CRIMINAL CODE (DOUBLE JEOPARDY) AMENDMENT BILL 2007

Explanatory Notes

Objectives of the Bill

The objects of this Bill are to modify the application of the double jeopardy rule in the following two ways:

(a) to enable a person acquitted of murder or a lesser offence to be retried for murder if there is fresh and compelling evidence of guilt, and

(b) to enable a person acquitted of an offence to be retried for an offence for which the maximum penalty is 25 years or more if the acquittal was tainted by the commission of an administration of justice offence.

In each case, a further object is to ensure that the retrial can only proceed after a hearing before the Court of Appeal has established that the grounds in paragraphs (a) or (b) above are made out, and that it will be in the interests of justice to order a retrial.

Reasons for the Bill

The term "double jeopardy" refers to the principle that a person cannot be charged with an offence for which he has already been convicted or acquitted. Contradicting an earlier verdict by preferring a different charge, such as perjury, is also encompassed by the double jeopardy principle; see the High Court decision in *The Queen v Raymond John Carroll* [2002] HCA 55 (5 December 2002).

The double jeopardy rule has long regarded as a fundamental principle of the criminal law. The principles underpinning the double jeopardy rules include that a person should not be harassed by multiple prosecutions about the same issue, the need for finality in proceedings, the sanctity of a jury verdict, the prevention of wrongful conviction and the need to encourage efficient investigations.

On the other hand, there is considerable public concern over the prospect that a person may escape conviction due to an earlier acquittal, despite the emergence of new evidence that may prove their guilt, or despite the person having secured an acquittal by interfering with the administration of justice. In recent times this concern has increased as scientific advances have meant that evidence pointing to a person's guilt may become available only some time after the person had been acquitted because of the weakness of evidence.

There have been recent reforms in other jurisdictions. In the United Kingdom, after the murder in 1993 of Stephen Lawrence, two enquiries called for the modification of the rule in cases where "fresh and viable" evidence came to light after an acquittal, and the *Criminal Justice Act 2003* put these recommendations into effect. The New Zealand (NZ) Law Commission has also recommended changes, and an amending Bill is presently before the NZ Parliament.

In Australia concern has been expressed since the High Court decision in *R v Carroll* [2002] HCA 55. The then Attorney-General, Hon Rod Welford, referred the matter to the Standing Committee of Attorneys-General (SCAG) in 2003. SCAG sought a report from the Model Criminal Code Officers Committee (MCCOC), and the issue has been on the agenda of SCAG ever since. Premiers and Attorneys-General of Queensland and other States have stated several times that some reform was necessary, but that a nationally consistent approach was desirable. However, in September 2006 the Parliament of New South Wales passed an Act closely based on the UK Act – the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006*. At the meeting of the Council of Australian Governments on 13 April 2007, COAG agreed that jurisdictions will implement the recommendations of the Double Jeopardy Law Reform COAG Working Group on double jeopardy law reform, prosecution appeals against acquittals, and prosecution appeals against sentence, noting that the scope of reforms will vary amongst jurisdictions reflecting differences in the particular structure of each jurisdiction's criminal law. Victoria and the Australian Capital Territory reserved their positions in relation to the recommendations.

This Bill is, in turn, based on the NSW Act, but is modified to specify a narrower range of offences for which retrial can be ordered, and to fit with existing provisions of our codified criminal law.

Achievement of the Objectives

The Bill implements reforms to double jeopardy rules in a manner that appropriately reflects the importance of double jeopardy principles. It will enhance public confidence in the justice system, while at the same time avoiding adversely impacting on the rights of the vast majority of acquitted accused.

The Bill inserts a proposed new Chapter 68 into the Criminal Code, immediately after existing chapter 67 which deals with appeals. Its main set of provisions, as explained below, correspond to objects (a) and (b) above. Importantly, proposed s 678G provides that only one application can ever be made to reopen an acquittal.

Estimated Cost for Government Implementation

If enacted, the Bill will probably result in occasional re-openings of criminal investigations and occasional applications to the Court of Appeal under proposed new sections 678B, 678C and 678I. With the limited scope of the Bill and the fact that the reforms will not operate retrospectively, it is anticipated that any reinvestigations, applications and retrials will be managed effectively within existing resources

Consistency with Fundamental Legislative Principles

Does the legislation have sufficient regard to the rights and liberties of individuals?

The Bill represents a qualification of one of the traditional rights or liberties of individuals. The double jeopardy rule is expressed in the International Covenant on Civil and Political Rights (ICCPR), article 14, as follows:

> 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.

It can be seen that much depends on the interpretation of the word "finally" in that article. It has been argued in other jurisdictions that a Bill such as this, which gives the prosecution just one chance to reopen an acquittal if the narrow grounds in sections 678B or 678C are met, is merely redefining finality. In any case, it is argued that the limited exposure to double jeopardy provided by the Bill can be justified in the public interest.

The Bill contains a number of safeguards to ensure that the reforms do not impact adversely on the vast majority of acquitted accused.

The first exception applies only to a charge of murder and requires fresh and compelling evidence to exist before a retrial can be ordered.

The second exception is only triggered if the accused or another person is convicted of an administration of justice offence in relation to the original trial and it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted of the original offence. This is high threshold to satisfy. For example, an accused is charged with murder. The brother of the accused gives false evidence at the accused's trial establishing an alibi. The accused is acquitted. Later, the brother is charged with and convicted of perjury in relation to the accused's trial. If the DPP can establish that it is more likely than not that the accused would have been convicted of murder without that false alibi, then the DPP can apply for a retrial on the basis that the acquittal was tainted.

For both exceptions, the Court of Appeal can only order a retrial if in all the circumstances it is in the interests of justice for the order to be made.

Other safeguards include –

- time limits apply to the making of the application (within 28 days of the accused being charged) and to the presentation of an indictment (within 2 months of the retrial order);
- no police investigations involving any arrest, questioning or search of the acquitted person, or any forensic procedure carried out on the person or property of the acquitted person can be undertaken unless first authorised by the DPP;
- a presumption in favour of bail;
- restrictions on publishing information identifying the acquitted person while under investigation, or subject to an application for a retrial until the end of the retrial;
- limiting the number of retrials that can be ordered under the exceptions; and

- excluding from the definition of "acquittal" a person who has been found not guilty by reason of insanity.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?

The exceptions in the Bill only apply to an acquittal occurring after commencement, even though the alleged offence may have been committed before commencement. This is in accord with the common law approach, as stated in *Rodway v R* (1990), that a statute that changes procedural aspects of law is not regarded as breaching the presumption against retrospectivity, even though it may be applied in a trial that relates to conduct that occurred before the statute commenced and have consequences for the rights of the accused.

Consultation

Although there has been no public consultation in relation to this Bill, the issue of double jeopardy law reform has been the subject of extensive consultation through a Discussion Paper released in 2003 by the Model Criminal Code Officers' Committee, under the auspices of the Standing Committee of Attorney-General.

Notes on Provisions

Clause 1 provides for the short title of the Bill.

Clause 2 provides that this Act amends the Criminal Code (the Code).

As there is no commencement provision, the proposed Act will commence on the day it is given assent.

Clause 3 amends section 17 (Former conviction or acquittal) by inserting a note indicating that section 17 does not apply to a retrial ordered under new sections 678B or 678C.

Clause 4 inserts a new Chapter 68 (Exception to double jeopardy rules) into the Criminal Code. The Chapter will consist of sections 678 to 678K.

Chapter 68 provides two exceptions to double jeopardy principles allowing the Director of Public Prosecutions to apply to the Court of Appeal for an order for a an acquitted person to be retried – a fresh and compelling evidence exception, allowing a retrial for murder; and a tainted acquittal exception, allowing a retrial for offences attracting a maximum penalty of imprisonment of 25 years of more, where the original acquittal is tainted by the commission of an administration of justice offence.

Each exception only applies if the acquitted person was completely acquitted, so that if the acquitted person was convicted of a lesser offence in the original proceedings, a retrial is not possible.

New section 678 contains the definitions for the Chapter 68.

"25 year offence" is defined to mean an offence punishable by imprisonment for life or for a period of 25 years or more. Life offences include serious riot offences; piracy; serious sexual offences (including rape, maintaining an unlawful sexual relationship, incest, sodomy, unlawful carnal knowledge); murder, attempted murder and manslaughter; serious offences relating to inflicting grievous bodily harm and disabling to commit offences; endangering the safety or railways and aircraft; robbery; burglary; and arson. Offences punishable by 25 years include sabotage and the most serious drug offences relating to drugs in schedule 1 of the *Drugs Misuse Act 1987*.

"Acquittal" is defined to include an acquittal in appeal proceedings and an acquittal at the direction of the court, but does not include an acquittal on account of unsoundness of mind under section 647 of the Code, or a discontinuance of proceedings following a determination of unsoundness of mind by the Mental Health Court by the under section 281 of the *Mental Health Act 2000.*

"Administration of justice offence" means an offence under chapter 16 of the Code, and includes offences such as corruption of jurors, corruption of witnesses, perjury and fabricating evidence.

Subsection (2) makes it clear that the term 'retrial' also covers what is really a new trial for a different offence (usually, a more serious offence) than the offence for which the person was originally acquitted (the provisions actually permitting such 'retrials' are sub-ss 678B(2) and 678C(2), discussed below).

Subsection (3) clarifies that where a person is acquitted on appeal, a reference to the proceedings in which a person was acquitted includes both the trial and appeal proceedings.

New section 678A (Application of ch 68) provides in subsection (1) that the new chapter applies only to an acquittal occurring after commencement, although the relevant offence may have been committed before commencement.

Subsection (2) confirms that the new chapter only removes the protection of double jeopardy principles where a person has not been convicted of *any* offence in relation to the conduct charged. In other words, if the acquitted person was convicted of a lesser offence in relation to the conduct charged (for example, manslaughter, when the original charge was murder), a retrial application cannot be made under Chapter 68.

Subsections (3) and (4) include an acquittal occurring in a place outside Queensland, but only if the laws in that place permit a person to be retried.

New section 678B (Court may order retrial for murder- fresh and compelling evidence) sets out the circumstances in which the Director of Public Prosecutions can apply to the Court of Appeal for an order that an acquitted person be retried for the offence of murder.

The Court may only make such an order if it is satisfied that there is fresh and compelling evidence against the acquitted person and in all the circumstances it is in the interests of justice for the order to be made.

"Fresh and compelling evidence" is defined in section 678D. Evidence is "fresh" if it was not adduced in the proceedings in which the person was acquitted and it could not have been adduced in those proceedings with the exercise of reasonable diligence. Evidence is "compelling" if it is reliable, substantial and, in the context of the issues in dispute in the original proceedings, it is highly probative of the case against the acquitted person. For example, in a case where the identity of the accused in not in issue, fresh evidence going to prove the accused's identity does not advance the case against the acquitted person. (Note that proposed s 678H provides that the Court's findings on these issues are not to be referred to in the course of the retrial.) Matters for consideration in the interests of justice are noted in proposed s 678F.

The effect of 678B Subsection (2) is that it is only the retrial offence that must be murder. For example, the acquitted person may have been charged with and acquitted of manslaughter, but fresh and compelling evidence emerges suggesting the acquitted person is guilty of murder. The prosecution can apply for a retrial on the charge of murder.

Conversely, the acquitted person may have been charged with and acquitted of murder. Later, fresh and compelling evidence arises establishing the acquitted person may be guilty of manslaughter. The prosecution cannot seek a retrial for manslaughter.

Section 678B is further qualified by section 678A(2). For example if the accused was charged with murder and *convicted* instead of manslaughter. Even if fresh and compelling evidence arises suggesting that murder was the right charge, the accused cannot be retried.

Where the Court orders the acquitted person to be retried for murder, the Court is required under subsection (3) to quash the person's acquittal or remove it as bar to the person being retried.

Subsection (4) provides that section 17 does not apply in relation to murder trial.

New section 678C (Court may order retrial for 25 year offence – tainted acquittal) sets out the circumstances in which the Director of Public Prosecutions can apply to the Court of Appeal for an order than an acquitted person be retried for a 25 year offence.

The Court may only make such an order if it is satisfied that the acquittal is a tainted acquittal and in all the circumstances it is in the interests of justice for the order to be made.

"Tainted acquittal" is defined in section 678E. An application under section 678C is triggered if the accused or another person has been convicted of an administration of justice offence (for example, corrupting a witness, threatening a juror, perjury) in relation to the original trial and it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted at the original trial.

As with the fresh and compelling evidence exception, subsection (2) provides that an acquitted person may be ordered to be retried on a 25 year offence even if originally charged with and acquitted of a lesser offence, but sub-s 678A(2) provides that if the person was originally *convicted* of a lesser offence he or she may not be tried again for the more serious offence.

Where the Court orders the acquitted person to be retried, the Court is required under subsection (3) to quash the person's acquittal or remove it as bar to the person being retried.

Subsection (4) provides that section 17 does not apply in relation to the retrial.

New section 678D defines "fresh" and "compelling" evidence. Evidence may still satisfy that definition, even if it would not have been admissible at the original trial.

New section 678E defines "tainted acquittal". Subsection (3) ensures that while an appeal period is running, or an appeal is to be determined in relation to a conviction for an administration of justice offence, that conviction cannot trigger a tainted acquittal application. Should an appeal be lodged after a tainted acquittal application has been granted, the Court is empowered under subsection (4) to restore the quashed acquittal, if that appeal is successful.

For both exceptions, the Court of Appeal can only order a retrial if in all the circumstances it is in the interests of justice for the order to be made. *New section 678F* (Interests of justice – matters for consideration) sets out the matters that a Court must consider in determining whether it is in the interests of justice to order a retrial.

A retrial order is not in the interests of justice unless the court is satisfied that a fair retrial is likely in the circumstances. The court must have regard to the length of time since the offence was committed and whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to the investigation and prosecution of the original trial and in relation to the application for retrial.

New section 678G (Application for retrial – procedure) limits the number of applications that may be made under Chapter 68 and provides time limits for procedural steps. Only one application for retrial may be made in relation to an acquittal. However, where an acquitted person is retried and acquitted, a tainted acquittal application may be made in relation to that acquittal, if the accused or another person has been convicted of an administration of justice offence in relation to that acquittal.

Unless the Court for good cause extends the time, an application must be made with 28 days of the acquitted person being charged or a warrant issued in relation to the retrial offence.

If on the hearing of an application under chapter 68 the Court decides that the acquittal is not a bar to the person being retried, then the court is empowered by subsection (11) to make a declaration to that effect.

New section 678H (Retrial) requires the indictment is be presented within 2 months of the order for retrial, unless the Court gives leave to present the indictment outside that time. Where an indictment has not been presented within that time frame, the person may apply to have the quashed acquittal restored.

New section 678I (Authorisation of police investigations) ensures that any police investigation involving the arrest, questioning or search of the acquitted person, or any forensic procedure carried out on the person or any search or seizure of premises or property of the acquitted person can only be undertaken if first authorised by the Director of Public Prosecutions (the DPP). Before seeking the DPP's consent, the Police Commissioner must be satisfied that relevant evidence has been obtained or is likely to be obtained as a result of the investigation. The DPP may only authorise the investigation if satisfied that there is or there is likely to be sufficient new evidence to warrant the conduct of the investigation and that it is in the public interest for the investigation to proceed. Alternatively, the DPP can advise that the earlier acquittal would not, in the particular circumstances, be a bar to the trial of the person for the offence now under investigation (compare the ruling that the Court may make under s 678G(11)).

New section 678J provides a presumption in favour of bail for an acquitted person charged with an offence for which a retrial is sought. This section displaces the requirement in section 16(3) of the *Bail Act 1980* that a person charged with murder and certain other offences is to be refused bail, unless the person shows cause why the person's detention in custody is not justified.

New section 678K (Restrictions on publication) prohibits the publication of information capable of identifying an acquitted person as being the subject of a police investigation, the subject of a retrial application, or the subject of an order for retrial. The ban on publication lasts until the retrial is concluded and a breach is punishable as a contempt of the Supreme Court. However, the Court of Appeal or the court of trial may authorise publication, if satisfied that it is in the interests of justice to make the order.

Note: If this Bill is not modified, these Explanatory Notes will reflect the Bill as passed by the House and the Act upon assent. If the Bill has been amended in its passage by the House, these Explanatory Notes may not necessarily reflect the content of the Act as finally enacted.