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The *Criminal Justice Bill*: Double jeopardy and prosecution appeals

Bill 8 of 2002-03

This paper is concerned with the *Criminal Justice Bill*, which is due to be considered on second reading on Wednesday 4 December.

The Bill is to introduce major reforms to the criminal justice system designed to rebalance it in favour of victims, witnesses and communities. Most of the reforms are based on proposals made in two major reviews commissioned by the Government, of the legal framework of sentencing, and of the criminal courts.

This paper considers the provisions of the Bill relating to double jeopardy and prosecution appeals. Other research papers in this series provide a general background to the Bill and consider the provisions relating to police powers, drug testing requirements, bail, conditional cautions, sentencing, disclosure, evidence, mode of trial and juries.

Sally Broadbridge

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Summary of main points

The *Criminal Justice Bill* is designed to implement some of the proposals contained in the Government's White Paper *Justice for All*, to reform the criminal justice system and rebalance it in favour of victims, witnesses and communities. Some of the other proposals are to be implemented in the *Courts Bill* which has been introduced in the House of Lords.

This paper is concerned with the provisions in the Bill relating to retrial for serious offences after acquittal and prosecution appeals against adverse rulings by the judge. It explains the reasons why the Government has decided that the prosecution should have a right of appeal against some rulings made before, or during the course of a trial, and when the prosecution is to have such rights. It also explains why there has been some opposition to these proposals.

The paper goes on to describe the rule against double jeopardy, and why there have been calls for an exception to it, so that there can be a retrial when compelling new evidence comes to light after a person has been acquitted of a serious offence. It discusses the circumstances in which the Bill will allow a person to be retried. The final part of the paper outlines some of the objections which have been raised both to the principle and the detail of the reform.

These provisions of the Bill extend to England and Wales only, but some of the ancillary reporting restrictions will also extend to Scotland and Northern Ireland.

Other provisions of the Bill, relating to police powers, drug testing requirements, bail, conditional cautions, sentencing, juries, mode of trial, disclosure and evidence are discussed in separate Library Research Papers on the Bill.

CONTENTS

I Introduction

A. The present law

In English law there is no general prosecution right of appeal against acquittals or other decisions adverse to it, but the prosecution does have limited rights of appeal.

From Magistrates Courts, the prosecution may appeal -

- to the Divisional Court under the "case stated" procedure, on the ground that the decision of the magistrates was either wrong in law or in excess of jurisdiction
- to the Crown Court against the magistrates' decision to grant bail[1]
- to the Crown Court in Customs and Excise cases

From the Crown Court, the prosecution may appeal -

- from particular rulings made by judges at preparatory hearings in serious fraud, or other long and complicated cases
- on an Attorney-General's reference, in some classes of case only, against unduly lenient sentences
- on an Attorney-General's reference on a point of law arising out of a trial on indictment resulting in an acquittal – but the result has no effect on the acquittal of the defendant in the case.
- by application (i.e. not strictly an appeal) to the High Court for an order[2] quashing an acquittal alleged to be tainted by intimidation of or interference with a witness, in respect of which a person has been convicted.

B. The Law Commission references

In March 2001, the Law Commission published its Report on Double Jeopardy and Prosecution Appeals[3], following consultation on two Consultation Papers arising from separate references by the Home Secretary –

> To consider the law of England and Wales relating to double jeopardy (after acquittal), taking into account: recommendation 3 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.[4]

and

> To consider (1) whether any, and if so what, additional rights of appeal or other remedies should be available to the prosecution from adverse rulings of a judge in

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1 *Bail (Amendment) Act* 1993
2 under the *Criminal Procedure and Investigations Act* 1996 ss 54-57
3 Law Com No 267
4 2 July 1999

> a trial on indictment which the prosecution may wish to overturn and which may result, or may have resulted, whether directly or indirectly, in premature termination of the trial; (2) to what, if any, procedural restrictions such appeals would be subject; and to make recommendations.[5]

C. The *Criminal Justice Bill*

Two Parts of the *Criminal Justice Bill*, which was published on 21 November 2002, bring forward proposed reforms in the areas covered by the two references. *Part 9* of the Bill would extend the prosecution's right of appeal to certain adverse rulings made by the judge during the course of a trial on indictment. It would also give the prosecution rights of appeal against potentially terminating matters such as severance, joinder of counts, and defendants' applications to quash an indictment or stay proceedings on the ground of abuse of process at preparatory hearings – those provisions are not covered in this paper.[6] *Part 10* would relax the rule against double jeopardy, which is normally regarded as a completely separate issue, but may in effect amount to giving the prosecution a right of appeal against an acquittal, when new evidence becomes available. The proposals for relaxing the double jeopardy rule are discussed in Part III of this paper. Other proposals for additional prosecution appeals are discussed in Part II.

As the proposals arise from reform projects which have been subject to public consultation on at least one occasion, and there has been little opportunity for those interested to make comments on the clauses of the *Criminal Justice Bill* since its publication, this paper includes reference to some comments made at earlier stages, where they seem to have continued relevance to the provisions of the Bill as introduced. Explanatory Notes to the Bill were published on 29 November 2002.[7]

II Prosecution appeals

A. The Law Commission Recommendations

1. Appeal from acquittal after misdirection

In its Consultation Paper *Prosecution appeals against judges' rulings*[8], 158, the Law Commission provisionally concluded that there should be no right of appeal by the prosecution against a jury's verdict of not guilty following its consideration of the evidence, even when there had been a misdirection by the judge which might have

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5 24 May 2000

6 Broadly speaking, a matter is "terminating" if it has the effect of bringing the case to an end at a stage before the facts have been considered by the jury. But the terminology is technical, as explained later in this paper.

7 Bill 8-EN: Home Office, November 2002, http://pubs1.tso.parliament.uk/pa/cm200203/cmbills/008/en/03008x-d.htm#end

8 Consultation Paper No 158, July 2000

favoured the defence.[9] There was virtually no opposition to that and the Law Commission saw no reason to depart from it.

2. Appeal against terminating rulings

They did, however, consider that the prosecution should have some rights of appeal against rulings which they called "terminating rulings", which result in not guilty verdicts at an earlier stage of the trial. They explained the difference between a "terminating ruling" and a "non-terminating ruling" as follows:

> 4.2 Our reference refers to rulings "which may have resulted, whether directly or indirectly, in premature termination of the trial". The distinction suggested by this phrase between rulings which result in termination of a trial and rulings which do not is, we consider, important. We understand it to mean not just rulings which abort a particular trial, with the result that there is a retrial (for instance, a ruling discharging the jury). Rather, we understand it to mean rulings which terminate the prosecution altogether, by resulting in a verdict of not guilty.
>
> 4.3 It is possible to distinguish between the following categories of rulings, where the judge rules against the prosecution:
> (1) Rulings which necessarily terminate the trial by virtue of the nature of the ruling itself – rulings which, as a matter of law, have as the direct consequence that the trial is terminated. They include, for instance, rulings that the indictment be stayed as an abuse of process, or that there is no case to answer.
> (2) Rulings which terminate the trial because, although the ruling does not necessarily terminate the trial as a matter of law, its effect is to persuade the prosecution to offer no or no further evidence, so that the judge orders or directs a verdict of not guilty.
> (3) Rulings which do not terminate the trial, because the prosecution can continue, albeit with a weakened case.
> The first two categories we refer to as "terminating rulings" and the third as "non-terminating rulings". Clearly, a ruling will generally only be "terminating" if the judge rules in a particular way. If the judge rules against the Crown on an application to stay proceedings as an abuse of process, or a submission of no case to answer, the trial terminates. If the judge rules against the defendant on such an application, he or she will (generally) continue to contest the matter on the facts.

They provisionally concluded that a prosecution right of appeal against a terminating ruling made during the course of a trial was capable of being fair, and proposed that subject to certain procedural safeguards there should be a prosecution right of appeal against such a ruling made during the trial up to the conclusion of the prosecution evidence. Following consultation they made a firm recommendation –

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[9] relaxation of the double jeopardy rule was considered separately

> that the prosecution should have a right of appeal against an acquittal arising from a terminating ruling made during the trial up to the conclusion of the prosecution evidence.[10]

3. Appeal against non-terminating rulings

The Law Commission also considered whether there should be a prosecution right of appeal against non-terminating rulings during the course of a trial. Their provisional conclusion was that there should not be. The vast majority of respondents agreed that an appeal against a non-terminating ruling during the trial would be wholly impracticable, would throw the system into chaos and would be contrary to long established principle. The one respondent who disagreed argued that the disincentives to abandoning a trial part-way through, in order to pursue an appeal against a non-terminating ruling, were such that the prosecution would only do so for very good reason. The Law Commission's view was that too much reliance would then be placed on the judgment of the prosecution, placing individual prosecutors under intolerable pressure by those who perceived that their interests had been damaged by such a ruling.

4. Note on terminology

The expression "terminating ruling" has been used in the *Criminal Justice Bill*, but it should be noted at the outset that the definition does not coincide with that used by the Law Commission and explained above. In *clause 49* of the Bill, "terminating ruling" is defined as:-

> a ruling by a judge of the Crown Court, in relation to a trial on indictment, which, if given effect to, will, without any further action by the prosecution, result in—
> (a) the termination of proceedings against the defendant for the offence, or one or more of the offences, included in the indictment, or
> (b) where there are two or more defendants, the termination of proceedings against one or more of them for the offence, or one or more of the offences, included in the indictment.

subject to the proviso that a ruling may be regarded as resulting in the termination of proceedings against a defendant for an offence notwithstanding the possibility of there being a fresh trial of the defendant for that offence.

So references in the Bill to a ruling which is *not* a terminating ruling do not mean the same as the Law Commission's "non-terminating rulings". There does not appear to be any particular significance in the slightly different use of language, but it could cause confusion if the Bill is read alongside the Report.

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[10] Recommendation 26

5. Ruling of no case to answer

The Law Commission's provisional conclusion had been that there should be no prosecution right of appeal against a ruling that there is no case to answer, which can follow when the defence makes a submission of no case to answer, at the end of the prosecution case. They had argued that a prosecution right of appeal would put the defence in an invidious position –

> The dilemma for the defence would be that if it makes a submission of no case, and is successful, there is a danger that the prosecution will appeal and there will be a retrial, which might go worse for the defence than the original trial. There might therefore be a disincentive to the making of a submission, even if it might succeed. We thought it wrong that such a disincentive should be created. [11]

However, following consultation, they were persuaded that there was no logical distinction between a terminating ruling of law during the prosecution case, and one made minutes later, at its conclusion, and also that there might be a temptation for trial judges too readily to accept defence submissions where they knew that their reasoning would not be susceptible to scrutiny by the Court of Appeal.

But they did not recommend that there should be a right of appeal on all successful submissions of no case to answer. Their conclusion was that there should be a prosecution right of appeal only where the submission of no case succeeded on the basis that there was *no* evidence that the alleged offence was committed by the defendant, and not when the effect of the submission was that the prosecution evidence, taken at its highest, was such that a jury properly directed could not properly convict on it. (These are known as the two "limbs" of the rule in *Galbraith* [12]).

6. Later terminating rulings

The Law Commission also considered whether there should be a prosecution right of appeal in the relatively rare case of a terminating ruling being made at a later stage. This might happen if the judge ordered disclosure of material previously not disclosed by the prosecution on public interest grounds, and the prosecution was unwilling to disclose it, with the result that the defendant would be discharged. The preponderance of opinion was that such issues scarcely ever arose at such a late stage, so the Law Commission made no recommendation but saw no reason why the issue should not be revisited if it became apparent that defendants were withholding issues for tactical reasons.

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[11] Law Com No 267 7.52
[12] [1981] 1 WLR 1039

7. Whether the right should be limited to trials for particular offences

The Law Commission had argued that there was a pressing need for reform only in the more serious cases, and considered whether the new right of appeal should apply to trials for offences carrying particular maximum sentences. They confirmed their provisional proposal that the test should be whether, had the defendant been convicted, the Attorney-General would have had power to refer the sentence to the Court of Appeal on the ground that it was unduly lenient. The Attorney-General has such power, under s.35-6 of the *Criminal Justice Act* 1988 in respect of offences triable on indictment and other offences as specified by order.

8. Safeguards

The safeguards recommended by the Law Commission were:

> (1) the Court of Appeal should have power to allow an appeal against an acquittal arising from a terminating ruling only if
>
> (a) the ruling was wrong in law, and
>
> (b) in all the circumstances of the case, it appears to the court that a retrial would be in the interests of justice; and
>
> (2) where the trial was terminated by a decision of the prosecution to offer no or no further evidence as a consequence of the ruling, the court should, in determining whether a retrial would be in the interests of justice, be required to have regard to
>
> (a) whether there was sufficient evidence remaining at trial after the ruling to provide a prima facie case against the defendant;
>
> (b) in the case of a ruling on disclosure, whether the public interest in prosecuting the case was outweighed by the public interest in protecting the material ordered to be disclosed; and
>
> (c) whether the decision to offer no or no further evidence was one which was open to a competent and conscientious prosecutor, together with any other considerations which appear to the court to be relevant.
>
> (Recommendation 29)

They also recommended that the new right of appeal should be exercisable subject to the same leave requirements as the existing right of appeal against conviction, namely with the leave of the Court of Appeal or a certificate from the trial judge that the case is fit for appeal[13] and that, where the prosecution seeks to appeal against an acquittal arising from a terminating ruling made otherwise than at a preparatory hearing, it should be required

> (1) to indicate at the hearing itself that it is minded to appeal against the acquittal, and
>
> (2) either
>
> (a) on that occasion, to obtain a certificate from the trial judge that the case is fit for appeal, or

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[13] Recommendation 30

> (b) within seven days of the acquittal (or such extended time as the trial judge may on that occasion grant), to serve a full notice of application for leave to appeal at the trial court for forwarding to the Court of Appeal.[14]

Another proposed safeguard was that there should be a prohibition on reporting appeals until the appeal was finally dismissed or any retrial had finished, although the Court of Appeal should have power to disapply or vary the prohibition if the defendant did not object, or the court having heard his representations was satisfied that it was in the interests of justice.

9. Detention after acquittal

Finally, the Law Commission considered whether there should be a power to detain the acquitted defendant pending the hearing of the new prosecution appeals. They envisaged that the outcome of any successful appeal would be a retrial, and the procedure might readily be thwarted by a defendant absconding or intimidating witnesses. Accordingly, they concluded that the court should have power to detain the defendant, who would have the same right to bail as other unconvicted defendants, but that there should be a custody time limit of two months, and a statutory time limit within which appeals must be concluded by the Court of Appeal, in each case subject to the Court of Appeal having power to extend the limit if satisfied that the prosecution has exercised due diligence, and that there is good and sufficient reason to extend the limit in the interests of justice. Likewise, there should be a time limit of two months between the order for a new trial and arraignment

B. Acceptance of the recommendations

In his Report, Lord Justice Auld expressed broad agreement[15] with the Law Commission recommendations without examining them in great detail. He could see no good reason why a defendant should be able to take advantage of a judge's error of law that could be quickly corrected on appeal. He went on to propose an additional right for prosecution appeals against perverse verdicts. That recommendation was not accepted by the Government. The recommendations were accepted with even less commentary in the White Paper, where the Government announced that the prosecution right of appeal would apply to *all* cases tried in the Crown Court, and not just the restricted range of offences proposed by the Law Commission.[16]

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[14] Recommendation 31

[15] Recommendation 309

[16] Justice For All Cm 5563, Home Office, July 2002 para 4.68

C. Part 9 of the *Criminal Justice Bill*

Part 9 deals with prosecution appeals, which may only be made with the leave of the judge or of the Court of Appeal. *Clause 50(1)* would give the prosecution rights of appeal against terminating rulings (as defined) made before the conclusion of the prosecution evidence and against rulings of no case to answer. *Clause 51* would provide that the prosecution may not appeal unless following the making of the ruling it informs the court that it intends to appeal (or seeks an adjournment, which the judge must grant, to consider whether to appeal). While there is a possibility of appeal, the ruling has no effect.

Clause 50(3) would give the prosecution a right of appeal against a ruling, made before the conclusion of the prosecution evidence, which is not a terminating ruling. *Clause 52* would provide restriction similar to *clause 51* with the addition that -

> (4) The prosecution may not inform the court in accordance with subsection (2)
>
> that it intends to appeal unless, at or before that time, it informs the court that it agrees—
>
> (a) that the defendant or defendants to which the ruling applies should be acquitted of the offence or offences to which the ruling applies if—
>
> (i) leave to appeal is not obtained, or
>
> (ii) the appeal is abandoned, and
>
> (b) that any such defendant should be acquitted of any such offence if the result of the appeal as finally determined is that proceedings against him for that offence should not take place or be resumed.

Clause 53 would require the judge to decide whether or not the appeal should be expedited: giving him power to order an adjournment in either event, and to discharge the jury if he decides that the appeal should not be expedited. The Court of Appeal would be able to reverse a decision that the appeal should be expedited.

Under *clause 55*, the Court of Appeal would have power to confirm, reverse or vary the ruling and to order the acquittal of the defendant(s). it would also have power, on reversing or varying the ruling, to order either resumption of the trial, or a fresh trial, but not unless it considers it necessary in the interests of justice to do so.

Clauses 59 and *60* would impose restrictions on reporting about the appeals or the steps preparatory to them, and create specific offences of reporting in contravention of those restrictions.

D. Reactions to the proposals

1. ACPO

The proposed introduction of new prosecution rights of appeal was warmly welcomed by the Association of Chief Police Officers (“ACPO”), who said:

> There is strong support for prosecution appeals against potentially terminating rulings pre-trial, up to end of the prosecution case and of no case to answer. An effective prosecution right of appeal is central to many of the other suggested reforms and issues for example admissibility, disclosure, abuse of process, severance. The Review makes the point (para 65) that concern has been expressed about widespread rights of appeal adding delay to the trial process but counters this by making the point that if the measures are justified, the fact that they may be well used is an argument in support of meeting a need rather than an argument against doing so.

But they had reservations, suggesting that the proposals did not go far enough:

> The first problem with the Recommendations, however, is in following the Law Commission and limiting the right of appeal to potentially terminating rulings. This will not alter the prosecutor's fear of going too far and getting the Court of Appeal's views too late. It is commonsense and business-sense for the trial to proceed on an authoritative and fair basis. At present part III of the Criminal Procedure and Investigations Act 1996 permits a prosecution appeal against rulings which may include admissibility of evidence but that power is dependent on the judge agreeing that the trial is likely to be complex or lengthy. So the notion of a prosecution appeal against a non-terminating ruling is not new but the present criteria are too restrictive even if the Law Commission suggests the power might be used more widely. We have already commented on the impact of severance on some prosecutions and the need for a right of appeal. The Law Commission's recommendations underestimate the extent to which the prosecution often has to limit or hedge its case and justifies its conclusions by saying that it would be unfair on the defendant who has no interlocutory right of appeal. To the suggestion that the defence can have this right as well, the Law Commission says it would be unworkable. We return to the point that Lord Justice Auld makes which is that if it is used it is needed. We have a duty to organise our courts and procedures to suit justice. Without the authority of a Court of Appeal ruling, significant prosecution evidence can be held back for fear of a successful post-conviction appeal by the defendant or can be excluded erroneously by the trial judge. The slant is always in favour of the defendant.
>
> Secondly, paragraph 64 qualifies the proposal by restricting it to indictable only offences and those attracting an unduly lenient sentence appeal so it would apply only from Crown Division to the Court of Appeal. There also needs to be a simple procedure for lower level prosecution appeals (compare Customs and Excise Management Act section147(3) – open appeal against magistrates' decisions) and this need is all the more pressing for the recommended removal of the prosecution's limited right to appeal by way of case stated or judicial review. There is no logic in limiting it to certain offences. For example where dishonesty has to be proved it can only be inferred from circumstances - many handling cases are wrongly withdrawn from juries by a value judgement on the sufficiency of this evidence.

> The Law Commission considered prosecution rights of appeal within the context of existing court procedures. Now is the opportunity to look at this issue, central to other themes throughout this response, creatively and with balance.[17]

2. Liberty

That enthusiasm was not shared by other respondents. The human rights organisation, Liberty, agreed with the Law Commission's provisional proposal, on consultation, that a prosecution right of appeal against a ruling of no case to answer would put defendants in a wholly invidious and unfair position, but went on to make comments on the proposed ancillary and procedural safeguards. They supported -

- the Commission's classification of the sort of offences to which the procedure would apply being those from which an Attorney-General's reference on sentence would currently be available;
- the need for leave to be obtained in all cases, and the consent of the Attorney-General or Director of Public Prosecutions where appropriate;
- the suggested time limit for applications for leave;
- the proposed compendious "interests of justice" test as the test for the Court of Appeal to apply; and
- the imposition of reporting restrictions.

But they also considered that -

- defendants awaiting prosecution appeals should have the right to bail on the same basis as unconvicted defendants.
- the most appropriate time limit for the hearing of such appeals should be 1 month for those in custody and 2 months for those on bail, with no discretion to extend time; and
- defendants facing a retrial as a result of a successful prosecution appeal should have their retrial heard more rapidly than those facing a retrial as a result of a defence appeal.

They also said –

> 4.67 We accept the point made that a defendant has a right of appeal at the end of a trial against both conviction and sentence while the prosecution has no equivalent right of appeal against legal decisions by the trial judge. Because of this we do not object in principle to the extension of a prosecution right of appeal where the judge makes a ruling effectively terminating the prosecution case. However this should only be to clarify a point of law and not to convict the

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[17] ACPO's response to the Auld Report, available on the Lord Chancellor's Department website at http://www.lcd.gov.uk/criminal/auldcom/index.htm#contents

> defendant in that case. It should also be noted that the separate consultation paper, which considers admissibility of previous misconduct, rejects the Law Commission's proposals in 'Evidence of Bad Character in Criminal Proceedings' (Report 273). The Law Commission recommended that evidence which is contaminated by improperly admitted evidence of previous convictions should result in a judges direction to acquit. If the prosecution were granted a right of appeal as proposed in the White Paper then it would be possible to follow the Law Commission's recommendation and allow the prosecution the right to appeal if they believe the judge misdirected the jury

3. The Bar Council

In their joint response to the White Paper, the Bar Council and Criminal Bar Association expressed fundamental objections to the proposed prosecution appeals:

> Moreover, we foresee serious logistical difficulties and potential unfairness to a defendant: Pursuant to a judge's ruling within the recommendations above, is it suggested that the trial be part-heard pending the exercise of the prosecution's right to appeal? If so, how is this to be achieved without massive inconvenience, and delay, so far as the trial process is concerned? In the event that the prosecution is successful, how are matters to be dealt with so far as the jury are concerned? What if a party wishes to appeal to the House of Lords?
>
> Alternatively, a different course may be contemplated. If the prosecution is to exercise its right to appeal following actual acquittal upon either of the bases of the second two recommendations above, with a view to re-trial if the prosecution is successful, then serious potential unfairness to a defendant ensues. Within the spirit of our general opposition to the rule against double jeopardy, it would be unjust if a defendant had to stand trial for a second time, witnesses having been rehearsed etc., because the appellate court had taken issue with the trial judge's rulings in favour of an accused.
>
> In this respect, whilst we recognise the contrary argument with regard to the need for pursuit of the guilty, we nevertheless proffer the rule in favour of finality, and general fairness, in support of our opposition to these recommendations.
>
> We can see that it may be in the interests of justice to provide a mechanism whereby the prosecution can appeal against an acquittal on the judges' direction at the close of the prosecution case which was the result of an error of law and that the Court of Appeal in hearing such an appeal should be allowed to order a re-trial if it would be in the interests of justice to do. Such a right of appeal would not provide a general right of appeal by the prosecution on factual issues, but would increase the accountability of judges as to their correct application of the law.

> With particular regard to the third recommendation, we oppose the Crown's suggested right of appeal because the ruling under Galbraith follows the calling of the Crown's evidence, the evaluation of which is best left to the trial judge who has heard it and the witnesses who gave it.[18]

4. Criminal Law Review

Malleson and Roberts writing in the Criminal Law Review explained their particular concerns about the likely effect on equality of arms:

> the main concern about the proposed change in terms of the proper functioning of the appellate system is whether it offends the equality of arms principle. The proposal to give the prosecution the right to appeal against a directed acquittal after the judge's direction that there is no case to answer would appear to comply with the principle since the right is technically available to both sides equally. In practice, however, the fact that the defence must wait until the end of the trial before it can challenge the ruling puts it at a substantial disadvantage. If the trial judge allows a submission of no case to answer and the prosecution appeals, it is asking the Court of Appeal to review the reasoned decision of a judge. This is exactly the sort of review the court considers itself both constitutionally and practically well-place to undertake. By contrast, if the submission is rejected by the trial judge and the jury convicts, the presence of the jury verdict adds an additional and very significant hurdle to the defence appeal. Very few cases succeed on this ground. To ensure that the right of appeal exercisable in such cases is exercisable equally by the prosecution and defence, there should be statutory amendment to give the defence the right to make an interlocutory appeal against a ruling by the judge rejecting a submission of no case to answer.[19]

5. Justice

Justice was also concerned that the new right would introduce unnecessary delay and uncertainty for defendants. They suggested that, if this proposal was adopted, it should be limited to the Law Commission's list of offences and be subject to fixed time limits. Special fast-track measures should be implemented within the Court of Appeal so as to deal with such appeals speedily. Further, the right to bail should not be affected by this type of appeal.[20]

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18 http://www.barcouncil.org.uk/document.asp

19 "Streamlining and Clarifying the Appellate Process" [2002] CLR 272, Malleson and Roberts

20 Justice response to the White Paper , October 2002: http://www.justice.org.uk/inthenews/index.html

III 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[21].

However, it is an inevitable consequence of a strict application of this rule, that there will be occasions when a person who has committed 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.

A. The Stephen Lawrence Enquiry

In July 1997 the Home Secretary asked Sir William Macpherson of Cluny to conduct the 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 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

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[21] 4 Commentaries, pp 335-6.

> 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 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[22].
> [-]
> 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[23].
>
> 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. [24]

So one of its 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[25].

B. 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[26] 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.[27] They discussed possible exceptions in two cases where this would be permitted by Article 4 of Protocol 7 to the

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22 Cm 4262 – I, para. 7.46
23 ibid para. 39.48
24 ibid para .43.47
25 ibid, recommendation 38
26 *Double Jeopardy* : Law Commission Consultation Paper no 156
27 (e.g. to offences founded on substantially the same facts) Consultation Paper no 156, para 4.16

ECHR, namely where new evidence is discovered, and where there was a fundamental defect in the first trial. They provisionally proposed that -

> 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 there years imprisonment.

Appendix B to the Consultation Paper contains an outline of the law of double jeopardy in 11 other jurisdictions.[28]

C. The Home Affairs Committee 2000 Report

The Home Affairs Committee[29] 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

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[28] Australia, New Zealand, Canada, Scotland, Germany, Belgium, The Netherlands, Italy, Spain, Denmark and Finland

[29] The Third Report of the Home Affairs Select Committee (1999-2000) HC 190, "The Double Jeopardy Rule" was published in June 2000, is available online at http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/190/19002.htm

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 made 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" [30]

[30] para 18

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"

- 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.

The Committee 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.

D. The Law Commission Report

The Law Commission published their final report in March 2001[31]. 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 –

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[31] Law Com no 267

> 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[32].

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 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[33] 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.

E. 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[34], published in October 2001, 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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[32] para 4.30

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

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

> 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, 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.
>
> 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[35].

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.

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[35] Chapter 12 para 61-62

F. 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.[36]

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 extended. We are consulting on those proposals at the moment and we will make our views known in due course[37].

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

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36 HC Deb 22 Oct 2001 : Col 14

37 The consultation closed on 31st January 2002

> reassuring, given that the original force would presumably still have to gather at least some evidence, to justify a new investigation.
>
> 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[38].

G. *Justice for All*: White Paper[39]

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.
>
> 4.65 Our proposals will work as follows:
> • 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:
> – there is compelling new evidence of guilt; and
> – the Court is satisfied that it is right in all the circumstances of the case for there to be a re-trial.
> • There will be scope for only one re-trial under these procedures.
>
> 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.

H. The Home Affairs Committee Report on the Bill

On 7 October 2002, the Home Affairs Select Committee announced[40] that it would examine the forthcoming *Criminal Justice and Sentencing Bill*, to implement the Government's proposals in *Justice for All* (Cm.5563) and expected to be published in the late Autumn. The Committee was proceeding on the assumption that the Bill would include the main elements of the White Paper. Relaxation of the double-jeopardy rule for

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38 "Dangers of double jeopardy", June 20, 2002, *The Daily Telegraph*
39 Justice For All Cm 5563, Home Office, July 2002
40 Press release no 25, 7 October 2002

serious offences (including manslaughter, rape and robbery) where compelling new evidence comes to light is among the issues in which the Committee was interested. The Committee is expected to publish its report, which will be made available on its website[41], on 4 December 2002.

The Bill will also be scrutinised by the Joint Committee on Human Rights, which is likely to publish a report later in December.

I. Cases which might be reopened

The Government said in the White Paper that they did not expect the procedures to be used frequently.

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[42], the Commissioner of the Metropolitan Police, Sir John Stevens, has 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[43].

Liberty's comment was that

> the fundamental problem with the investigation was the appalling manner in which it was carried out with evidence being lost and strong leads being ignored. It is unlikely that even with the abolition of this rule these suspects can ever be tried again fairly and it is likely that any trial will be stopped by the judge as an abuse of process.[44]

According to *The Daily Telegraph*, one investigation has already been reopened.

> A double child murder investigation is being reopened after the announcement of Government plans to abolish the double jeopardy rule which prevents a suspect being tried twice for the same offence.
> Sussex police said yesterday that its Major Crimes Branch was reviewing the inquiry into the 1986 murders of Karen Hadaway and Nicola Fellows, the nine-year-old friends who became known as the Babes in the Wood.

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41 http://www.parliament.uk/commons/selcom/hmafpnot.htm

42 "Double jeopardy no threat to Lawrence suspects", 1 Aug 2002, *The Guardian*

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

44 Liberty's response to the White Paper, October 2002

> The chief suspect for the murders is Russell Bishop, 36, who was tried and acquitted of killing the girls in Wild Park, Moulsecoomb, Brighton in 1987.
> Three years later, however, Bishop was jailed for life for the attempted murder of a seven-year-old girl.
> [-]
> a new investigation would be expected to include a fresh scientific examination of a sweatshirt that was linked to the murdered girls by forensic evidence. DNA tests were unavailable at the time of the original inquiry.[45]

J. Part 10 of the *Criminal Justice Bill*

The effect of the clauses is summarised in the Explanatory Notes[46]. What follows is a very brief outline of the main provisions.

1. Cases that may be retried

Clause 62 provides that the cases which may be retried are those in which a person has been acquitted of a "qualifying offence". Qualifying offences are those listed in ***Schedule 4***, including murder[47], soliciting murder, manslaughter, wounding or causing grievous bodily harm, kidnapping, rape[48], intercourse and incest by a man with a girl under 13, certain offences concerned with importation etc of Class A drugs, armed robbery, arson endangering life, causing an explosion likely to endanger life or property, genocide, crimes against humanity and war crimes, grave breaches of the Geneva Conventions, directing terrorist organisations, hostage-taking, hijacking aircraft, ships or Channel Tunnel trains, destroying, damaging or endangering safety of aircraft, seizing or exercising control of fixed platforms, destroying ships or fixed platforms, and conspiracy to commit any listed offence.

According to the Explanatory Notes all the offences on the list carry a maximum sentence of life imprisonment but –

> (t)hey do not include all offences for which life imprisonment is the maximum punishment, because this would catch a number of common law offences which may not have such serious consequences, and for which a life sentence would rarely be imposed.[49]

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45 "Babes in the wood suspect could be tried a second time", 19 Nov 2002, Daily Telegraph

46 *Criminal Justice Bill* Bill 8-EN, available at http://pubs1.tso.parliament.uk/pa/cm200203/cmbills/008/en/03008x--.htm

47 and attempted murder

48 and attempted rape

49 para 42

2. Application to the Court of Appeal

Clause 63 provides that a prosecutor may apply to the Court of Appeal for an order quashing a person's conviction and ordering him to be retried. Only one such application may be made in relation to any acquittal (*subsection (5*)), and an application may only be made with the written consent of the Director of Public Prosecutions. *Clause 78* disapplies the provision of the *Prosecution of Offences Act* 1985 which allows the DPP's functions to be exercised by a Crown Prosecutor, so that this must be his personal consent. He must be satisfied that there is new and compelling evidence (as defined by *clause 65*) that the acquitted person is guilty *and* that it is in the public interest for the application to proceed.

Evidence is new if –

> it was not available or known to an officer or prosecutor at or before the time of the acquittal (*clause 65(2*))

and it is compelling if –

> (a) it is reliable,
> (b) it is substantial, and
> (c) when it is considered in the context of the outstanding issues, it is highly probable that the person is guilty of the offence(*clause 65(3)),*

and it is irrelevant whether it would have been admissible at the original trial.

Under *section 64*, the Court of Appeal must make the order if satisfied that there is new and compelling evidence (as defined) and that in all the circumstances it is in the interests of justice for the court to make it. *Clause 66(2)* requires the court considering whether that requirement is met to have regard in particular to –

> (a) whether it is likely that a fair trial pursuant to the order would be possible;
> (b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;
> (c) whether it is likely that the new evidence would have been available sooner (either in the earlier proceedings against the acquitted person or subsequently) but for a failure by an officer or by a prosecutor to act with due diligence;
> (d) whether any officer or prosecutor has failed to act with due expedition since the new evidence became available or known to him or, if later, since the commencement of this Part.

Either the acquitted person or the prosecutor may appeal to the House of Lords against the Court of Appeal's decision (*clause 68*).

3. Retrial

Clause 72 provides that any retrial must be on indictment preferred by direction of the Court of Appeal but the person may not be arraigned more than two months after the court's order without leave, which must not be given unless the court is satisfied that the prosecutor has acted with due expedition and there is good and sufficient cause for trial

despite the lapse of time since the order. It also provides that evidence given at the retrial must be given orally *if it was given orally at the original trial* unless *section 100* of the *Criminal Justice Act* (hearsay evidence where a witness is unavailable) applies or the witness is otherwise unavailable.

4. Investigations

Clause 72 provides that acts in re-investigation of an acquitted person may not be undertaken (with or without his consent) without the written consent of the DPP (which again must be his personal consent) but *clause 73* does allow urgent investigative steps to be taken if certain conditions are all satisfied.

5. Reporting restrictions

Clauses 69 and *70* impose reporting restrictions from the time when the prosecutor gives notice of his application to the Court of Appeal and create specific offences of reporting in contravention of them.

6. Acquittals abroad

Part 10 also contains provisions under which a person who has been acquitted abroad may be retried here if the Court of Appeal orders the acquittal is not to be a bar. The Explanatory Notes explain:

> 252. In certain circumstances cases may also be tried where an acquittal for an offence has taken place abroad, but that offence took place within the United Kingdom. Such cases are likely to be rare. The Government intends to make a declaration under Article 55 of the Schengen Convention, which allows an exception to the normal rule against double jeopardy within member states, in cases where the offences took place within the home state. This will ensure that this measure is compatible with the Convention. The definition of offences within clauses 62(4) and (5) recognises that offences may not be described in exactly the same way in the legislation of other jurisdictions.

The notes do not explain what the position would be where a person has been acquitted abroad for an offence which took place abroad but over which the English courts have jurisdiction. Murder and manslaughter committed by British citizens are among those exceptional cases.[50]

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[50] *Offences against the Person Act* 1861, s.9 and *British Nationality Act* 1948 s.3

7. Arrest, custody and bail

Clauses 74 to *77* deal with warrants for arrest, and bail and custody at various stages of the proceedings.

K. Reactions to the proposals

The proposed change to the double jeopardy rule has attracted much criticism, both in principle and on the extent of the proposed relaxation of the rule. Particular issues which have been raised include -

- whether the change should be retrospective
- whether it should apply only to acquittals on charges of murder or to a wider range of offences
- whether it should be an absolute requirement that that the new evidence on which the application is based is evidence which could not reasonably have been available at the original trial (i.e. should there be a "due diligence" test)
- whether there should be a time limit for reopening acquittals
- whether it should be possible to convict a defendant on evidence which would not have been admissible at the original trial
- whether there should be a limit on the number of attempts to reopen an acquittal
- whether the change is compatible with our international obligations

Some reactions on general principle are set out below, followed by discussion of these particular issues.

1. General response

a. The Bar Council

In a joint response, the Bar Council and Criminal Bar Association opposed the change. 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.

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.[51]

b. Liberty

The immediate comment of the human rights organisation, Liberty, to the Queen's Speech was -

> 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.[52]

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. It was highly unlikely (especially in high profile cases) that a jury would not be aware of the fact that it was a retrial and that a court had already decided that there was 'compelling' new evidence. Even if it was not

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51 http://www.barcouncil.org.uk/documents/FINALComp14Oct.doc

52 Liberty Press release 13 November 2002

the prosecution would have a huge advantage in knowing exactly what the defence witnesses and defendant would say having been through one trial and would be able to prepare accordingly.

> The rule against double jeopardy prevents oppressive repeat prosecutions. We doubt that giving the police and prosecution the option of a 'second go' at defendants will do anything to tackle the issues of quality investigation in the first place or ensure the absolute diligence that serious crimes should demand of them. Indeed, it raises the possibility that police officers' certainty that they are right will allow them to pursue an innocent person beyond their acquittal, rather than focusing on a full investigation to find the real culprit. If the bar is relaxed it will allow the state the opportunity to try time and again to get a popular result against an unpopular defendant.
> [-]
> The White Paper puts forward a number of safeguards to limit the reduction of the bar. We maintain that the only watertight safeguard is the rule itself.[53]

c. Justice

Justice also opposed the change in principle:

> 119. The safeguards proposed in the White Paper are welcome and have clearly been designed to meet some of the obvious objections to removal of the rule. One concern has been that such a move would encourage sloppiness by the police and prosecution. The safeguards probably do adequately address that anxiety. The question is whether the principle should be preserved, nonetheless.
> [-]
> 121. Thus, the rule has several purposes. Firstly, double jeopardy provides protection against wrongful conviction. The state should not be able to retry people until it gets the result it wants because to do so is obviously oppressive. Secondly, it also prevents the continued distress of the trial process which can cause unacceptable hardship to the defendant. Thirdly, double jeopardy confirms the importance of finality in the criminal justice process. Finally, it promotes efficient investigation and prosecution. The fact that the prosecution fails as an adversary does not justify further encroachment on individual liberty, even if the guilty are perceived to go free as a result.
>
> 122. Those who support change say that double jeopardy is the cause of considerable injustice. Examples are largely hypothetical – involving the dramatic finding of genetic evidence years after a trial. In practice, some of the usual cases which are said to justify reform do not. The failure of the authorities to bring the perpetrators of Stephen Lawrence's murder to justice did not lie with the double jeopardy rule. Rather, as the Macpherson inquiry showed, it stemmed from institutional racism and incompetent investigation. In any event,

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[53] Liberty Response to the White Paper: October 2002

Macpherson has said himself recently that there is no new evidence which would justify a fresh prosecution in the case.

123. It is concerning that there has been no research to justify the need to abolish this rule or to look at the potential effect of reform. As with any change, it is important to understand the roots of right to ensure that protection is not weakened. In addition to the consideration of the rule in our system, it is always instructive to look at both international and comparative law to see if they provide any guidance in the scope, extent and practice of rights.

124. In respect of international law, article 14(7) ICCPR does not prevent the re-opening 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. However, the court's involvement is required. Unfortunately, there is no European consensus on the double jeopardy principle but most states distinguish between reopening by court and a fresh prosecution without court's involvement. The lack of consensus is the result of differing views about the role of the state in adversarial and inquisitorial systems. In relation to the ECHR, as previously stated, Article 4(2) of Protocol 7 allows a retrial on fresh evidence provided it was not available at the time of trial. The evidence must also be sufficiently probative of guilt.

125. Common law countries generally maintain a commitment to the double jeopardy principle. In Canada, acquittal is final and can only be appealed by the Crown on a point of law. The case can be sent back for retrial. The Crown's right to appeal on a question of law alone survived the application of the s. 11(h) Canadian Charter of Rights, the double jeopardy provision. However, in another case, the Court held that a provision of the Quebec Summary Convictions Act which permitted a wider scope for Crown appeal was unconstitutional. By implication, it is thought likely that an attempt to allow the Crown to appeal on the basis of fresh evidence in Canada would also be found to violate the Charter. In Australia, the prosecution can appeal for clarification of the law but whatever decision is rendered on the legal issue cannot affect the not guilty verdict in the appealed case. In South Africa, the Law Commission proposed changes to the right of the prosecution to appeal against an acquittal on fact but they have not been acted upon. Thus, the position, in common law systems similar to our own, is that the double jeopardy principle is still valued and retained.

126. Justice is concerned at removal of the double jeopardy rule. If reform is thought necessary, we propose that retrial be limited to murder cases, as recommended by the Law Commission. The fresh evidence criteria should be limited to fresh scientific evidence not reasonably available at the original trial, where there are issues of public safety - although the problems with even this type of evidence should be recognised. There will be the grave difficulty of conducting a fair trial in cases with any degree of public notoriety - how will a jury be found that is unaware of the fact of the first trial, and who, at the second trial, will potentially know that the Court of Appeal considered that there existed

compelling new evidence of guilt? What directions are judges to give to juries in such circumstances?

d. Comments in the press

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.[54]

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?[55]

Writing in *The Spectator*, Boris Johnson said:

> 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,

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

55 "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*

> post-acquittal, the more we appreciate the clarity of the rule against double jeopardy.[56]

2. Particular issues

a. Retrospection

Clause 62(6) provides that *Part 10* applies whether the acquittal was before or after the passing of the Act. The provisions of this Part therefore have retrospective effect.

In their consultation, the Law Commission sought views on whether their proposal to make an exception to the double jeopardy rule in murder cases should be made retrospective. Following consultation, they concluded that it should, and set out the arguments which they found compelling:

> 4.44 We consider that the arguments in favour of giving the exception retrospective effect are powerful. Substantive retrospective criminal legislation renders an act, which was legal when it was performed, subsequently illegal. In the case of the procedural change we propose, the alleged act was already a crime. The new procedure merely makes it possible (or easier) to bring the offender to justice, a desirable outcome whenever it is achieved.
>
> 4.45 Further, if the new exception were not retrospective, it could well be a number of years before it could be used. In deciding to recommend a new exception we have taken account of the fact that, in recent years, we have seen considerable advances in forensic science, particularly in DNA analysis. It is the possibility of bringing these new techniques to bear on materials from old cases that is likely to constitute a major source of cases said to fall within the new exception. If there were no retrospective effect, the potential advantage in being able to bring these new techniques to bear on materials from old cases would be lost.
>
> 4.46 Furthermore, if the exception were not retrospective, arbitrary distinctions would be drawn between persons who happened to have been acquitted before and after the relevant date. This would open up the prospect of public outrage where new evidence came to light and the exception would otherwise have been available. By recommending that it should be confined to murder, we are limiting the exception to the most serious cases – cases which might be thought particularly to cry out for justice for the deceased and his or her relatives. In such cases, we do not believe that a person against whom there is compelling evidence of guilt should be protected by a mere accident of timing.[57]

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[56] "Try, try and try again", 3 Aug 2002, *The Spectator*

[57] Law Com No 267

It is arguable that, without retrospection, the effectiveness[58] of the new provisions could be virtually dependent on the emergence of some new category of forensic evidence as powerful as DNA analysis. The Law Commission found it unsurprising that many consultants who objected in principle to the exception also objected to retrospectivity: of those who favoured the exception, a clear majority thought it should have retrospective effect. Some of the objections to retrospectivity came from the Bar Council and Liberty. The Bar Council opposed retrospectivity, pointing out that a defendant who has already been tried and acquitted is and was entitled to expect that his acquittal was for all time, not merely provisional pending a change in the law. 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.

b. Range of offences

The range of offences to which the exception is to apply is much wider than the limited range proposed by the Law Commission, and also wider than the extended range of "other very serious offences such as rape, manslaughter and armed robbery" anticipated by the White Paper.

The Bar Council did not believe that the Government had produced any rational justification for going beyond the category (murder and serious allied offences) proposed by the Law Commission. The Law Society thought that the proposed list of offences to which the procedure could apply was too wide and the choice of offences unjustified. They considered that the offences should be limited to murder and manslaughter, and possibly rape, and asked:-

> Is the purpose of the reform a) to improve public safety? b)administration of justice? c) a mark of society's disapproval? d) resolution and healing for other parties involved? Different answers would produce different lists of offences.
> Many persons convicted of murder for example never commit another offence and pose little risk to the public.

c. Limit on number of applications

In response to the *White Paper*, the Bar Council commented:-

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[58] Knowledge that an acquittal may be reopened is likely to discourage post-acquittal confessions, but would not necessarily discourage new witnesses from coming forward or prevent other evidence being discovered.

> 8. We note that the White Paper envisages one retrial only. However, we do note that there is no limit on the number of times that an application may be made to the Court of Appeal on the basis of "fresh evidence." A person may thus be subjected to repeated attempts by the authorities, possibly incited by the media, to satisfy the conditions in any particular case. This further exemplifies the continued pursuit of an acquitted person that may occur if these changes are made.

Clause 63(5) provides that not more than one application may be made to the Court of Appeal in relation to an acquittal.

d. Reporting restrictions

The Bar Council had urged:

> Before the DPP considers whether to give his consent to a reinvestigation, he ought to go to the Court of Appeal, indicate that he is minded to order a reinvestigation and seek an order from the Court of Appeal (for which provision ought to be made in legislation) that there should be an absolute ban on the reporting of the fact of a reinvestigation, and reinvestigation itself and any subsequent proceedings. This would go some way to minimising the chances of any retrial having to be abandoned because of prejudicial publicity. Such publicity will result in a fair retrial being impossible. Unless such a blanket ban is put in place the media will report on every detail of the investigation and thereby, in all probability, poison the minds of those who will have to try the case the second time around. The acquitted person should have a right to be present and legally represented at the hearing in the Court of Appeal, transcripts of the first trial and all witness statements and other documentation should be available for the Court of Appeal.

These recommendations are reflected in *clauses 67, 69* and *70.*

e. Due diligence test

The Bar Council proposed that fresh evidence should only be considered if it could not reasonably have been available for the first trial and that it should unambiguously point in the strongest terms towards the conclusion that a previously acquitted defendant was in fact guilty.

The Law Commission had proposed in their consultation paper that the power to reopen an acquittal on the grounds of new evidence should be available *only* where that evidence could not, with due diligence, have been adduced at the first trial. Although the majority of respondents had agreed, the Commission found the arguments of the minority persuasive. The arguments against were that a due diligence test would not in practice work as a disciplinary mechanism at the level of the police, or at the level of the courts, and that it was simply wrong to refuse to reopen a case which should otherwise be reopened merely because of some extraneous earlier failing of the police. Also, the

original proposals would have had the effect of diverting attention away from the merits of the case and towards a closer examination of the adequacy of the original investigation.

The wording of the *White Paper* in explaining how the proposals would work –

> 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.

may have suggested that it would not be possible to reopen an acquittal unless the new evidence could not reasonably have been available for the first trial. However, the Bill does not impose an absolute condition. It provides in *clause 66(2)(b)* that –

> whether it is likely that the new evidence would have been available sooner (either in the earlier proceedings against the acquitted person or subsequently) but for a failure by an officer or by a prosecutor to act with due diligence

is one of the matters to which the court is to have regard in determining whether in all the circumstances it is in the interests of justice for the court to make an order.

f. Time limits

The Bar Council suggested that there should be a time limit of ten years from the acquittal, after which no application could be made. There is no such time limit in the Bill, although prosecution failure to act with due expedition since the new evidence became available or known is one of the matters to which the court is to have regard in determining whether in all the circumstances it is in the interests of justice for the court to make an order, and there is a time limit of two months (which may be extended by the court) for the new prosecution to be brought after the Court of Appeal has made an order.

g. Admissible evidence

In their consultation[59], the Law Commission had proposed that, for the purposes of the new exception, evidence should count as new evidence if, having been inadmissible at the first trial, it becomes admissible through a change in the law. However, their final recommendation[60] was that it should not be possible to apply for a retrial on the basis of evidence which was in the possession of the prosecution at the time of the acquittal but could not be adduced because it was inadmissible, even if it would now be admissible because of a change in the law. Their provisional proposal had been comprehensively rejected by respondents, largely through fears that the law might be changed in order to secure a second trial. Even if this seemed a little far-fetched, anyone arguing for a change

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59 Consultation Paper 156
60 Recommendation 6

in the law of evidence would be bound to point to examples of cases in which the change would have been effective to secure a conviction; if the argument was successful and the law was changed, the "example" case could be reopened and the effect would be much the same. The Law Commission considered these objections well founded.

The requirements of *clause 65* are met if there is "new and compelling evidence" that the acquitted person is guilty of the qualifying offence. Evidence is "new" –

> if it was not available or known to an officer or prosecutor at or before the time of the acquittal *(subsection (2)*

and *subsection (5)* provides that for the purposes of the section –

> it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

Any evidence which was not used merely because it was not admissible at the first trial must have been known to the prosecution, even if it could be argued that it was not "available" because of its inadmissibility. By making earlier inadmissibility irrelevant *subsection (5)* appears to confirm that such evidence could not qualify as "new" evidence, as recommended by the Law Commission. Conversely, the *Bill* does not appear to contain any provision which would prevent the use (either on an application to the Court of Appeal or at the retrial) of evidence which was new but would not have been admissible under the law in force at the time of the first trial. Nor is there any provision which would expressly preclude a conviction at the retrial which would not have been possible on the substantive law in force at the time of the first trial.[61]

It seems likely that the reforms to the rules of evidence, contained in Part 11 of the Bill, would not apply to a retrial where the original trial took place before Part 11 came into force.

h. International obligations

Protocol 7[62] to the European Convention on Human Rights, which was opened in 1984, contains relevant provisions, but has not been signed by the UK. Article 4, "Right not to be tried or punished twice", provides: -

> 1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
> 2 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

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61 Those laws could have been amended by legislation, or modified in caselaw, between the two trials.

62 http://conventions.coe.int/Treaty/EN/WhatYouWant.asp?NT=117

> 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.
> 3 No derogation from this Article shall be made under Article 15 of the Convention.

Article 14(7) of the United Nations International Covenant on Civil and Political Rights 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.

The Law Commission[63] considered both articles and did not consider itself constrained from recommending an exception to the double jeopardy rule on the ground of new evidence. It pointed out that Article 14(7) read literally would prohibit an appellate court from quashing a conviction and ordering a retrial, and drew attention to the United Nations Human Rights Committee's view that reopening criminal proceedings "justified by exceptional circumstances" did not infringe the principle, but also to the Committee's distinction between "resumption" of criminal proceedings, and "retrial" which was expressly forbidden.

i. Other options

Other options which have been suggested (in addition or alternative to making an exception to the double jeopardy rule) involve greater use or strengthening of the law of perjury. The Association of Chief Police Officers suggested: -

> Also on this subject, there is a strong public interest to investigate and prosecute witnesses, including defendants, for perjury where their evidence has been palpably incredible. There is a culture that condones perjury; where a defendant who has given evidence and called witnesses is convicted, the court should be more ready to infer perjury and call upon the police to investigate.

Writing in *The Times*, Mr Michael Straddling suggested:-

> While there are instances of those acquitted of serious offences subsequently confessing to the crime, surely a less radical and more effective solution would be to increase sentencing powers for perjury. A discretionary life sentence for those who, say, admit to murder after acquittal would allow for justice and the retention of the double jeopardy rule.[64]

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63 Law Com No 267, Part III.

64 "Criminal justice in the dock", June 28, 2002, *The Times*

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