Double Jeopardy

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This note explains the rule against double jeopardy (which generally bars any re-trial of acquitted defendants) and the background to the new exception to it which now allows re-trial for some serious offences. The new provisions were introduced by Part 10 of the *Criminal Justice Act 2003*, which came into force in April 2005.

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A. The Double Jeopardy Rule

It is a general principle of English law that a person may not be tried twice for the same offence, whether he was acquitted on the first occasion (autrefois acquit) or convicted (autrefois convict). The rule has been firmly established in the common law for many centuries. In the eighteenth century it was described by Blackstone as follows:

> The plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life or limb more than once for the same offence … [T]he plea of autrefois convict, or a former conviction for the same identical crime … is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime[1].

However, it is an inevitable consequence of a strict application of this rule, that there will be occasions when a person who is guilty of an offence will gain immunity from conviction and punishment.

Two recent developments heightened concerns about the potential conflict between the double jeopardy rule and the fundamental objective of the criminal law that the guilty should be convicted. One was that scientific advances have increased the chances of there being compelling evidence of a person's guilt long after the offence was committed. The other was the inquiry into the matters arising from the death of Stephen Lawrence.

B. The Stephen Lawrence Enquiry

In July 1997 the Home Secretary had asked Sir William Macpherson of Cluny to conduct an investigation. The Report was published in February 1999, and many of its recommendations have been implemented. One feature of the Stephen Lawrence case was that although, in 1993, the Crown Prosecution Service had decided to discontinue proceedings against three suspects, a private prosecution was brought against them by Stephen Lawrence's parents in 1995. It failed when the judge ruled that the identification evidence of the prosecution's main witness was too unreliable to be admitted. He said that adding one injustice to another did not cure the first injustice done to the Lawrence family. That decision ended the case, and the three men were then formally acquitted upon the Judge's direction.

The effect of that result was highlighted in the *Macpherson Report*:

> Both we and others during our Part 2 hearings have considered, in the context of this case, whether the law which absolutely protects those who have been acquitted from any further prosecution for the same or a closely allied offence should prevail. If, even at this late stage, fresh and viable evidence should emerge against any of the three suspects who were acquitted, they could not be tried again however strong the

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[1] Commentaries, pp 335-6.

> evidence might be. We simply indicate that perhaps in modern conditions such absolute protection may sometimes lead to injustice. Full and appropriate safeguards would be essential. Fresh trials after acquittal would be exceptional. But we indicate that at least the issue deserves debate and reconsideration perhaps by the Law Commission, or by Parliament.[2]
> […]
> The truth is that viable evidence was in the end not available at the trial and the final outcome was that those prosecuted obtained, as a result of their acquittal, immunity from any future prosecution.[3]

> The result of the unsuccessful prosecution was that the three men who were acquitted can never be tried again, even if final appeals for fresh witnesses were to bear fruit, or if the three men were to admit their guilt. Any change in the law in this respect would be solely a matter for Parliament. A suggestion made to us is that the Court of Appeal might be given jurisdiction to consider whether a second prosecution could be brought, particularly if fresh evidence supported such a course. The suggestion deserves examination.[4]

Accordingly, one of their most controversial recommendations was:

> That consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented.[5]

C. The Law Commission Consultation Paper

In July 1999, the Home Secretary made a reference to the Law Commission:

> To consider the law of England and Wales relating to double jeopardy (after acquittal), taking into account: recommendation 38 of the Macpherson Report on the Stephen Lawrence Inquiry that consideration should be given to permit prosecution after acquittal where fresh and viable evidence is presented; the powers of the prosecution to re-instate criminal proceedings; and also the United Kingdom's international obligations; and to make recommendations.

In its Consultation Paper,[6] the Law Commission summarised the present law in England and Wales, and in some other jurisdictions, and examined the justifications for the rule against double jeopardy. They concluded that there was justification not only for retaining the autrefois rule but for extending it beyond its present scope. They discussed possible exceptions in two cases where this would be permitted by Article 4 of Protocol 7 to the ECHR, namely where new evidence is discovered, and where there was a fundamental defect in the first trial. They provisionally proposed that -

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2 Cm 4262 – I, para. 7.46
3 ibid para. 39.48
4 ibid para .43.47
5 ibid, recommendation 38
6 *Double Jeopardy* : Law Commission Consultation Paper no 156

> it should be possible for the High Court to quash an acquittal on the grounds of new evidence– but only where
> (a) if the defendant were convicted of the offence now alleged, the sentence would probably be of a specified minimum severity;
> (b) the new evidence makes the prosecution's case substantially stronger than it was at the first trial;
> (c) there is a very high probability of the defendant being convicted at a retrial;
> (d) the defendant has not previously been acquitted of the offence at a trial held by virtue of this exception to the double jeopardy rule;
> (e) the new evidence could not, with due diligence, have been adduced at the first trial; and
> (f) the court is satisfied that, in all the circumstances of the case, it is in the interests of justice to quash the acquittal.

The Law Commission admitted that they did not feel especially well qualified to pronounce on what the specified minimum sentence should be. They invited views on what the specified minimum sentence should be, giving their provisional preference as three years imprisonment.

D. The Home Affairs Committee

The Home Affairs Committee then looked at whether such a change could be justified and what effect change might have:

> The most obvious example of how such fresh and viable evidence might be used is the results of scientific advances in DNA testing. For instance, blood samples taken at a murder scene in the early 1980s might not have produced sufficient identification evidence at that time. The prime suspect may have been prosecuted on the basis of other evidence. If the prosecution failed to satisfy the jury that the defendant was guilty beyond reasonable doubt, the defendant would have been acquitted and left the court a free man. A decade later, advances in DNA testing could enable the original blood samples to be analysed and show with near certainty that the acquitted person had been at the crime scene. There have also been cases where the prime suspect was not prosecuted at the time through lack of evidence, but was convicted years later after scientific advances made the original evidence more compelling. In a recent case a man twice tried and cleared in 1991 of killing a pizza delivery woman in 1989 was eventually jailed for perjury after he admitted that he had lied in court when he denied murder. There have also been at least seven press reports in the last two years of other people who, having once been acquitted of a serious offence, have subsequently confessed their guilt.

They also provided a concise summary of the arguments for and against relaxation of the rule:

> The arguments in favour of relaxing the double jeopardy rule are:

- The guilty should be convicted—"the whole point of a criminal justice system is to bring criminals to justice" .

- New evidence should be deployed to secure such a conviction—"where it is manifest to the public and to the victim, that there is strong evidence now, that was not available once before, that someone is, in fact, guilty who has been acquitted, ...[it] is an affront to the notion of truth and justice".

- Scientific advances make it possible to bring forward evidence not available at the original trial—"modern techniques of DNA analysis are allowing us to take a single cell and produce evidence which is compelling to a far greater degree than it ever used to be".

- There are a number of actual cases in which the real offender could be brought to justice—"there are at least 35 cases ... where further enquiry has largely terminated, someone having been acquitted, on the basis that the likelihood is that if it were possible for there to be a retrial that is the route the enquiry would take".

- The law must be concerned to prevent miscarriages of justice not just to the defendant but also to the victim who may be at risk if an offender is wrongly acquitted - the victim has as much need for finality as the accused

- In the case of murder, new evidence might allow the family of the victim the opportunity to see brought to justice those who may be convicted of the crime.

- "the law is brought into disrepute by the knowledge that someone who is manifestly guilty can evade conviction".

- "the law has to be organic, evolving over time to accommodate the way society moves forward in its values and in its capabilities. The law should be the servant of society not the master. As such it has to be responsive and adaptable". [7]

The arguments against changing the rule are:

- The prosecution authorities should assemble their best case at the first trial—"there is a burden on the state, who have hugely more resources than any individual, when they start the investigation to conduct it with due diligence and not to put a person on trial until such time as they have gathered in all the evidence that they competently and properly can".

- People acquitted of crimes should not live in distress at the prospect of a further trial—"it would cause needless anxiety and insecurity to thousands of acquitted defendants".

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[7] para 18

- It would be very hard for a defendant to get a fair second trial—"there would be a real risk of the jury at the retrial assuming that the new evidence must be reliable and that the defendant must be guilty".

- A second opportunity to prosecute would encourage the police to be less thorough in their initial investigation.

- There could be fears that the police, unhappy at the defendant being found not guilty, would unfairly pursue the person in order to try to bring about a second trial.

They did not think that a relaxation of the double jeopardy rule should apply to all cases, nor that it should it be left entirely to judicial discretion to decide in individual cases. They believed that a significant departure from the double jeopardy rule should not be too broad. but should be confined to the most serious offences. Their recommendation was that –

> any relaxation of the double jeopardy rule should apply only to offences for which a life sentence would be available to the court on conviction and where the Director of Public Prosecutions determines that it is in the public interest to apply to the High Court for the acquittal to be quashed.

E. The Law Commission Report

The Law Commission published its final report in March 2001.[8] The issue had attracted much robust discussion in the responses to the consultation paper, with 51 responses supporting the proposal and 32 opposing it. The Law Commission's approach had been to see whether they could identify specific offences potentially attracting a life sentence which they believed inherently serious enough to justify the application of a new evidence exception. They came to the conclusion that the only such offence was murder –

> The main reason for this conclusion is the widespread perception, which we share, that murder is not just more serious than other offences but qualitatively different. The effect of this difference is that murder satisfies the test we have proposed for the scope of any new exception, namely whether a manifestly illegitimate acquittal sufficiently damages the reputation of the criminal justice system so as to justify overriding the rule against double jeopardy…[9]

and recommended:

> That the rule against double jeopardy should be subject to an exception in certain cases where new evidence is discovered after an acquittal, but only where the offence of which the defendant was acquitted was murder, genocide consisting in the killing

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8 Law Com no 267

9 para 4.30

> of any person, or (if and when the recommendations in our report on involuntary manslaughter are implemented) reckless killing.

They also recommended that the new exception should apply equally to acquittals which had already taken place before the exemption came into force.

The Law Commission had departed from its normal practice, of publishing a draft Bill with its final report, because the Home Office had indicated that it would be very helpful to be able to take into account the Law Commission's recommendations in formulating its response to the conclusions of Lord Justice Auld's review of the criminal courts.[10]

F. The Auld Report

On 14 December 1999 the Lord Chancellor, the Home Secretary and the Attorney-General appointed Lord Justice Auld to conduct a review into the working of the Criminal Courts.

In Chapter 12 of his Report, published in October 2001, [11] Lord Justice Auld supported the general thrust of the Law Commission's proposals for statutory reform and codification of the law of double jeopardy, but said that he believed that the Law Commission's approach had led it to be unduly cautious in ultimately limiting its main proposal to cases of murder. He asked:

> What principled distinction, for individual justice or having regard to the integrity of the system as a whole, is there between murder and other serious offences capable of attracting sentences that may in practice be as severe as the mandatory life sentence? Why should an alleged violent rapist or robber, who leaves his victim near dead, or a large scale importer of hard drugs, dealing in death, against whom new compelling evidence of guilt emerges, not be answerable to the law in the same way as an alleged murderer?
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> I can see why the likely three years custody sentence criterion could, in its uncertainty, have been difficult to apply and that, in any event, it was almost certainly too low. As the Home Affairs Committee observed, in theory a relaxation of the double jeopardy rule could apply to all cases, but in practice the public interest in securing conviction of the guilty depends on the seriousness of the offence. My inclination is the same as that of the Committee and the majority of the respondents to the Law Commission's first consultation paper, namely to fix on some objective and clear criterion of seriousness for this purpose, for example, by reference to the type of offence or the maximum sentence available for it. A suitable level of seriousness of offence and clarity of application might be to include in the exception all offences punishable with life imprisonment, as suggested by the Home Affairs Committee, and/or to sentences up to a specified maximum. Professor Ian Dennis has pointed out that the list would then include, in addition to murder, such offences as rape, arson,

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[10] the drafting of which would have delayed publication beyond the then expected completion of the Auld review

[11] *Review of the Criminal Courts of England and Wales*, October 2001

> robbery and wounding with intent to do grievous bodily harm, just the sort of offences "from which victims may justifiably demand the greatest degree of protection, and which figure most often in discussion about the merits of a new exception". It would be for Parliament to decide and specify the offences to which it would apply. I sympathise with the Law Commission's unease about identifying the line between those offences that do and those that do not qualify, but such an exercise is commonplace in the criminal law and is capable of a broadly principled approach.
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> For the reasons I have given, I regret to say that I do not understand the Law Commission's reliance on the public interest test, as it has defined it, for confining to murder its proposed exception to the autrefois acquit rule. Nor do I see any logic in distinguishing, for this purpose, murder from all other offences, simply because of a "widespread perception" that it is "not just more serious than other offences but qualitatively different". There may be all sorts or reasons for giving - and legal contexts in which murder should be given special treatment. But that is not a reason for excluding other serious offences from a procedure capable of removing grave injustice in their cases too[12].

His recommendation was that:

> the exceptions should not be limited to murder and allied offences, but should extend to other grave offences punishable with life and/or long terms of imprisonment as Parliament might specify; and there should be no reopening of an investigation of a case following an acquittal without the Director of Public Prosecution's prior, personal consent and recommendation as to which police force should conduct it.

G. The Government's Commitment

In answer to an oral question by Dr. Stephen Ladyman, the Minister for Criminal Justice, Sentencing and Law Reform, said:

> **Keith Bradley:** The Government's manifesto includes a commitment to reform the double jeopardy rule in cases involving murder, and the Government will do so when parliamentary time allows.
>
> In the meantime, we will be giving careful consideration to Sir Robin Auld's recent recommendation that the reform should apply to a wider range of offences.[13]

He declined an opportunity to give an undertaking that any change would be limited to murder cases:

> **Mr. Bradley**: As I said, we are carefully considering the views of Sir Robin Auld, and those of the Law Commission, on whether double jeopardy reform should be

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[12] Chapter 12 para 61-62

[13] HC Deb 22 Oct 2001 : Col 14

extended. We are consulting on those proposals at the moment and we will make our views known in due course[14].

In the month before publication of the White Paper, the *Daily Telegraph* urged caution:

> Whenever this Government finds itself under pressure over crime, its instinctive reaction is to propose the abolition or curtailment of one or another ancient civil liberty. On Tuesday, the Home Secretary was forced to back down over his plans to extend official powers to snoop on e-mail and telephone records. But, on the very same day, the Prime Minister reaffirmed his determination to abolish, in serious cases, the ancient rule against double jeopardy, which prevents a defendant, once acquitted, being tried again on the same charge.
> […]
> The potential effect on police behaviour of abolishing the double jeopardy rule also has to be considered. There is an obvious danger that they might abuse the change to harass a suspect they think has been wrongly acquitted. There is also a risk that the authorities might reckon that having a watertight case first time round is no longer vitally important, because they can always have a second go.
>
> These are serious problems, and it is hard to see how they can be overcome. It has been mooted that, before a second trial, the Appeal Court would first have to certify that new evidence had emerged that was likely to lead to a conviction. If this became known, however, it could fatally undermine the fairness of the new trial before it had even begun. It has also been suggested that the Director of Public Prosecutions would have to sanction any new inquiry, and that it would be carried out by a different police force. But even this would not be entirely reassuring, given that the original force would presumably still have to gather at least some evidence, to justify a new investigation.
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> Finality in justice is important, for defendants as well as victims. Of course no one wants to see people getting away with murder, but to abandon an ancient protection largely on the basis of one notorious crime surely runs the risk of allowing a hard case to make bad law.[15]

H. Justice for All: White Paper

In confirming acceptance of the Auld recommendation, the White Paper states:

> we have decided that the change should extend to a number of other very serious offences such as rape, manslaughter and armed robbery. We do not expect these procedures to be used frequently, but their existence will benefit justice.
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> 4.65 Our proposals will work as follows:

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[14] The consultation closed on 31st January 2002

[15] "Dangers of double jeopardy", June 20, 2002, *The Daily Telegraph*

> • Should fresh evidence emerge that could not reasonably have been available for the first trial and that strongly suggests that a previously acquitted defendant was in fact guilty, the Director of Public Prosecutions (DPP) will need to give his personal consent for the defendant to be re-investigated. He may also indicate that another police force should conduct the re-investigation. This will ensure that the rights of acquitted defendants are properly protected.
> • Before submitting an application to the Court of Appeal to quash an acquittal, the DPP will need to be satisfied that there is new and compelling evidence and that an application is in the public interest and a re-trial fully justified.
> • The Court of Appeal will have the power to quash the acquittal where:
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> – there is compelling new evidence of guilt; and
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> – the Court is satisfied that it is right in all the circumstances of the case for there to be a re-trial.
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> • There will be scope for only one re-trial under these procedures.
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> 4.66 The power will be retrospective. That is, it will apply to acquittals which take place before the law is changed, as well as those that happen after.

Although Sir William McPherson is reported to have said that the youths acquitted of the Stephen Lawrence murder would not stand trial again if the double jeopardy rule were abolished, and that there was no new evidence that could be used to prosecute them,[16] the Commissioner of the Metropolitan Police, Sir John Stevens, told *the Independent* that he would press for fresh charges:

> Sir John said: We will be reviewing cases. There would be Damilola and there would obviously be Lawrence, and we would also be looking at other cases. It will be our public duty to do that. The public expects us to do that within the new legislation.[17]

However, in May 2004, the Crown Prosecution Service advised the Metropolitan Police that there was insufficient evidence to prosecute anyone for the murder of Stephen Lawrence.[18]

I. Reactions

The proposed change to the double jeopardy rule attracted criticism. The human rights organisation, Liberty, immediately commented –

> Removing the protection of double jeopardy may well help convict a handful more serious criminals; unfortunately, it will also lead to the repeated prosecution of many more innocent people. For innocent people, even once acquitted, their ordeal won't be over. And police and prosecutors, knowing they can have a 'second bash', won't have to tackle real problems of incompetent investigation in the first place.

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[16] "Double jeopardy no threat to Lawrence suspects", 1 Aug 2002, *The Guardian*

[17] Met Chief: "I will use new law in Lawrence case", 2 Sept 2002, *The Independent*

[18] CPS advise on Stephen Lawrence re-investigation, 5 May 2004, CPS press release 12/04

In its full response to the White Paper, Liberty expressed the views that the handful of cases used to justify the change more often made a compelling case for better criminal investigation and prosecution, that it was unlikely that someone prosecuted again would receive a fair trial, and that any retrial of the Stephen Lawrence suspects would be stopped by the judge as an abuse of process. Liberty made the additional point, against making any change retrospective, that -

> If there were any removal of the bar and there were retrospective re-trials the effect would be even more prejudicial to a fair trial…What is being said is 'We are so certain that you are guilty that the law has been changed to bring you to justice'. Quite simply no one can have a fair trial in these circumstances, as every jury will be aware of the circumstances which lead to the retrial.[19]

Writing in the *Daily Telegraph*, Peter Lilley MP said –

> The double jeopardy rule persisted for eight centuries for four very good reasons. It protects the individual from harassment by the state; it forces the prosecution to get all its ducks in a row before taking a case to court; and it reassures all innocent people, once acquitted, that they will not face a second trial. Finally, any second trial would inevitably be prejudiced if a judge first ruled that the new facts were "compelling evidence" of guilt.[20]

The *Observer* was also highly critical:

> This Government's attitude to rights is further demonstrated in the proposal to abolish the 'double jeopardy' rule. This is a most cynical exploitation of the case of Stephen Lawrence. Of course it was humiliating and frustrating for the Lawrence family, after so many years of struggle to highlight the injustice they had suffered, to see the alleged killers of their child defiantly flaunting the fact that they were now outside the law's reach. Yet a rule which has served us well over so many centuries should not be jettisoned because of one experience - however dreadful. The potential consequences are even graver. The assumption at a re-trial, brought about because of the emergence of 'new and compelling' evidence, would be that the defendant(s) was necessarily guilty. How would such a natural assumption square with the idea of innocence until proven guilty? How would the publicity of a previous trial be dispelled? It is suggested that such a power would only be exercised in a small number of cases, but it is precisely in the high-profile cases where an acquittal results that the public clamour for a re-trial would be greatest. How would the jury at the re-trial dismiss from their minds the publicity surrounding the first trial?[21]

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[19] "Liberty's response to the Home Office White Paper 'Justice for All'", October 2002,

[20] "Blunkett's notion of justice: guilty until proved innocent", 17 July 2002, *Daily Telegraph*

[21] "Crime And Punishment: The Observer Debate: Counsel for the defence: Continuing our debate on the reform of the criminal justice system, Courtenay Griffiths, QC, who represented one of those acquitted of killing Damilola Taylor, warns of further erosion of the rights of the accused", July 21, 2002, *The Observer*

In a joint response, the Bar Council and Criminal Bar Association also opposed the change, and any retrospection. They said:

> 6. We oppose the abolition of the rule against double jeopardy:
> a. It is a rule of constitutional importance recognised throughout the common law world and applied in virtually all developed legal systems;
> b. There is a real risk of harassment from the State and press where both believe that the acquitted defendant should be retried;
> c. There is a real risk that disappointed investigators, particularly in high profile cases, may well wish immediately to recommence investigations after an acquittal, particularly if there is pressure from the media, victims or politicians. Those with previous convictions known to the investigating officer would also be a target. Officers with a personal animus against an accused may wish to pursue him despite an acquittal;
> d. There is a very serious risk that any new trial will be unfair. The Law Commission in its Consultation Paper acknowledged this at 5.49 and 5.50. With the Government's proposals, any tribunal trying the defendant would know that the case had already been to the Court of Appeal and that the Court of Appeal was satisfied that there was "new and compelling evidence". This is likely to be used in high profile cases and will run the risk that a fair, subsequent trial will be impossible;
> e. In any event the Prosecution will have precise knowledge of the defendant's case and be able to review and strengthen its own case in the light of that knowledge;
> f. Whilst the Government proposes that fresh evidence should only be taken account of where it "could not reasonably have been available for the first trial", it is our view that such situations are likely to be commonplace because of inadequate investigation in the first place. It is likely that prosecutors will be able to satisfy the Court of Appeal that there was "no reason" to suspect that that particular witness could give material evidence.
> g. Abolition of the rule against double jeopardy is liable to encourage unreasonable expectations in victims, create media campaigns and rob the process of finality.
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> 7. In any event no one has produced any hard figures to justify such a departure from the established international norm. The proportion of those who are acquitted who are in fact guilty is completely unknown. There can be no rational basis, other than prejudice, for suggesting that someone who has been acquitted after a full trial was in fact guilty.[22]

They went on to suggest additional safeguards in the event of the proposals continuing to have government support.

Writing in *The Spectator*, Boris Johnson said:

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[22] http://www.barcouncil.org.uk/documents/FINALComp14Oct.doc

> Of course, it may be right to hound the racist thugs to the end of their days. But with such ambiguity about the safeguards, the change in the law does begin to look as though it could be seriously oppressive. Under the cloak of sanctity provided by the martyrdom of Stephen Lawrence, it may be that the state is being given an important and potentially aggressive new power over the citizen. The harder we cudgel our brains, and try to work out what counts as new evidence, post-acquittal, the more we appreciate the clarity of the rule against double jeopardy.[23]

J. The *Criminal Justice Act 2003*

On 7 October 2002, the Home Affairs Select Committee announced[24] that it would examine the forthcoming *Criminal Justice and Sentencing Bill*, which would implement the Government's proposals in Justice for All (Cm.5563). Relaxation of the double-jeopardy rule for serious offences (including manslaughter, rape and robbery) where compelling new evidence comes to light was among the issues in which the Committee was interested.

The *Criminal Justice Bill 2002-03* was published on 21 November 2002. Part 10 contained provisions for allowing retrial of cases in which a person had been acquitted of a "qualifying offence". In its report published on 28 November, the Home Affairs Committee welcomed Part 10, on which it commented as follows:

> 104. Part 10 of the Bill will give effect to the broad thrust of our predecessors' recommendations. It will allow a person previously acquitted of a 'qualifying offence', to be retried for that offence. The qualifying offences, which are listed in Schedule 4, are all very serious offences which carry a maximum penalty of life imprisonment (although they do not include all offences for which life imprisonment is the maximum penalty). Clauses 63 and 65 provide that an application for a retrial may only be made with the written consent of the Director of Public Prosecutions, who must be satisfied that (a) there is "new and compelling evidence that the acquitted person is guilty of the qualifying offence" and (b) that it is in the public interest for the application to proceed. For an application to succeed, the Court of Appeal must also be satisfied that there is new and compelling evidence and that is in the interests of justice to make such an order (Clauses 64-66). Clause 62(6) will give Part 10 retrospective effect and Clause 63(5) will prevent multiple applications for retrial by limiting the prosecution to one application only.
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> 105. In practice, this will usually apply where DNA evidence, which was not available at trial, subsequently becomes available. Ian Blair, the Deputy Commissioner for the Metropolitan Police, said:
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> > " If scientific evidence becomes available that was not available at the time of the first trial, then is it really rational that we should not put that back in front of another court".

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[23] "Try, try and try again", 3 August 2002, *The Spectator*

[24] Press release no 25, 7 October 2002

> 106. During this inquiry, several of our witnesses were concerned that a retrial could never be conducted fairly because the jury would know that the Court of Appeal had already decided that there was new and compelling evidence of the person's guilt. We are satisfied, however, that Part 10 contains sufficient provision to safeguard against this. First, when considering whether it is in the interests of justice to order a retrial, the Court of Appeal must have "particular regard" to a number of specified factors including, "whether it is likely that a fair trial pursuant to the order would be possible" (Clause 66(2)(a)). Secondly, if the person who is to retried is concerned about the likely prejudice before a jury he can, under the Bill, apply for his trial to be conducted without a jury (Clause 36). When we asked the Minister how many retrials were anticipated under this Part, he said "a handful—ie, a small number of such cases".

The Joint Committee on Human Rights saw no reason to disagree with the Law Commission's conclusion that their recommendations were human rights compatible, but –

> … we consider that the Bill should make it clear that the law to be applied at a second trial would be the law applicable at the time of the first trial, so as to prevent any risk of a violation of the right to be free of retrospectively imposed criminal sanctions (ECHR Article 7) or of the right to a fair hearing (ECHR Article 6.1).

Part 10 was enacted in the *Criminal Justice Act 2003* with two significant changes. Some amendments moved in both Houses, seeking substantial reduction of the category of qualifying offences (eg to murder, as originally recommended by the Law Commission) and to remove the retrospective effect were successfully resisted. The modifications which were made were government amendments which changed the list of qualifying amendments, and changed the definition of new evidence which could bring a case within Part 10.

Amendment to list of qualifying offences

The list of qualifying offences was modified, by Government amendment, at Lords Report Stage. In speaking to the Government amendments, and to the more fundamental amendments proposed by the Liberal Democrat spokesman, Lord Thomas of Gresford, Lord Goldsmith said:

> Schedule 4 to the Bill, to which the amendments relate, contains the list of offences that the Government presented as those most suitable for the new retrial procedures. Opposition to this part of the Bill has focused on three points: first, some have criticised the schedule for being too extensive; secondly, some thought that the list did not comprise the most serious crimes; and, thirdly, others in another place argued that some of the crimes were high volume and that, instead of the retrial procedures being used in exceptional circumstances, retrial would therefore be used as a matter of routine. The Government have listened carefully to the criticisms levelled at Schedule 4 in both Houses. What comprises the most serious offences remains a matter of judgment, but I believe that the retrial procedure should apply to offences other than murder, soliciting murder and genocide alone, as was proposed by the Opposition.

> Having said that and having looked again at this matter, we believe there is scope to reduce the number of offences that should qualify for the retrial provisions. Therefore, we are proposing a number of amendments which will help to focus the list on the gravest offences and remove those which are not of the highest order of seriousness but are relatively high-volume offences—for example, causing grievous bodily harm.
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> I should point out that, although we have deleted a number of offences, the list overall does not look shorter. However, that is because we need to include in the schedule the new sex offences which are regarded as of equivalent seriousness to rape or attempted rape under the new Sexual Offences Bill. Because those offences are brigaded under heads, they seem to go up in number but they are equivalent in terms of seriousness. I hope that the amendments will allay the fears of noble Lords who have expressed concerns about this part of the retrial provisions. [25]

Lord Thomas of Gresford responded:

> We on these Benches have taken the view that the Government's approach introduces into the schedule far too many offences which would be subject to the retrial procedure. If one looks for balance, as I outlined it, one is driven back to consider which cases really cause public disquiet. In any event, the whole purpose of introducing these provisions is to deal with public disquiet. The cases which have attracted publicity in the past are, without exception to my knowledge, cases of murder or homicide. It is those cases where acquitted defendants have, in very rare instances, gone on record as saying, "I have been acquitted. I cannot be prosecuted again, and I did it". It is in those cases, where there is a feeling that the police investigation has not been thorough enough or that people have been wrongly acquitted, that public disquiet arises.
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> I have said to your Lordships on many occasions that the whole basis of the criminal justice system rests not with lawyers or judges but with the people. If the people do not have confidence in the justice system for one reason or another, injustice will occur because witnesses will not come forward and jurors will not convict in appropriate cases. Therefore, where there is a degree of disquiet, as happens when a person is acquitted of murder and then confesses to have committed the crime, we concede that the double-jeopardy principle should be breached.
>
> We oppose the amendments put forward by the Government and we oppose the scope of Schedule 4 as originally drafted. I suppose one can say that at least the amendments cut down the size of the list. But we cannot see that it is in the public interest that cases listed in Schedule 4, even as amended, should be the subject of the use of resources in the judicial process and police investigations and that they should breach the principle of finality about which we said so much on the previous occasion.
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> If there is to be an exception, it should be as the Law Commission decided after considerable thought in its report, Double Jeopardy and Prosecution Appeals, Cmnd. 5048, published in 2001 and presented to Parliament in March 2001. We take a

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[25] HL Deb 4 November 2003 c 692

> principled stand on the basis of what is recommended in that report, and we believe that the Government have not justified going beyond the Law Commission's views. [26]

Lord Ackner, who had been highly critical of many aspects of the Bill, also thought that the category had been too widely drawn:

> My Lords, I too think that we should proceed incrementally. I see no virtue in leaping far ahead. We can always add to the legislation. Criminal Justice Bills seem to appear at every Session, so there is no reason to doubt that the opportunity will arise again.

The Conservative spokesman, Baroness Anelay of St Johns, was content with the Government amendments:

> I now accept that the Government's new schedule would cover the most serious offences, including those most commonly associated with international crime and terrorism. I accept that it vastly reduces the number of acquitted persons who may face the possibility of a retrial. I estimate the reduction, taking the annual figure, to be about 65 per cent. Despite all that, we have to take note that it will be vital for the Director of Public Prosecutions and the police to consider very carefully in each and every case whether it would be right, safe or appropriate to seek a retrial and if they determine to proceed, to ensure that the process is carried out with the utmost care and reliability.
>
> The fact remains that the Government and the police have already raised the hopes of victims and the relatives of victims with the promise of this new power. It must not be used incautiously or unfairly. Both the innocent accused—there will remain innocent accused who may be caught by this—and the victim would, thereby, suffer even more than they do now. We must avoid that. In the mean time, I support the amendments.[27]

Amendment to definition of new evidence

Under the provisions of the Bill as introduced in the Commons, the power to order a new trial would have been limited to circumstances in which there was compelling evidence against the defendant, which –

> was not available or known to an officer or prosecutor at the time of the acquittal.

In commenting on the Government's modifications in the Commons, the Joint Committee on Human Rights said:

> 28. On Report in the House of Commons, certain amendments proposed by the Government were accepted. One of these changed the definition of 'new evidence' in

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[26] HL Deb 4 November 2003 c 693

[27] HL Deb 4 November 2003 c 701

what is now clause 72(2) of the Bill. It would make it possible to reopen a criminal trial on the basis of evidence which 'was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).' In other words, following an acquittal it would be possible for the Court of Appeal to allow a further trial to allow evidence to be adduced which could have been, but was not, used in the original trial. A further amendment to what is now clause 73 would require the Court of Appeal, when deciding whether it is in the interests of justice to order a new trial, to consider (among other things) whether the evidence could have been available sooner had an officer or prosecutor acted with due expedition, and more generally whether an officer or prosecutor has failed to act with due diligence or expedition at any time after the power to apply for a new trial becomes available. However, the Court of Appeal would still have power to order a new trial where evidence was available at the time of the original acquittal, even if there has been a lack of due diligence or expedition, taking account of other factors.

29. We have reconsidered the human rights implications of Part 10 of the Bill in the light of these amendments. It seems to us that, as amended, the provisions appear likely to be incompatible with ICCPR Article 14.7, which provides: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.' This Article binds the UK in international law. It has not been introduced to national law in the UK. There was no need to do so: the rule against double jeopardy is currently entirely compatible with it. The Bill's provisions could be incompatible with the obligation in international law. The UN Human Rights Committee has accepted that the reopening or resumption of a criminal trial in exceptional circumstances might be acceptable, but would not sanction a straightforward retrial. In our Second Report, we accepted that newly available and compelling new evidence might fall within the former category. If the evidence in question is not new, this is very doubtful.

30. Another relevant instrument is Article 4 of Protocol 7 to the ECHR ('P7/4'). The UK has not ratified this Protocol, and so is not bound by it in international or national law, but HMG has said that it intends to ratify it. The terms of P7/4 allow greater leeway to the state than the ICCPR appears to do. While P7/4.1 is in effect the same as ICCPR Article 14.7, P7/4.2 continues, 'The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.'

31. Although P7/4 does not bind the UK, and the more restrictive terms of ICCPR Article 14.7 do, we were prepared in our Second Report to assume (in favour of the Government) that the proviso to P7/4 would be likely to be read into ICCPR Article 14.7, because of the UN Human Rights Committee's concession that resuming a criminal trial might be acceptable in exceptional circumstances. We therefore examined the case-law of the European Court of Human Rights on P7/4, and concluded that the Bill as originally drafted was compatible with it as long the new evidence is 'evidence of new or newly discovered facts'. This approach was in line with the recommendations of the Law Commission on which Part 10 of the Bill was originally based.

32. As the amended version of the Bill seemed to give rise to a serious danger of an incompatibility with a human right if a case were to be reopened for the sake of airing evidence which had been available at the time of the first trial, we asked the Minister, when he gave evidence to us, why the Government considered that the new provisions would be compatible with ICCPR Article 14.7 (read in the light of ECHR P7/4). He replied that the Government's objective had not changed. It still intended that cases should be reopened only in exceptional circumstances where there is new or newly discovered evidence. But it had proved difficult to find a test which covered evidence which had existed before only where it could not have been found, or its significance could not have been understood at the time, even with reasonable diligence on the part of officers and prosecutors. The Government had decided that the best approach was to expand the meaning of 'new evidence', and to rely on the need for it to be compelling, coupled with a new emphasis on the importance of officers and prosecutors having acting with due diligence and expedition, to weed out cases where the original investigation or prosecution had simply been conducted in a sloppy way.

33. The Minister accepted that the new test would rely on judicial discretion after an assessment of the degree of diligence and expedition shown by officers and prosecutors in relation to the evidence. Nevertheless, he suggested that it would provide a better way of achieving the goal of ensuring that only newly available evidence could form a basis for reopening a case than to demand that the evidence should not have been available at the time of the original trial. Eliminating the need for the Court of Appeal to decide whether evidence had been available or known to an officer or prosecutor at the time of the acquittal would avoid difficult arguments about the availability of evidence or the knowledge of officers and prosecutors at a time in the distant past.

34. We consider that the Government's new approach, reflected in what are now clauses 72(2) and 73(2)(c) and (d) of the Bill, is likely to lead to incompatibility with ICCPR Article 14.7, even interpreted (as we interpreted it in our Second Report) in the way most favourable to the Government. It is not satisfactory to rely on judicial discretion to ensure that a human right is respected. The right in question is the right not to be tried for a second time for an offence save in exceptional circumstances where the case is reopened in accordance with a legal procedure because there is new evidence. Clauses 72(2) and 73(2) leave open the possibility that the court might use its discretion to allow a case to be reopened in a range of circumstances, including the following:

a) where evidence that was available was inadmissible at the time of the original trial, but the law has subsequently been amended to allow the evidence to be admissible. For example, hearsay evidence or evidence of bad character might have become admissible by virtue of the provisions of Part 11 of the Bill;

b) where the prosecution decided not to adduce admissible evidence at the original trial for sound tactical reasons, in circumstances that did not amount to a lack of diligence or expedition on their part;

> c) where the evidence was not adduced at the earlier trial, and this was because of a lack of diligence or expedition on the part of an officer or prosecutor, but the Court of Appeal decides in its discretion that the case should be reopened to allow the evidence to be used, because the seriousness of the crime and the likelihood of being able to give a fair hearing to the accused mean that it is in the interests of justice to do so.
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> 35. When exercising its discretion, the Court of Appeal would not be required by the Human Rights Act 1998 to act in accordance with the right under ICCPR Article 14.7, or that under ECHR P7/4, because that Act does not make either of them a directly enforceable part of the law in the United Kingdom.
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> 36. We therefore consider that the Bill as currently drafted gives rise to a significant threat to the right under ICCPR Article 14.7, which binds the United Kingdom in international law. We also think that the current version of the Bill would fail to achieve the Government's object of avoiding legal arguments. Instead of disputes about whether evidence was known about at the time of the original trial, there would probably be long arguments about whether the general conduct of officers and prosecutors, both at the time of the original trial and subsequently (and particularly after the coming into force of Part 10 of the Bill), showed a lack of due diligence or of expedition. It therefore seems to us that the creation of a threat to a human right would not be balanced by any compensating benefit. We draw this to the attention of each House. [28]

At Report Stage, opposition amendments to narrow the definition of "new" evidence were unsuccessful but Lord Goldsmith gave an undertaking about cases where evidence had not been adduced, for tactical reasons:

> … there is one circumstance to which I shall draw attention. It was picked up by the Joint Committee on Human Rights and we have given thought to it. I would have to read Hansard to be quite clear, but probably it touches on the example given by the noble Viscount, Lord Bledisloe. The Joint Committee pointed out that there could be circumstances in which relevant evidence was in the possession of the prosecution at the original trial, but it was not adduced for tactical reasons. That is rather different from the case where the evidence might have been discovered by the police or, perhaps, its significance understood. I can give the House an undertaking, which I have agreed with the Director of Public Prosecutions, that where evidence was not adduced for tactical reasons, it would not be right to use it as a basis for an application under Part 9. I hope that that will give some comfort. It will be reflected in guidance.[29]

The Joint Committee had also pointed out that is was unfortunate that the Bill should refer to "retrial" and to the defendant being "retried", bearing in mind that *retrial* after acquittal was

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[28] 11th report, June 2003

[29] HL Deb 4 November 2003 c 711

never permitted by international law although in limited and exceptional circumstances the *reopening* of a case might be.

The Act was given Royal Assent on 20 November 2003. Part 10 was bought into force from 4 April 2005.[30] There was some media speculation about which investigations might be reopened with a view to retrial.[31]

K. Applications under Part 10 of the *Criminal Justice Act 2003*

There have, so far been two applications under Part 10, both in murder cases.

In *R v Dunlop*,[32] the defendant had been acquitted when the prosecution offered no evidence following two murder trials in which the juries had failed to reach verdicts, but he later admitted that he had committed the murder. He pleaded guilty to perjury and, after the Court of Appeal set aside the murder acquittal, also pleaded guilty to the murder. The court had not been impressed by the argument that the retroactive effect of Part 10 would operate particularly oppressively if applied to Dunlop because he had confessed and pleaded guilty to perjury under the belief that he could not be retried for murder.

In *R v Miell*,[33] the defendant was acquitted of a murder but, while in prison for unrelated offences, confessed to it. He pleaded guilty to perjury, but the Court of Appeal refused the CPS' application for an order quashing the murder acquittal, finding that the new evidence was *not* compelling, reliable and highly probative of the case against him. It consisted of a series of confessions which were manifestly untruthful in a number of significant respects. The court said:

> We have found it very difficult to know what to make of all this and, were there a retrial, we think that the jury would be in the same position.

L. Other jurisdictions

Questionable acquittals in high profile murder cases have prompted a number of other jurisdictions to move towards introducing exceptions to the double jeopardy rule, following the model provided by Part 10.

1. New Zealand

In New Zealand law controversy about double jeopardy was particularly prompted by the case of *Moore* who had been tried for murder. A defence witness gave Moore an alibi and he

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[30] *Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005*, SI 2005/950

[31] see eg Rosenberg, "Murder reviews with end of 'double jeopardy'", 4 April 2005, *Daily Telegraph*

[32] [2006] EWCA Crim 1354

[33] [2007] EWCA Crim 3130

was acquitted. Moore was subsequently convicted of conspiracy to pervert the course of justice in relation to that evidence. He received the maximum penalty - seven years imprisonment - but escaped what would otherwise have been the murder conviction and a life sentence.

The New Zealand Law Commission published a report *Acquittal Following Perversion of the Course of Justice* in March, 2001.[34] Aware of the concern that "any dilution of the double jeopardy rule tends to impair the important values that it protects", the NZ Law Commission saw their principal options as:

- leaving the existing law unaltered; or
- permitting a limited departure form the principle of double jeopardy.

They recommended taking the second option, concluding:

> We have proposed as conditions to an application to reopen:
> - the accused must have been convicted of an administration of justice crime;
> - the crime of which the accused was originally acquitted must carry a penalty of 14 years imprisonment or more.
>
> We further propose:
> - that the High Court alone have jurisdiction to consider an application;
> - that it must be satisfied that:
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> - the accused has been convicted of an administration of justice crime;
> - it is more likely than not that, but for the administration of justice crime, the acquitted person would not have been acquitted;
> - the prosecution has acted with reasonable despatch since discovering evidence of the administration of justice offence;
> - the acquitted person has been given a reasonable opportunity to make written or oral submissions to the Court;
> - no appeal or other application to set aside the administration of justice conviction remains undisposed of;
> - it would not, because of lapse of time or for any other reason, be contrary to the interests of justice to take proceedings against the acquitted person for the crime of which he or she was acquitted.

There was no recommendation for a "new evidence" exception to the double jeopardy rule, or for retrospective application of the reform. A Bill creating two exceptions to the double jeopardy rules – tainted acquittal and compelling new evidence – is currently before the New Zealand Parliament.

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[34] NZLC R70

2. Australia

In September 2003, the New South Wales government published a Bill, based on what is now Part 10 of the UK's *Criminal Justice Act*. There had been controversy in Australia surrounding double jeopardy, much of which was inspired by the case of Raymond John Carroll.

> In March 1985 in the Supreme Court of Queensland, Carroll was convicted by a jury of the murder of the infant Diedre Kennedy in Ipswich in 1973.
>
> In November 1985, on appeal to the Queensland Court of Criminal Appeal, the conviction was quashed on the grounds that the evidence could not sustain the verdict. A verdict of acquittal was entered (Carroll v R (1985) 19 A Crim R 410).
>
> In 2000 Carroll was tried and convicted for perjury at his 1985 trial (R v Carroll [2000] QSC 308 (6 September 2000); (2000) 115 A Crim R 164).
>
> That conviction was quashed on appeal by the Queensland Court of Appeal in 1999 on the grounds that it violated due process, the principle of double jeopardy, that the evidence lacked weight or cogency and the verdict was unsafe and unsatisfactory (R v Carroll; ex parte AG [2001] QCA 394 (1 September 2001)). It is worth noting that:
>
> > the court found the 'new evidence' relating to the bite marks on the child's thighs "of doubtful quality" (at [61]); and
> > there was no DNA evidence mentioned in any of the perjury decisions.
> > In 2002 the High Court of Australia found that the charge at the second trial was an abuse of process and dismissed the appeal (R v Carroll [2002] HCA 55 (5 December 2002)).[35]

In November 2003 the Attorneys-General of Australia released a discussion paper on double jeopardy reform. The paper, which invites public discussion, puts forward three options including:

- prosecution for an administration of justice offence connected to the original trial (under this proposal, an acquitted accused could be prosecuted for an administration of justice offence [eg perjury, bribery of a juror] committed at the original trial);
- retrial of the original or similar offence where there is fresh and compelling evidence (under this proposal, an acquitted accused could be retried for a very serious offence where there is fresh and compelling evidence against the acquitted person in relation to the offence);
- retrial of the original or similar offence where the acquittal is tainted (under this proposal, an acquitted accused could be retried for a very serious offence where the acquittal appears to be tainted).

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[35] http://www.nswccl.org.au/unswccl/issues/double%20jeopardy.php#carroll

The paper includes the following statements suggesting that it could be said with some conviction that they were true:

- The law of double jeopardy is intricate and complex in detail, but the basic principles have been in place for centuries and the core doctrine has not been the subject of any reasonable or sustained challenge on policy grounds until very recently. The reason for that challenge has been a small number of controversial cases, the facts of which are not new. It is not clear why these cases have suddenly attained public prominence right now.
- The decision of the High Court in Carroll was not new and unexpected, but a mere rationalisation of previous authority by classic judicial method. In particular, the decision cleared up considerable uncertainty, which had surrounded previous High Court decisions in the area.
- Similar kinds of decisions have sparked inquiries by law reform bodies in the United Kingdom and New Zealand. These law reform bodies have not come to the same conclusion, except that it can be said that both have recommended that the common law be changed. The recommendations have prompted a Bill in the United Kingdom but not in New Zealand. It seems a fair conclusion that, even if the recommendations of either or both law reform bodies were enacted, Carroll would probably be decided in the same way.
- In very general terms, the law on that aspect of double jeopardy which deals with prosecution appeals against acquittals can be described as saying that, with the exception of Tasmania, an acquittal on a charge of an offence tried by a jury is final subject to very limited exceptions. It can also be seen from the account of State and Territory laws above, that virtually the entire statutory application of this aspect of the double jeopardy principle can be summarised as saying that the prosecution can appeal, one way or another, with varying effect, against an acquittal pronounced by any legal authority other than a jury.

In April 2007, the Council of Australian Governments ("COAG") agreed that the jurisdictions would implement recommendations on double jeopardy law reform, prosecution appeals against acquittals, and prosecution appeals against sentence, noting that the scope of reforms would vary amongst jurisdictions reflecting differences in the particular structure of each jurisdiction's criminal law.[36]

3. Scotland

On 21 January 2009, the Scottish Law Commission published a discussion paper seeking views on whether it was desirable for any exceptions to the rule against double jeopardy to be

[36] Double jeopardy law reform, 13 April 2007, COAG, *Double Jeopardy Law Reform: Model Agreed By COAG*

introduced; if so, how these should operate; and whether the rule should be restated in statute.[37]

[37] Scottish Law Commission considers exceptions to double jeopardy, 21 January 2009, Scottish Law Commission news release