

Summer Semester 2013

LWC304 — RESEARCH PAPER

**DOUBLE JEOPARDY REFORM: POLITICAL EXPEDIENCY
OR MUCH NEEDED CHANGE?**

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I INTRODUCTION

Double jeopardy, or a plea of *autrefois acquit/convict*,¹ is in its simplest form, a doctrine that no person shall be tried twice for the same offence. This paper examines the historical context of the doctrine and traces its passage through to the 20th century and describes its several principles and application in some detail.

The paper also examines the rationality for reform in light of important judicial cases, such as *R v Carroll*², which lead to media sensationalism and knee-jerk reactions from politicians who were more concerned about re-election than effective, principle-based law reform. In doing so it will examine the reforms it has undergone in England, New Zealand and Australia during the 21st century and whether the Australian reforms are a matter of media-driven political expediency or much needed change in a contemporary Australian legal arena.

Whilst law reform is always necessary in an ever-changing society with ever-developing forensic science, it will be argued that such changes require careful consideration and should not involve hasty political reactions to media campaigns and poll-based political law-and-order platforms. In this respect, and more specifically, reform should not interfere with the rule of law³ which underpins Australian democracy, particularly so with respect to the maintenance of the separation of powers and the independence of the judiciary to ensure confidence in judicial outcomes.

¹ *Autrefois* — a French adverb meaning ‘formerly’.

² (2002) 213 CLR 635.

³ Tony Blackshield and George Williams, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) 90.

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II HISTORICAL PERSPECTIVES

The origins of double jeopardy have ‘an ancient lineage, founded in deep principles of religion, morality and law’,⁴ a concept ‘not entirely unknown to the Greeks and Romans’.⁵

A *Ancient Origins*

Ancient Greece is a common historical starting point of the doctrine for many legal scholars: ‘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”’.⁶

The maxim *nemo debet bis puniri pro uno delicto*,⁷ Dr Sigler suggests, is part of Roman Law but its applicability to more contemporary English common law use is questionable because of different legal systems employed in those times.⁸ It does, however, provide compelling evidence of double jeopardy being ‘shrouded in the mists of time’.⁹ Similarly, the maxims *res judicata*¹⁰ and *res judicata pro veritate accipitur*¹¹ again suggests Roman law origins, both having a common theme of judicial fairness.

⁴ Justice Michael Kirby, ‘Carroll, Double Jeopardy and International Human Rights Laws’ (2003) 27 *Criminal Law Journal* 231, 231-2.

⁵ Jay Sigler, ‘A History of Double Jeopardy’ (1963) 7 *American Journal of Legal History* 283.

⁶ Michelle Edgely, ‘Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy’ (2007) 7 1 *Queensland University of Technology Law & Justice Journal* 108, 112.

⁷ Peter Butt (ed), *Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3rd ed, 2004) 294. ‘A person ought not be twice vexed for one and the same cause’.

⁸ Jay Sigler, above n 5, 283.

⁹ Edgely, above n 6, 111.

¹⁰ Butt, above n 7, 375. ‘A judicially decided matter. The rule that if a dispute is judged by a court of competent jurisdiction, the judgment of the court is final and conclusive as to the rights and duties of the parties involved. *Res judicata* constitutes an absolute bar to a subsequent suit for the same cause of action’.

¹¹ *Ibid* 375. ‘The decision of a court of justice is assumed to be correct’.

Canon Law,¹² imported into England at the end of the Roman Empire, and upon its Christianisation, has also been suggested as further evidence of the influence of Roman law. As observed by Justice Kirby: ‘It is true that most legal systems, in their early phase, derived their rules from the commandments of a deity or of a monarch or equivalent person’,¹³ and furthermore:¹⁴

It is in this way that a principle against double punishment was inherited by most legal systems from religious rules attributed to God. Thus, in the Judeo-Christian tradition, in the Book of *Nahum*, a passage in the Old Testament states that: ‘Affliction shall not rise up the second time’.

B *English Origins*

The more formal pleas of *autrefois acquit/convict*, ‘still expressed today in Norman French’,¹⁵ and indicative of early English legal origins, do not appear to have derived from the Magna Carta in 1215.¹⁶

1 *Thomas á Becket — 12th Century*

Application of double jeopardy in English common law can be traced to circumstances surrounding the *Constitutions of Clarendon*.¹⁷ When Thomas á Becket¹⁸ resisted an 1164 move by King Henry II to punish clergy,¹⁹ he ‘claim[ed] that dual jurisdiction would violate a

¹² Ibid 61. ‘Compilation of the laws of the Catholic Church’.

¹³ Kirby, above n 4, 231.

¹⁴ Ibid.

¹⁵ Edgely, above n 6, 112.

¹⁶ Sigler, above n 5, 284.

¹⁷ Also known as the *Assize of Clarendon*, a series of ordinances enacted by King Henry II in an extreme effort to control rampant lawlessness and had the unfortunate effect of encouraging accusations leading to miscarriages of justice (and was later amended). Encyclopaedia Britannica online <<http://www.britannica.com/EBchecked/topic/119804/Assize-of-Clarendon>>.

¹⁸ Archbishop of Canterbury (1118–1170) <<http://www.spartacus.schoolnet.co.uk/NORbeckett.htm>>.

¹⁹ Kirby, above n 4, 231–2.

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maxim observed in ecclesiastical courts, *nemo bis in idipsum* — no man ought to be punished twice for the same offence'.²⁰ In 1176, following Papal pressure in conjunction with á Becket's murder²¹, the King relented with the matter settled by the grant of benefit to clergy.²²

Dr Sigler, on the other hand, suggests that there is some speculation on whether double jeopardy as a legal doctrine entered England at this time 'since much of Western law derives from a common fund of shared judicial sources'.²³ It could be argued, however, that the matter involving á Becket was more a power struggle between the church and the monarchy than one of basic legal rights for ordinary citizens.

The benefit to clergy was 'whittled away [as] the growing primacy of the state restored the risk of dual punishment'²⁴ and little refinement to double jeopardy occurred until the 16th century.

2 *Sparry's Case and Sir Edward Coke — 16th and 17th Centuries*

According to Michelle Edgely, the first recorded use of double jeopardy was from 1589 in *Sparry's Case*²⁵ where *nemo debet bis vexari pro una et eadem causa* — a man shall not be twice vexed for one and the same cause — was pleaded.²⁶ There were exceptions, with 'the

²⁰ Edgely, above n 6, 113, citing *Cooke v Purcell* (1988) 14 NSWLR 51, 55 (Kirby P); see also Anthony Bellanto, 'Developments in Double Jeopardy & the Application of the Statutory Non-Parole Period' (Paper presented at the LexisNexis Criminal Law Conference, Parkroyal, Darling Harbour, 30 November 2011. At this time in English history 'there were two different courts systems — ecclesiastical and the king's court — there was concern whether someone tried in ecclesiastical courts could subsequently be tried in the king's court'.

²¹ In 1170 <<http://www.spartacus.schoolnet.co.uk/NORbeckett.htm>>.

²² Kirby, above n 4, 232.

²³ Sigler, above n 5, 284.

²⁴ Kirby, above n 4, 232.

²⁵ (1589) 5 Co Rep 61 a [77 ER 148] — a case involving trover (conversion) of goods in which the defendant James Sparry pleaded that the plaintiff Israel Owen had another action on the same case before the King's Bench. Sparry's plea, effectively double jeopardy, was successful.

²⁶ Edgely, above n 6, 114.

plea only applied to an acquittal on the merits; it was not available for an acquittal based on a pleading defect or other error of law'.²⁷

Sir Edward Coke,²⁸ a British jurist and politician influential in the 'defence of the supremacy of the common law against the Stuart claims of royal prerogative',²⁹ was also the author of early English Law Reports,³⁰ the source of *Sperry's Case*. Coke, Sigler suggests, was a 'fountainhead of double jeopardy law'³¹ and:

In his *Second Institutes* the basis of double jeopardy was described, to be reiterated by Blackstone who informed generations of English Lawyers that in English courts 'the plea of autrefois acquit, or a formal acquittal, is grounded on the universal maxim ... that no man is to be brought into jeopardy for his life more than once for the same offense'.

Coke's struggles in defending common law supremacy were followed by the English Civil War,³² a turbulent 17th century struggle between Parliament and the Crown,³³ and thereafter by the Glorious Revolution in 1688,³⁴ marking 'the end of any basis for the claim that English monarchy ruled by anything other than parliamentary consent'.³⁵ It was an era that saw the beginnings of constitutional principles of the rule of law and the separation of powers.³⁶

²⁷ Ibid.

²⁸ 1552–1634 — Encyclopaedia Britannica Online <<http://www.britannica.com/EBchecked/topic/124844/Sir-Edward-Coke>>; see also Butt, above n 7, 72.

²⁹ Ibid.

³⁰ Abbreviated as Co Rep (Coke's Reports, King's Bench) 1572–1617 — extracted from Melbourne University Law Review Association, *Australian Guide to Legal Citation* (Melbourne University Law Review Association Inc, 3rd ed, 2010) 291; see also Butt, above n 7, 72.

³¹ Sigler, above n 5, 295.

³² Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 7th ed, 2009) 22–23 [2.14]–[2.15]. 1642–46.

³³ Ibid 23 [2.15].

³⁴ Ibid 23 [2.16].

³⁵ Ibid.

³⁶ Ibid 24 [2.17].

By the 18th century, double jeopardy became firmly established in English common law with the legal writings of Sir William Blackstone.³⁷

3 *Sir William Blackstone — 18th Century*

Blackstone's *Commentaries of the Law of England*³⁸ was an 'attempt to canvass the entire field of English law in a systematic form ... very highly regarded both in England and the United States, and remains of occasional use as a research tool even today'.³⁹ Blackstone summarised the double jeopardy pleas as a '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'.⁴⁰ It was that maxim James Madison⁴¹ articulated in the Fifth Amendment of the *United States Constitution*.⁴²

C *United States Constitution*

Madison, a founding father of the *United States Constitution*, wrote the double jeopardy clause in the Fifth Amendment in 1789.⁴³ This Amendment includes, inter alia, 'nor shall any person be subject by the same offence to be twice put in jeopardy of life or limb',⁴⁴ applicable to both Federal and State laws by virtue of the Fourteenth Amendment,⁴⁵ clause 1.⁴⁶

³⁷ Butt, above n 7, 72. 1723–1780. English jurist who collated the laws of England into four volumes known as Blackstone's *Commentaries on the Laws of England* (1765-69).

³⁸ Sir William Blackstone, *Commentaries on the Law of England* (Oxford: Clarendon Press, 1st ed, 1765-1769). As extracted from Yale Law School Lillian Goldman Law Library — The Avalon Project <http://avalon.law.yale.edu/18th_century/blackstone_bk4ch26.asp>.

³⁹ Cook et al, above n 32, 30 [2.24].

⁴⁰ Kirby, above n 4, 232.

⁴¹ 1751–1836, the fourth President of the United States 1809–17. The Whitehouse online <<http://www.whitehouse.gov/about/presidents/jamesmadison>>.

⁴² Kirby, above n 4, 232.

⁴³ Sigler, above n 5, 305–6.

⁴⁴ The Fifth Amendment is part of the *United States Constitution's Bill of Rights* <<http://constitutionus.com/>>; see also Kirby, above n 4, 232.

⁴⁵ Kirby, above n 4, 232.

⁴⁶ Fourteenth Amendment (clause 1) to the *United States Constitution* <<http://constitutionus.com/>>.

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All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pronouncement of ‘jeopardy of life or limb’ was a common theme that evolved with the double jeopardy doctrine over time.

Furthermore, in the US and other countries,⁴⁷ the inclusion of double jeopardy within their constitutions is viewed as a guarantee rather than a protective mechanism. Thus, the ‘maxims remained related to technical rules of pleading and, in many circumstances, had little more protective force than a bare slogan’.⁴⁸ Despite this, the principles enunciated in the Fifth Amendment and applied in various US cases are often raised persuasively in Australia.⁴⁹

⁴⁷ Edgely, above n 6, 116. For example, Canada, New Zealand and South Africa.

⁴⁸ Ibid 115 citing Sigler, above n 5, 298.

⁴⁹ See, eg, *Pearce v The Queen* (1998) 194 CLR 610, 618–9 [27] (McHugh, Hayne and Callinan JJ); *R v Carroll* (2002) 213 CLR 635, 662 [89] (Gaudron and Gummow JJ).

III DOUBLE JEOPARDY — AUSTRALIAN PERSPECTIVE

A *Modern Principle*

Early pleas of *autrefois acquit/convict* applied ‘strictly to acquittal or conviction for precisely the same felony’ — however, by the end of the 18th century ‘the modern form of the principle had emerged’ applying to ‘reprosecution for the same crime or a crime that was *in substance the same*’.⁵⁰ This change has been necessary because of ever-increasing complexity of criminal law and the need to ‘examine those principles upon which the disparate principles encompassed by the expression double jeopardy are based’;⁵¹ sentiments echoed by Edgely, suggesting that with ‘the proliferation of statutory offences, the courts are more inclined to look beyond the record to consider what had been, in substance, the factual gravamen of the prior verdict’.⁵²

This modern form of the doctrine, accepted into Australia upon settlement in 1788, and remaining until 21st century reform, is not as straightforward as it appears.

B *Differing Rules and Principles*

Double jeopardy is not a single doctrine,⁵³ but one describing many differing rules and principles applicable at different stages of criminal proceedings.⁵⁴ Importantly, double jeopardy is a defence, not an excuse. These different rules and principles are briefly discussed below.

⁵⁰ Edgely, above n 6, 115.

⁵¹ *R v Carroll* (2002) 213 CLR 635, 640 [9] (Gleeson CJ and Hayne J).

⁵² Edgely, above n 6, citing *R v O’Loughlin* [1971] 1 SASR 219.

⁵³ *Pearce v The Queen* (1998) 194 CLR 610, 614 [9] (McHugh, Hayne and Callinan JJ).

⁵⁴ Kirby, above n 4, 232.

1 *Plea in Bar*

A plea in bar is a direct plea by an accused that the prosecution is unable to proceed as it offends the rule against double jeopardy. The plea is entered before the prosecution opens its case and is by way of *autrefois acquit/convict*,⁵⁵ and restricted to cases where ‘the elements of the offences charged are *identical* or in which all of the *elements of one offence are wholly included in the other*’⁵⁶ (emphasis added).

No plea in bar is available in cases requiring proof of facts different from those of other offences.⁵⁷ *Autrefois acquit*, for example, is a defence to a charge entered prior to a plea of not guilty — the court has no discretion to stay proceedings until the plea is made out. If unsuccessful, the accused either pleads guilty or not-guilty — ‘it is only at this stage that any questions of exercising discretion to stay the proceedings would arise’.⁵⁸

2 *Stay of Proceedings*

Courts have an inherent or implied jurisdiction to order a temporary or permanent stay⁵⁹ of any proceedings before it where the matter is frivolous or vexatious, there are no reasonable grounds for the action, or the proceedings are an abuse of process and therefore unfair.⁶⁰

Even where no opportunity exists for a plea in bar, courts may still exercise powers to stay proceedings where there would be an abuse of process.⁶¹ Compared with *autrefois acquit/convict*, a stay is a judicial discretion, seemingly more available than the defence

⁵⁵ Butt, above n 7, 331; see also *Dodd v The Queen* (1991) 56 A Crim R 451.

⁵⁶ *Pearce v The Queen* (1998) 194 CLR 610, 618 [24] (McHugh, Hayne and Callinan JJ).

⁵⁷ *Ibid.*

⁵⁸ *R v Carroll* (2002) 213 CLR 635, 639 [7] (Gleeson CJ and Hayne J).

⁵⁹ *Barton v The Queen* (1980) 147 CLR 75; see also *Jago v District Court (NSW)* (1989) 168 CLR.

⁶⁰ Butt, above n 7, 411 (definition); see also *Jago v District Court of New South Wales* (1989) 168 CLR 23, 117 (Toohey J).

⁶¹ *Pearce v The Queen* (1998) 194 CLR 610, 620 [29] (McHugh, Hayne and Callinan JJ); see also *Walton v Gardiner* (1993) 177 CLR 378.

pleaded by double jeopardy. An example is *R v Carroll*⁶² where, because of the inordinate lapse of time, ‘thirteen years passed since the acquittal, [and] some twenty-six years had passed since the death [of the victim]’,⁶³ a stay due to an abuse of process was applicable.

The authority to permanently stay proceedings may, in some States, be found within legislation.⁶⁴ A stay is not an acquittal, but similar to an adjournment where proceedings are stopped.⁶⁵

3 *Other Doctrines/Principles*

The above are just the main examples of double jeopardy, but there are other explanations, set out here.

(a) *Issue Estoppel*⁶⁶

Issue Estoppel is a principle originally recognised in both civil and criminal proceedings which can be both a doctrine and an evidentiary rule. *Autrefois acquit* is ‘the species of estoppel by which the Crown is precluded from re-asserting the guilt of the accused when that question has previously been determined against it’.⁶⁷ However, where estoppel arises in criminal law it can no longer be applied as a strict principle but rather giving rise to a broad discretionary power to prevent an abuse of process and stay the proceedings’.⁶⁸ Issue

⁶² *R v Carroll* (2001) QCA 394.

⁶³ Kirby, above n 4, 234.

⁶⁴ See, eg, *Criminal Procedure Act 2004* (WA) ss 75–76, 89–90 are relevant.

⁶⁵ Heather Douglas, Kimberly Everton-Moore, Sue Harbidge and Laurie Levy (eds), *Criminal Process in Queensland and Western Australia* (Lawbook, 2010) 266 [9.60].

⁶⁶ Butt, above n 7, 237. ‘A judicial determination directly involving an issue of fact or law which has disposed of the issue so that it cannot thereafter be raised by the same parties’.

⁶⁷ Anthony Bellanto, ‘Developments in Double Jeopardy & the Application of the Statutory Non-Parole Period’ (Paper presented at the LexisNexis Criminal Law Conference, Parkroyal, Darling Harbour, 30 November 2011) 5.

⁶⁸ *Rogers v The Queen* (1994) 181 CLR 251, 254 (Mason CJ); see also *R v Carroll* (2002) 213 CLR 635, 647 (Gleeson CJ and Hayne J).

estoppel relates to a single issue associated with a case, compared with cause of action estoppel, relating to the whole proceedings.

(b) *Res Judicata – the Doctrine of Finality*

Res judicata, the mechanism by which a plea in bar of *autrefois acquit/convict* can be entered, is defined as ‘a judicially decided matter ... an absolute bar to the subsequent suit for the same cause of action’⁶⁹ — a plea has a ‘commonly alleged pedigree as the most visible manifestation in criminal proceedings of the doctrine of *res judicata*’.⁷⁰

Res judicata differs from issue estoppel as it relates to an entire claim, not a single issue,⁷¹ more accurately described as a cause of action estoppel.⁷² It is also known as the doctrine of finality, preventing inconsistent results.⁷³ *Autrefois acquit* ‘has a protective effect at common law because the acquittal has passed into judgment: it is *res judicata*’.⁷⁴

Closely related to *res judicata* is the maxim *res judicata pro veritate accipitur* — ‘[t]he decision of a court of justice is assumed to be correct’,⁷⁵ offering finality to any court decision, without which there would be no certainty in a judgment and cases would never be fully settled.⁷⁶ Anthony Bellanto QC comments that ‘*res judicata* ... like double jeopardy, is grounded on public policy ... the individual has a right to be protected from vexatious

⁶⁹ Butt, above n 7, 375.

⁷⁰ Richard Mahoney, ‘Previous Acquittal and Previous Conviction in New Zealand: Another Kick at the Cheshire Cat’ (1990) 7 2 *Otago Law Review* 221, 226, citing *R v Storey* (1978) 140 CLR 364, 399 (Mason J).

⁷¹ Butt, above n 7, 237.

⁷² 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), 8.

⁷³ *Ibid.*

⁷⁴ Edgely, above n 6, 116.

⁷⁵ Butt, above n 7, 375.

⁷⁶ *R v Carroll* (2002) 213 CLR 635, 643 [22] (Gleeson CJ and Hayne J).

multiplication of suits and prosecutions'.⁷⁷ Finality also promotes 'diligence in investigations and prosecutions' where police and prosecutors have only one opportunity to succeed.⁷⁸

The matter of finality was also raised in *Carroll* where Gleeson CJ and Hayne J commented, 'the need to secure a conclusion of disputes concerning status is widely recognised, and the status conferred by acquittal is important'.⁷⁹ Their Honours also referred to Lord Wilberforce's comments in *The Amphyll Peerage*⁸⁰ where:

Any determination of disputable facts may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution 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 gap. 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.

If finality were not important or relevant to criminal justice, then it could be reasoned that neither are acquittals or convictions.

(c) *Merger*

A doctrine whereby double jeopardy may be claimed if the elements of one offence merge into another more serious offence — for example, a person charged with Actual Bodily Harm (ABH) cannot be also convicted of assault as the elements of ABH include those of the lesser

⁷⁷ Bellanto, above n 67, 6.

⁷⁸ Edgely, above n 6, 123.

⁷⁹ *R v Carroll* (2002) 213 CLR 635, 643 [22] (Gleeson CJ and Hayne J).

⁸⁰ *Ibid* citing *The Amphyll Peerage* [1977] AC 547, 569 (Wilberforce LJ).

offence of assault.⁸¹ *Autrefois convict* is ‘akin to merger, that is, the Crown is precluded from re-asserting the very same facts as in earlier proceedings which formed the basis of a conviction in which its rights have merged’.⁸²

4 *Statutory Construction*

With all Australian jurisdictions carrying double jeopardy related legislation,⁸³ it must be remembered that statutes should not be interpreted as abrogating important common law rights, privileges or immunities without ‘clear expression of an unmistakable and unambiguous intention’⁸⁴ — including the right to claim double jeopardy. Such legislation would be more accurately described as statutory defences reflective of the common law principle.

The statutory defences contained in the *Criminal Codes* of both WA and Qld⁸⁵ prevent further prosecution on less serious offences where the prosecution has failed ‘on a more serious offence, [for example] pursuing a charge for manslaughter after an acquittal on murder’.⁸⁶

The same applies for ‘further prosecution on a more serious offence after obtaining a conviction for a less serious offence ... a charge of murder after receiving a manslaughter conviction’.⁸⁷

⁸¹ See, eg, *Criminal Code Act 1899* (Qld) s 339 (Actual Bodily Harm), s 335 (Assault).

⁸² Bellanto, above n 67, 5–6.

⁸³ See, eg, *Acts Interpretation Act 1915* (SA) s 50; *Criminal Code Act 1899* (Qld) s 17.

⁸⁴ *Coco v The Queen* (1994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron and McHugh JJ); *R v Carroll* (2002) 213 CLR 635, 60 [81] (Gaudron and Gummow JJ).

⁸⁵ *Criminal Code Act Compilation Act 1913* (WA) s 17; *Criminal Code Act 1899* (Qld) s 17.

⁸⁶ Douglas et al, above n 65, 200 [7.180].

⁸⁷ Ibid.

Double jeopardy does not arise where alternative verdicts are available. For example, should the prosecution fail to prove the intentional element of murder, the accused may be found guilty of the alternative of manslaughter⁸⁸ — the accused is not being retried.

Autrefois acquit does not apply in matters not finalised, such as where the prosecution may have tendered no evidence, a *nolle prosequi*,⁸⁹ as further proceedings on the same charge may later be enlivened by the prosecution. The same applies in other non-finalised trials such as where the jury fails to reach a unanimous verdict or where matters are discontinued or withdrawn by the prosecution.

In both WA and Qld, the statutory provisions mentioned only apply to matters on indictment. Those heard on complaint — simple offences for example — and dismissed before a Magistrate are dealt with in a similar manner to those mentioned but only where a Certificate of Dismissal has been issued.⁹⁰ Where there may be cases not caught by the legislation,⁹¹ a stay for abuse of process may still apply, where for example, it can be shown that continued prosecution is oppressive⁹² or malicious.⁹³

However, special exceptions apply to the application of statutory defences as a result of recent double jeopardy reform.

⁸⁸ *Criminal Code Act 1899* (Qld) s 310.

⁸⁹ Butt, above n 7, 296. *Nolle prosequi* — ‘unwilling to proceed’; see also *Criminal Code Act 1899* (Qld) s 563.

⁹⁰ See, eg, *Criminal Code Act 1899* (Qld) s 700.

⁹¹ *Criminal Code Act Compilation Act 1913* (WA) s 17; *Criminal Code Act 1899* (Qld) s 17.

⁹² See, eg, *R v S* [2000] 1 Qd R 445. A case where the charges were too vague; see also *Williams v Spautz* (1992) 174 CLR 509, 518 (Mason CJ, Dawson, Toohey and McHugh JJ).

⁹³ Douglas et al, above n 65, 276–79 [7.180].

C *Application at Different Stages in Proceedings*

1 *Double Prosecution*

Protection against double prosecution is the basic double jeopardy situation where no person can be tried twice for the same offence — there can only be ‘one bite of the cherry’. As noted in *Carroll*, these notions of judicial fairness must be protected as the State has the power and resources generally not available to the accused and ‘the consequences of conviction are very serious.’⁹⁴ Moreover: ‘Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression’.⁹⁵

Pursuing double prosecution may also amount to oppressive prosecution where, for example, ‘the charge may be a duplication of other charges’⁹⁶ and considered an abuse of power.⁹⁷

Although civil judicial redress is available in the tort of malicious prosecution⁹⁸ it may be difficult to prove the prosecution had not ‘honestly formed the view that there was a proper cause for prosecution, or to have formed that view on an insufficient basis, the element of reasonable and probable cause is not established’.⁹⁹ Moreover, the Court held that as malice is one of the elements, ‘the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law ... that improper purpose must be the sole or

⁹⁴ *R v Carroll* (2002) 213 CLR 635, 643 [21] (Gleeson CJ and Hayne J).

⁹⁵ *Ibid.*

⁹⁶ Douglas et al, above n 65, 276 [9.140].

⁹⁷ *R v Noyes* [2005] 1 Qd R 169.

⁹⁸ See, eg, *A v New South Wales* (2007) 230 CLR 500.

⁹⁹ *Ibid* 528–539 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

dominant purpose of the prosecutor'.¹⁰⁰ Given the strict guidelines, under which Australian DsPP operate, it is difficult to envisage success in pursuit of such litigation.¹⁰¹

The accepted test for double jeopardy in Australia is one which 'looks to the elements of the offences concerned'.¹⁰² A plea in bar would not be available where 'each of offences with which the appellant was charged required proof of a fact which the other did not'.¹⁰³

2 Evidentiary Matters

The cornerstone of a fair trial is the presumption of innocence, a fundamental right encapsulated in the maxim, *ei incumbit probatio qui dicit, non qui negat* — 'the burden of proof lies upon the person who affirms, not upon the person who denies'.¹⁰⁴ An accused has both the legal and evidentiary burden of proving double jeopardy¹⁰⁵ — that onus is proof on the balance of probabilities,¹⁰⁶ not beyond a reasonable doubt.¹⁰⁷ Once raised by the accused, the prosecution has 'the legal and evidential burden of negating double jeopardy beyond reasonable doubt'.¹⁰⁸ This high burden of proof was famously explained in *Woolmington v DPP*¹⁰⁹ as the 'one golden thread always to be seen ... no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law and no attempt to whittle it down can be entertained'¹¹⁰ (emphasis added).

¹⁰⁰ Ibid.

¹⁰¹ See, eg, Office of the Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines* (2005) <<http://www.dpp.wa.gov.au/P/publications.aspx?uid=6069-6055-8084-2454>>.

¹⁰² *Pearce v The Queen* (1998) 194 CLR 610, 620 [28] (McHugh, Hayne and Callinan JJ).

¹⁰³ Ibid.

¹⁰⁴ Butt, above n 7, 145.

¹⁰⁵ Kelly Burton, Thomas Crofts and Stella Tarrant (eds), *Principles of Criminal Law in Queensland and Western Australia* (Lawbook, 2011) 36 [3.20].

¹⁰⁶ *R v Viers* [1983] 2 Qd R 1, 6.

¹⁰⁷ *Woolmington v DPP* [1935] AC 462, 481–2.

¹⁰⁸ Burton, Crofts and Tarrant, above n 105, 36 [3.20].

¹⁰⁹ *Woolmington v DPP* [1935] AC 462, 481–2 (Viscount Sankey).

¹¹⁰ Ibid.

Woolmington serves as a reminder of the core principles of judicial fairness — there could be nothing more abhorrent than an innocent person falsely convicted and punished.

However, the presumption of innocence in statutory provisions of strict or absolute liability offences,¹¹¹ where the burden of proof is effectively reversed, demonstrates the fragility of this concept.

3 *Admissibility of Evidence*

Double jeopardy could arise where the prosecution attempts, at an appeal, to call evidence which had at the earlier trial been ruled inadmissible. In *Carroll*,¹¹² for example, the inadmissibility arose from the fact that ‘the trial judge in the first trial [found] that the records of interview were not made voluntarily’.¹¹³ An abuse of process would lie at the heart of such matters.

Double jeopardy may also arise in the admissibility of tendency and coincidence evidence relating to evidence of a victim from an acquittal trial being raised in a subsequent trial.¹¹⁴ *R v Z*¹¹⁵ involved a matter in which an accused faced a charge of rape where the prosecution wished to present tendency evidence relating to three previous rapes on which there was an acquittal. Although a question of double jeopardy could arise because of the accused’s acquittal in the first trial, it was held that although the facts of the fourth rape were similar, tendency evidence could be led regarding the three acquitted matters as there is no retrial of those original offences. In other words, evidence of similar facts is not inadmissible only

¹¹¹ See, eg, *Criminal Code Act 1995* (Cth) s 13.5. Standard of proof – defence — discharged on the balance of probabilities applicable, for example, to possession of stolen goods under s 132.1 of the *Code*.

¹¹² When recalling the facts in *Rogers v The Queen* (1994) 181 CLR 251.

¹¹³ *R v Carroll* (2002) 213 CLR 635, 650 [46] (Gleeson CJ and Hayne J).

¹¹⁴ *R v Z* [2000] 2 AC 483.

¹¹⁵ *Ibid*.

because there could be a tendency to show an accused is guilty of other offences on which the accused had been acquitted — double jeopardy principles would prevent a retrial on the original charges.

The uniform evidence law¹¹⁶ position in Australia regarding tendency and coincidence¹¹⁷ is that its probative value must substantially outweigh any prejudicial effect of such evidence.¹¹⁸

The evidence must have more than ‘mere logical relevance’ — it must have significant probative value that substantially outweighs any prejudicial effect upon the defendant.¹¹⁹

Moreover, Simpson J in *Zhang v The Queen*¹²⁰ opined that: ‘the trial judge must engage in an evaluative and predictive process as to the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue’.

Those seeking to have such evidence admitted must provide reasonable notice in writing of such intention to each other party¹²¹ — failure to properly comply could result in that evidence being disallowed.¹²²

4 *Conviction and Punishment*

The argument against double jeopardy regarding conviction and punishment stages of trials is ably described in *Pearce v The Queen*.¹²³

¹¹⁶ See, eg, *Evidence Act 2008* (Vic).

¹¹⁷ *Ibid* s 97 and s 98 respectively.

¹¹⁸ *Ibid* s 101(2).

¹¹⁹ *Gardiner v The Queen* [2006] NSWCCA 190 (Simpson J).

¹²⁰ [2005] NSWCCA 437, 139 (Simpson J).

¹²¹ *Evidence Act 2008* (Vic) s 97(1)(a) and s 98(1)(a) respectively.

¹²² *Gardiner v The Queen* [2006] NSWCCA 190. See also comments by Justice R A Hulme, ‘Admissibility of Tendency and Coincidence under the *Uniform Evidence Act*’ (Paper presented to Judges of the County Court of Victoria, 27 November 2009) 9–10.

¹²³ (1998) 194 CLR 610, 623 [40] (McHugh, Hayne and Callinan JJ).

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To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common ... To punish an offender twice if conduct falls in that area of overlap [of the elements] would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.

These sentiments were echoed in *Carroll* by both Gleeson CJ and Haynes J.¹²⁴

D *Summary of Australian Concepts at Common Law*

The obiter dicta of Gaudron and Gummow JJ in *Carroll* accurately summarised the position on double jeopardy:¹²⁵

In Australia, 'double jeopardy' is not an independent doctrine of avoidance, which, for example, would found a demurrer to a court or a stay application. The law's aversion to placing an individual twice in jeopardy of criminal punishment for the one incident or series of events reflects a broader precept or value.

Judicial fairness underpins the principles of double jeopardy. Even where cases do not meet the strict application of that principle, they may still fall under a more general ambit of being an abuse of process and the subject of a stay.¹²⁶

E *Other Principles*

Having considered the general principles of common law regarding double jeopardy, Australian legislation and case law will now be examined.

¹²⁴ *R v Carroll* (2002) 213 CLR 635, 640 [9] (Gleeson CJ and Haynes J).

¹²⁵ *Ibid* 660 [84] (Gaudron and Gummow JJ).

¹²⁶ *Walton v Gardiner* (1993) 177 CLR 378, 398 (Mason CJ, Deane and Dawson JJ).

1 *Legislation*

All Australian states and territories have enacted basic double jeopardy legislation — for example the *Acts Interpretation Act 1915* (SA) s 50:¹²⁷

Where any act or omission constitutes an offence under two or more Acts, or both under an Act or Acts and at common law, the offender will, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but is not liable to be punished twice for the same offence.

2 *Seminal Australian Cases*

(a) *Myall Creek Massacre*

One of the earliest attempts at an application of double jeopardy in Australia is *R v Kilmeister (No 2)*,¹²⁸ known in early Australian settlement history as the Myall Creek Massacre in north-western NSW on 10 June 1838, only 50 years after settlement.¹²⁹ It involved the murder of 28 Aboriginal men, women and children where seven men, earlier acquitted,¹³⁰ were re-tried, convicted and executed in Sydney.

During the opening of the second trial, the defence entered pleas of *autrefois acquit* regarding five of the 20 counts charged. The pleas turned on arguments that they had already been acquitted on the same charges for murdering the same Aboriginal child. The Court ruled

¹²⁷ See also *Crimes Act 1958* (Vic) s 394; *Criminal Code Act 1913* (WA) ss 16–17; *Criminal Code Act 1899* (Qld) s 17.

¹²⁸ [1838] NSWSupC 105 as described in Macquarie University — Decisions of the Superior Courts of New South Wales 1788–1899

<http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1838/r_v_kilmeister2/>; see also Superior Courts of New South Wales (pre-1900) Case Notes — *R v Kilmeister (No 2)* [1838] NSWSupC 110 <<http://www.austlii.edu.au/au/other/NWSupC/1838/110.html>>.

¹²⁹ R H W Reece, *Aborigines and Colonists* (Sydney University Press, 1974) 145–158; see also C D Rowley, *The Destruction of Aboriginal Society* (Penguin Books Australia, 1983) 35–7.

¹³⁰ *R v Kilmeister (No 1)* [1838] NSWSupC 105.

otherwise — although the facts were the same, the charges related to a different albeit unidentified child victim.¹³¹

The two trials ‘created a tremendous furore in the colony where it was regarded as an extraordinary and unprecedented thing that a white man should have been hanged for killing a “black”’.¹³² Part of the furore was also, no doubt, due to the fact that in the first trial the jury took only 15 minutes to return an acquittal.¹³³

(b) *Rogers v The Queen*¹³⁴

This 1994 High Court case involved an appeal by Rogers, previously convicted on two armed robbery charges but acquitted on two similar counts on the basis that three involuntary records of interview were acquired by police. Rogers faced further robbery charges three years later when the prosecution sought to rely on the same records of interview despite Rogers claiming that the trial was unfair and an abuse of process — the Court ruled otherwise. He appealed unsuccessfully to the NSW Court of Criminal Appeal claiming issue estoppel, that the question of the admissibility of the records of interview had been dealt with in the first trial. He was granted leave to appeal to the High Court on those grounds.¹³⁵

¹³¹ Further arguments arose over the identity of whether the victim was a male or female and whether or not the child was named. The lack of identity was due to the fact that the 28 victims were all burned beyond recognition after they were slayed — see commentary of 27 November 1838 in *R v Kilmeister (No 2)* [1838] NSW SupC 110 as reported by Macquarie University — Decisions of the Superior Courts of New South Wales 1788–1899

<http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1838/r_v_kilmeister2/>.

¹³² Reece, above n 129, 145–46.

¹³³ *R v Kilmeister (No 1)* [1838] NSW SupC 105; see also Reece, above n 129, 145–158; see also Rowley, above n 129, 149.

¹³⁴ (1994) 181 CLR 251.

¹³⁵ *Rogers v The Queen* (1994) 181 CLR 251, 257–8 (Brennan J).

This case is the first time that a majority decision of the High Court denied the use of issue estoppel in criminal trials,¹³⁶ a subject previously argued at some length.¹³⁷ Issue estoppel is described by Heather Douglas et al as ‘technical baggage’ and ‘legal archaisms’,¹³⁸ with a preference given to allowing discretion on the part of the court based ‘on the broad discretionary power to prevent an abuse of process and stay the proceedings’.¹³⁹ Despite the ruling against issue estoppel, the High Court found in favour of Rogers in that the matter was an abuse of process:¹⁴⁰

[R]e-litigation in subsequent criminal proceedings of an issue [evidence held previously to be inadmissible] already finally decided in earlier criminal proceedings is not only inconsistent with the principle that a judicial determination is binding, final and conclusive ... but is also calculated to erode public confidence in the same issue.

(c) *Pearce v The Queen*¹⁴¹

In 1998 Pearce was charged with causing grievous bodily harm¹⁴² and of break and enter a dwelling-house and committing grievous bodily harm therein¹⁴³ — both charges related to the same set of circumstances.¹⁴⁴ Pearce unsuccessfully appealed to the NSW Court of Appeal, applying for a stay of proceedings on the grounds that it was ‘oppressive or an abuse of process, submitting that he was thereby placed in double jeopardy’.¹⁴⁵ Pearce was sentenced

¹³⁶ Ibid 251 (Mason CJ, Deane, Gaudron, Brennan and McHugh JJ).

¹³⁷ See, eg, *R v Storey* (1978) 140 CLR 364; *R v El Zarw* (1991) 58 A Crim R 200.

¹³⁸ Douglas et al, above n 65, 204 [7.190].

¹³⁹ *Rogers v The Queen* (1994) 181 CLR 251, 254 (Mason CJ); see also *R v Carroll* (2002) 213 CLR 635, 647 (Gleeson CJ and Hayne J).

¹⁴⁰ *Rogers v The Queen* (1994) 181 CLR 251, 257 (Mason CJ).

¹⁴¹ (1998) 194 CLR 610.

¹⁴² *Crimes Act 1900* (NSW) s 33 (maximum penalty of 25 years imprisonment).

¹⁴³ Ibid s 110 (maximum penalty of 25 years imprisonment).

¹⁴⁴ *Pearce v The Queen* (1998) 194 CLR 610, 611.

¹⁴⁵ *R v Pearce* (Unreported, NSW Court of Appeal, 1 November 1996), 10-11 (Newman J), 19-20 (Hunt CJ and Bell AJ concurring).

to two 12-year sentences to be served concurrently — the Court held that the matter did not involve either double jeopardy or double punishment.¹⁴⁶

Pearce appealed to the High Court which held that despite the two charges being related to the same set of circumstances there were different elements required to be proven and there had been no abuse of process.¹⁴⁷ However, the Court held that Pearce had been punished twice in that causing grievous bodily harm was a common element of both offences — despite the two sentences ordered to be served concurrently.¹⁴⁸

(d) *R v Carroll*¹⁴⁹

This infamous 1985 case commenced when Carroll was convicted of the 1973 Queensland murder of a young child, Deidre Kennedy.¹⁵⁰ Carroll gave evidence on oath denying his involvement. He was convicted but on appeal the conviction was quashed — it was concluded that ‘on the evidence led at trial, it was not open to a properly instructed jury to conclude beyond reasonable doubt that the respondent was guilty’.¹⁵¹

Nearly 14 years later, ‘and with the benefit of developments in forensic dental science ... [linking] Carroll with the bite marks [on the victim]’,¹⁵² Carroll was charged with perjury¹⁵³ over his sworn evidence at the first trial that he did not kill the child.¹⁵⁴ Despite pleading abuse of process¹⁵⁵ due to his earlier acquittal he was convicted. That conviction was quashed however when the Appeal Court held ‘that the trial should have been stayed as an

¹⁴⁶ Ibid.

¹⁴⁷ *Pearce v The Queen* (1998) 194 CLR 610, 615 (McHugh, Hayne and Callinan JJ).

¹⁴⁸ Ibid.

¹⁴⁹ (2002) 213 CLR 635.

¹⁵⁰ *R v Carroll* (2002) 213 CLR 635.

¹⁵¹ *Carroll v R* (1985) 19 A Crim R 410.

¹⁵² Douglas et al, above n 65, 206 [7.210].

¹⁵³ *Criminal Code Act 1899* (Qld) s 123.

¹⁵⁴ *R v Carroll* (2000) 115 A Crim R 164.

¹⁵⁵ *Criminal Code Act 1899* (Qld) s 292A(2)(a) (as applicable at that time).

abuse of process and that, in any event, the verdict returned by the jury was unsafe and unsatisfactory'.¹⁵⁶ The grounds for the claim of abuse of process relied upon were 'occasioned by the lapse of time inherent in the proceedings ... a further thirteen years passed since the acquittal, [and] some twenty-six years had passed since the death of Deidre Kennedy'.¹⁵⁷

With special leave the prosecution unsuccessfully appealed to the High Court which held: 'The perjury indictment was an abuse of process and should have been stayed by the judge. The prosecution had sought to controvert the acquittal on the charge of murder given that the charge of perjury raised the same ultimate issues as that which had been raised in the trial.'¹⁵⁸

Carroll identified four major considerations in defence of double jeopardy; the 'imbalance of power between prosecution and accused', the 'seriousness for an accused of conviction', the use of 'prosecution as an instrument of tyranny'; and the 'importance of finality'.¹⁵⁹ As noted by Justice Kirby: 'Unless such controls are maintained by the law, there will be a risk that state power will be deployed to subject an accused "to the embarrassment, expense and ordeal ... compelling him to live in a continuing state of anxiety and insecurity"'.¹⁶⁰

These factors would seriously impinge on a person's family, employment and indeed on all facets of life in general.

¹⁵⁶ *R v Carroll* (2001) QCA 394 [72].

¹⁵⁷ Kirby, above n 4, 234.

¹⁵⁸ *R v Carroll* (2002) 213 CLR 635 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁵⁹ *Ibid* 643-4 [23] (Gleeson CJ and Hayne J).

¹⁶⁰ Kirby, above n 4, 235-36 citing *Green v United States* 355 US 184-9 (1957) (Black J).

Moreover, in *Carroll*, McHugh J opined:¹⁶¹

The rule is an aspect or application of the principle of double jeopardy whose ‘main rationale ... is that it prevents the unwarranted harassment of the accused by multiple prosecutions’.

Policy considerations that go to the heart of the administration of justice and the retention of public confidence in the justice system reinforce this rationale. Judicial determinations need to be final, binding and conclusive.

Criminal trials ‘are by nature stressful for all concerned’¹⁶² and moreover, ‘the larger the number of prosecutions permitted by law, the greater “the possibility that even though innocent [the accused] may be found guilty”’.¹⁶³ *Carroll* also serves as a reminder of the possible frailty of jury trials — tainted by the fact there was an appeal by the Crown, with all its resources, possibly ‘subject[ing] the accused to the risk of a presumption of guilt’¹⁶⁴

F *Australian Reform*

The catalyst for double jeopardy reform in Australia has been *Carroll* and the law ‘as interpreted ... in *Carroll* is in contrast to reform initiatives in several Australian States.’¹⁶⁵ It raises important questions, are acquittals now to be looked upon as being ‘conditional pending retrial’? — and taken further, what of the rights to a trial enshrined in the *Australian Constitution*,¹⁶⁶ or indeed, why have criminal trials at all?

Whilst appeals are allowable over questions of error of law, double jeopardy reform takes on new meaning for those acquitted on unsound evidence, or matters not proven beyond

¹⁶¹ *R v Carroll* (2002) 213 CLR 635, 672 [128] (McHugh J).

¹⁶² Bellanto, above n 67, 19.

¹⁶³ Kirby, above n 4, 235–36 citing *Green v United States* 355 US 184–9 (1957) (Black J).

¹⁶⁴ *Ibid* 242.

¹⁶⁵ Chris Corns, ‘Retrial of Acquitted Persons: Time for Reform of the Double Jeopardy Rule?’ (2003) 27 *Criminal Law Journal* 80, 81.

¹⁶⁶ *Australian Constitution* s 80; see also Edgely, above n 6, 122.

reasonable doubt. Persons acquitted may be forced to continually look over their shoulders, waiting for blindfolded Themis' sword to fall, effectively enforcing a lifelong parole. Courts are, after all, concerned with justice, 'maintaining a balance between the state and the citizen'.¹⁶⁷

¹⁶⁷ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3rd ed, 2010) 106 [2.70].

IV INTERNATIONAL AND NATIONAL REFORM

International developments in double jeopardy from a human rights perspective will be briefly examined, as will reform in the United Kingdom, New Zealand and Australia.

A *International Human Rights Law*

The principle of double jeopardy is firmly underpinned by the *International Covenant on Civil and Political Rights* (ICCPR)¹⁶⁸ of which Australia is a signatory: ‘No-one shall be liable to be tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted in accordance with the law and penal procedure of each country’. However, as Dr Corns comments, ‘it is a prerequisite under Art 4(1) [ICCPR] that the person was “finally *acquitted or convicted in accordance with the law and penal procedures of that State*”’.¹⁶⁹

Whilst the *European Convention on Human Rights* (ECHR)¹⁷⁰ includes similar protection, Australia is not a signatory.¹⁷¹ Although ‘more than fifty countries have constitutional guarantees of the doctrine, including the United States, Canada, New Zealand and South Africa’,¹⁷² Australia does not.

¹⁶⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 23 ATS (entered into force 23 March 1976) art 14(7).

¹⁶⁹ Corns, above n 165, 88 (emphasis added).

¹⁷⁰ *European Convention on Human Rights, Seventh Protocol*, opened for signature 22 November 1984, art 4(1) (entered into force 1 November 1988).

¹⁷¹ Corns, above n 165. ‘Although Australia is a signatory to the ICCPR, Art 4 of the ECHR is clearly not part of Australian law as neither the ICCPR nor the ECHR has been incorporated into Australian law by legislation’.

¹⁷² Edgely, above n 6, 116.

B *International Reform*

The strict interpretation of double jeopardy under the ICCPR as mentioned¹⁷³ seems at odds with law reform into this area of law internationally and within Australia.¹⁷⁴

1 *English Reform*

Reform against double jeopardy in the United Kingdom (UK) took effect from 20 November 2003¹⁷⁵ with enactment of amendments to the *Criminal Justice Act 2003* (UK),¹⁷⁶ following extensive prior consultation and review.¹⁷⁷

The English Court of Appeal can overturn acquittals and order a single retrial where new and compelling evidence arises ‘relevant to the guilt of the acquitted person and it is in the interests of justice to do so’.¹⁷⁸ Only one application can be made for any particular case.¹⁷⁹ New evidence is that which ‘was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related)’.¹⁸⁰ Compelling evidence must be reliable, substantial and ‘in the context of the outstanding issues, it appears highly probative of the case against the acquitted person’.¹⁸¹

¹⁷³ *International Covenant on Civil and Political Rights*, above n 168.

¹⁷⁴ See, eg, Kirby, above n 4, 243–44; see also Bronitt and McSherry, above n 167, 93 [2.40].

¹⁷⁵ *Criminal Justice Act 2003* (UK) — Explanatory Notes.

¹⁷⁶ *Ibid* c 44, ss 75–97 — Retrial for Serious Offences.

¹⁷⁷ See, inter alia, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, 1999 (The Macpherson Report) <<http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm>>.

¹⁷⁸ Crown Prosecution Services (CPS) (UK), *DPP refers William Dunlop case to Court of Appeal as first under double jeopardy law* (10 November 2005) Crown Prosecution Service (online) <http://www.cps.gov.uk/news/latest_news/158_05/index.html>; see also *Criminal Justice Act 2003* (UK) c 44, ss 75–97.

¹⁷⁹ *Criminal Justice Act 2003* (UK) c 44, s 76(5).

¹⁸⁰ *Ibid* s 78(2).

¹⁸¹ *Ibid* s 78(3)(a)–(c).

The amendments act retrospectively for new and compelling evidence, but not for tainted acquittals.¹⁸² Retrials for previous acquittals on serious offences¹⁸³ can and have been considered in the UK.¹⁸⁴

2 *New Zealand*

In New Zealand (NZ), the principle of double jeopardy is constitutionally enshrined,¹⁸⁵ prohibiting retrial for the same offence following acquittal or conviction.

Double jeopardy reform in NZ commenced in 2001 following *R v Moore*,¹⁸⁶ a case involving an acquittal on a charge of murder where ‘defence witnesses gave [false] alibi evidence on behalf of both accused’ — Moore was later convicted of conspiracy to pervert the course of justice¹⁸⁷ but could not be retried for murder due to double jeopardy.¹⁸⁸

The Law Commission of NZ prepared a report on *Moore*¹⁸⁹ leading to major legislative reform,¹⁹⁰ incorporating ‘a tainted acquittal exception¹⁹¹ as well as the UK’s “new and

¹⁸² *Ibid* s 75(6).

¹⁸³ *Ibid* c 44, sch 5. Includes, inter alia, serious offences against the person, serious sexual offences, serious drug offences, war crimes, etc.

¹⁸⁴ *Ibid* s 76. Applications for retrial, with written consent of the Director of Public Prosecutions, of acquitted persons are made to the Court of Appeal; see also the case of Harbinder Khatkar, previously acquitted in the UK for rape but who had his acquittal quashed under the UK’s double jeopardy reform, Press Association, ‘Violent rapist jailed after court of appeal quashes acquittal’, *The Guardian* (online) (UK), 8 December 2013 <<http://www.theguardian.com/law/2013/dec/07/violent-rapist-jailed-court-quashes-acquittal>>.

¹⁸⁵ *New Zealand Bill of Rights Act 1990* (NZ) s 26(2).

¹⁸⁶ [1999] 3 NZLR 385.

¹⁸⁷ *R v Moore* [1999] 3 NZLR 385; see also Edgely, above n 6, 129.

¹⁸⁸ New Zealand Law Commission, *Acquittal Following Perversion of the Course of Justice: A Response to R v Moore*, Preliminary Paper 42 (2001).

¹⁸⁹ New Zealand Law Commission, *Acquittal Following Perversion of the Course of Justice*, Report 70 (2001).

¹⁹⁰ *Criminal Procedure Act 2011* (NZ) ss 151–56.

¹⁹¹ *Ibid* s 151. A ‘tainted acquittal’ is one achieved because of an administration of justice offence (eg, perjury, pervert the course of justice, etc).

compelling evidence” exception’.¹⁹² There are no retrospectivity provisions.¹⁹³ There have been no retrials of acquittals in NZ as of July 2012.¹⁹⁴

C *Australian Reform*

In 2003, following the public outcry over *Carroll*,¹⁹⁵ the Australian Standing Committee of Attorneys-General (SCAG) referred the issue of injustices that may result from double jeopardy laws in Australia to the Model Criminal Code Officers Committee (MCCOC).¹⁹⁶ The MCCOC’s discussion paper¹⁹⁷ was presented in 2007 to the Council of Australian Governments (COAG) which agreed to implement reform¹⁹⁸ without any further formal independent Law Commission reform process.¹⁹⁹

Matthew Goode reports that ‘the MCCOC was not “independent” in the sense that, in reporting to SCAG, it was conscious of the fact that its recommendations had to be politically acceptable’.²⁰⁰ Australia’s reform needs to be ‘contrasted with the comprehensive review of the law in New Zealand and the United Kingdom by their respective Law Commissions’.²⁰¹ The reform was criticised by the Australian media due to its ‘lack of even-handedness’ and

¹⁹² Edgely, above n 6, 130; see also *Criminal Procedure Act 2011* (NZ) ss 151–56.

¹⁹³ *Criminal Procedure Act 2011* (NZ) s 154(6) — not applicable for acquittals before 26 June 2008.

¹⁹⁴ Graeme Edgeler, ‘On the possibilities of a retrial of Chris Kuhui’, *Legal Beagle* (online) (NZ), 25 July 2012 <<http://publicaddress.net/legalbeagle/on-the-possibilities-of-a-retrial-of-chris/>>.

¹⁹⁵ Edgely, above n 6, 128 — a ‘cause celebre’; see also Kirby, above n 4, 238–40.

¹⁹⁶ Standing Committee of Attorneys-General, *Annual Report 2003-04 Standing Committee of Attorneys-General*, 3, Standing Council on Law and Justice (online) <http://www.sclj.gov.au/sclj/standing_council_index.html>.

¹⁹⁷ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 72.

¹⁹⁸ Bronitt and McSherry, above n 167, 92–3 [2.40].

¹⁹⁹ M Goode, ‘Constructing Criminal Law Reform and the Model Criminal Code’ (2002) 26 *Criminal Law Journal* 152, 166.

²⁰⁰ *Ibid.*

²⁰¹ Bronitt and McSherry, above n 167, 92–3 [2.40]; see also, from a UK perspective, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, 1999 (The Macpherson Report) <<http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>>.

moreover, ‘that the lack of a balanced and comprehensive proposal of reform indicated that the change in the law was “more of a stunt than a principle”’.²⁰²

The MCCOC’s report ‘dodged the fundamental question of whether any change to the rule against double jeopardy was necessary’ and exposed ‘the significant political and resource “real world” constraints operating on the Committee generally’.²⁰³ It would seem that COAG bowed to the weighty pressure of media-driven public opinion.

All Australian double jeopardy reform has more or less followed the UK model of fresh and compelling evidence and tainted verdicts for administration of justice (AOJ) offences.

1 *New South Wales*²⁰⁴

The first to introduce double jeopardy reform was NSW in 2006.²⁰⁵ The reform applies to retrials of acquittals for offences attracting life imprisonment²⁰⁶ where retrials involves fresh and compelling evidence,²⁰⁷ and to tainted AOJ offences attracting sentences of 15 years or more.²⁰⁸ Appeals are to the NSW Court of Criminal Appeal on application by the DPP.²⁰⁹ Further police investigations into acquittals cannot commence without DPP authorisation.²¹⁰

‘Fresh and compelling’ evidence is defined²¹¹ similarly to the ‘new and compelling’ evidence of the UK reform. The legislation is retrospective and only one retrial is permitted.²¹²

²⁰² Kirby, above n 4, 239.

²⁰³ Bronitt and McSherry, above n 167, 93 [2.40].

²⁰⁴ Hereafter ‘NSW’.

²⁰⁵ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW).

²⁰⁶ See, eg, *Crimes Act 1900* (NSW) s 19A (murder), s 61JA(1) (aggravated sexual assault in company); see also *Drug Misuse and Trafficking Act 1985* (NSW) ss 23–28 for serious drug trafficking offences.

²⁰⁷ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) s 99–100.

²⁰⁸ *Ibid* s 101.

²⁰⁹ *Ibid* s 100.

²¹⁰ *Ibid* s 109.

²¹¹ *Ibid* s 102.

2 *Queensland*

Reform legislation similar to that in NSW was enacted in Queensland in 2007.²¹³ Modelled on the UK reform, legislation applies to retrials before the Queensland Court of Appeal for offences attracting a sentence of imprisonment for life or 25 years or more²¹⁴ and to tainted AOJ offence acquittals involving the same period of imprisonment.²¹⁵ Unlike NSW and other states, the legislation is prospective.²¹⁶

Appeals to the Court of Appeal can only be made once²¹⁷ by the DPP²¹⁸ who is required to authorise any fresh police investigations.²¹⁹

3 *Other States*

South Australia followed with similar reform in 2008²²⁰ applicable to retrial of acquittals for a variety of serious offences and tainted AJO offence acquittals.²²¹ Tasmania followed later in 2008.²²² Applications are made by the DPP to the Court of Criminal Appeal.²²³ 2011 saw similar reform enacted in Victoria.²²⁴

Western Australian²²⁵ reform was enacted in 2012²²⁶ for offences attracting life imprisonment or for serious offences attracting 14 years or more imprisonment.²²⁷ Differing slightly from

²¹² Ibid s 99(2) and s 105 respectively.

²¹³ *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld).

²¹⁴ Ibid s 678.

²¹⁵ Ibid ch 16.

²¹⁶ Ibid s 678A.

²¹⁷ Ibid s 678G(1).

²¹⁸ Ibid ss 678B–678C.

²¹⁹ Ibid s 678I.

²²⁰ *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (SA).

²²¹ Ibid s 331 — offences such as murder, rape, robbery; and serious offences against the *Controlled Substances Act 1984* (SA).

²²² *Criminal Code Act 1924* (Tas) ch XLIV.

²²³ Ibid s 394.

²²⁴ *Criminal Procedure Amendment (Double Jeopardy) and Other Matters Bill 2011* (Vic) ch 7A.

²²⁵ Hereafter 'WA'.

other states, the legislation provides for approval of re-investigation and applications to the WA Court of Appeal by the Attorney-General, Solicitor-General, State Solicitor or the DPP.²²⁸ The inclusion of the Attorney-General as an authorising person met with some controversy in Parliament given the possible conflict of interest of a publicly elected officer.²²⁹

4 *Reform Safeguards*

Within Australian reforms, risk of jury prejudice from pre-trial publicity in double jeopardy retrial cases, questions of judicial fairness and impartiality, are abrogated by the inclusion of limitations on publicity in the period before the re-commencement of any police investigations and the completion of the trial unless deemed to be in the public interest²³⁰ — penalties are applicable for any breaches.²³¹ There is little doubt breaches may result in proceedings being permanently stayed.²³²

Each state legislation includes an ‘interests of justice test’²³³ — courts must give due consideration to ensure justice is served.²³⁴ Courts must consider ‘the length of time since the offence is alleged to have occurred, and whether there has been any failure on the part of the

²²⁶ *Criminal Appeals Act 2004* (WA) pt 5A.

²²⁷ *Ibid* s 46A.

²²⁸ *Ibid* s 46A(1).

²²⁹ Western Australia, *Parliamentary Debates*, ‘Extract from Hansard’, Assembly, 3 May 2012, 2338b-2348a Mr John Quigley, Mr Christian Porter, Mr Rob Johnson <[http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/8694db16097f6c53482579f7002511f9/\\$FILE/A38%20S1%2020120503%20p2338b-2348a.pdf](http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/8694db16097f6c53482579f7002511f9/$FILE/A38%20S1%2020120503%20p2338b-2348a.pdf)>.

²³⁰ See, eg, *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld) s 678K.

²³¹ *Ibid* s 678K(8).

²³² *Barton v The Queen* (1980) 147 CLR 75.

²³³ Edgely, above n 6, 134–35.

²³⁴ See, eg, *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (SA) s 337(1).

police or prosecution to act with reasonable diligence or expedition with respect to the making of the application'.²³⁵

The interest of justice test was questioned in the WA Parliament with the opposition arguing that the Attorney-General, one of the authorising officers, could easily confuse this requirement with that of 'the public interest'²³⁶ and is too close to politics to make a well-considered independent judgement on such issues. It was also argued that should the Attorney-General decide to reopen a previous acquittal not supported by the DPP it might be seen as the Government lacking confidence in the DPP, thereby undermining its authority. Although unresolved the legislation was nevertheless enacted.²³⁷

Whilst the above demonstrates a lack of uniformity between WA's reform and that of other states, a matter perhaps of minor significance, it nevertheless raises the question of possible political interference with otherwise independent judicial processes.

Other safeguards in the Australian reform includes the restriction to 'very serious offences', that 'only one application for retrial can be made, and only one retrial heard', and that any 'police investigation into acquitted persons require external authority'.²³⁸ It is argued, however, that this 'safeguard' allows for a second opportunity by police who may have failed to investigate a serious offence sufficiently prior to the first trial — the same argument applies to cases involving incompetent prosecution.

²³⁵ Ibid s 337(1)(b)(i)–(ii).

²³⁶ Western Australia, *Parliamentary Debates*, 'Extract from Hansard', Assembly, 3 May 2012, 2338b-2348a Mr John Quigley, Mr Christian Porter, Mr Rob Johnson <[http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/8694db16097f6c53482579f7002511f9/\\$FILE/A38%20S1%2020120503%20p2338b-2348a.pdf](http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/8694db16097f6c53482579f7002511f9/$FILE/A38%20S1%2020120503%20p2338b-2348a.pdf)>.

²³⁷ Ibid.

²³⁸ Acting Justice Jane Matthews, 'Advice to the Attorney General [NSW]', 27 November 2003 *Safeguards in relation to proposed double jeopardy legislation*, 15 <http://www.lpcld.lawlink.nsw.gov.au/agdbasev7wr/lpcld/documents/doc/advice_from_justice_mathews_final.doc>.

5 *Retrospectivity*

Justice Matthews, in her advice to the NSW Legislature regarding the reform, raised a salient point about the importance to both accused and the judiciary of the finality of judicial decisions and also time limits on retrospectivity in pursuing retrials, ‘the concept of retrospectivity is repugnant in the criminal law. It is all the more so when, as here, it affects the liberty of the individual’.²³⁹ Matthews J further submitted:²⁴⁰

I am firmly of the view that a time limit should be set ... at least in relation to acquittals which were not procured through the wrongdoing of the acquitted person. Finality under the law is of such significant value that a stage must be reached at which acquittals can be treated as final and incontrovertible, at least so far as the finding of fresh evidence is concerned. I consider that seven years is an appropriate time limit.

No limitation regarding retrospectivity was included in any state legislation other than Queensland where no retrospectivity applies.

6 *A Remaining Question and Post-Reform Retrials*

With the discussion so far on double jeopardy reform in Australia, and as will be shown, the impetus for reform being the public outrage over *Carroll*, one question remains: given the High Court’s decision, would Carroll have been liable for retrial had the reform been in place at that time? The answer is no — there was no new/fresh or compelling evidence, no tainted AOJ offences involved, and there were no errors of law involved in the acquittal.²⁴¹

²³⁹ Ibid 26.

²⁴⁰ Ibid.

²⁴¹ Kelly Burton, ‘Reform of the Double Jeopardy Rule on the Basis of Fresh and Compelling Evidence in New South Wales and Queensland’ (2004) 11 *James Cook University Law Review* 84.

Given the highly publicised and controversial circumstances leading to double jeopardy reform in Australia it is unremarkable that they have seen little use. There have been no retrials on acquittals in NSW,²⁴² WA,²⁴³ SA,²⁴⁴ Victoria²⁴⁵ or Tasmania.²⁴⁶ Information from Queensland DPP was not forthcoming²⁴⁷ and was not easily researched.

Compared with the UK, where there have been at least 13 applications²⁴⁸ for retrials of previous acquittals,²⁴⁹ and taking into account the discussion above, and the public outcry over *Carroll*, it could be argued that the reform in Australia has been ‘much ado about nothing’.²⁵⁰

²⁴² Interview with Professor Nicholas Cowdery, former Director, Office of the NSW Director of Public Prosecutions (by email, 10 December 2013).

²⁴³ Interview with Ms Sarah Jessup, former Criminal Law Research Officer, Office of the Director of Public Prosecutions for WA (by email 12 November 2013).

²⁴⁴ Interview with Ms Dianne Flynn, Executive Assistant to Adam Kimber SC, Director of Public Prosecutions, South Australia (by email, 10 February 2014).

²⁴⁵ Interview with a staff member of the Office of Public Prosecutions Victoria who wished to remain anonymous (by telephone, 20 January 2014).

²⁴⁶ Interview with Ms Kerry Worthley, Tasmanian Office of Director of Public Prosecutions (by telephone, 13 January 2014).

²⁴⁷ Interview with Mr Zak Ahmed, the Queensland Office of Public Prosecutions (by telephone, 13 January 2014), but release of the necessary information was not possible — no reasons were provided.

²⁴⁸ Press Association, ‘Violent rapist jailed after court of appeal quashes acquittal’, *The Guardian* (online) (UK), 8 December 2013 <<http://www.theguardian.com/law/2013/dec/07/violent-rapist-jailed-court-quashes-acquittal>>.

²⁴⁹ See the highly publicised Stephen Lawrence UK murder where Gary Dobson, previously acquitted for murder, had his acquittal quashed due to the UK’s reform, Crown Prosecution Services (CPS) (England), *Joint CPS and MPS statement on Stephen Lawrence case* (18 May 2011) Crown Prosecution Service (online) <<http://blog.cps.gov.uk/2011/05/joint-cpsmps-statement-on-stephen-lawrence-case-.html>>; see also Crown Prosecution Services (CPS) [England and Wales], *William Dunlop pleads guilty in first double jeopardy case* (11 September 2006) Crown Prosecution Service online <http://www.cps.gov.uk/news/latest_news/152_06/>; see also Mario Cellaire (McNish), previously acquitted of murdering Cassandra McDermott. Cellaire later confessed and his acquittal quashed by the UK Court of Appeal, Nick McDermott, ‘Legal first as footballer acquitted of killing girlfriend seven years ago is convicted of the crime’, *The Daily Mail* (online), 21 May 2009 <<http://www.dailymail.co.uk/news/article-1185808/Legal-footballer-acquitted-killing-girlfriend-seven-years-ago-convicted-crime.html#ixzz2rSv4g0Mv>>.

²⁵⁰ Title of William Shakespeare’s play of the same title, British Library (online) <<http://www.bl.uk/treasures/shakespeare/muchado.html>>.

V POLITICAL EXPEDIENCY OR MUCH NEEDED CHANGE?

A *Catalyst for Australian Reform*

As already stated, the stimulus for double jeopardy reform in Australia was the *Carroll Case* where the High Court finally settled this long-running and contentious murder case, holding, ‘the perjury indictment was an abuse of process and should have been stayed by the judge. The prosecution had sought to controvert the acquittal on the charge of murder given that the charge of perjury raised the same ultimate issue as that which had been raised in the trial’.²⁵¹

It also affirmed the findings of the Appeal Court in that ‘in any event, the verdict returned by the jury was unsafe and unsatisfactory’.²⁵² *Carroll* was quite uncontroversial and unremarkable from a legal perspective, ‘being a mere rationalisation of previous authority’.²⁵³ However, the media attention it attracted, as will be discussed, was quite unprecedented, particularly so given that *Carroll* itself would not have been caught by the Australian reforms.

B *Media Response to R v Carroll*

A common thread leading to the reforms in each of the jurisdictions mentioned is one of public outrage resulting from concentrated media campaigns following high-profile cases where offenders were acquitted.²⁵⁴ Press and television media reporting of *Carroll* peaked

²⁵¹ *R v Carroll* (2002) 213 CLR 635, 635 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

²⁵² *R v Carroll* (2001) QCA 394 [72].

²⁵³ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 72, ii.

²⁵⁴ In England see, eg, the case of William Dunlop, twice previously acquitted of murder but after confessing was convicted in the English Court of Appeal, Crown Prosecution Services (CPS) (England), *William Dunlop pleads guilty in first double jeopardy case* (11 September 2006) Crown Prosecution Service (online) <http://www.cps.gov.uk/news/latest_news/152_06/>; *R v Carroll* (2002) 213 CLR 635 was a major catalyst for double jeopardy law reform throughout Australia; in New Zealand *R v Moore* [1999] 3 NZLR 385 served as the impetus for double jeopardy reform in that country.

after the High Court hearing²⁵⁵ and even extended to the media personalising the double jeopardy reform, calling for ‘the enactment of what was called “Deidre’s Law”’.²⁵⁶

Furthermore, ‘over 25,000 signatures on a petition to the [NSW] Attorney-General ... called for a nation-wide approach to problems caused by the double jeopardy rule’.²⁵⁷

As Justice Kirby points out:²⁵⁸

‘*The Australian* went further than this. It commissioned and funded legal reports on the options open to Mrs Kennedy to pursue civil remedies. It quoted opinions received from legal counsel, all unfavourable to Mr Carroll. It published criticisms of the Queensland appellate courts said to have been expressed by the trial judge in the first trial ... by the original trial prosecutor and others.

Sections of the media, including the *Sydney Morning Herald* and others,²⁵⁹ soon joined battle over *Carroll*. Public discussions also took place with a view to seeking a civil trial on the matter, lauded as being possibly successful due to the lower burden of proof required²⁶⁰ — possibly due to the fact that the O J Simpson murder acquittal and subsequent successful civil trial in the United States²⁶¹ was still on the minds of the general public.

²⁵⁵ See, eg, comments in Kirby, above n 4, 238–40.

²⁵⁶ Kirby, above n 4, 239, citing D MacFarlane, ‘25,000 Sign Up for Deidre’, *The Australian*, 11 June 2003, 6.

²⁵⁷ Robin Lincoln and Steven Bennetts, ‘Should the double jeopardy rule be in jeopardy?’ (2003) 9 2 *The National Legal Eagle*, art 5, 11.

²⁵⁸ Kirby, above n 4, 239.

²⁵⁹ Ibid; see also, as late as 2010, ABC Television, ‘A Dirty Business’, *Four Corners*, 12 April 2010 (Andrew Fowler) <<http://www.abc.net.au/4corners/content/2010/s2870687.htm>>.

²⁶⁰ Walker, Jamie, ‘A review of the Deidre Kennedy Murder Case “Body of Evidence”’, *The Weekend Australian* (online), 15–16 February 2003 <<http://www.ourcivilisation.com/signs/deidre.htm>>.

²⁶¹ B Drummond Ayres, ‘Jury Decides Simpson Must Pay \$25 Million in Punitive Award’, *The New York Times* archives (online), 11 February 1997 <<http://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html>>.

With selective reporting of *Carroll*, sympathetic only to the victim's mother,²⁶² many media reports erroneously implied the acquittal resulted from trial judge error²⁶³ — supporting Mark Twain's adage, 'never let the truth get in the way of a good story'.²⁶⁴

1 *Competing Rights*

There is no doubting a public interest in reporting issues like *Carroll* with much of the media touting the right to free speech²⁶⁵ but this right must be fairly weighed against the right to an accused of a fair trial. Whilst freedom of expression is contained within the ICCPR²⁶⁶ and freedom of speech guaranteed within the *United States Constitution*,²⁶⁷ no such specific guarantees exist in Australia — it has been held to be 'the other side [of the argument] to free speech, as scrutiny protects the public interest by holding the state to account for its actions'.²⁶⁸

The media plays an important role in a democratic society, informing the public and reflecting public opinion to law-makers. However, the truthfulness of media reporting is important, commented on by Professor Cowdery, '[a]ccurate and complete information can help enormously to prevent knee-jerk reactions and hysteria in political responses to utterly mundane events'.²⁶⁹ It is interesting to note that the fact that the Queensland Court of Appeal found that the evidence at Carroll's second trial 'was so lacking in weight and cogency that

²⁶² Walker, above n 260.

²⁶³ Corns, above n 165, 100.

²⁶⁴ Samuel L Clemens, better known as Mark Twain, 1835–1910, famous American novelist <<http://www.biography.com/people/mark-twain-9512564>>.

²⁶⁵ Tony Krone, 'Pre-Trial Publicity: "Guilty Until Proven Innocent?"' (Paper presented at the International Society for the Reform of Criminal Law 20th International Conference Justice for All — Victims, Defendants, Prisoners, and the Community, Brisbane Queensland, 2–6 July 2006) 1 <<http://www.ISRC.org/Papers/2006/Krone-paper.pdf>>.

²⁶⁶ *International Covenant on Civil and Political Rights*, above n 168.

²⁶⁷ *United States Constitution* amend I.

²⁶⁸ Krone, above n 265.

²⁶⁹ Nicholas Cowdery, 'The Need to Know: Law, Politics, the Community, the Profession, the Media' [online] (Winter 2006) *Bar News: The Journal of the NSW Bar Association* 18.

the jury should have acquitted the respondent',²⁷⁰ and affirmed by the High Court, was not reported by the media.

Over-zealous and often sensationalistic media coverage can, however, be viewed as a double-edged sword.

2 *Paradoxical Effect of Media Campaigns*

Media campaigns could well result in a successful application for a stay of proceedings where it can be shown that a fair trial would be impossible because of a prejudiced jury — a matter of prejudicial publicity. There must be a balance between the competing interests of protecting the integrity of the administration of justice and the exercise of free expression,²⁷¹ matters discussed at length in *R v Glennon*,²⁷² a seminal Australian case regarding the influences of the media upon a jury: 'The mere possibility that such knowledge may have been acquired by a juror during the trial is not a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice. Something more must be shown'.²⁷³

Given these principles, whilst it could be argued that applications for a permanent stay on the grounds of prejudicial publicity face an uphill battle, there may well be situations where such applications are successful.

²⁷⁰ *R v Carroll* (2002) 635, 652 (Gleeson CJ and Hayne J).

²⁷¹ *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 24 (Brennan J).

²⁷² (1992) 173 CLR 592.

²⁷³ *R v Glennon* (1992) 173 CLR 592, 601 [22] (Mason CJ and Toohey J).

C *Political Response to Carroll*

The timing of the High Court's decision in *Carroll* coincided with the 2003 NSW election and.²⁷⁴

On the very day that it was called, the Premier of New South Wales, Mr Bob Carr, announced that, if re-elected, his government would propose changes to the law of double jeopardy so that it would no longer 'protect those who were acquitted of a crime if new information or compelling new evidence emerged'.

As Justice Kirby notes, this was Carr's 'first law-and-order pledge of the campaign'²⁷⁵ — Carr was re-elected.

Christian Porter,²⁷⁶ then WA's Attorney-General, referred extensively to *Carroll* in proceedings before Parliament on the Bill²⁷⁷ introducing the reforms in WA.²⁷⁸ The use of *Carroll* was also referred to in most other states during parliamentary discussions on the reform.²⁷⁹ When viewed from the perspective that *Carroll* was not, as already stated, a matter that could be the subject of a retrial under the reform, it is difficult to understand the emphasis on this case as justification for reform. A cynical view could be one where political expediency has come to the fore at the expense of sound and considered legal argument.

²⁷⁴ Kirby, above n 4, 239.

²⁷⁵ Ibid.

²⁷⁶ A former senior prosecutor with the WA Office of Public Prosecutions.

²⁷⁷ *Criminal Appeals Amendment (Double Jeopardy) Bill 2011* (WA).

²⁷⁸ See, eg, Western Australia, *Parliamentary Debates*, 'Extract from Hansard', Assembly, 3 May 2012, 2338b-2348a Mr John Quigley, Mr Christian Porter, Mr Rob Johnson 2338b; see also Western Australia, *Parliamentary Debates*, 'Extract from Hansard', Assembly, 28 February 2012, 367c-369a, Mr Christian Porter, 367c.

²⁷⁹ See, eg, 'Criminal Law Consolidation (Double Jeopardy) Amendment Bill [2008 (SA)]', extract from SA Parliamentary Debate, 4 March 2008, Mark Goldsworthy MP, Member for Kavel (online) <<http://www.markgoldsworthy.com.au/news/default.asp?action=article&ID=10>>; see also South Australia, *Parliamentary Debates*, (House of Assembly, 4 March 2008, 2358-59 Mrs Redmond).

1 *Political Law-and-Order Platforms*

The effect of notorious criminal trial publicity on political law-and-order platforms within Australia cannot be doubted: ‘Law and order legislation could be said to attract so much attention because of its impact on the lives of many in the community’.²⁸⁰ Moreover, ‘[t]he community’s concern with law and order policy usually corresponds with fear of crime’,²⁸¹ and it is almost impossible to separate political law-and-order platforms from the influences on such policies by the media.²⁸²

Unsurprisingly, despite contrary implications usually contained within political law-and-order platforms, ‘crime rates within Australia have generally declined’²⁸³ — in fact ‘[t]he 2011 [national] figure of 244 murder victims represents a 29 per cent decrease in the number of victims of murder compared with 1999’.²⁸⁴ One could be forgiven in thinking that politicians play on community fears of crime but no doubt the political answer would be that crime rates, despite lack of evidence, have decreased *because of* such platforms.²⁸⁵

Carroll, with its associated national media coverage, serves as an excellent example of the newsworthiness of crime and the media’s ability to arouse public interest, much of which was

²⁸⁰ Talina Drabsch, ‘Law and order legislation in the Australian States and Territories, 1999-2002: a comparative survey’ (Briefing Paper No 6/03, Parliamentary Library, NSW, 2003) 1.

²⁸¹ *Ibid* 2; see also Nicholas Cowdery, *Getting Justice Wrong, Myths, Media and Crime* (Allen & Unwin, 2001) 137. ‘As a group we live with an undercurrent of fear which is well known to, and shamelessly exploited by, politicians’.

²⁸² Sir Anthony Mason, ‘The Courts and Public Opinion’ (Winter 2002) *Bar News: The Journal of the NSW Bar Association* 31.

²⁸³ Nicholas Cowdery, ‘The Times they are A-Changing: Where to for the Criminal Law in NSW?’ (Keynote speech delivered at the John Marsden Memorial Lecture 2012, Sydney, 15 November 2012) 9 <<http://www.marsdens.net.au/news/n/john-marsden-memorial-lecture-2012-120917>>.

²⁸⁴ Australian Institute of Criminology, ‘Australian Crime: Facts and Figures 2012’ (released 2013) 16 <<http://www.aic.gov.au/publications/current%20series/facts/1-20/2012.html>>.

²⁸⁵ Cowdery, above n 283, 8–10; note and cf with controversial mandatory sentencing law reform in Australia which has also attracted extensive media coverage.

unwarranted or ill-informed²⁸⁶ — it also serves as an example of political reaction to media campaigns, exemplified by the plethora of parliamentary debate over the *Carroll Case*.²⁸⁷

Another notoriously sensationalised Australian case includes Lindy Chamberlain, initially convicted of murdering her baby in 1982 but later acquitted in 1987 when fresh evidence supporting Chamberlain's innocence was found.²⁸⁸ The media coverage of this tragic affair was exhaustive and highly critical of Chamberlain, exemplified by her comment:²⁸⁹

How do you think we felt knowing most of you, our fellow Australians, were often maliciously discussing us over morning coffee? ... The media often misquoted me. They made up all sorts of dreadful stories. That Azaria was a sacrifice. That we always dressed her in black. One of the media misquotes was that Azaria meant sacrifice in the wilderness. It actually means Blessed of God.

2 *Judiciary Independence*

One of the basic tenets of Australia's Westminster system of Parliament is the separation of power between the legislature, the executive, and the judiciary.²⁹⁰ Despite unavoidable blurring between the power of the legislature and the executive,²⁹¹ definitive separation between the executive and judicial branches is imperative to ensure judicial independence, important and relevant in a contemporary democracy.

²⁸⁶ Krone, above n 265.

²⁸⁷ See, eg, Western Australia, *Parliamentary Debates*, 'Extract from Hansard', Assembly, 28 February 2012, 367c–369a, Mr Christian Porter <[http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/8694db16097f6c53482579f7002511f9/\\$FILE/A38%20S1%2020120503%20p2338b-2348a.pdf](http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/8694db16097f6c53482579f7002511f9/$FILE/A38%20S1%2020120503%20p2338b-2348a.pdf)>.

²⁸⁸ See Lindy Chamberlain-Creighton online <<http://lindychamberlain.com/>>.

²⁸⁹ National Library of Australia, 'The dingo's got my baby', *Teacher Resources: Lindy Chamberlain* <<http://treasure-explorer.nla.gov.au/treasure/lindy-chamberlain/resources>>.

²⁹⁰ Blackshield and Williams, above n 3, 90.

²⁹¹ *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73.

Arguments that strict separation of powers between the legislature/executive and the judiciary is more federally aligned and not applicable to states were settled in *South Australia v Totani*²⁹² where state courts are required to exercise the same independence and character as Federal Courts.

Judicial independence is ‘the feature of the system which is most prized by the judges themselves, seen as the cornerstone of the rule of law’.²⁹³ It ensures that the rule of law is the essential principle of a democracy, with Professor Cowdery remarking:²⁹⁴

The rule of law connotes regulation by laws that are democratically made; laws that protect and enforce universal human rights; laws that are certain, being prospective, open, clear and relatively stable; laws that apply generally and equally to all, including (so far as possible) to the government; laws that can be impartially, honestly and fairly applied and whose effects are subject to review by independent arbiters.

Ruth McColl²⁹⁵ mentioned that ‘lawyers ... take on the core values [of the rule of law]’ but cautioned.²⁹⁶

We should not lose sight of the fact that the Rule of Law is not as concrete and ever-present a phenomenon to some members of the community as it is to us. At times, the transient but regrettably politically significant influence of opinion polls can push the Rule of Law to one side and allow pragmatism to prevail over principle.

²⁹² (2010) 242 CLR 1.

²⁹³ Sir Anthony Mason, *The Mason Papers: Selected Articles and Speeches* (Federation Press, 2007) 96.

²⁹⁴ Cowdery, above n 269.

²⁹⁵ Former President of the NSW Bar Association and currently Judge of the NSW Supreme Court <http://www.justice.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_mccoll_290403>.

²⁹⁶ Cowdery, Nicholas, ‘The Law of the Ruler?’ (Keynote speech delivered at the Australian and New Zealand Critical Criminology Conference, University of Sydney, 2 July 2010) 5, citing Ruth McColl on her term as President of the NSW Bar Association <<http://www.odpp.nsw.gov.au/speeches/University%20of%20Sydney%20-%20Critical%20Criminology.pdf>>.

Moreover, the media plays an important role:²⁹⁷

There must be an independent judiciary (as the third arm of government) and an organised and independent legal profession to ensure access to justice with procedural fairness. The process of regulation of society must be reasonably transparent and completely accountable and it is incumbent upon the media especially to foster an enlightened public opinion to assist all that to occur, to examine what happens and to complain if it goes wrong.

All too often though we see the media as ill-informed sensationalists,²⁹⁸ pandering to what they perceive as being newsworthy but hardly conducive of accurately informing the public. Journalism should be objective, certainly not used for propaganda or as the sole driving force of a government's agenda.

D *Changes for the Better?*

1 *Social Factors*

There is little doubt that criminal law is in 'a constant state of change'²⁹⁹ — after all, '[c]rime is simply whatever the law-makers (legislatures or courts) at a particular time have decided is punishable as a crime'.³⁰⁰ Lord Aitkin's comments are relevant:³⁰¹

The domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

²⁹⁷ Cowdery, above n 269.

²⁹⁸ Cowdery, Nicholas, *Getting Justice Wrong, Myths, Media and Crime* (Allen & Unwin, 2001) 31.

²⁹⁹ Cowdery, above n 283, 1.

³⁰⁰ Bronitt and McSherry, above n 167, 6 [1.20].

³⁰¹ *Proprietary Articles Trade Association v Attorney-General (Canada)* [1931] AC 310, 324 (Lord Aitkin).

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Criminal laws are defined ‘by reference to the legal norms (rules and principles) for identifying and punishing proscribed conduct, rather than by reference to the inherent wrongful quality of that conduct’.³⁰² These rules ‘imposed upon the community with its agreement (in a democratic system)’³⁰³ are ever-changing. However, paradoxically:³⁰⁴

In general terms in criminal justice, vicarious revenge seems to guide the politicians. It is politely called retribution. Revenge is trumpeted by the media. It resonates in the minds of the unthinking and uninformed. It buys votes. But we all become its victims, if only in our pockets.

Punishment for breaches of criminal laws must be guided by principles of legality through the rule of law which ‘provides one of the few ... means of rendering the State accountable for its actions’.³⁰⁵ With societal values and criminal law in a state of flux it is only logical that reform keep pace, but reform needs to be carefully considered to maintain a sound balance to ensure judicial independence and the maintenance of confidence in judicial outcomes.

2 *Advancing Forensic Science*

Forensic technology has developed rapidly over the past century or so. Fingerprint identification of criminals was first introduced into England in 1901 and 85 years later deoxyribonucleic acid (DNA) saw its first forensic use in 1986.³⁰⁶ Since then, forensic DNA has undergone considerable change, from Polymerase Chain Reaction Amplification (PCR) to now Mitochondrial DNA profiling, allowing for very small biological samples to be used

³⁰² Bronitt and McSherry, above n 167, 6 [1.20].

³⁰³ Cowdery, above n 298.

³⁰⁴ Ibid.

³⁰⁵ Bronitt and McSherry, above n 167, 8–9 [1.25].

³⁰⁶ Justice J R T Wood, ‘Forensic Science from the Judicial Perspective’ (2003) 23 *Australian Bar Review* 137.

in identifying offenders.³⁰⁷ Provided evidence is stored correctly, one can only imagine what future technologies will bring to criminal law — a sound and logical argument can therefore be raised that reform to double jeopardy laws are needed. Whether retrospectivity of all but the Queensland reform is judicially fair, and passing the interests of justice test, particular in cases that have languished for several decades, would need to be individually assessed.³⁰⁸

E *Further Arguments*

Some academics argue that the original intention of double jeopardy rules was more applicable to that time in history when the accused of capital crimes faced execution,³⁰⁹ those ‘in fear of life or limb’. However, even though capital punishment no longer exists in Australia it is argued that a sentence, for example, of 25 or more years’ imprisonment for murder does in fact place offenders in a similar situation.

The reforms, quite narrow in scope, being limited to new and compelling evidence and tainted AOJ acquittals have, at least in Australia, seen little or no use to date and with no empirical evidence to the contrary their future utilisation is questionable. Whether the reform has been worthwhile will only be resolved in the future but provided the police, prosecution and the courts exercise continued due diligence it is suggested the reform will be little used.

The real battle-ground of any modern reform though lies with ensuring judicial independence and fairness to maintain public confidence in the judiciary.

³⁰⁷ Ibid.

³⁰⁸ The ‘interests of justice test’ as, for example, contained in the *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008 (SA)* s 337(1).

³⁰⁹ See, eg, Sigler, above n 5, 287–9.

VI CONCLUSION

The 21st century saw the principles that evolved over double jeopardy's 800-year development undergo dramatic reform in the UK, New Zealand and all Australian States. Whilst reform in the UK and New Zealand was the result of detailed Law Commission consideration, the reform in Australia, although based on the UK model, was ad-hoc at best and has seen little or no use. Although arguments for reform based on ever-changing societal values and ever-improving forensic science are reasonable, the evidence suggests the Australian reform can only be seen as being a result of media-driven political knee-jerk reaction to the *Carroll* case. Any benefits to the criminal justice system will be subsequently minor.

It is argued that the cost of such reform is the continual erosion of judicial independence, a high a price to pay. Law reform should be approached with caution — it needs to be carefully considered and free of ill-considered, poll-based political decisions. It is further argued that the reform was smoke and mirrors, leaving unanswered two important issues — was the reform really necessary, and what of the veracity of real-world political and resource limitations on the MCCOC, the driving force behind the reform? The answer to the former is believed to be a resounding no — veracity is self-evidently lacking in the latter.

Judges will continue to make decisions the public and politicians find disagreeable, a price we must pay for continued judicial independence. It would seem that reform based on political expediency takes precedence over well-defined legal principles and the reform of the well-established double jeopardy doctrine serves as but one example.

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