 conclusion

The Councils for Civil Liberties do 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 – the horse will have already bolted.

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.

Furthermore, a jury member at a retrial could easily infer that the Court of Criminal Appeal had quashed the acquittal, otherwise there would be no retrial underway. A jury member could also assume that if the learned judges of the Court of Criminal Appeal think the evidence is compelling, then it must be true.

These safeguards are unlikely to have any practical impact on the retrial of an accused and it is more likely that the Court of Criminal Appeal will conclude that a fair trial is unlikely.¹⁷¹

7.10 other appeal or review (2.8.13)

In New South Wales these two forms of appeal are already in operation.¹⁷² Consequently, the Councils have nothing to add to the debate on appeals of interlocutory judgments at this stage.

7.11 directed acquittals & judge-only acquittals (2.8.14)

7.11.1 directed acquittals

The Discussion Paper moots the possibility of introducing a Crown appeal as of right to directed and non-jury acquittals on a question of law alone.¹⁷³ This appeal is not limited to 'very serious offences', but will provide the Crown with an appeal as of right to all acquittals of indictable offences. This proposal will not be retrospective.¹⁷⁴

¹⁷⁰ *Hinch and Macquarie Broadcasting Holdings Ltd v Attorney-General (Vic)* (1987) 164 CLR 15.

¹⁷¹ MCCOC, n 2, s 2.8.8(2).

¹⁷² s 2.8.13(2)(a) = *Criminal Appeal Act 1912* (NSW) s 5F(2); s 2.8.13(2)(b) = *Criminal Appeal Act 1912* (NSW) s 5F(3A) inserted by Crimes Legislation Further Amendment Bill 2003, commencement date 14/2/2004.

¹⁷³ MCCOC, n 2, s 2.8.14. These are similar to NSW proposals: Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW) s 9I.

¹⁷⁴ MCCOC, n 2, s 2.8.14(6).

In 1995 the NSW Law Reform Commission, after an exhaustive review, concluded that there was no need for an appeal of directed acquittals.¹⁷⁵ The Councils for Civil Liberties do not believe that the MCCOC has made a better case for *introducing* such appeals.

Endorsing the conclusion of the NSW Law Reform Commission, the Councils for Civil Liberties do not recommend the introduction of appeals of directed acquittals or judge-only acquittals.

7.11.2 appeal as of right: 2.8.14(2)

If the Standing Committee of Attorneys-General proceeds to introduce these Crown appeals of acquittals, then in order to provide a greater safeguard the Councils for Civil Liberties recommend that they be made *by leave* to the Court of Criminal Appeal, not as of right.

A convicted person has an appeal as of right on a question of law¹⁷⁶ 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'.¹⁷⁷ Given that the punishment imposed for most very serious offences involve the deprivation of liberty of the acquitted person, it is only right that the state not be granted any appeal as of right when such an appeal seeks to controvert the actual verdict of a duly constituted court.

7.11.3 high risk of political interference

It is undesirable that the Attorney-General be allowed to appeal acquittals.¹⁷⁸ 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 oppressive to require innocent defendants to face additional stress and harassment.

Furthermore, should the Court of Criminal Appeal reject the Attorney-General's appeals of acquittal, the MCCOC proposals will 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. This could undermine the public confidence in the Supreme Court.

The Councils for Civil Liberties reject 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.

¹⁷⁵ NSW Law Reform Commission, *Directed Verdicts of Acquittal* (1996) Report 77, Ch 3.

¹⁷⁶ eg *Criminal Appeal Act 1912* (NSW) s 5(1)(a).

¹⁷⁷ *Mraz v The Queen* (1955) 93 CLR 493, 514 (Fullagar J).

¹⁷⁸ MCCOC, n 2, s 2.8.14(2).

Finally, the Attorney-General currently has a right to appeal an acquittal in the context of stated cases.¹⁷⁹ This is very different from the MCCOC proposals 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 and directed acquittals gives the Executive an interest in the outcome of individual cases, which amounts to an desirable interference in the judicial process and the personal liberty of citizens.

7.11.4 *inherent unfairness*

The acquitted person will be worse off if the Court of Criminal Appeal upholds an appeal and orders a re-trial.¹⁸⁰ 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 court to convict,¹⁸¹ 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.¹⁸²

7.11.5 *significant changes to the dynamic of judge-only trials*

The Councils for Civil Liberties are 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.¹⁸³ This is usually done when the crime is of an horrific nature or a technical legal defence is to be argued.¹⁸⁴

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.

The Councils for Civil Liberties are concerned that this proposal, by increasing the options available to the Crown, will significantly limit the options available to defence counsel. This amounts to increasing the power of the well-resourced state over the individual and is an erosion of personal liberty.

7.11.6 *appeal should be time-limited*

Given the significant erosion of personal liberty occasioned by such appeals, it is highly desirable that a statutory time limit be placed on the bringing of these appeals to the Court of Criminal Appeal. Appeals of convictions have statutory time limits, for example in

¹⁷⁹ e.g. *Criminal Appeal Act 1912* (NSW) s 5A (point of law stated by judge).

¹⁸⁰ MCCOC, n 2, s 2.8.14(3).

¹⁸¹ MCCOC, n 2, s 2.8.14(5).

¹⁸² eg Jeannie Mackie, above n 5, [41]. See also "the question of probative value" on page 19 above.

¹⁸³ eg *Criminal Procedure Act 1986* (NSW) s 132.

¹⁸⁴ Brown et al., n 67, 252.

New South Wales an appeal of conviction must be brought within 28 days of the verdict.¹⁸⁵ The CCA has a discretion to accept out-of-time applications.¹⁸⁶

The Councils for Civil Liberties recommend that an application to appeal a directed acquittal or judge-only acquittal be time-limited to 28 days.

7.11.7 DPP has too much (non-reviewable) discretion

There is an asymmetry between judicial errors in direction (or non-direction) resulting in convictions, on the one hand, and acquittals, on the other.

When a conviction is quashed and a retrial ordered, the DPP still has a discretion not to proceed with the retrial.¹⁸⁷ In an appeal of acquittal, however, the DPP *brings* the application for retrial and the acquitted person has no say in the decision to proceed with prosecution.

This inequity, which flows from the very nature of the prosecutorial role of the state, highlights (once again) the oppressive nature of appeals of acquittals.

¹⁸⁵ *Criminal Appeal Act 1912* (NSW) s 10(1).

¹⁸⁶ *Criminal Appeal Act 1912* (NSW) s 10(3).

¹⁸⁷ see *Gipp v The Queen* [1998] HCA 21, [146] (Kirby J).