

TRUTH OR JUSTICE? DOUBLE JEOPARDY REFORM FOR QUEENSLAND: RIGHTS IN JEOPARDY

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ABSTRACT

This paper discusses proposed reforms to double jeopardy contained within the Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) which is likely to be passed by Queensland's parliament later this year. The paper argues that the development of double jeopardy rules and the reform debate has been muddled by doctrinal confusion over whether double jeopardy is primarily a procedural right for the protection of accused individuals or a procedural rule to protect the institutional integrity of judicial outcomes. The paper critically examines the underlying rationales for double jeopardy protections along with arguments in support of the proposed reforms. The discussion of the proposed Queensland provisions takes place with regard to similar reforms that have been recently implemented in the UK and NSW and which are planned for New Zealand.

The rule against double jeopardy has traditionally been thought of as a hallowed canon of the common law, a golden rule which sits at the heart of all English common law systems.¹ Double jeopardy is revered as a principle 'vital to the protection of personal freedom'.² It is claimed that the rule underpins the legitimacy of the legal system because it recognises the incontrovertibility of verdicts, which are transformed, via the declared judgment, into a record of a 'higher nature'.³

Later this year, the Criminal Code (Double Jeopardy) Amendment Bill 2007 (the Bill) will pass into law in Queensland.⁴ Queensland will thereby become the second

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¹ Lord Justice Auld, 'Chapter 12 – Appeals', *Review of the Criminal Courts of England and Wales*, (2001) [50], <<http://www.criminal-courts-review.org.uk>> at 18 July 2007; *Davern v Messel* (1983) 155 CLR 21, 62 (Murphy J).

² (1983) 155 CLR 21, 62 (Murphy J).

³ *Pearce v R* (1988) 194 CLR 610, 625 (Gummow J). Gummow J notes that this principle is expressed in the Latin maxim: *transit in rem judicata*. See also *Rogers v R* (1994) 181 CLR 251, 273 (Deane and Gaudron JJ).

⁴ The Legislative Assembly of Queensland's *Notice Paper for 7 August 2007*, 5, lists the Bill on the General Business agenda for this 52nd sitting of Parliament.

Australian State to introduce double jeopardy reform in the past twelve months, following the passage in NSW of the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006*. Further States may follow. The Queensland Bill implements, with few changes, the model for double jeopardy reform adopted at the Council of Australian Governments meeting in April 2007.⁵

The Bill creates two classes of exceptions to the ancient common law principle of double jeopardy. That principle provides, broadly speaking, that no person should be twice placed in jeopardy of conviction or punishment for the same offence.⁶ The principle gives rise to a rule that, once convicted or acquitted, an accused person is immune from further prosecution for that offence, or for a different offence covering the same factual elements.⁷

The first exception to the principle of double jeopardy under the Bill will allow someone acquitted of murder to be retried for murder if, after their acquittal, 'fresh and compelling evidence' of the person's guilt emerges.⁸ The second exception applies to offences involving a maximum penalty of 25 years or more imprisonment, where an acquittal is 'tainted' because of the commission of an 'administration of justice offence'.⁹ 'Administration of justice offences' include offences which are directed at undermining the integrity of the trial process, such as perjury and witness tampering.¹⁰ The 'tainted acquittals' exception is available only if, but for the administration of justice offence, the accused would probably have been convicted at the original trial.¹¹

The debate surrounding double jeopardy reform centres around two propositions, both held by proponents to be of cardinal importance. The first is that a guilty offender should not be able to escape punishment for a serious crime. If an acquittal is found to have been wrongful, the inaccuracy should be rectified. To the extent that the criminal justice system fails to correct known errors, its legitimacy is impaired.¹² The second proposition is that society as a whole, and especially the State, must, after lawful avenues of appeal are exhausted, accept an acquittal as inconvertibly correct. The legitimacy of the criminal justice system requires that final judgments of the court be accepted as final.¹³

⁵ Council of Australian Governments 'Double Jeopardy Law Reform: Model Agreed by COAG', 13 April 2007, <www.coag.gov.au/meetings/130407/> at 18 July 2007. Victoria and the ACT reserved their positions on the recommendations for reform.

⁶ Ben Fitzpatrick, 'Double Jeopardy: One Idea and Two Myths from the Criminal Justice Bill 2002' (2003) 67(2) *Journal of Criminal Law* 149, 150.

⁷ *Criminal Code (Qld)* s 17; (2002) 194 ALR 1. Further manifestations of the principle are discussed below in Part 1.2.

⁸ *Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld)* s 678B.

⁹ *Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld)* s 678C.

¹⁰ *Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld)* s 678. Section 678 defines an 'administration of justice offence' as any offence under Chapter 16 of the *Criminal Code (Qld)*.

¹¹ *Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld)* ss 678C, 678E.

¹² Ian Dennis, 'Rethinking Double Jeopardy: Justice and Finality in Criminal Process' (2000) *Criminal Law Review* 933, 944; Mirko Bagaric and Luke Neal, 'Double Jeopardy: Time for a Fundamental Re-think?' (2003) 3(4) *Criminal Law News Victoria*, LexisNexis Butterworths Online; Queensland, 'Second Reading Speech', *Parliamentary Debates*, Legislative Assembly, 2 Nov. 2006, 470 (Peter Wellington).

¹³ Fitzpatrick, above n 6, 163. This was also the position adopted by the High Court in *R v Carroll* (2002) 194 ALR 1. For example, see comments by Gleeson CJ and Hayne J at 13.

The debate therefore reveals a tension between the two values most fundamental to the criminal justice system's claim to legitimacy: truth and justice. A generation ago, Lord Wilberforce explained that:

[a]ny determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that conclusion, it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interests of peace, certainty, and security, it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gaps. But there are cases where the certainty of justice prevails over the possibility of truth...and these are cases where the law insists on finality.¹⁴

Dr Corns explains the matter this way:

[t]here is some authority for the proposition that the system (or institutional) requirements (for example, for finality) outweigh the search for what might be the "objective truth". Here lies perhaps the fundamental ideological tension behind the question of retrials. That is, criminal proceedings under an adversarial system are not a search for the objective truth behind the allegations. Rather, the proceedings (specifically the trial) are designed to provide a fair and efficient process to determine whether the prosecution is able to satisfy the burden of proving all the elements of the particular offence. In this sense, the primary interests being protected are those of the accused who is (rightly) presumed innocent. This ideology prevails over any public interest in securing the conviction and punishment of guilty persons.¹⁵

Thus there exists a structural tension between the idea that criminal proceedings are designed to determine the objective truth about particular events and the competing notion that justice requires that verdicts be treated as inviolable.¹⁶ However there is a further tension which remains largely unacknowledged – that is the tension between the idea that the protection against double jeopardy is a personal right designed to protect individuals and the idea that double jeopardy is a procedural mechanism which protects the institutional integrity of the judicial system.¹⁷ The tension is discernible in the subtly divergent views of Lord Wilberforce and Dr Corns quoted above. The former emphasises institutional and social values: “peace, certainty and security”. The latter emphasises the primary role of protection of the individual accused; in this conception the collective interest comes second.

Most commentators treat these two separate justifications as complementary, insofar as they seem to provide cumulative reasons to support the retention of double jeopardy

¹⁴ *The Amphyll Peerage* [1977] AC 547, 569.

¹⁵ Chris Corns, ‘Retrial of acquitted persons: Time for reform of the double jeopardy rule?’ (2003) 27(2) *Criminal Law Journal* 80, 87.

¹⁶ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ‘Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals’ *Discussion Paper Model Criminal Code* (2003), 70.

¹⁷ Jay Sigler, ‘A History of Double Jeopardy’ (1963) 7 *American Journal of Legal History* 283, 308.

rules.¹⁸ However, these doctrinally distinct issues may not necessarily be complementary. Confusion about the underlying purpose of the rules may have contributed to the notorious profusion of technicalities that has characterised double jeopardy rules until quite recently.¹⁹ Arguably, the same doctrinal confusion continues to muddy the debate about double jeopardy reform.

This paper will consider Queensland's double jeopardy reforms in the context of these tensions. Part One will commence with a discussion of the historical development of the principle, with emphasis on the question of whether double jeopardy evolved as a protective right or as a bulwark of institutional integrity. The current manifestations of double jeopardy within the criminal justice system will be discussed, including the application of various legal rules and, more flexibly, the use of double jeopardy as a principle to inform discretionary decision-making. Part One will conclude with a discussion of the key justifications for the existence and retention of strong double jeopardy protections within the criminal justice system.

Part Two will consider the background to double jeopardy reform in Queensland, including the catalytic Carroll case.²⁰ The reform programs in other jurisdictions will be considered including the United Kingdom, New Zealand and New South Wales.

Part Three will present the arguments in favour of the proposed reforms. The scheme of double jeopardy exceptions under the Queensland Bill will then be outlined with special reference to putative safeguards.

It will be concluded that, although double jeopardy lacks the force in Australia of a fully formed constitutional right, a cautious approach should be taken to whittling away long-evolved process protections. Reforms that respond to problems of perceived injustice in particular cases may seem superficially attractive, but changes are preferable when they cohere within the fundamentally normative scheme of the criminal justice system.²¹

I DOUBLE JEOPARDY & THE ANGLO-AUSTRALIAN CRIMINAL JUSTICE SYSTEM

A *Historical Background*

The ancient origins of the law of double jeopardy are shrouded in the mists of time.²² Justice Kirby believes that, like many legal norms, the principle may have biblical

¹⁸ Andrew Haesler, 'The Rule Against Double Jeopardy – Its Tragic Demise in New South Wales, A Tale of Woe, Another victim of the Law 'n' Order Regime' (Paper presented to Lawyers Reform Association Seminar Series), 18 June 2003 <www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_papersbypublicdefenders> at July 18 2007; Corns, above n 15, 86-87.

¹⁹ *Discussion Paper Model Criminal Code*, above n 16, 1. The Committee considered that 'the technical rules which govern this area of the law... remained unbelievably complex in Australia until the decision of the High Court in Pearce ((1998) 194 CLR 610)': *ibid*, 1.

²⁰ (2002) 194 ALR 1.

²¹ Justice Frank Vincent, 'Human Rights and the Criminal Law' (14th Sir Leo Cussen Memorial Lecture), Melbourne, 16 Oct. 2003, <<http://www.leocussen.vic.edu.au/content.asp?p=188>> at 18 July 2007.

²² Jill Hunter, 'The Development of the Rule Against Double Jeopardy' (1984) 5(1) *Journal of Legal History* 3, 4.

origins.²³ He traces the principle to an Old Testament passage which promises that: ‘affliction shall not rise up the second time’. This text has been interpreted by scholars as support for the canonical maxim: ‘not even God judges twice for the same act’.²⁴

Ancient Greece is another possible point of origin. Historians have discovered the rule in ancient case law: ‘the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim or anything else of that sort’.²⁵

There seems to be broader acceptance for Roman Law as the likely origin of double jeopardy.²⁶ The *Digest of Justinian* mandated that ‘the Governor should not permit the same person to be again accused of a crime of which he has been acquitted’.²⁷ The prescription was not absolute – the informer could bring another prosecution, but only within 30 days of the acquittal.²⁸ Sigler cautions against assuming that the principle carried protective force in Roman law. In his view, the concept of rights was ‘still primitive’ and criminal procedure patterns much more informal.²⁹

Historians believe that double jeopardy may have been imported into English law along with the Roman doctrine of *res judicata*.³⁰ The import may have eventuated as a factor of the pervasive nature of Roman Law or it may have percolated indirectly into English law via Canon Law, which rose to greater prominence after the Norman conquest of England in 1066.³¹ Indeed, the defining tools of the double jeopardy principle – the pleas of *autrefois convict* and *autrefois acquit* – are still expressed today in Norman French.³²

Whatever the precise early provenance of the principle, it is clear that by the twelfth century, an early but limited version of the principle was in use in England.³³ Under William I, ecclesiastical courts had flourished, growing alongside secular courts, but with distinct jurisdictional bases. The Church’s revenue base became an important source of tension during the reign of Henry II. He sought to improve that base by restoring the jurisdiction of secular courts over clergy who committed secular crimes.³⁴

²³ Justice Michael Kirby, ‘Carroll, double jeopardy and international human rights law’ (2003) 27 *Crim LJ* 231, 231-2; see also Justice Kirby’s comments to like effect in (1998) 194 CLR 610, 630-631.

²⁴ *Book of Nahum*, cited in George Thomas (1998) *Double Jeopardy: The History*, cited in Kirby, above n 23, 231. See also Sigler, above n 17, 284.

²⁵ Demosthenes, *Against Leptines* XX, 147 (translated in J Vince, *Demosthenes I* (1962) 589), in Charles Parkinson, ‘Double Jeopardy Reform: The New Evidence Exception for Acquittals’ (2003) 26(3) *UNSW Law Journal* 603, 605, fn 16.

²⁶ Hunter, above n 22, 4; Sigler, above n 17, 283.

²⁷ *Digest of Justinian*, Book 48, Title 2, Note 7, in S.P. Scott (1932) *The Civil Law*, cited in Hunter, above n 22, endnote 2.

²⁸ Sigler, above n 17, 283.

²⁹ *Ibid*, 284.

³⁰ Hunter, above n 22, 4; Parkinson, above n 25, 605. *Res judicata pro veritatem accipitur* – ‘a matter decided is accepted as the truth’: Parkinson, above n 25, 605, fn 20.

³¹ Hunter, above n 22, 4; Parkinson, above n 25, 605.

³² *Discussion Paper Model Criminal Code*, above n 16, 1. *Autrefois acquit* translates to ‘I have already been acquitted’; *Autrefois convict* translates to ‘I have already been convicted’: *ibid* 1.

³³ Hunter, above n 22, 5; *Cooke v Purcell* (1984) 14 NSWLR 51, 54–55 (Kirby P).

³⁴ Hunter, above n 22, 5. Hunter notes that death and forfeiture of all property to the Crown was the usual form of punishment for felonies. Fines were standard for breaches of the King’s peace. Both were an important source of Crown revenue: *Ibid*, 5-6.

Archbishop Thomas Becket resisted, claiming that dual jurisdiction would violate a maxim observed in ecclesiastical courts, *nemo bis in idipsum* — no man ought to be punished twice for the same offence.³⁵ Posthumously, Becket prevailed, with Henry II renouncing his claim to dual jurisdiction over the clergy in 1176.³⁶

The records show that the pleas of *autrefois* acquit and *autrefois* convict were in somewhat regular use by the thirteenth century.³⁷ However it is by no means obvious that the pleas, whether imported or evolved, existed to protect the rights of the accused.³⁸ Certainly, no mention of double jeopardy principles appear in the Magna Carta, either expressly or by implication.³⁹ Hunter notes that criminal justice in Norman England was ‘bereft of individual rights or democratic ideals’.⁴⁰ Instead, she argues that the notion of double jeopardy as an ancient principle developed to protect individual rights is misconceived.⁴¹ The rule, in its early form, was merely procedural, which, given the prevalence of private prosecutions, was most likely developed to protect judicial time and resources from repeated prosecutions pursued for improper motives.⁴² The judiciary’s attitude to the impact of this abusive practice on hapless defendants was, in Hunter’s view, most likely, ambivalence.⁴³

By contrast, Sigler argues that double jeopardy was probably developed for the protection of individuals. He acknowledges that double jeopardy was not considered fundamental. The principle was not mentioned in the Assize of Clarendon of 1166, nor in the Bill of Rights of 1689, nor in any of the early English statutes. Sigler explains that there was no real divide between criminal and civil law until the fourteenth century; even then, the separation developed slowly.⁴⁴ Moreover, most crime was ‘prosecuted’ by affected persons, usually to obtain monetary damages.⁴⁵ However, Sigler points out that when punishment was inflicted, it frequently included mutilation or death. Individuals facing prosecution were thus literally at risk of life and limb.⁴⁶ Additionally, as the power of the State grew, its role as prosecutor of crime became more important; simultaneously, the number of crimes grew and punishments became more severe.⁴⁷ Moreover, the introduction of a new prosecutorial procedure, the indictment, gave rise to a real risk of an accused being prosecuted privately by the ancient appeal procedure and again by the State on indictment.⁴⁸ It was in this complex legal and social environment that double jeopardy started to gain significance. In Sigler’s view, it

³⁵ (1984) 14 NSWLR 51, 55 (Kirby P).

³⁶ *Ibid*; Hunter, above n 22, 6.

³⁷ *Ibid*; (1984) 14 NSWLR 51, 55 (Kirby P).

³⁸ Hunter, above n 22, 7.

³⁹ Sigler, above n 17, 284.

⁴⁰ Hunter, above n 22, 7.

⁴¹ *Ibid*.

⁴² *Ibid*, 7 - 9.

⁴³ *Ibid*, 8.

⁴⁴ Sigler, above n 17, 287.

⁴⁵ *Ibid*, 287, 288.

⁴⁶ *Ibid*, 285-6.

⁴⁷ *Ibid*, 289.

⁴⁸ *Ibid*.

emerged as a protective doctrine, albeit one riddled with exceptions and rooted in antiquated procedures and technical rules of pleading.⁴⁹

By the sixteenth century, the principle of double jeopardy seems to have firmed into a settled tenet of the common law.⁵⁰ The first legal text to describe the pleas in detail, *Les Plees Del Coron* by Staunford, was published in 1557.⁵¹ The maxim underpinning the pleas appears in Sparry's Case in 1589: *nemo debet bis vexari pro una et eadem causa* (a man shall not be twice vexed for one and the same cause).⁵²

However, the plea of *autrefois acquit* had quite wide exceptions, allowing for further vexation in numerous circumstances. The plea applied only to an acquittal on the merits; it was not available for an acquittal based on a pleading defect or other error of law.⁵³ There were also geographic exceptions. For example, one statutory exception allowed a second prosecution in England for offences committed and prosecuted in Wales.⁵⁴ This exception was presumed to arise because the Welsh could not be trusted to vigorously prosecute their own criminals.⁵⁵ Another statutory exception, which endured from 1487 – 1819, allowed private prosecution of homicide to follow within a year and one day of a Crown prosecution, regardless of whether the outcome at the first trial was conviction or acquittal.⁵⁶

Hunter argues that, although the double jeopardy rules were 'slowly achieving significance', they were not at that time considered to be fundamental to personal liberty and certainly not the cornerstone of English justice, as some have claimed.⁵⁷

Sigler argues that the protective aspects of double jeopardy, limited as they were, evolved initially to protect an accused from repeated private prosecutions, rather than from repeated State prosecution.⁵⁸ The latter purpose, appeared later, around the fifteenth century, and it was another century before double jeopardy emerged as a doctrine directed at diminishing 'the danger of governmental tyranny through repeated prosecutions for the same crime'.⁵⁹

However, one can see, even in the way the early maxims are expressed, some degree of concern for the individual accused. The direct references to vexation of the accused in the early Latin maxims suggests a desire to protect the accused from oppressive re prosecution. Similarly, the term 'double jeopardy' refers to the personal jeopardy faced by the accused. Justice Kirby acknowledges that a prior prosecution in the late medieval period did not attach to the accused as a strict protection.⁶⁰ During this period

⁴⁹ Ibid, 288–291.

⁵⁰ Parkinson, above n 25, 605; Sigler, above n 17, 293.

⁵¹ Hunter, above n 22, 13.

⁵² *Sparry's Case* (1589) 5 Co Rep 61a [77 ER 148], in (1998) 194 CLR 610, 625.

⁵³ *Vaux's Case* (1591) 4 Co Rep 44a; 76 ER 992, cited in both Hunter, above n 22, 13 and (1984) 14 NSWLR 51, 55.

⁵⁴ Act (1534) 26 Hen. VIII, c.6, cited in Hunter, above n 22, 12.

⁵⁵ Hunter, above n 22, 12.

⁵⁶ Ibid; Sigler, above n 17, 289, 293.

⁵⁷ Hunter, above n 22, 14, 15.

⁵⁸ Sigler, above n 17, 293.

⁵⁹ Ibid, 293–4, 297.

⁶⁰ (1988) 14 NSWLR 51, 55.

of growth in the primacy of the State, he contends that nonetheless, the underlying rationale for the pleas was the avoidance of vexation; in other words, the central concern of double jeopardy rules was to protect the accused individual from oppression and misuse of State power.⁶¹

By the 1700s the principle of double jeopardy had firmed into its modern form. Sir William Blackstone referred to the ‘universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.’⁶² That maxim was incorporated into the Fifth Amendment of the *United States Constitution* in 1789 as part of the *Bill of Rights*: ‘nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb’.⁶³ The American constitutional conception of double jeopardy was declaratory of the law as the framers understood it to apply in England.⁶⁴ Certainly, the US constitutional version of double jeopardy was a faithful contemporary reflection of the maxims employed in England. But the very act of incorporating the principle into constitutional form altered its essential nature, transforming it into a *right*. In England, although protective in nature, the maxims remained related to technical rules of pleading and, in many circumstances, had little more protective force than a bare slogan.⁶⁵

The modern form of the principle had thus emerged. It applied to protect an acquitted or convicted person from reprosecution for the same crime or a crime that was *in substance the same*.⁶⁶ Blackstone described the scope of protection:

[T]he pleas of autrefois acquit and autrefois convict ... must be upon a prosecution for the same identical act and crime, or for such a charge as that, by statute or otherwise, the defendant might have been convicted upon it of the identical act and crime subsequently charged against him.⁶⁷

Originally the pleas had applied strictly to acquittal or conviction for precisely the same felony. But by the end of the eighteenth century, perhaps because of the proliferation of statutory offences, the courts were more inclined to look beyond the record to consider what had been, in substance, the factual gravamen of the prior verdict.⁶⁸

This was the law relating to double jeopardy, as received into Australia.⁶⁹ Internationally, the principle of double jeopardy grew in importance as an increasing number of States recognised its significance by transforming the rule into a guarantee.

⁶¹ Ibid; Kirby, above n 23, 232.

⁶² W. Blackstone (1789) *Commentaries on the Law of England*, Vol 4, p 329, in Kirby, above n 23, 232. See also: *R v O’Loughlin* [1971] 1 SASR 219, 244-5.

⁶³ Kirby, above n 23, 232.

⁶⁴ Sigler, above n 17, 298.

⁶⁵ Ibid.

⁶⁶ Serjeant Hawkins (1824) *Treatise of the Pleas of the Crown*, 8th ed, vol II, p 516, in [1971] 1 SASR 219, 244-5, emphasis in original.

⁶⁷ W. Blackstone (1789) *Commentaries on the Law of England*, Vol 4, p 330, in [1971] 1 SASR 219, 245; (1998) 194 CLR 610, 641 (Kirby J).

⁶⁸ [1971] 1 SASR 219, 245, 247. Justice Kirby considers that the relaxation of criminal pleading rules and the absence of a settled discretion to stay oppressive prosecutions might also have contributed to a softening of the court’s approach: (1998) 194 CLR 610, 641-2.

⁶⁹ (1998) 194 CLR 610, 641-2

The *International Covenant on Civil and Political Rights*⁷⁰ and the *European Convention on Human Rights*⁷¹ both incorporate double jeopardy protections and more than fifty countries have constitutional guarantees of the doctrine, including the United States, Canada, New Zealand and South Africa.⁷²

B *Modern Scope of Double Jeopardy*

For most of the twentieth century, the rules relating to double jeopardy were regarded as 'unbelievably complex'.⁷³ Recently, the High Court has made significant refinements to the rules, which have had the convenient effect of simplifying the doctrine.⁷⁴

This section of the paper summarises the applicable double jeopardy rules with particular emphasis on preventing a second prosecution.

1 *Prosecution for the same offence*

Most obviously, a person who has already been acquitted or convicted cannot be re-prosecuted subsequently on an identical charge.⁷⁵ This is the classic and straightforward case where the pleas, *autrefois acquit* and *autrefois convict* would be applicable. The former acquittal has protective effect at common law because the acquittal has passed into judgment; it is *res judicata*.⁷⁶ The latter plea is based on the doctrine of merger. The subsequent charge cannot be dealt with because it has merged in the earlier judgment.⁷⁷

There is a limited, but important statutory exception to this straightforward common law rule. That exception relates to appeals, which are a statutory remedy.⁷⁸ A successful appeal against conviction might, under statute, result in a retrial.⁷⁹ That result would not be possible under common law because the plea of *autrefois convict* would bar the retrial.⁸⁰ In Queensland, this exception exists exclusively for the benefit of convicted persons.⁸¹

⁷⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 Dec. 1966, art 14(7) (entered into force 23 Mar. 1976).

⁷¹ *European Convention on Human Rights, Seventh Protocol*, opened for signature 22 Nov. 1984, art 4(1) (entry into force 1 Nov. 1988).

⁷² Parkinson, above n 25, 607.

⁷³ *Discussion Paper Model Criminal Code*, above n 16, 1.

⁷⁴ *Ibid.*

⁷⁵ (2002) 194 ALR 1, 5; [1971] 1 SASR 219, 247.

⁷⁶ *Discussion Paper Model Criminal Code*, above n 16, 5; *R v Storey* (1978) 140 CLR 364, 399 (Mason J); (1994) 181 CLR 251, 276-277 (Deane and Gaudron JJ); (1998) 194 CLR 610, 626 (Gummow J).

⁷⁷ *Discussion Paper Model Criminal Code*, above n 16, 4.

⁷⁸ (1983) 155 CLR 21, 30 (Gibbs CJ), 47 (Mason and Brennan JJ).

⁷⁹ For example, see *Criminal Code* (Qld) s 669.

⁸⁰ (1983) 155 CLR 21, 31 (Gibbs CJ).

⁸¹ *Criminal Code* (Qld) s 669(1) provides:

The prosecution does not generally enjoy equivalent statutory rights to appeal against acquittals;⁸² and a statute will not be interpreted as conferring such a right unless it expresses a clear intention to do so.⁸³ The well-known common law rule of interpretation applies - a statute will not be interpreted as infringing the rights and liberties of the subject unless clear and unambiguous words are used.⁸⁴ However, the High Court's defence of the principle is qualified.⁸⁵ Although a jury acquittal is effective at common law to prevent further litigation of the charge by the prosecution, an acquittal ordered by a Court of Appeal does not achieve protective finality until any further rights of appeal have been exhausted.⁸⁶ A conviction set aside on erroneous legal grounds can therefore be restored by a higher court.⁸⁷

2 Prosecution for substantially the same offence

The pleas of *autrefois acquit* and *autrefois convict* might also apply, in limited circumstances, to protect an individual from a second prosecution for a different charge arising from the same facts. This application of double jeopardy is potentially of very broad scope because, with the proliferation of statutory offences, a single factual scenario can give rise to several different offences.⁸⁸ There has been considerable uncertainty about the precise ambit of this aspect of double jeopardy.⁸⁹ It has been variously described as applying to successive but different charges which are 'in substance the same',⁹⁰ where 'the fact prosecuted is the same in both, though the offences differ in colour and degree'⁹¹ or simply to offences based on 'the same fact'.⁹²

In *Pearce*,⁹³ the High Court clarified the issue. In that case an indictment was presented charging the accused, under s 33 of the *Crimes Act 1900* (NSW), with maliciously inflicting grievous bodily harm with intent, and in a further count under s 110 of the same Act, with breaking and entering that victim's house and, while in it, inflicting grievous bodily harm on him.⁹⁴ Both charges contained infliction of grievous bodily

On an appeal against a conviction on indictment, the Court may, either of its own motion or on the application of the appellant, order a new trial in such manner as it thinks fit, if the Court considers that a miscarriage of justice has occurred, and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the Court is empowered to make.

⁸² Corns notes that the prosecution enjoys limited statutory rights of appeal against acquittal in Tasmania and Western Australia and in several Australian jurisdictions prosecution appeals are allowed in summary proceedings: Corns, above n 15, 89.

⁸³ (1983) 155 CLR 21, 33 (Gibbs CJ), 48 (Mason and Brennan JJ).

⁸⁴ *Chu Kheng Lim and Ors v Minister for Immigration* [1992] HCA 64, [9] (Mason CJ).

⁸⁵ Mason and Brennan JJ make a spirited case for allowing prosecution appeals against acquittal, but declined to overthrow the weighty body of authority supporting the rule as a manifestation of the principle of double jeopardy: (1983) 155 CLR 21, 55-56 (Mason and Brennan JJ).

⁸⁶ *Ibid*, 36 (Gibbs CJ); *R v Wilkes* (1948) 77 CLR 511, 516-517 (Dixon J).

⁸⁷ (1983) 155 CLR 21, 33 (Gibbs CJ), 60 (Mason and Brennan JJ).

⁸⁸ (1998) 194 CLR 610, 615.

⁸⁹ *Ibid*, 641 (Kirby J); *Discussion Paper Model Criminal Code*, above n 16, 12.

⁹⁰ Hawkins, *Treatise of the Pleas of the Crown*, 8th ed (1824), vol II, p 516, in (1998) 194 CLR 610, 641 (Kirby J); (1971) 1 SASR 219, 241, 245; (2002) 194 ALR 1, 31 (McHugh J).

⁹¹ *O'Sullivan v Rout* [1950] SASR 4, 5, in (1971) 1 SASR 219, 244.

⁹² (1971) 1 SASR 219, 245.

⁹³ (1998) 194 CLR 610.

⁹⁴ *Ibid*, 612.

harm as an element. The former additionally required an element of intent to inflict grievous bodily harm; the latter additionally required an element of burglary.⁹⁵

The High Court held that the pleas apply only to prevent prosecution of a different offence where the essential elements of the offences charged are identical or where the elements of one offence are wholly included in the other.⁹⁶ The rule reiterates Blackstone's original conception by focussing attention on the elements of the offence and the question of whether the accused is relevantly rejeopardised, because he or she might, on the earlier indictment, have alternatively been convicted of the latter charge.⁹⁷ The common law test now largely corresponds with s 17 of the *Criminal Code* (Qld), which provides:

It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged.

To summarise, the double jeopardy rules therefore prevent subsequent prosecution for an offence wholly incorporated in a more serious or aggravated version of that offence.⁹⁸ However, the rule will not apply to offences which merely have overlapping elements; the rule will not protect against a second prosecution if there is even one additional element which reflects some aspect of the accused's criminality not wholly included in the prior charge.⁹⁹ The rule reflected in the *autrefois* pleas may therefore be of limited application, but it is binding on the courts. No exercise of discretion is required.

3 *Abuse of Process*

The inherent judicial discretion to prevent an abuse of process enjoyed a resurgence in Anglo-Australian law in the last decades of the twentieth century.¹⁰⁰ The jurisdiction extends to any category of case in which court processes may be used as instruments of injustice or unfairness.¹⁰¹ The power to grant a stay of proceedings in such cases is usually described, by way of shorthand, as a discretionary power. Strictly speaking however, if proceedings are found to be an abuse, the stay must be granted. There are some clear categories of case (discussed below) where the weight of authority in support of a stay would seem almost unanswerable. The reference to the decision being discretionary, most likely refers to those cases that do not sit in a recognised category and where reasonable minds may differ about whether the proceedings are an abuse.¹⁰²

⁹⁵ Ibid, 613.

⁹⁶ Ibid, 618, 641-642, 652.

⁹⁷ Ibid, 642.

⁹⁸ Ibid, 618.

⁹⁹ Ibid, 620.

¹⁰⁰ Jill Hunter, 'Abuse of Process Savages Criminal Issue Estoppel' (1995) 18(1) *UNSW Law Journal* 151, 151.

¹⁰¹ (1992) 177 CLR 378, 393.

¹⁰² (2002) 194 ALR 1, 18 (Gaudron and Gummow JJ).

In order to decide whether proceedings should be permanently stayed the court will undertake a balancing test. On the one hand, the court considers the question of fairness to the accused, and in particular, whether the prosecution is oppressive or vexatious in the circumstances of the case. On the other hand, the court considers the public interest in resolving serious criminal charges and the need to maintain public confidence in the criminal justice system.¹⁰³

In *Rogers*¹⁰⁴ the appellant was charged with a number of counts of armed robbery. The only evidence connecting him with those offences was a confession. At a previous trial of different armed robbery charges, another confession, taken at the same time under identical circumstances, had been ruled involuntary, and hence, was inadmissible.¹⁰⁵ Rogers argued that criminal issue estoppel applied to prevent the relitigation of issues previously and conclusively determined in his favour at the earlier trial.¹⁰⁶ Criminal issue estoppel is a doctrine founded on double jeopardy principles because it protects the accused from the need to traverse issues already determined conclusively against the Crown in earlier proceedings. Hunter argues that it is a doctrine implicitly protective of an accused's rights.¹⁰⁷

The High Court held that criminal issue estoppel had no place in the criminal law of Australia.¹⁰⁸ The decision followed an earlier decision in *Storey*¹⁰⁹ where Gibbs J analysed a line of what were, purportedly, criminal issue estoppel cases. He found that for the purpose of an estoppel, an issue in a criminal case is rarely able to be identified with precision because a verdict is almost always multifaceted, and involves no conclusive determination of component issues.¹¹⁰ Moreover, he found that very few of the cases analysed were true applications of the estoppel.¹¹¹ Instead, they involved application of another principle, also founded in double jeopardy norms: that the Crown cannot in a subsequent case seek to controvert a prior verdict of acquittal.¹¹²

In *Rogers*, the Court accepted that the principles involved were truly fundamental because they promoted confidence in the administration of justice by preventing the embarrassing absurdity of conflicting judicial decisions.¹¹³ The majority determined that the principles could be protected more effectively and the law developed more coherently by recognising the issue as a species of abuse of process.¹¹⁴ In their judgment, Deane and Gaudron JJ emphasised the public interest in the incontrovertibility of judicial decisions without reference to any consideration of fairness to the accused.¹¹⁵ Mason CJ considered that, in the circumstances of the case,

¹⁰³ (1994) 181 CLR 251, 256; (1992) 177 CLR 378, 398.

¹⁰⁴ (1994) 181 CLR 251, 251.

¹⁰⁵ *Ibid*, 271-272.

¹⁰⁶ *Ibid*, 272.

¹⁰⁷ Hunter, above n 100, 154.

¹⁰⁸ (1994) 181 CLR 251, 254 (Mason CJ), 278 (Deane and Gaudron JJ). Brennan and McHugh JJ rendered separate judgments dissenting on that point, at 266 and 284.

¹⁰⁹ (1978) 140 CLR 364.

¹¹⁰ *Ibid*, 389 (Gibbs J).

¹¹¹ *Ibid*, 388 (Gibbs J).

¹¹² *Ibid*, 387 (Gibbs J).

¹¹³ (1994) 181 CLR 251, 280.

¹¹⁴ *Ibid*, 278 (Deane and Gaudron JJ), 255 (Mason J, agreeing with Deane and Gaudron JJ).

¹¹⁵ *Ibid*, 278-280 (Deane and Gaudron JJ).

tendering the confessions was vexatious and unfair to the appellant, but like Deane & Gaudron JJ, he considered that the prevailing factor was the need for judicial determinations to be accepted as binding.¹¹⁶

In *Carroll*¹¹⁷ the accused was tried for the murder of a baby. At trial, he denied on oath any involvement in the killing, and was ultimately acquitted. Some time later the Crown indicted him for perjury. The charge alleged that his denial under oath constituted perjury, because he did in fact kill the baby.¹¹⁸ In order to succeed, the charge required proof of the killing, but it was not within the scope of the *autrefois* acquit plea because guilt for perjury was not a verdict open on the previous indictment.¹¹⁹

The High Court unanimously recognised the case as one which went to the heart of the double jeopardy principle.¹²⁰ Following Rogers, the court declared that no rule of preclusion prevented the bringing of the perjury charge.¹²¹ Instead, the case was recognised as an unambiguous example of an abuse of process. The abuse lay in the manifest inconsistency between the charge of perjury and the acquittal for murder and in the Crown's attempt to controvert that earlier verdict.¹²² Like the Rogers case, members of the court emphasised the public interest in the finality of judicial determinations; factors relating to the potential for oppression of individuals were less prominent in the judgments.¹²³

It seems that in Pearce, Rogers and Carroll, the High Court has demonstrated a preference for promoting double jeopardy by reference to a discretionary mechanism, rather than through preclusionary rules. In Carroll, Gleeson CJ and Hayne J explained that the principle of double jeopardy was broader and less precise than the preclusionary rules claimed to support it. Of necessity, the boundaries of rules must be precisely defined. Resolving these issues under the rubric of abuse of process allows the court greater flexibility to give effect to the principles in a broader range of cases.¹²⁴

*Walton*¹²⁵ was a case that illustrated that claim. In Walton, the respondents were doctors involved in the notorious Chelmsford Psychiatric Hospital in the 1970s, where the routine practicing of controversial and scientifically dubious therapies became the subject of numerous investigations, including a coronial inquiry, a Royal Commission and various civil suits.¹²⁶ There were also complaints to the Medical Tribunal. In 1986 the NSW Court of Appeal granted a stay of Tribunal proceedings on the grounds that the prolonged delay was 'inexcusable' and constituted an abuse of process.¹²⁷ In 1991, without any attempt to dispute or reopen the Court of Appeal's findings, the Health Department brought further complaints in the Tribunal, making precisely the same

¹¹⁶ Ibid, 256-257 (Mason CJ).

¹¹⁷ (2002) 194 ALR 1. The Carroll case is discussed in more detail below, in Part 2.1.

¹¹⁸ Ibid, 14-15.

¹¹⁹ Ibid, 5.

¹²⁰ Ibid, 6 (Gleeson CJ and Hayne J), 14 (Gaudron and Gummow JJ), 30 (McHugh J).

¹²¹ Ibid, 10.

¹²² Ibid, 11.

¹²³ Ibid, 12-13.

¹²⁴ Ibid, 10.

¹²⁵ (1992) 177 CLR 378.

¹²⁶ Ibid, 382-384.

¹²⁷ Ibid, 385, 389.

malpractice allegations as in the previous complaints, but using different nominal complainants.¹²⁸

The High Court identified the case as one which was beyond the scope of any double jeopardy rule. There had been no full hearing of the earlier case on its merits and the identity of the complainants in the second case was different. However the court recognised the oppressive potential in repeatedly jeopardising the respondents' right to practice.¹²⁹ This was a case where notions of fairness to the respondents dominated the Court's reasoning.

Hunter argues that, in removing the technical rules, the High Court has replaced a legal right with a mere discretionary protection.¹³⁰ Justice Kirby claims that the power to order a stay instead 'represents a separate and independent safeguard'.¹³¹ Both arguments have their attractions. As *Walton* shows, a 'discretionary' power is more flexible because it can be employed in novel situations. But Hunter's concerns also seem valid, especially where protective rights have given way to discretion. This is concerning because the court has seemed somewhat ambivalent, especially in criminal cases, about the fairness of renewed litigation *to the accused*. As noted above, *Walton* indicates that fairness to the accused is a countervailing factor that must be balanced against various public interests,¹³² but Hunter notes that the countervailing factors are not susceptible to precise 'weighing', so the balancing process may simply mask the judge's subjective preferences.¹³³ And, whether or not the decision is strictly classed as discretionary, the rules applying to appellate review of discretionary decisions seem to apply, thus limiting appellate courts' powers of supervision.¹³⁴ At any event, as the above analysis shows, the significance of an accused's personal right to avoid the vexation of double prosecution has not dominated the court's reasoning. If common law double jeopardy ever conferred protective rights for the benefit of individuals, that right seems now to be in decline.

C *The Rationale for Double Jeopardy*

This section of the paper will present a brief précis of the underlying rationales for double jeopardy. It is already apparent from the above discussion that some of the policies underlying the principle are directed at protecting fundamentally distinct values.

¹²⁸ Ibid, 388.

¹²⁹ Ibid, 398.

¹³⁰ Hunter, above n 100, 169; *Discussion Paper Model Criminal Code*, above n 16, 1.

¹³¹ (1998) 194 CLR 610, 649.

¹³² (1992) 177 CLR 378, 398.

¹³³ Hunter, above n 100, 170.

¹³⁴ Ibid, 170-171; (2002) 194 ALR 1, 18. In *Carroll*, Gaudron and Gummow JJ, after explaining that a decision to order a stay of proceedings for abuse of process is not strictly a discretionary decision, state (at 18):

However, as with discretionary decisions, properly so called, appellate review of its exercise looks to whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration. If so, the appellate court may reach its own decision in substitution for that of the primary judge, where there are before it the materials for so doing.

1 *The societal value of finality*

The finality of judicial determinations is an important value which lies at the heart of the double jeopardy principle. Finality promotes closure after potentially tragic events, allowing a line to be drawn indicating that a crime and its aftermath are now closed.¹³⁵

More importantly, finality promotes confidence in judicial outcomes. Concurrently inconsistent or subsequently conflicting judicial decisions potentially appear as an absurdity, making the criminal trial process seem like a lottery.¹³⁶ This value has been repeatedly emphasised by the High Court:¹³⁷

The interests at stake ... touch upon matters fundamental to the structure and operation of the legal system and to the nature of judicial power. First, there is the public interest in concluding litigation through judicial determinations which are final, binding and conclusive. Secondly, there is the need for orders and other solemn acts of the courts (unless set aside or quashed) to be treated as incontrovertibly correct. This reduces the scope for conflicting judicial decisions, which would tend to bring the administration of justice into disrepute. ... Finally, there is the principle that a cause of action is changed by judgment recovered in a court of record into a matter of record, which is of a higher nature.¹³⁸

Related to that argument is the notion that our system is underpinned by the sanctity of the jury verdict.¹³⁹ Subsequent trials of matters already finalised smacks of jury shopping and undermines the jury as an institution.¹⁴⁰ Roberts argues that jury trials are ‘part of the basic structure of legitimate political authority’.¹⁴¹ Indeed, the right to trial by jury is one of the few express criminal procedure rights enshrined in our *Constitution*.¹⁴²

The public interest in finality is undoubtedly important. But the value is not absolute. The appeals process already allows retrials under limited circumstances.¹⁴³ It is difficult to accept that this aspect of finality would be fundamentally challenged by the addition of two other, highly circumscribed statutory exceptions.¹⁴⁴

¹³⁵ Kirby, above n 23, 236.

¹³⁶ Hunter, above n 100, 165; Kirby, above n 23, 267 (Brennan J).

¹³⁷ (2002) 194 ALR 1, 21 (Gaudron and Gummow JJ), 30 (McHugh J); (1994) 181 CLR 251, 273 (Deane and Gaudron JJ).

¹³⁸ (2002) 194 ALR 1, 21, (Gaudron and Gummow JJ).

¹³⁹ *Discussion Paper Model Criminal Code*, above n 16, 72.

¹⁴⁰ Ibid; Justice Roslyn Atkinson, (Untitled speech given at Australian Law Students’ Association Double Jeopardy Forum), Brisbane, 9 July 2003, <<http://www.courts.qld.gov.au/publications/articles/articlestd.htm#Atkinson>> at 18 July 2007, 4-5.

¹⁴¹ Paul Roberts, ‘Double Jeopardy Law Reform: A Criminal Justice Commentary’ (2002) 65 *Modern Law Review* 393, 410.

¹⁴² *Australian Constitution* s 80.

¹⁴³ Rowena Johns, *Double Jeopardy*, NSW Government Briefing Paper 16/2003, (2003) <http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_double_jeopardy> at 18 July 2007, 20; Corns, above n 15, 89.

¹⁴⁴ Bagaric and Neal, above n 12.

2 *Investigative and prosecutorial diligence*

Another public interest argument suggests that double jeopardy promotes diligence in investigations and prosecutions.¹⁴⁵ The idea is that police and prosecutors know that they have only one opportunity to convict an offender. So, they marshal resources to investigate thoroughly and put forward the strongest case possible.¹⁴⁶

A number of commentators consider this to be a weak argument in support of double jeopardy.¹⁴⁷ Even if it were true that the work ethic of police and prosecutors is driven by case outcomes,¹⁴⁸ as a matter of logic their diligence would be unaltered by the reforms.¹⁴⁹ During the original investigation and prosecution it could not be known whether a second trial would be available because the delineated circumstances which would permit it are unknowable in advance.¹⁵⁰

3 *Risk of wrongful convictions*

Another argument for retaining strong double jeopardy rules is that reform would increase the risk of wrongful convictions.¹⁵¹ This argument acknowledges that the trial process is necessarily fallible. The risk that a jury will unjustifiably convict will, theoretically, double if a second trial is allowed.¹⁵² The second prosecutor will doubtless enjoy some tactical advantages at the second trial. The defence strategy will be known and the prosecution case can be adapted to answer it.¹⁵³ Areas of presentational weakness in the first prosecution case can be polished.¹⁵⁴ These advantages may make it easier the second time around for the prosecution to discharge the burden of proof.¹⁵⁵

Bagaric and Neal answer this argument convincingly by pointing out that the risk of wrongful conviction should instead be ameliorated by addressing the base causes, for example, by increasing investigatory and evidential safeguards. The wrongful conviction argument, in their view, is not so much an argument for retaining double

¹⁴⁵ Kirby, above n 23, 241; Fitzpatrick, above n 6, 154; Johns, above n 143, 14.

¹⁴⁶ Johns, above n 143, 14.

¹⁴⁷ Bagaric and Neal, above n 6; Parkinson, above n 25, 614; Dennis, above n 12, 941; Corns, above n 15, 87.

¹⁴⁸ Bagaric and Neal express doubts that the work standards of police and prosecutors are outcome driven: above n 12.

¹⁴⁹ Dennis, above n 12, 941.

¹⁵⁰ Parkinson, above n 25, 614.

¹⁵¹ Roberts, above n 141, 397; Dennis, above n 12, 939; Parkinson, above n 25, 613; Bagaric and Neal, above n 12.

¹⁵² Roberts, above n 141, 398.

¹⁵³ Dennis, above n 12, 939.

¹⁵⁴ Roberts, above n 141, 398.

¹⁵⁵ Gavin Dingwall, 'Prosecutorial Policy, Double Jeopardy and the Public Interest' (2000) 63 *Modern Law Review* 268, 268.

jeopardy rules, as an argument for fundamental reform of the entire criminal justice process.¹⁵⁶

4 *The individual value of finality*

There are also important individual values protected by double jeopardy. In the US, these values are considered to be one of the foremost justifications for double jeopardy protections. In *Green v United States*, Black J made the following oft-cited comment:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.¹⁵⁷

This value is also the subject of the maxim so frequently cited in double jeopardy cases, from the 1589 Sparry's Case to today:¹⁵⁸ *nemo debet bis vexari pro una et eadem causa* – no-one shall be twice vexed for the same cause.

A prosecution for a serious criminal offence is undoubtedly an enormously stressful event in the life of an accused individual.¹⁵⁹ The accused's liberty is at stake, possibly for decades into the future. If convicted, the accused's life will be changed forever. The accused's social and even familial relationships will be intensely challenged. These outcomes are contingent on conviction, but the anxiety commences much sooner and will beset innocent and guilty alike.

Even before the verdict is known, the process is not merely inconvenient. Criminal charges can potentially disrupt careers and relationships. The highly public nature of the process makes it inevitably embarrassing, possibly even permanently stigmatising.¹⁶⁰ The cost of mounting a defence may be substantial and is unrecoverable, even if the accused is acquitted.¹⁶¹

Exposing citizens to this legitimate but arduous process is the price we presumably must pay for having a rigorous system for identifying and punishing criminals. But once that process has reached conclusion, many commentators claim that repeating it would be vexatious. It is claimed that affected individuals are justified in demanding finality, so that they can rebuild their lives without living in a constant state of insecurity.¹⁶² Some

¹⁵⁶ Bagaric and Neal, above n 12.

¹⁵⁷ *Green v United States* 355 US 184, 187-188 (1957).

¹⁵⁸ *Sparry's Case* (1589) 5 Co Rep 61a [77 ER 148], cited in (1998) 194 CLR 610, 625; *Broome v Chenoweth* [1946] HCA 53, (Starke J); (1978) 140 CLR 364, 366; (1983) 155 CLR 21, 29 (Gibbs CJ); (2002) 194 ALR 1, 21 (Gaudron and Gummow JJ).

¹⁵⁹ Roberts, above n 141, 405.

¹⁶⁰ Dingwall, above n 155, 269; Johns, above n 143, 18; Haesler, above n 18.

¹⁶¹ Sir Anthony Mason, 'Double Jeopardy and the Limits of Justice', *Sunday Telegraph*, 22 Dec. 2002, 95.

¹⁶² Dingwall, above n 155, 269; Luke Brasch, in Johns, above n 143, 18; Haesler, above n 18; Terry O'Gorman, 'Review risks Presumption of Innocence', *The Australian*, 20 Dec. 2002, 9; Atkinson, above n 140, 5.

commentators have fallen into the trap of thinking that only the guilty need fear.¹⁶³ But all defendants acquitted of a crime within the scope of an exception may, to some extent, fall prey to the fear that the ordeal will be repeated.

Parkinson considers that the prospect of subjecting accused individuals to a double dose of anxiety and distress is not a strong argument to retain double jeopardy protections.¹⁶⁴ Dennis agrees, arguing that these concerns more than others, have generated the most high-pitched rhetoric.¹⁶⁵ In both cases, these authors consider that the individual interests in finality are not as compelling as the collective interest in securing the conviction of guilty offenders.¹⁶⁶

However, as Dennis noted, the individual's interest in finality arises from the State's duty to treat its citizens with humanity.¹⁶⁷ It is an aspect of the 'liberal imperative to treat all citizens with dignity and respect'.¹⁶⁸ In a liberal democracy the notion of an *entitlement* to be free from vexation is not simply about the avoidance of fear and distress – freedom from State harassment can plausibly be portrayed as the defining characteristic of autonomy; it allows people space, as the Law Commission realised, to meaningfully pursue their own visions of the good life.¹⁶⁹ As the Law Commission eventually accepted, autonomy is a fundamentally worthwhile political and social objective, something to be valued for its own sake.¹⁷⁰

5 *To limit (abuse of) State power*

The corollary of the notion that individuals have a *right* to freedom from vexation is the notion that State powers are, in some way, limited. One of the most compelling rationales for maintaining strong double jeopardy protections concerns its capacity to operate as a check on the abuse of State power.¹⁷¹

This rationale emphasises the normative political foundations of legitimate criminal process.¹⁷² One way to view double jeopardy is through the construct of a Rousseauist social contract. Under the terms of this putative bargain, citizens consent to State use of coercive power, but only according to strictly defined rules which keep State power within proper ambit.¹⁷³ In Roberts' view, the bargain has constitutional force because its terms are the bedrock of reciprocal obligations between citizens and the State.¹⁷⁴

¹⁶³ Law Commission (United Kingdom), *Double Jeopardy and Prosecution Appeals*, LAW COM # 267 (2001), 37.

¹⁶⁴ Parkinson, above n 25, 615.

¹⁶⁵ Dennis, above n 12, 940.

¹⁶⁶ Parkinson, above n 25, 615; Dennis, above n 12, 940; Roberts, above n 141, 406.

¹⁶⁷ Dennis, above n 12, 940.

¹⁶⁸ *Ibid.*

¹⁶⁹ Law Commission (UK), above n 163, 38.

¹⁷⁰ *Ibid.* The Law Commission published a consultation paper in 1999, *CP 156*, which disregarded autonomy as a value supported by double jeopardy laws: *Ibid.*, 38.

¹⁷¹ Haesler, above n 18; Johns, above n 143, 13; Law Commission (UK), above n 163, 39.

¹⁷² Roberts, above n 141, 410.

¹⁷³ Law Commission (UK), above n 163, 39-40; Parkinson, above n 25, 618; Fitzpatrick, above n 6, 163.

¹⁷⁴ Roberts, above n 141, 404, 410.

The criminal justice deal that Roberts describes, stipulates an adversarial trial, as a settled and ‘culturally acceptable mode of forensic fact-finding’, at which the State will marshal its considerably superior resources, and take its one best (and last) shot at securing a conviction against an accused citizen. The final verdict will be delivered by a jury of the citizen’s peers, which Roberts considers to be a fundamental part of the ‘basic structure of legitimate political authority’.¹⁷⁵ Roberts argues that double jeopardy represents a central feature of the criminal justice deal.¹⁷⁶ The rule is extremely well-known among citizens (even if not known by name), which belies its status as an arcane rule of criminal procedure.¹⁷⁷ Thus, having submitted herself to the criminal justice system, once the final verdict is delivered, whether guilty or innocent, the State’s political and moral authority to scrutinise the accused’s conduct is exhausted.¹⁷⁸

Roberts argues that double jeopardy reform amounts to an attempt by the State to renege on the criminal justice deal. He argues that removing double jeopardy protection effectively reconfigures the system of jury trials. It involves a move from a system where jury verdicts are virtually inviolable to a system where one jury verdict can be invalidated and supplanted by another, presumably delivered by a more accommodating jury.¹⁷⁹ In his view, it is an affront to constitutionally mandated finality.¹⁸⁰

Roberts’ argument is that a second prosecution is illegitimate per se, regardless of the merits of the case or the motivations of the prosecutor.¹⁸¹ Another concern is the idea that citizens could be subject to malicious or illegitimately-motivated prosecutions.¹⁸² It’s possible, of course, that a police officer could develop personal animus against an acquitted accused.¹⁸³ Conceivably, a prosecutor could also develop a win-at-all-costs mentality.¹⁸⁴ More plausible is the concern expressed by many commentators that media campaigns may drive politically-motivated prosecutions.¹⁸⁵ A precedent already exists in Australia for precisely this concern. *The Australian* mounted a concerted campaign following the 2002 Carroll case calling for changes to double jeopardy laws to make the acquitted man ‘answer for murder’.¹⁸⁶ That campaign and the Carroll case is discussed in more detail below in Part Two.

¹⁷⁵ Ibid, 410; Law Commission (UK), above n 163, 39.

¹⁷⁶ Roberts, above n 141, 404.

¹⁷⁷ Law Commission (UK), above n 163, 39.

¹⁷⁸ Parkinson, above n 25, 618-619.

¹⁷⁹ Roberts, above n 141, 405, 410, 422.

¹⁸⁰ Ibid, 411; Fitzpatrick, above n 6, 163.

¹⁸¹ Hunter, above n 100, 168.

¹⁸² Law Commission (UK), above n 163, 38; Fitzpatrick, above n 6, 155; Haesler, above n 18; Parkinson, above n 25, 616.

¹⁸³ Fitzpatrick, above n 6, 155.

¹⁸⁴ Parkinson, above n 25, 616.

¹⁸⁵ Kirby, above n 23, 242; Law Commission (UK), above n 163, 38-39; Fitzpatrick, above n 6, 155; Haesler, above n 18; Parkinson, above n 25, 616; O’Gorman, above n 162, 9.

¹⁸⁶ Paul Toohey, ‘Matter of Principle’ *The Australian*, 26 April 2003, 23; Kirby, above n 23, 242.

II BACKGROUND TO QUEENSLAND'S DOUBLE JEOPARDY REFORM

A THE CARROLL CASE

In 1973, the body of baby Deidre Kennedy was found on top of a toilet block in a park in Ipswich. The baby had been strangled and was dressed in women's underwear stolen from a nearby house. There were bruises on Deidre's thigh which experts believed were human bite marks.¹⁸⁷ Alas, a panel of 10 odontological experts, led by the eminent Dr Romaniuk, reported that the marks were too ill-defined to identify the killer.¹⁸⁸ The only clue to the killer's identity was a single pubic hair found on the body.¹⁸⁹ For a long time, the murder remained unsolved.

In 1984, Carroll came to the attention of police in relation to an investigation into the theft of women's underwear. The connection was tenuous, but Carroll agreed to an interview and supplied investigators with a hair sample and allowed a cast to be made of his teeth. The hair sample was inconclusive (1984 being part of the pre-DNA era), but the dental impressions were to prove critical.¹⁹⁰

At Carroll's trial three odontologists gave evidence about the bruises on the baby's thigh. They testified about the difficulties of the comparison task: it required comparing two-dimensional photographs of bruises with the three-dimensional cast; there were no indentations to compare, only bruises, which can be distorted by the body's positioning; and teeth change naturally over time - to further complicate that picture, the accused had dental work performed in the intervening period. All experts concluded that the marks were made by Carroll's teeth, although there was disagreement among them as to which teeth caused particular marks.¹⁹¹ That unexplained discrepancy was later highlighted by Kniepp J, as one of the least satisfactory aspects of the odontological evidence.¹⁹² Moreover, one of the experts, notwithstanding his own conclusion, candidly admitted that the identification of teeth by reference to bruises was not scientifically valid - his own conclusion was, therefore, unreliable. The others, including Dr Romaniuk, testified that teeth could be identified from these bruises. However, Dr Romaniuk's opinion at trial represented a complete reversal of the conclusion in his 1973 report - another discrepancy which Kniepp J found was never satisfactorily explained.¹⁹³

There was no other evidence linking Carroll with the murder. Doubt was cast on his alibi, that he was in South Australia at the time of the murder, but there was no evidence to show that he was in Ipswich at the relevant time.¹⁹⁴ Carroll testified on his own behalf, denying that he killed baby Deidre, but the jury did not believe him. A verdict of guilty was returned.¹⁹⁵ On appeal, the Court quashed the verdict, finding that a

¹⁸⁷ Kirby, above n 23, 233; Corns, above n 15, 82; Johns, above n 143, 7; *R v Carroll* [2001] QCA 394, [2]-[4].

¹⁸⁸ [2001] QCA 394, [4].

¹⁸⁹ Kirby, above n 23, 233.

¹⁹⁰ *Ibid.*

¹⁹¹ [2001] QCA 394, [8]; *Raymond John Carroll* (1985) 19 A Crim R 410, 413-414.

¹⁹² (1985) 19 A Crim R 410, 417; and 430, 434 (Shepherdson J).

¹⁹³ [2001] QCA 394, [8] (Williams JA), citing the judgement of Kniepp J in (1985) 19 A Crim R 410, 416; Kirby, above n 23, 233-234.

¹⁹⁴ [2001] QCA 394, [6].

¹⁹⁵ [2001] QCA 394, [10]; Kirby, above n 23, 234.

reasonable jury acting on the evidence must have entertained doubts about Carroll's guilt.¹⁹⁶

Thirteen years later, in 1999, Carroll was indicted for perjury. The charge alleged that at his 1985 trial, Carroll knowingly gave false testimony because his sworn denial of killing Deidre Kennedy was a lie.¹⁹⁷ Regrettably, the pubic hair found on Deidre's body had been lost in a laboratory mishap, but in the interim, the Crown had uncovered new evidence.¹⁹⁸ It had acquired more consistent odontological evidence, a cellmate would testify to a jailhouse confession in 1984 and a witness came forward who, 26 years after the murder, was able to testify that Carroll was in Ipswich on the day in question.¹⁹⁹ Again, the jury convicted.²⁰⁰ Carroll's ensuing appeal was upheld on the grounds of abuse of process, but the Court of Appeal noted that at any event, the jury's verdict was, even with the new evidence, unsafe and unsatisfactory (again).²⁰¹ The Crown appealed to the High Court but the appeal was dismissed.²⁰²

The case was used as cause célèbre by media to lobby for law reform to permit Carroll's retrial. Implicit was the view that Carroll had been wrongly acquitted.²⁰³ *The Australian* obtained legal opinions from eminent legal experts and launched a petition calling for legal reform. If all else failed, the newspaper promised to fund a civil suit to help Deidre's mother 'fight for justice'.²⁰⁴ Ironically, underpinning the newspaper's demands for the lifting of double jeopardy restrictions, was outrage that the sanctity of the jury had been attacked by the Court of Appeal's reversal of two jury verdicts.²⁰⁵

B UNITED KINGDOM

In the United Kingdom, calls for double jeopardy reform started in 1999, in the aftermath of the racially-motivated 1993 murder of an 18 year old black man, Stephen Lawrence, while he was waiting for a bus.²⁰⁶ A report into the police investigation showed that it was riddled with errors and possibly infected by institutionalised racism.²⁰⁷

¹⁹⁶ (1985) 19 A Crim R 410, 417, 435.

¹⁹⁷ Kirby, above n 23, 234; Corns, above n 15, 83; Johns, above n 143, 7.

¹⁹⁸ Kirby, above n 23, 238.

¹⁹⁹ *R v Carroll* [2000] QCS 308, [28], [29], [31].

²⁰⁰ Kirby, above n 23, 234; Johns, above n 143, 7.

²⁰¹ [2001] QCA 394, [72]; Kirby, above n 23, 235.

²⁰² (2002) 194 ALR 1.

²⁰³ Kirby, above n 23, 238; Vincent, above n 21; O'Gorman, above n 162, 9; *Discussion Paper Model Criminal Code*, above n 16, 58. Sometimes the belief that Carroll was wrongly acquitted is virtually explicit – see, for example, Toohey, above n 186, 23.

²⁰⁴ Kirby, above n 23, 238-239; Richard Ackland, 'Carroll case questions double jeopardy, but single issue of a media stunt is in no doubt', *Sydney Morning Herald*, 13 Dec. 2002, 17; Toohey, above n 186, 23.

²⁰⁵ Kirby, above n 23, 239.

²⁰⁶ Johns, above n 143, 24; Ben Fitzpatrick, 'Tinkering or Transformation? Proposals & Principles in the White Paper, "Justice for All"' (2002) 5 *Web Journal of Current Legal Issues*, <<http://webjcli.ncl.ac.uk/2002/issue5/fitzpatrick5.html>> at July 18 2007; Corns, above n 15, 92.

²⁰⁷ Sir William Macpherson, *The Stephen Lawrence Inquiry Report*, Cm4262-I (1999), in Parkinson, above n 25, 608; and in Roberts, above n 141, 396, fn 21.

Five suspects were identified, but no charges were brought until 1995, when Lawrence's parents instigated a private prosecution. Two suspects were discharged at the committal stage; the others proceeded to trial, where the judge ruled that the prosecution identification evidence was too unreliable to be admitted. The prosecution case collapsed and the jury acquitted the three men.²⁰⁸

The parents called for an inquiry and in 1999, the *Macpherson Report* was published.²⁰⁹ It recommended that consideration be given to reforms to permit a second prosecution where fresh and viable evidence was available.²¹⁰ A litany of reports and consultation papers followed and in due course, the *Criminal Justice Act 2003* (UK) became law.²¹¹ Part 10 of that Act permits a second trial of a serious criminal offence, where there is new and compelling evidence and the retrial is in the interests of justice.²¹² The scheme builds on the *Criminal Procedure & Investigations Act 1996* (UK), which allows a retrial of a 'tainted acquittal' when, but for the commission of an administration of justice offence, the accused would probably not have been acquitted.²¹³

C NEW ZEALAND

In 1992 Moore and a co-accused, both gang members, were charged with the murder of a rival gang member. At their trial, a defence witness gave alibi evidence on behalf of both accused and they were acquitted. In 1999 Moore was convicted of conspiracy to pervert the course of justice in relation to that alibi evidence and was sentenced to the maximum penalty available, seven years in prison.²¹⁴ In sentencing Moore, the judge remarked that the maximum penalty was justified, indeed it was inadequate, because he 'had literally got away with murder'.²¹⁵

The Law Commission of New Zealand was asked to report into the Moore case and whether, in light of it, limited exceptions to double jeopardy laws were justified.²¹⁶ The Commission concluded that no case had been established in New Zealand for a new evidence exception, but it considered that a narrow exception was justified, based on the UK notion of a tainted acquittal.²¹⁷

²⁰⁸ Johns, above n 143, 24.

²⁰⁹ Ibid; the report's full title is: *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, 1999 (the Macpherson Report).

²¹⁰ Recommendation 38, the *Macpherson Report*, cited in Johns, above n 143, 24.

²¹¹ Law Commission (United Kingdom) *Double Jeopardy*, Consultation Paper # 156 (1999); Home Affairs Select Committee of the House of Commons, *3rd Report: Double Jeopardy Rule*, HC190 (2000); Law Commission (United Kingdom) *Double Jeopardy and Prosecution Appeals*, LAWCOM # 267 (2001); White Paper, *Justice for All* (2002); Lord Justice Auld, 'Chapter 12 Appeals', *Review of the Criminal Courts of England and Wales*, (2001); Sally Broadbridge, *The Criminal Justice Bill: Double Jeopardy and Prosecution Appeals*, Research Paper 02/74 (2002).

²¹² *Criminal Justice Act 2003* (UK) ss 76, 78, 79.

²¹³ *Criminal Procedure and Investigations Act 1996* (UK) ss 54, 55.

²¹⁴ Law Commission (New Zealand), *Acquittal Following Perversion of the Course of Justice*, Report 70 (2001), 2.

²¹⁵ *R v Moore* (17 Sept. 1999) unreported, High Court, Palmerston North Registry, T31/99, 3–5, Doogue J, in Law Commission (New Zealand), above n 214, 2.

²¹⁶ Law Commission (New Zealand), above n 214, vii; Corns, above n 15, 98.

²¹⁷ Law Commission (New Zealand), above n 214, viii, 16.

Currently, clause 7 of the Criminal Procedure Bill 2004 (NZ) embodies the proposed changes, incorporating a tainted acquittal exception as well as the UK's 'new and compelling evidence' exception.²¹⁸ A second reading speech was made in 2006, but at the time of writing, the debates were continuing.²¹⁹

D NEW SOUTH WALES

The Australian's double jeopardy reform campaign coincided with the run-up to a NSW State election.²²⁰ The day before the election was called, Premier Carr announced that double jeopardy laws would be reformed to allow retrials based on fresh evidence and to create wider prosecution powers of appeal.²²¹

Within months, briefing papers were obtained and the Commonwealth's Model Criminal Code Officers Committee also published a discussion paper.²²² In 2006, the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) (the NSW Act) was passed. The legislation is modelled on the UK reforms, incorporating the fresh and compelling evidence and tainted acquittal exceptions.²²³

Additionally, the prosecution will be able to appeal against directed jury acquittals or acquittals in trials without juries on grounds of law alone, and if successful, the verdict can be quashed and a retrial ordered.²²⁴ There is already Australian precedent for the latter appeal powers. These prosecution appeal powers are well-established in Western Australia²²⁵ and Tasmania allows appeals against an acquittal on questions of law alone, provided the court grants leave.²²⁶

III THE PROPOSED QUEENSLAND REFORMS

A ARGUMENTS FOR REFORM

Proponents of double jeopardy reform assert that the legitimacy of the criminal justice system depends on a commitment to the delivery of accurate judgments.²²⁷ Essentially, this argument doesn't favour truth over justice, but it professes that truth *is* justice. Dennis argues that the moral authority of the law 'derives in large measure from factual

²¹⁸ Criminal Procedure Bill 2004 (NZ) cl 7, proposed ss 378A, 378D.

²¹⁹ New Zealand Parliament, *Bills, SOPs, Acts, Regulations*, <<http://www.parliament.nz/en-NZ/PB/Legislation/Bills/1/1/5/1156d206d5ee4e23863ea3e92ef31d0e.htm>> at 20 July 2007.

²²⁰ Kirby, above n 23, 239.

²²¹ Ibid; Johns, above n 143, 1.

²²² Johns, above n 143, released August 2003; Acting Justice Jane Matthews, *Safeguards in Relation to Proposed Double Jeopardy Legislation, An Advice to the Attorney-General (NSW)*, 27 Nov. 2003, <http://www.bocsar.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_reports> at 18 July 2007; *Discussion Paper Model Criminal Code*, above n 16.

²²³ Johns, above n 143, 1; *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) ss 100, 101.

²²⁴ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) s 106.

²²⁵ *Criminal Appeals Act 2004* (WA) s 24 (replacing repealed s 688 of the *Criminal Code* (WA)).

²²⁶ *Criminal Code Act 1924* (Tas) s 401(2).

²²⁷ Dennis, above n 12, 944; Parkinson, above n 25, 616; Law Commission (United Kingdom), above n 163, 35-36.

accuracy'.²²⁸ While supporting the general application of double jeopardy rules, Dennis believes that the legitimacy of the criminal justice system is seriously challenged when new evidence casts doubt on the veracity of previous verdicts or when offenders perpetrate a fraud on the system that allows them to escape justice.²²⁹ Dennis considers that the procedures used to determine guilt and innocence must deliver both substantive and procedural justice. Where there is tension between the demands of substantive and procedural justice, the rules should favour delivering substantive justice.²³⁰ As to finality, it should be accepted that an acquittal is not a declaration of innocence.²³¹ Dennis believes there is simply no merit in doggedly demanding respect for an outcome which is strongly suspected of being wrong.²³²

This legitimacy argument draws on both normative and public confidence considerations. Certainly, there is little doubt that public outrage is generated when a presumptively guilty offender exploits the system and escapes justice.²³³ The community has a valid interest in ensuring that known offenders are punished. Apart from consequentialist arguments (which on a marginal basis are hardly compelling), that interest is legitimately retributive – guilty criminals should receive their just deserts.²³⁴

On that view, double jeopardy reform is simply another crime control proposal.²³⁵ And yet, most guilty offenders escape justice, not because of procedural rights, but because they escape detection.²³⁶ Fitzpatrick believes, unquestioningly, in the public interest in convicting guilty offenders, but he also considers that those accused of serious crimes are also those in most potential need of protection against State abuses.²³⁷ In that regard, it should be noted that proponents often seem to assume that we can accurately distinguish between valid and wrongful acquittals.²³⁸ Fitzpatrick considers that the public interest in punishing the guilty might be advanced more directly by focussing on the decidedly-less-sexy issues of improved investigative techniques, better police training and the adequate resourcing of investigative agencies.²³⁹

There is also an argument that victims have a 'right' to see guilty offenders punished.²⁴⁰ There has been, in recent decades, growing recognition of victims' needs, and of the role that the criminal justice system can play in assisting their recovery.²⁴¹ It has been asserted that victims suffer trauma when the acquitted accused cannot, despite new

²²⁸ Dennis, above n 12, 944.

²²⁹ Ibid, 944-945, 950; Corns, above n 15, 95.

²³⁰ Dennis, above n 12, 944; Bagaric and Neal, above n 12.

²³¹ Nicholas Cowdrey, 'In compelling cases a retrial makes sense', *The Australian*, 16 Dec. 2002, 9; *Discussion Paper Model Criminal Code*, above n 16, 8.

²³² Dennis, above n 12, 945.

²³³ Corns, above n 15, 87; Mason, above n 161, 95.

²³⁴ Bagaric and Neal, above n 12.

²³⁵ Fitzpatrick, above n 6, 159.

²³⁶ Roberts, above n 141, 409.

²³⁷ Fitzpatrick, above n 206.

²³⁸ Atkinson, above n 140, 5.

²³⁹ Fitzpatrick, above n 206.

²⁴⁰ Johns, above n 143, 14; *Discussion Paper Model Criminal Code*, above n 16, 70.

²⁴¹ See, for example, Adam Crawford and Jo Goodey (Eds), *Integrating a Victim Perspective within Criminal Justice* (2000).

evidence, be reprosecuted. It is suggested that the unfairness to the victim of the failure to reprosecute is equal to the unfairness of subjecting an acquitted accused to another trial.²⁴²

There are a number of answers to this argument. First, logically, the fairness of subjecting the accused to another trial cannot be assessed without making assumptions about the accused's guilt or innocence. If the accused is guilty, then the process is procedurally unfair, but substantively, not the least so. If, on the other hand, the accused is innocent, then the process is both procedurally and substantively unfair in very large measure.

Second, where is the evidence that the process of prosecution-conviction-punishment aids victim recovery? Victimologists acknowledge that, to date, there has been little empirical research into this question. What is known, is that victims often feel moral satisfaction when they believe that a just verdict has been delivered, whereas unfavourable court outcomes are known to cause disappointment and even moral outrage.²⁴³ What is also known is that victim interactions with criminal justice processes can cause secondary victimisation and that risk can be ameliorated by provision of information and support and a more holistic approach to victim needs.²⁴⁴ The assumption that the victim's interests will automatically be enhanced by the diminution of the accused's rights is a potentially dangerous one.²⁴⁵ When the issue at stake is process protections that have been developing for more than half a millennium, care should be taken to justify changes, at least by reference to evidence-based claims.

Third, trials are not run for therapeutic purposes.²⁴⁶ It may have to be accepted that victims are unlikely to support any procedural protections which prevent punishment of the person they believe responsible.²⁴⁷ The presumption of innocence is one factor which victims have identified as a 'significant imbalance in the consideration of [their] interests vs. the perpetrator's interests'.²⁴⁸ And yet, the presumption of innocence is, arguably, the core organising idea of the criminal justice system. It is one of the ideas that breathes life into the concept of autonomy. It may be that that the price that has to be paid for that presumption, is toleration of the occasional wrongful acquittal.²⁴⁹

B THE QUEENSLAND BILL

The Queensland Bill is closely modelled on the NSW Act, which in turn, was modelled on the UK Acts.²⁵⁰ There are however some important differences between the NSW

²⁴² Johns, above n 143, 14; Dennis, above n 12, 940. Johns' claim regarding victim trauma is unsourced.

²⁴³ Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15(4) *Social Justice Research* 313, 313-314, 315.

²⁴⁴ Ibid, 314; Fitzpatrick, above n 6, 162.

²⁴⁵ Fitzpatrick, above n 6, 162; *Discussion Paper Model Criminal Code*, above n 16, 70.

²⁴⁶ Justice Geoffrey Flatman and Mirko Bagaric, 'The Victim and the Prosecutor: the Relevance of Victims in Prosecution Decision Making' (2001) 6(2) *Deakin Law Review* 238, 251.

²⁴⁷ Roberts, above n 141, 396.

²⁴⁸ Orth, above n 243, 316.

²⁴⁹ Dennis, above n 12, 948.

²⁵⁰ Explanatory Memorandum, Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) 2; Johns, above n 143, 1. Reference to 'the UK Acts' is a reference to the *Criminal Justice Act 2003* (UK) and the *Criminal Procedure and Investigations Act 1996* (UK).

and Queensland schemes, which will be highlighted below. The scheme of the Queensland Bill reveals attention to many of the arguments supporting the retention of double jeopardy protections. Hence, the scope of the exceptions has been limited in some significant ways and a number of safeguards have been incorporated into the Bill.

1 *Fresh and compelling evidence exception*

The retrial of a person under the ‘fresh and compelling evidence exception’ will only be permitted in Queensland in relation to the offence of murder.²⁵¹ In NSW, the exception applies to offences which carry a maximum penalty of life imprisonment.²⁵² Apart from murder, that currently includes certain aggravated sexual assaults and serious commercial drug operation charges.²⁵³

In the UK, the debate on the scope of this provision attracted diverse views. The Law Commission (UK) originally proposed that the exception apply to cases attracting a minimum three year prison sentence, but ultimately it concluded that the scope should be limited to murder because ‘murder is not just more serious than other offences but [it is] qualitatively different’.²⁵⁴ Others thought that there was no principled distinction between murder and other serious offences.²⁵⁵

The decision in Queensland to limit the exception to murder seems to represent a trade-off between the fundamental interests protected by double jeopardy and the public interest in ensuring that the most serious offence under our system can be prosecuted, even after an acquittal.²⁵⁶

The provision only applies to cases where there is ‘fresh and compelling’ evidence.²⁵⁷ Both terms are defined: evidence will be ‘fresh’ if it was not adduced in the original proceedings and could not have been adduced with the exercise of reasonable diligence.²⁵⁸ Evidence is ‘compelling’ if it is reliable, substantial and, in the context of the issues in dispute, highly probative of the case against the acquitted person.²⁵⁹

The UK exception applies more expansively to *new* and compelling evidence.²⁶⁰ The choice in Queensland and NSW to opt for the higher threshold of ‘fresh evidence’ will

²⁵¹ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678B.

²⁵² *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) s 100.

²⁵³ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) s 98.

²⁵⁴ Law Commission (United Kingdom), above n 163, 41-43; The view was shared by the MCCOC and the author of the NSW Government Briefing Paper: Johns, above n 143, 25; *Discussion Paper Model Criminal Code*, above n 16, 45.

²⁵⁵ Lord Justice Auld, ‘Chapter 12 – Appeals’, *Review of the Criminal Courts of England and Wales*, (2001) [60], <<http://www.criminal-courts-review.org.uk>> at 18 July 2007. Eventually a list of ‘serious’ qualifying offences was settled. Schedule 5 lists certain offences against the person, sexual offences, drug offences, criminal damages offences and war crimes and terrorism offences as qualifying offences for Part 10 of the Act: *Criminal Justice Act 2003* (UK) Sch 5.

²⁵⁶ Dennis, above 12, 947.

²⁵⁷ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678B.

²⁵⁸ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678B(2).

²⁵⁹ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678B(3).

²⁶⁰ *Criminal Justice Act 2003* (UK) s 78.

prevent a retrial where, as a result of incompetence or a tactical decision, evidence was not called at the original proceedings.²⁶¹

2 *Tainted acquittals exception*

The tainted acquittal exception in Queensland applies to offences with a maximum penalty of 25 years or more imprisonment.²⁶² In NSW, the exception applies to offences with a maximum of 15 years or more, and in the UK there is no restriction on which offences can be reopened.²⁶³ The exception will be available when the court is satisfied that, but for the commission of the administration of justice test, it is likely that the accused would have been convicted.²⁶⁴

This proposal has been less controversial, with a number of commentators considering that an acquittal procured by fraud is less deserving of double jeopardy protection.²⁶⁵ There has been some concern that the inclusion of perjury within the list of offences that can 'taint' an acquittal, will undermine an accused's right to testify on his or her own behalf.²⁶⁶ The MCCOC's view was that:

perjury must be seen as an offence against the administration of justice. It would be absurd not to do so. The offence of perjury protects interests that lie at the heart of the criminal trial process. The fact that one happens to be the accused in a criminal trial does not and should not confer a licence to lie on oath. For that reason, it is not rational to limit such an option to serious offences. The insult to the integrity of the legal process is the same no matter what the offence.²⁶⁷

Others have drawn attention to the fact that the provision allows an acquittal to become tainted by an administration of justice offence committed by a third party.²⁶⁸ Acting Justice Jane Mathews considered it would be unfair to an acquitted person to retry them without being satisfied of their complicity in the 'tainting' of the acquittal.²⁶⁹

3 *Interests of justice test*

Both exceptions also require a determination by the court that the order allowing the retrial will be, in all the circumstances, in the 'interests of justice'.²⁷⁰ Certain matters must be considered in reaching that determination. The court must have regard to the length of time since the acquitted person allegedly committed the offence and whether

²⁶¹ *Discussion Paper Model Criminal Code*, above n 16, 76, 109.

²⁶² Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678C.

²⁶³ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) s 101; see *Criminal Procedure and Investigations Act 1996* (UK) ss 54–57; Matthews, above n 222, 16.

²⁶⁴ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678E(2).

²⁶⁵ Dennis, above n 12, 949; Matthews, above n 222, 10; *Discussion Paper Model Criminal Code*, above n 16, 71.

²⁶⁶ Kirby, above n 23, 236.

²⁶⁷ *Discussion Paper Model Criminal Code*, above n 16, 71.

²⁶⁸ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678E(2)(a); Matthews, above n 222, 11.

²⁶⁹ Matthews, above n 222, 11.

²⁷⁰ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) ss 678B(1), 678C(1).

there has been any failure to act with competence and diligence in relation to the original investigation or prosecution or, in relation to the application for retrial.²⁷¹ The provision declares that it will not be in the interests of justice to make the order unless the court is satisfied that a fair trial is likely in the circumstances.²⁷² This important safeguard preserves the court's discretion to apply the scheme flexibly and, perhaps, to guard against injustice in particular cases.²⁷³

4 *Prospectivity / retrospectivity*

In NSW, both double jeopardy exceptions operate retrospectively.²⁷⁴ In the UK, only the fresh evidence exception operates retrospectively.²⁷⁵ In Queensland, both exceptions will operate prospectively.

Johns, in a NSW Government Briefing Paper, recommended that the exceptions operate retrospectively because new forensic techniques, such as DNA technology, would allow unsolved cases to be cleared up.²⁷⁶ The issue of retrospectivity is controversial.²⁷⁷ Acting Justice Mathews supported the application of retrospectivity to tainted acquittals.²⁷⁸ But she opined more generally that the notion of retrospectivity was repugnant in criminal law, and especially when the liberty of the individual was at stake. She noted that retrospectivity in relation to the fresh and compelling evidence exception, would render *all* past acquittals for qualifying offences conditional.²⁷⁹ Moreover, retrospective application of the exceptions may constitute a breach of our due process obligations under international human rights law.²⁸⁰

5 *Risk of prejudice*

A number of commentators were concerned about the risk of prejudice to the accused from pretrial publicity.²⁸¹ The risk would presumably be amplified if the jury became aware that the retrial had the Court of Appeal's imprimatur, or that the Court had found new evidence to be compelling or that the accused had been earlier acquitted because of an administration of justice offence.²⁸²

²⁷¹ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678F(3).

²⁷² Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678F(2).

²⁷³ *Discussion Paper Model Criminal Code*, above n 16, 115; Mathews, above n 222, 18.

²⁷⁴ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) s 99(3).

²⁷⁵ *Criminal Justice Act 2003* (UK) s 75(6); *Criminal Procedure and Investigations Act 1996* (UK) s 54(7).

²⁷⁶ Johns, above n 143, 13.

²⁷⁷ Haesler, above n 18; Fitzpatrick, above n 6, 158, and Paul Roberts in Fitzpatrick, above n 6, 163; *Discussion Paper Model Criminal Code*, above n 16, 45, 103-104.

²⁷⁸ Mathews, above n 222, 28.

²⁷⁹ *Ibid*, 26.

²⁸⁰ Acting Justice Mathews may be referring to possible inconsistency with art 15 of the *International Covenant on Civil and Political Rights*: *ibid*.

²⁸¹ Haesler, above n 18; Kirby, above n 23, 242; Fitzpatrick, above n 6, 153, 156-157; Mathews, above n 222, 20; Johns, above n 143, 12, 14; *Discussion Paper Model Criminal Code*, above n 16, 59-60.

²⁸² Fitzpatrick, above n 6, 156-157.

The scheme meets these concerns by prohibiting the publication of any material which could have the effect of identifying an acquitted person subject to an application under the scheme.²⁸³ The ban would apply from before the reopening of the police investigation until the end of the trial.²⁸⁴ The ban would not apply if the court so orders, but it can only so order if satisfied that lifting the ban is in the interests of justice.²⁸⁵ A contravention of the ban is punishable as contempt of the Supreme Court.²⁸⁶

Fitzpatrick remains unconvinced that even a well-intentioned, comprehensive prohibition will be effective. He points out that the first trial and acquittal may have provoked ample publicity and much of the supposedly protected information will remain in the public domain.²⁸⁷ The Carroll case illustrates the point. Imagine the challenge of recruiting an untarnished jury today for that matter.²⁸⁸

6 Other safeguards

A range of other safeguards are incorporated into the scheme. Only one application for retrial can be made in relation to the original offence.²⁸⁹ The prosecution thus gets a second 'bite of the cherry', but not a third.²⁹⁰ Police cannot investigate an acquitted person in relation to a possible retrial without the written authorisation of the Director of Public Prosecutions.²⁹¹ Additionally, pending the retrial, a presumption in favour of bail applies, reversing the usual presumption against bail for a person charged with murder.²⁹²

IV CONCLUSION

Ironically, given the incendiary role of these cases, neither Raymond Carroll nor the killers of Stephen Lawrence will be re-prosecuted. For various reasons, neither case falls within the scope of the exceptions.²⁹³ Corns examined controversial acquittals Australia-wide and has concluded that, while no hard data exists, the number of cases likely to fall within the reforms is tiny.²⁹⁴ In the UK, police have closed the file on 35 cases because the suspected offender was acquitted.²⁹⁵ There is nothing to suggest how

²⁸³ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678K.

²⁸⁴ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678K(1), (6).

²⁸⁵ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678K(2), (3).

²⁸⁶ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678K(8).

²⁸⁷ Fitzpatrick, above n 6, 157.

²⁸⁸ *Discussion Paper Model Criminal Code*, above n 16, 60.

²⁸⁹ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678G(1). However, if during a retrial under the new scheme, an administration of justice offence is committed which causes a second acquittal, then an application can be brought under the tainted acquittal exception in relation to the second trial: s 678G(2).

²⁹⁰ Matthews, above n 222, 19.

²⁹¹ Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678I.

²⁹² Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) s 678J; *Bail Act 1980* (Qld) s 16(3).

²⁹³ Parkinson, above n 25, 611; *Discussion Paper Model Criminal Code*, above n 16, 61.

²⁹⁴ Corns, above n 15, 96.

²⁹⁵ Home Affairs Committee (UK), House of Commons, 'Numbers of Cases' *Third Report – The Double Jeopardy Rule*, HC190, (2000), [20], <<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/190/19002.htm>> at 18 July 2007.

many, if any, of those cases will ever come within the scope of the exceptions. The Director of Public Prosecutions in the UK told the Home Affairs Committee that ‘in a twelve month period it would be astonishing if there were more than a handful [of cases]’.²⁹⁶ The tainted acquittal provisions commenced in 1996, and as of 2004, no cases had been brought under the provisions.²⁹⁷

Roberts argues that the benefit to the criminal justice system of these reforms will be meagre. Claims that the reforms will increase the overall accuracy of criminal justice outcomes are challenged, in his view, by the paltry number of qualifying cases. He asks whether the normative and practical implications of diminishing double jeopardy protections are justified by the promise of just a few extra guilty verdicts.²⁹⁸

Many commentators have also highlighted the risk of basing reforms on highly politicised individual cases.²⁹⁹ It is a notorious aphorism that hard cases make bad law.³⁰⁰ Justice Vincent invites us to recall:

the complex nature of the relationships between our basic rights and the criminal law and, of course, the need for careful consideration of the effect upon those relationships of making superficially attractive changes in the law designed to deal with perceived problems in particular cases. It must not be overlooked that alterations of the system to achieve what is presumed to be justice in a specific type of situation may occasion serious injustice to others.³⁰¹

Truth and justice are both fundamental values in our legal system. It is hoped that in advancing the cause of either, we do not surrender rights which have been long evolving for our protection.

²⁹⁶ Ibid.

²⁹⁷ Commentary, Criminal Procedure Bill 2004 (NZ), 7.

²⁹⁸ Roberts, above n 141, 414-415.

²⁹⁹ Corns, above n 15, 82; Mason, above n 161, 95; Cowdrey, above n 231, 9.

³⁰⁰ O’Gorman, above n 162, 9; Roberts, above n 141, 396.

³⁰¹ Vincent, above n 21.