

Double Jeopardy: Resolving the Conflict between Competing Rights and Interests

By Dan Rogers

Double jeopardy is commonly regarded as the process by which a person is put in peril of conviction more than once for the same offence.¹ It is regarded as a fundamental human safeguard against oppression by the State. The rule has existed in the English common law since the twelfth century.² Despite this rich history, recent events have shown how vulnerable the rule is to the legislative whim of national and international communities. Many States have now introduced legislation allowing for exceptions to this long-standing rule. The international community, particularly the United Nations Human Rights Committee, has also shown preparedness to weather away the rule under limited circumstances. It is this background of reform which has seen an increased debate, and an influx of literature, about the rule against double jeopardy.

The erosion of any fundamental human right is concerning and requires close analysis. However, the abrogation of this principle has been welcomed by politicians seeking to 'cash in' on the law and order debate. Notwithstanding the concerning political climate which has fuelled reform, it is fanciful to think that certain rights are so paramount that there can never be circumstances in which they should be limited. This paper will argue that a limited exception to the rule against double jeopardy is acceptable under international human rights law and where strict control mechanisms are in place, it constitutes a rational and acceptable abrogation of a human right.

Part one of this paper will provide an overview of double jeopardy, through a consideration of the various principles and rationales underlying the rule. It is vital to first understand the right at stake before considering whether an abrogation is appropriate. Part two of this paper will assess double jeopardy under international law

¹ Bagaric, M. & Neal, L., "Double Jeopardy in Australia: The Illusion of an Absolute Protection and the Prosecution Process as Punishment" (2005) *Canberra Law Review*, 8, 87-110, 88

² Honourable Justice Michael Kirby, 'Carroll, Double Jeopardy and International Human Rights Law' (2003) *Criminal Law Journal*, 27, 231, 232.

instruments and case law. This analysis shows that the rule against double jeopardy is not absolute and that some exceptions to the rule are justifiable.

Part three of the paper will look at the position of double jeopardy under Australia's common law and statutes. This will include a discussion of the High Court decision in *R v Carroll*³ which was influential to the law reform in Queensland and New South Wales. The key double jeopardy provisions in these States will be explained. Recent developments in Victoria, where a similar change is being advocated, will be considered in light of the *Charter of Human Rights and Responsibilities Act 2006* (VIC). Part four of this paper will consider some other country's position on double jeopardy. This is important as overseas developments and trends may influence the degree of abrogation viewed as permissible in Australia.

Part five of the paper will rationalise and explain the writer's view that a limited exception to the rule against double jeopardy is compliant with human rights law. The key challenge of balancing competing rights and interests will be explored here. Part six focuses on the required control mechanisms for an application for a re-trial. To ensure the appropriate balance of rights and interests remains intact, there must be clear and strongly enforced safeguards against abuse of double jeopardy exceptions.

The paper concludes with an interview of Michael Byrne QC. Byrne is one of Australia's most experienced criminal barristers. Importantly, he was counsel for the Crown in the High Court appeal of *R v Carroll* and has written on the subject since the High Court's decision in 2002.⁴ Prior to the interview, Mr Byrne was given a list of questions and then participated in a taped interview.⁵ The writer explains his stated hypothesis to Byrne. The interview provides an interesting and authoritative insight into the interplay between the principle of double jeopardy and human rights.

³ [2002] HCA 55

⁴ See Byrne, M., "Double Jeopardy and Perjury" (2006) *Precedent*, 72, 21-24

⁵ The list of questions given to Michael Byrne QC is annexed to this paper (annexure 1). Also annexed is the transcript of the interview with Byrne, conducted on 19 August 2011 (annexure 2)

Part One: The Principles and Rationales of Double Jeopardy

The following represents the key principles and rationales proffered for the maintenance of a strict approach to the rule against double jeopardy.

Hardship associated with repeated prosecutions

As a criminal defence practitioner, the writer sees firsthand the extreme distress and anxiety that defendants face during the criminal process. So distressing is the criminal process that clients often develop anxiety disorders, depression or other associated mental illnesses. If they have pre-existing mental health problems, these are usually exacerbated by the process. In extreme cases, the writer has acted for persons who could not bear the uncertainties ahead in the criminal proceeding; choosing to take their own life instead.

To put someone through the perils of the criminal law process twice is extremely burdensome. These observations conform what Lord Loreburn L.C. told the British Parliament in 1907, that it “approaches the confines of torture to put a man on trial twice for the same offence”.⁶ Corns believes that the psychological distress of an accused outweighs the possibility of a conviction at a re-trial.⁷

There will be little to no public sympathy for the distress of a guilty person who has to face two trials before finally being convicted. However, it is dangerous to assume one’s guilt as an easy way to dismiss this argument. The presumption of innocence must guide considerations of hardship associated with repeated prosecutions.

Furthermore, it must be remembered that the defendant is not the only person who suffers hardship through repeated prosecutions. The defendant’s family and friends, plus witnesses and victims are all subject to hardship when the rule against double jeopardy is relaxed.

⁶ Loreburn, L.C., “H.L.DeB.” (1997) Vol. 179, col. 1473 cited in Dennis, I, “Rethinking Double Jeopardy: Justice and Finality in Criminal Process” (2000) *Criminal Law Review*, 933-951, 940

⁷ Corns, C., “Retrial of Acquitted Persons: Time for Reform of the Double Jeopardy Rule?” (2003) *Criminal Law Journal*, 27, 80-99, 86

Dennis associates this argument with the state's duty of humanity to its citizens.⁸ This is true but the duty to treat citizens with respect and dignity includes the duty to seek out justice for victims and their family where new and compelling evidence comes to light. The conflict between competing rights and interests is a recurring theme of this paper.

Finality in Criminal Litigation

Finality for litigation, either civil or criminal, is an important aspect of the justice system. It helps all interested parties to move on, to resume socio-economic activity and to create new legal relationships. Finality also ensures that the authority of the court is not undermined by inconsistent verdicts.⁹

For civil judgments, once a matter has been adjudicated it becomes *res judicata*. Very strict rules apply to re-opening a civil judgment. This is not necessarily the case for criminal litigation where finality for convictions is viewed with less importance. For convicted criminals, a time limit usually applies to filing a notice of appeal. However, the court retains discretion to hear an application at any time after conviction. There are reported cases of convictions being overturned many, many years after judgment.¹⁰

Finality for acquittals has traditionally been viewed with greater importance. Those acquitted are usually given the opportunity to move forward with certainty that there will be no further interferences with their life. However, the victim and the community have a competing interest to ensure that the final outcome is the correct one. Logic may suggest that if convicted criminals can seek justice at any time after conviction then acquitted criminals should expect the prospect of a re-trial if fresh and compelling evidence comes to light.

⁸ Dennis, I, "Rethinking Double Jeopardy: Justice and Finality in Criminal Process" (2000) *Criminal Law Review*, 933-951, 940

⁹ Burton, K., "Reform of the Double Jeopardy Rule on the Basis of Fresh and Compelling New DNA Evidence in New South Wales and Queensland" (2005) *IJCULR*, 1, 84-107, 89

¹⁰ See for example *Mallard v R* (2005) 224 CLR 125

The Risk of Wrongful Conviction

It is suggested that repeated trials for the same offence increases the risk of a wrongful conviction.¹¹ This is certainly a risk where the prosecution case is weak and they are allowed repeated trials. Dennis identifies the practical consequences of repeated trials which can impact on the likelihood of a wrongful conviction.¹² Firstly, many defendants, having already endured a lengthy and costly trial, may not have the stamina or the resources to effectively face a second trial. Secondly, the prosecution have a tactical advantage at a second trial because the defence case is known to them and they can more easily adapt their case.¹³

These concerns reinforce the need for caution when allowing exceptions to the rule against double jeopardy. For instance, a re-trial should not be ordered unless there is fresh and very strong evidence to support a re-trial. This constraint to applications for re-trials effectively reduces the risk of wrongful convictions when the matter is re-heard.

Efficient Investigations

Where police and prosecution bodies know that they have only one chance of securing a conviction against a suspected criminal, it encourages and promotes efficient investigations and thorough trial preparation.¹⁴ By maintaining the rule against double jeopardy, police are more likely to investigate all aspects of an incident and put forward the strongest case possible. However, it is unlikely that police carry out investigations in a sloppy manner with the foresight that a re-trial is their safeguard.

If a re-trial is granted for fresh evidence, a high threshold should be placed on police to show that such evidence was not reasonably available at the time of the original investigation. Intense scrutiny should apply to fresh evidence produced by the police;

¹¹ Parkinson, C., "Double Jeopardy Reform: The New Evidence Exception for Acquittals" (2003) *University of New South Wales Law Journal*, 41, 1-13, 7

¹² Dennis, Above n8, 939.

¹³ Corns, Above n7, 89

¹⁴ Parkinson, Above n11, 8

particularly in light of concerns that police may fabricate evidence against an acquitted person that they believe is guilty.¹⁵

Power Imbalance and Tactical Advantages to the Crown at Re-Trial

Power balance is particularly important in an adversarial system such as Australia. For criminal trials, the starting point is the presumption of innocence and secondly, that the Crown bears the onus of proof. However, when an individual is prosecuted by the State, with all its resources and powers, the individual defendant is at a distinct disadvantage. The High Court in *Carroll* recognised the power imbalance argument for double jeopardy stating that '[w]ithout safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression.'¹⁶ This risk would be increased for persons that the State particularly dislikes.

A defendant's disadvantage is evident in relation to the State's powers of investigation. Police have the right to obtain a warrant and seize documents and other evidence. They can take someone's fingerprints or other bodily samples and can force an accused to participate in a line-up procedure.¹⁷ The State has financial and other resources not available to the individual. For example, with DNA evidence defendants lack the resources to match the police technology and they also do not have access to the crime scene, effectively disabling them from testing the evidence.¹⁸

The extensive powers of the State should never be forgotten as it is relevant to the issue of whether the State should be given the opportunity to re-trial an acquitted person. When charged, a defendant has just a few key tactical advantages. They include the right to silence and the right not to disclose their case except for rare examples such as an alibi or an expert's report. The element of surprise, which comes with the defence ability to conceal their case, should not be undermined. It is fundamental to limit the imbalance that remains between a State and its citizens.¹⁹ At

¹⁵ See for example, Queensland, Royal Commission into Possible Illegal Activities and Associated Police Misconduct, "*Final Report*" (1987). See also New South Wales Government, "*Royal Commission into the New South Wales Police Service: Final Report*" (1997)

¹⁶ *R v Carroll* [2002] HCA 55, [22] per Gleeson, CJ & Hayne, J.

¹⁷ See for example the *Police Powers and Responsibilities Act 2000* (Qld)

¹⁸ Yallop, R., "Split verdicts on Retrials" (2003) *The Australian*, 11 February 2003, 9.

¹⁹ Australian Law Reform Commission, "*Evidence*" (1985) ALRC 26, 1, 487

a re-trial, the defence case is already known, through the defendant giving evidence at the first trial or through the cross examination of witnesses by defence counsel. As a result, the prosecution are more easily able to adapt their case and increase the prospect of a conviction.

Allowing a re-trial, after a defence case is disclosed, is akin to compelling a person to answer questions, in breach of the privilege against self-incrimination.²⁰ The privilege against self incrimination protects against compulsion to give evidence or to supply documents that would tend to prove one's own guilt.²¹ It is irrelevant if a defendant denies the charge. At the original trial, defence may be forced to concede particular facts which can be subsequently used by the prosecution to strengthen their case. This results in the power balance at trial favouring the prosecution even more heavily.

Part Two: Double Jeopardy under International Law

Australia signed the *International Covenant on Civil and Political Rights* (ICCPR) on 18 December 1972 and ratified it on 13 August 1980.²² Because of the ratification of this treaty, Australia is under an international obligation to perform its obligations under the treaty in good faith. This rule finds force in Article 26 of the Vienna Convention on the Law of Treaties and is known as the maxim *pacta sunt servanda*.²³ Australia's ratification ensures that the treaty applies to the entire country including all states and territories. An internal law cannot be passed as justification for a violation of the treaty.²⁴ As a party to the First Optional Protocol of the ICCPR, Australians can lodge complaints with the Human Rights Committee alleging a violation of the rights under the ICCPR. The Committee's response to a complaint is non-binding on the respondent person or body.

²⁰ *Caltex Refinery Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 per Gleeson CJ, 127

²¹ *Sorby and Another v Commonwealth of Australia and Others* (1983) 152 CLR 281 per Mason, Wilson and Dawson JJ, 310

²² *International Covenant on Civil and Political Rights (ICCPR)*, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), Chapter 4

²³ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a10.html> [last viewed 13 July 2011]

²⁴ *Ibid*, Article 27

Article 14(7) of the ICCPR states that '[N]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'²⁵ A similar provision exists under Article 4(1) of Protocol 7 to the European Convention on Human Rights.²⁶ Australia is not a party to this convention. It is important to note that article 14(7) of the ICCPR is not listed as a non-derogable right under article 4(2).²⁷

General Comments

In the international realm, the prohibition against multiple prosecutions for the same offense is cited as the maxim *non bis in idem*. The Human Rights Committee acknowledge that States report differing views as to the scope of article 14(7).²⁸ Even in 1984 when the Human Rights Committee released its last general comment, some States made reservations in relation to procedures for the resumption of criminal cases.²⁹ The Committee acknowledged that State parties may allow for exceptions to article 14(7) through 'making a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem*...'³⁰

Where an appellate court has the power to order a re-trial, as part of the ordinary procedures of that State, there will be compliance with article 14(7).³¹ In contrast, the prosecution cannot simply just re-institute proceedings. The Committee even encourages States to 'reconsider their reservations about article 14(7).'³² In the writer's view, this is a clear invitation to States to provide for exceptions to the rule against double jeopardy.

²⁵ ICCPR, Above n22, Article 14(7)

²⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, available at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> [last viewed 22 August 2011]

²⁷ ICCPR, Above n22, article 4(2).

²⁸ Office of the High Commissioner for Human Rights, "General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14):. 13/04/1984. CCPR General Comment No. 13. (General Comments)" available electronically at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)> (last viewed 29 June 2011), [19]

²⁹ Ibid, [19]

³⁰ Ibid, [19]

³¹ Emmerson, Ashworth & McDonald, "*Human Rights and Criminal Justice*" (2007), 424

³² Ibid, [19]

Human Rights Committee Views

The Committee's interpretation of article 14(7) is most usefully explained in the communication of Mr Konstantin Babkin.³³ Babkin, a Russian citizen, was charged with three counts of murder and one count of forgery of documents. The Moscow Regional Court found him guilty of the forgery charges but acquitted him of the murder charges. He was sentenced to two years imprisonment. The relatives of the three murder victims appealed against his acquittal for the murder charges. The Supreme Court of Appeal quashed the acquittals for the murder charges, confirmed the conviction for the forgery and ordered a re-trial for the murders.

At the re-trial, Babkin was recharged with forgery of documents where the factual basis of this charge was almost identical to the original forgery charge to which he had been convicted already and such conviction confirmed by the Court of Appeal. Babkin was again convicted of forgery of documents and was convicted of 2 of the 3 murder charges. He was sentenced to 23 years imprisonment.

Babkin complained that his re-trial for the murders and for the forgery breached article 14(7) of the ICCPR. In considering the complaint, the Committee placed significant emphasis on the word 'finally' convicted or acquitted in accordance with the law and penal procedure of each country. It held that the State party's law and penal procedure provided a right of appeal against an acquittal. As such, Babkin's acquittal at trial for the murders was not 'final' until all appeal avenues against the acquittal were exhausted by the State. His acquittal had not survived the Court of Appeal and as such, his re-trial for the murders did not breach article 14(7). In coming to this view, the Committee has affirmed that the right against double jeopardy is capable of derogation through reliance on the word 'final' to provide for appeals against an acquittal.

³³ *Babkin v Russia*, "Communication No. 1310/2004: Russia CCPR/C/92/D/1310/2004, 24 April 2004" Human Rights Committee Views, available electronically at http://www.worldcourts.com/hrc/eng/decisions/2008.04.03_Babkin_v_Russian_Federation.htm (last viewed 1 August 2011)

By similar reasoning, the Committee held that Babkin's re-trial for the forgery did breach article 14(7). At his original trial, he was convicted of this offence and then on appeal, that conviction was upheld which constituted the 'final' outcome of the charge. To re-try him for the forgery, as the State did at the second trial, breached article 14(7).³⁴

This case shows that under international law, if a State's law and penal procedure provides for a re-trial after an appeal, an acquittal is not final until such time as the avenues of appeal have been exhausted. It is important to note that not all State parties to the ICCPR have rights of appeal against an acquittal. However, an application for a re-trial because of fresh and compelling evidence is a similar scenario to a normal appeal against an acquittal on the basis that it was unsafe or unsatisfactory. The desired outcome of the appeal is the same, namely a retrial.

The focus of this paper relates to situations where a re-trial is ordered as opposed to an increase in punishment. However, it should be remembered that article 14(7) also relates to the requirement not to be punished again for an offence where someone has already been finally convicted or acquitted. An example of this is the communication by Mr Tillman where he complained about Australia's preventative and indefinite detention of serious sexual offenders after the expiration of a sentence.³⁵ The committee noted that the effect of preventative detention was criminal and punitive in nature, despite claims by Australia that it was a civil process of community protection through identifying a person's risk of re-offending.³⁶

Part Three: Double Jeopardy in Australia

The principle of double jeopardy exists under Australia's common law.³⁷ In certain States, it also exists under statute.³⁸ To a degree, the international law on double

³⁴ Ibid, [20]

³⁵ *Tillman v Australia*, "Communication No. 1635/2007: Australia CCPR/C/98/D/1635/2007, 18 March 2010" Human Rights Committee Views, available electronically at <http://www.hrlrc.org.au/court-tribunal/un-human-rights-committee/tillman-v-australia-un-doc-ccprc98d16352007-12-april-2010/> (last viewed 12 August 2011)

³⁶ Ibid, [7.3]

³⁷ See *R v Carroll* [2002] HCA 55

³⁸ See for example the *Criminal Code Act 1899* (Qld), section 16 and 17

jeopardy can guide the interpretation of these statutes. Justice Gummow has explained that “[t]he terms of a convention may be resorted to in order to help resolve an ambiguity in domestic primary or subordinate legislation... This is taken on the footing that Parliament intended to legislate in conformity and not in conflict with international law...”³⁹ According to Justice Kirby in *Al-Kateb v Godwin*, international rules ‘do not bind as other “rules” do. But the principles they express can influence legal understanding.’⁴⁰

In 2007 the Council of Australian Governments (COAG) agreed that jurisdictions would implement the recommendations of a working group dealing with double jeopardy reform.⁴¹ In 2011, a national standard has not been achieved with states adopting different attitudes to reform. This paper will focus on the position at common law and on the states of Queensland and New South Wales that provide statute-based provisions concerning double jeopardy. Victoria will also be briefly mentioned, particularly as it is presently considering reform of this law.

R v Carroll

The leading High Court decision on double jeopardy in Australia is *R v Carroll*.⁴² Carroll was convicted by a jury of abducting, sexually abusing and strangling a 17-month-old baby, Deidre Kennedy. The baby was found dead on the roof of a toilet block in Ipswich. The baby had bite marks to its legs and a pubic hair was found on her body. At trial, Carroll gave evidence and denied knowledge of the crime. The jury convicted him.

Carroll appealed the conviction and the Court of Appeal held that the forensic evidence, linking the crime to Carroll, was unsafe and unsatisfactory. He was acquitted. The rule against double jeopardy prevented the Director of Public Prosecutions (DPP) from pursuing a re-trial. Subsequently, advancements in DNA

³⁹ *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1993) 112 ALR 529, 560 per Gummow, J. Cited with approval in *Nolan v MBF Investments Pty Ltd* [2009] VSC 244, [152] per Vickery, J.

⁴⁰ *Al-Kateb v Godwin* [2004] HCA 37, [173] per Kirby, J.

⁴¹ The Honourable Wayne Martin, “Current Issues in Criminal Justice” (2009) *Speech delivered to the Rotary District Conference*, 21 March 2009.

⁴² [2002] HCA 55

technology and forensic odontology showed that there was very little doubt that Carroll was responsible for the death.

In an attempt to circumvent the rule against double jeopardy, the DPP successfully prosecuted Carroll for perjury on the basis of his false testimony at the original trial. An application to stay the perjury proceedings, as an abuse of process, failed. This conviction was subsequently quashed by the Court of Appeal. The DPP was granted special leave to appeal to the High Court of Australia. However, the High Court held that the subsequent perjury proceedings were an abuse of the court process and that they undermined the rule against double jeopardy by challenging the finality of the acquittal for murder.⁴³ Carroll's conviction for perjury remained quashed.

The majority of the High Court explained that the perjury proceedings were 'vexatious or oppressive in the sense necessary to constitute an abuse of process; in substance there was an attempt to re-litigate the earlier prosecution.'⁴⁴ The High Court also took the view that allowing an exception to double jeopardy, because of new evidence, lacked 'cogency'.⁴⁵ The public outcry and community dissatisfaction over the decision in Carroll led to a substantial review of double jeopardy, particularly in Queensland and New South Wales.

Queensland Provisions and New South Wales Provisions

The rule against double jeopardy is found in s17 of the *Criminal Code Act 1899* (QLD) and in s156 of the *Criminal Procedure Act 1986* (NSW). These provisions confirm the common law rule against double jeopardy, most notably espoused by the decision in Carroll.

In 2003, New South Wales passed the *Criminal Appeal Amendment (Double Jeopardy) Act 2003* (NSW). Four years later in 2007, Queensland passed the *Criminal Code (Double Jeopardy) Act 2007* (QLD). The exceptions to double jeopardy, provided for in the respective Acts, are very similar. Both states now allow for an

⁴³ *R v Carroll* [2002] HCA 55, [118] per McHugh, J.

⁴⁴ *Ibid*, [114] per McHugh J, Gaudron and Gummow JJ.

⁴⁵ *Ibid*, [114] per McHugh J, Gaudron and Gummow JJ.

acquitted person to be re-tried through an application to the Court of Appeal. The following safeguards exist:

- Only one re-trial will be granted;
- The offence must be a very serious offence (i.e. having a head sentence of 25 years or life);
- The DPP must consent to re-investigations;
- The DPP must apply to the Court of Appeal for a re-trial;
- The evidence must be fresh (not reasonably available at the time of the original trial);
- The evidence must be compelling (likely to result in a conviction when put to a reasonably instructed jury);
- Presumption in favour of bail for the person being re-tried;
- Certain restrictions on the publication of information about the person being re-tried; and
- The re-trial must be in the interests of justice.

The Queensland and New South Wales provisions comply with article 14(7) of the ICCPR on the basis that the original acquittals are not ‘final’.⁴⁶

Proposed Victorian Reform

Victoria’s Attorney General, Robert Clarke has recently advocated the reform of double jeopardy.⁴⁷ This change has been publicly supported by the father of one of the victims of the Walsh Street police killings. If Victoria introduces exceptions to double jeopardy, in a similar way to Queensland and New South Wales, it will be interesting to see how the Supreme Court resolves a challenge to the legislation on the basis that it the reform is not rights complaint.

In Australia, only Victoria and the ACT currently have a human rights charter. Section 26 of the *Charter of Human Rights and Responsibilities Act 2006 (VIC)* states that ‘[A] person must not be tried or punished more than once for an offence in

⁴⁶ Burton, K., “Double Jeopardy, The Queensland Reform” (2008) *Proctor*, 21-22, 21

⁴⁷ Author Unknown, “Double Jeopardy” *The Age*, 6 June 2011, 6

respect of which he or she has already been finally convicted or acquitted in accordance with law.’⁴⁸ This provision is a reproduction of article 14(7) of the ICCPR.

Under section 7 of the Victorian Charter, all rights are capable of limitation. If there was a Charter challenge in Victoria, the easy solution for the court would be to follow the Human Rights Committee’s interpretation of article 14(7). This would involve them hanging their hat on the word ‘finally’ and interpreting it in such a way that allows for an appeal against an acquittal because the matter is not ‘finally’ litigated.

It is hoped by this writer that if the reform is passed and a Charter challenge made, the Supreme Court will constructively engage in a consideration of section 7(2) factors in determining whether the balance between competing rights and interests is met. This will provide significant authority for double jeopardy reform in the context of Australia’s human rights jurisprudence.

Part Four: Double Jeopardy in other Countries

It is important to consider the current practices of overseas jurisdictions. The trend of the international community may impact on the future direction of Australia’s approach to double jeopardy and the exceptions that we allow. This is particularly the case for the development of our common law where the High Court is increasingly referring to the practices of overseas jurisdictions. The following overview shows that most countries provide for an appeal against an acquittal.

In some countries like India, Mexico and the United States, the guarantee against double jeopardy is a constitutional right. For example, Article 20(3) of the Constitution of India provides that no-one shall be prosecuted twice for the same offence. Notwithstanding this constitutional protection, there is an avenue for an appeal against an acquittal. Japan operates in a similar way.⁴⁹ The Canadian Charter prohibits double jeopardy.⁵⁰ However, the prosecution can appeal against an acquittal.

⁴⁸ *Charter of Human Rights and Responsibilities Act 2006 (VIC)*, s26

⁴⁹ See *Constitution of Japan*, Article 39.

⁵⁰ *Canadian Charter of Rights and Freedom*, s11(h)

The effect of this is that the Charter only has effect after a person has been finally acquitted and all appeal avenues exhausted by the Crown. France has similar provisions, including the right to appeal an acquittal, although a case can also be re-opened if the final ruling or presentation of evidence was committed in forgery.⁵¹ The German provisions allowing prosecution appeals because of new evidence and/or fraud is also similar.⁵²

In 2003, the United Kingdom passed the *Criminal Justice Act 2003* (UK). The Act provides for re-trials where there is “new” and “compelling” evidence of a serious crime. The Director of Public Prosecutions must make an application to the Court of Appeal for the conviction to be quashed. Since the 2003 amendments to double jeopardy, there have been two key successful re-trials. The Court of Appeal ordered a re-trial of William Dunlop for the murder of Julie Hogg in 1989. Dunlop pleaded guilty prior to the re-trial.⁵³ Mark Weston was ordered to stand a re-trial for the murder Vikki Thompson and the jury convicted him on the strength of new DNA evidence relating to the victim’s blood found on the defendants boot.⁵⁴ The UK exceptions to double jeopardy are very similar to Queensland and New South Wales. The successful prosecution of these two persons shows the value in allowing a re-trial in special circumstances where there is fresh and compelling new evidence.

Part Five: Rationalising the Exceptions to the Rule against Double Jeopardy

The Law Commission for England and Wales succinctly identified the question for consideration; “Is it possible to identify a category of cases in respect of which the objective of achieving accurate outcomes clearly outweighs the justifications underlying the rule against double jeopardy?”⁵⁵ The writer believes that it is possible to find an appropriate balance between the efficient administration of justice and the

⁵¹ See the *French Code of Penal Procedure*, Article 6.

⁵² See The Penal Procedural Code (Strafprozessordnung), section 362 and 373a

⁵³ Crown Prosecution Service, “William Dunlop pleads guilty in first double jeopardy case”, 11 September 2006, available electronically at <http://www.cps.gov.uk/news/press_releases/152_06/> (last viewed 22 August 2011)

⁵⁴ Author unknown, “Double jeopardy man guilty of Vikki Thompson murder”, *BBC Online*, 13 December 2010

⁵⁵ Roberts, P., “*Double Jeopardy Law Reform: A Criminal Justice Commentary*” (2002), 412

rights of the accused. This balance exists where there is a limited and controlled exception to the rule against double jeopardy.

The issue is one of competing rights considerations. Traditionally, accused persons rights against double jeopardy have trumped other considerations. It is important to respect the rights of an accused not to be repeatedly prosecuted. However, it is also important to have a high regard for the rights of victims and their families to seek justice. On the same footing, the rights of the community to justice and to protection from serious offenders must be considered. Wrongful acquittals, including those based on tainted evidence, undermine their protection.

In appropriate cases, decided by a court of high authority, the strict application of the rule against double jeopardy stands in the way of justice. Keane agrees with this view stating, “Abrogation of the rule against double jeopardy is not some first step on a road to loss of individual freedom. The rule is an anachronistic obstacle to justice. The safeguards of the new proposal will make retrial an exceptional remedy in rare cases in which there is new and compelling evidence of guilt.”⁵⁶

Dennis argues that the ultimate aim of the law of evidence and criminal process is to secure legitimacy of verdicts and decisions in official adjudication.⁵⁷ Further, a legitimate verdict must be factually correct and morally authoritative.⁵⁸ This is a sound theory. However, respect for fundamental principles of criminal justice and the rights of accused persons represent an important aspect of moral authority. In this sense, there must be a balancing exercise between the desire to secure a factually correct verdict and on the other hand, respect for a suspect’s procedural and human rights.

In an adversarial system, the purpose of a trial is to determine whether the prosecution can establish a person’s guilt beyond reasonable doubt. It is suggested that in an adversarial system, less weight is attached to the just result or the pursuit for the

⁵⁶ Keane, A., “Reform of the ‘double jeopardy’ law has caused unjustified fury” *The Times*, 30 June 2003.

⁵⁷ Dennis, Above n8, 944

⁵⁸ Dennis, Above n8, 944

objective truth.⁵⁹ A reliance on an adversarial system to excuse wrongful acquittals is unacceptable and for this writer, this is an example where the inquisitorial system of law is more favourable.

Nason suggests that the most important question is whether the rule of double jeopardy meets the community standards.⁶⁰ As a determinative factor, this is a dangerous suggestion. We must be cautious as to the emotive effect of cases like Carroll. If law reform is driven by emotive responses, we are at risk of allowing the community's knee-jerk reaction to become over-bearing. This, coupled with our current 'law and order' political environment, may risk the balance unduly favouring the community.

The onus on the State

If we accept, as we should, that the rule against double jeopardy is a fundamental human right, then any abrogation of this should be justified by the State. The State should bear the onus in demonstrating that this incursion on rights is warranted and supported by evidence based research demonstrating the effectiveness of allowing exceptions to double jeopardy. Anecdotal case examples are insufficient.

Given the adolescent nature of the law reforms, the number of successful re-trials under the new provisions is limited. The Director of Public Prosecutions in the UK told the Home Affairs Committee that in a twelve month period, there would be no more than a handful of cases subject to review.⁶¹ These figures limit the ability of the State or other organisations from carrying out any meaningful evidence based research. Furthermore, it is difficult to conceive of a research design for assessing such a reform. Qualitative assessments, academic review and careful scrutiny by the legal profession are the better ways to critically assess double jeopardy. Such analysis should occur through an independent and carefully appointed committee. The working group of the Council of Australian Government's (COAG) meeting was a good example of such a committee.

⁵⁹ Edgley, M., "Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy" (2007) *Queensland University of Technology Law Journal*, 7, 1-27, 3

⁶⁰ Nason, D & Emerson, S., "Mason Joins Push for Review", *The Australia*, 13 December 2002, 1

⁶¹ Edgley, Above n59, 22

Part Six: The Importance of Strict Control Mechanisms

Most jurisdictions rely on the Court of Appeal to act as the ‘gatekeeper’ to applications for a re-trial. In the writer’s view, the Court of Appeal is best placed to ensure that only a limited exception to double jeopardy is allowed to operate in practice. Former Queensland Law Society president, Megan McMahon disagrees by criticising the subjective judgments required to be made by the Court of Appeal in determining whether evidence is fresh and compelling.⁶² Ms Mahon has a point but fails to identify an alternative body to oversee re-trials. It would be highly inappropriate to allow the DPP to make such assessments. The DPP may be jaded by the original acquittal, unduly influenced by police pressure or the victim’s family and finally, unwilling to pay proper regard to any submissions put forward by defence counsel.

The standard of proof for applications for a re-trial must be high. This is important to prevent the groundless erosion of rights. The New South Wales Legislation Review Committee warned that the standard should not be so high that the appeal court is perceived to be influencing the final decision on conviction or acquittal, which would impinge upon the right to a trial by jury.⁶³ If Court of Appeal applications remained private and suppression orders were granted pending the outcome of the re-trial, this concern would be immediately removed and the presumption of innocence maintained.

Fresh Evidence

This refers to evidence which was not adduced in the original proceedings and could not have been adduced in those proceedings with the exercise of reasonable diligence.⁶⁴ Fresh is preferred to the word ‘new’ as a second trial will not be allowed

⁶² McMahon, M., “Abandoning double jeopardy: 800 years of fundamental protection gone” (2007) *Proctor*, 7-8, 7.

⁶³ Parliament of New South Wales Legislation Review Committee, “*Consultation Draft Bill – Criminal Appeal Amendment (Double Jeopardy) Bill 2003, Draft Report*” (2003), 8

⁶⁴ See for example, *Criminal Code Act 1899* (Qld), Chapter 68

if the evidence was overlooked at the first trial.⁶⁵ The requirement for ‘reasonable diligence’ should be applied to a high standard. According to the University of New South Wales Civil Liberties Council, this is important to discourage sloppy investigations and prosecutions, particularly given the amount of resources and powers available to the State.⁶⁶

The drafters of the reforms were clearly mindful of advancements in DNA technology. This technology has resulted in new evidence coming to light which was not reasonably available under older testing procedures. This is a clearer example where exceptions to the rule against double jeopardy should be relaxed. It is now possible for a very small quantity of bodily fluid, located at a crime scene, to be analysed and matched to a suspect. The LCN procedures, which allow for an individual profile to be matched to a single cell, is a further example of the advancements in technology demanding a review of certain acquittals. The UK Home Affairs Committee, in a 2000 report, also identified scientific advances in corneal mapping, improved fingerprint technology and enhancement of CCTV pictures and footage.⁶⁷

Compelling Evidence

For evidence to be compelling it has to be reliable, substantial and highly probative. It has to be strong and likely to affect the outcome of a jury’s deliberations. The UK Law Commission have recommended a test of whether the new evidence would strengthen the prosecution case to the point where it is highly probable that a reasonable jury, properly directed, would convict.⁶⁸ Such a strict standard is preferable as it would best ensure that any re-trial is really in the interests of justice.

⁶⁵ Burton, K., “Reform of the Double Jeopardy Rule on the Basis of Fresh and Compelling New DNA Evidence in New South Wales and Queensland” (2005) *IJCULR*, 1, 84-107, 94

⁶⁶ Cook, Coutts & Poole, “Submission of the University of New South Wales Council for Civil Liberties to the NSW Attorney General’s Community Consultation of the Draft Criminal Appeal Amendment (Double Jeopardy) Bill (2003)” University of New South Wales Council for Civil Liberties

⁶⁷ Law Com, C.P. No. 158 (The Stationery Office, 2000)

⁶⁸ *Ibid*, [323] cited in Dennis, Above n8, 947

In the Interests of Justice

The requirement for a re-trial to be in the interests of justice encompasses a non-exhaustive list of factors. Some factors identified include whether the circumstances suggest a fair trial is likely, the length of time since the original acquittal and whether the police and prosecution have acted promptly in seeking a re-trial.⁶⁹ This requirement ensures the Court of Appeal is receptive to unforeseen circumstances and submissions which may arise in the future.

Stay of Proceedings

It is inevitable that there will be a level of prejudice attaching to a case where a court of appeal has given a clear expression of guilt and/or quashed a conviction. The presumption of innocence is at stake. Any Court of Appeal hearings may need to occur in private with a suppression of the judgment until such time as the jury trial has concluded. If they were not conducted in such a way, the accused person's right to a fair trial would also be breached. This would have a compounding effect on accused person's rights. The Court of Appeal must have the power to stay proceedings if such prejudice exists and is, in their view, likely to render any re-trial unfair.

Where the Court of Appeal does order a re-trial, it is also vital that the trial court retains its powers to stay proceedings where prejudicial publicity has prevented a fair trial from occurring. This is particularly important in respect of publicity in the period between the Court of Appeal hearing and the re-trial. Exceptions to the rule against double jeopardy are relatively new in most jurisdictions. As such, the media publicity for the initial cases, where a re-trial is ordered, is likely to be high. This is particularly so in respect of high profile cases which have been the impetus for the law reform. In Victoria, the Walsh Street murder case will be a prime example.

Judges of the trial division must be conscious of the accused person's right to a fair trial. They must be courageous in the face of media support for a re-trial and conviction. They must, where appropriate, stay proceedings either temporarily or

⁶⁹ Burton, K., Above n63, 95

permanently. Alternatively, they must take advantage of other mechanisms to reduce the impact of prejudicial publicity. In some jurisdictions, this will include judge-alone trials or the relocation of the trial away from the media “centre”. Over time, less attention will be given to cases where re-trials are ordered. However, if only serious offences are allowed to be re-tried, a level of media attention is likely to always be an issue.

The Most Serious Cases

Allowing exceptions to double jeopardy for all types of offences would have drastic consequences to individuals, investigative agencies and the court system. There must be a minimum level of seriousness for the exception to apply. In the writer’s view, the highest threshold should apply. It is the most serious cases where the safety of the community is strongly engaged. It is also the most serious cases where victims may justifiably demand justice and such demands may outweigh the breach of an accused person’s rights.

Most jurisdictions only allow a re-trial for life offences or offences carrying a head sentence of up to 25 years. Crimes carrying life imprisonment usually include offences such as murder, manslaughter, rape, arson, robbery and wounding with intent to do grievous bodily harm. The State has a duty to protect its citizens against those who commit serious criminal acts such as murder. In *Osman v UK*, the European Court of Human Rights held that article 2(1) of the European Convention on Human Rights required the State not only to have substantive laws against unlawful killing but also to take preventative steps to prevent individuals being exposed to criminal acts likely to result in a death.⁷⁰

As a party to the ICCPR, Australia has a duty to comply with article 6 which protects the inherent right to life. By analogy to *Osman v UK*, it could be argued that Australia breaches this right by failing to re-try those acquitted of murder where fresh and compelling evidence comes to light. The level of threat posed by the acquitted suspect would be a relevant consideration in terms of an allegation of a breach of article 6.

⁷⁰ *Osman v United Kingdom* (1999) 1 F.L.R. 193, European Court of Human Rights, para. 115.

The State must protect its citizens by bringing dangerous persons to justice through lengthy incarceration following a conviction.

Only one re-trial

Allowing more than one re-trial must be prohibited. A defendant who has been acquitted twice can strongly argue that the verdict is legitimate and final. This is particularly the case where the prosecution case at the second trial includes apparent fresh and compelling evidence. For the prosecuting authority, who continues to pursue a suspect after two acquittals, they are undermining the court process and the jury system. Their continued pursuit, at this point in time, represents an abuse of State power and resources.

Tainted Acquittals

It is understandable that prosecuting authorities would wish to pursue a defendant who interfered with the administration of justice by intimidating or influencing witnesses or the jury. Such interference makes the original trial tainted and in these circumstances, the argument in favour of a re-trial is fairly strong. A defendant who engages in such practices cannot rely on the unnecessary hardship argument as the re-trial is the product of them committing a criminal act in perverting the course of justice.

It must be recognised that witnesses sometimes mislead or lie to the court about certain aspects of their evidence. Often this is not for the purpose of assisting an accused person but rather, to protect the witnesses' own integrity or susceptibility to a criminal offence. An advantage for an accused may be a collateral consequence of an untruthful witness. If an accused person is acquitted in this situation, it is debatable whether the prosecution can rely on a perjury by a witness as grounds for a re-trial. Where a witness is misleading the court or changing their version at trial, provisions exist for the prosecution to declare a witness hostile. In this situation, the prosecution can cross examine their own witnesses in an attempt to expose the witness or discredit them.

For an alleged tainted acquittal in these circumstances, a court of appeal would need to be satisfied beyond reasonable doubt that the verdict was tainted by virtue of the witness' false testimony. A failure to enforce a high threshold here would result in the prosecution seeking to discredit or attack some of their own witnesses in order to seek a re-trial.

Appeals Cost Fund

When a person is forced to undergo a re-trial, because a jury is unable to reach a verdict or the jury is discharged through no fault of the defendant, the accused person is usually entitled to apply to an Appeals Cost Fund. The State Fund will pay the accused person for the costs incurred in the original trial. There is a strong argument in favour of the same approach applying to a person forced to undergo a re-trial where one has been ordered through the provisions allowing for exceptions to double jeopardy. This would remove part of the hardship associated with repeated prosecutions.

Part Seven: Interview with Michael Byrne QC

Byrne agreed with the writer's overall hypothesis that a limited exception to the rule against Double Jeopardy is acceptable where there are strict control mechanisms in place. However, he made some interesting comments about the status of the rule under international law. Specifically, he criticised the way in which Article 14(7) has been interpreted by the Human Rights Committee. He believes that if an acquittal can be appealed against, on the basis that the acquittal is not 'final', then article 14(7) really has no effect. He described the operation of article 14(7) as a 'somewhat circular situation.'⁷¹ This is a good point and although he thinks the interpretation produces the right result, it is still inappropriately circular.

To Byrne, human rights listed under the ICCPR should not have qualifications. If they are allowed to have qualifications then, to him, they should not exist under international instruments such as the ICCPR. This represents a view that rights are

⁷¹ Interview with Byrne QC, 19 August 2011, page 1, line 25

non-derogable; “I don’t believe that human rights generally can have qualifications and/or exceptions.”⁷²

Byrne believes that exceptions to double jeopardy are acceptable. As such, he does not believe that the rule against double jeopardy should be a non-derogable right; “I don’t think there should be that right as something set in stone.”⁷³ This view is in conformity with article 4(2) of the ICCPR which does not list double jeopardy as a non-derogable right.

Byrne believes that the High Court in *Carroll* took an overly legalistic approach to the principle of double jeopardy. He feels that the Court’s decision failed to reflect developments in Canada, New Zealand and certain US states where exceptions to double jeopardy are now provided for. Having regard to part four of this paper, where other countries position on double jeopardy was explained, this is a plausible argument. There is a strong international acceptance of appeals against an acquittal. Byrne suggests that the current High Court is more liberal. He suggested that if the issue is litigated now, it may be that our High Court accepts that the rule against double jeopardy has certain qualifications.

Byrne agrees that the ultimate issue or consideration is one of appropriately balancing rights and interests. Specifically, balancing the rights of an accused with the interest of victims and the community to seek justice. He believes that ‘persons within the community are entitled to equal and fair treatment by the criminal justice system, if that means trying people again based on cogent evidence then why should that not be an equal right to a person who’s been acquitted say by fraud say by perjury, say by averting the Justice system, why should their acquittal be sacrosanct.’⁷⁴ He also agrees that the State has a right to protect its citizens from serious offenders and a duty to do so. He feels that Article 14(7) fails to correctly identify and balance these considerations.

⁷² Ibid, page 1, line 35

⁷³ Ibid, page 5, line 5

⁷⁴ ibid, page 3, line 28-36

Byrne elaborates on the balancing of rights argument by suggesting that serious offences against the person are the sorts of crimes where the community's rights and interests are most engaged. For him, this is a good reason to keep the threshold high so that only serious offences can be re-tried. Offences against the property should not be re-litigated.

Byrne acknowledges that there are certain valid rationales for the maintenance of the rule against double jeopardy. However, he believes that none of these provide authority for the strict maintenance of the rule without qualification or exceptions. He dismisses hardship associated with repeated prosecutions as it is inevitable and already a consequence of our criminal process, particularly in relation to mistrials or appeals. He does however think that the right to apply to the Appeals Cost Fund for the monies spent on the original trial would be a good amendment to our law and that it would further weaken the hardship rationale. He accepts that there needs to be an end to criminal litigation but that this can't overbear other considerations such as a just result.

The prospect of increased wrongful convictions is a nil issue for Byrne, so long as a high threshold is in place for 'fresh and compelling' new evidence to support a re-trial. The promotion of efficient investigations is a 'furphy' for Byrne. The requirement that fresh evidence was not reasonably available at the first trial is important to counter this argument. He notes advancements in technology as a key example. Finally, Byrne believes that the power imbalance argument is a 'major plank for double jeopardy', both at the time of its creation and now. He points to the recent erosions of committals, disclosure requirements for expert reports and the requirement to give notice about a DNA challenge. Regardless of the power imbalance that continues to exist in different forms, he believes that 'it's not something which should stand in the way of various rights of people in society.'⁷⁵

Clear safeguards and strict control mechanisms for applications for a re-trial are important to Byrne and to his view that exceptions to double jeopardy should be provided for. He believes re-trials should only be granted where there is both fresh

⁷⁵ Ibid, page 6, line 12-13

and compelling evidence. The role of the Court of Appeal is paramount in applying this test rigidly. Restricting re-trials to the most serious offences is also important and finally, the court's inherent power to stay proceedings must be used where appropriate. He notes that this last safeguard is an evolving one and courts have shown a preparedness to use it which is encouraging.

Byrne shares the writer's concern that there may be a sliding effect where exceptions to double jeopardy are provided for. He agrees that in our current 'law and order' political climate this concern is exacerbated. He points to the balancing of rights argument to suggest that the current threshold is correct. He agrees with the writer's view that if less serious offences are re-litigated then the rights of the community and of victims is inappropriately high.

Concluding Remarks

It is now widely accepted that the rule against double jeopardy is not absolute. Under international law, it is a right capable of derogation under the ICCPR. This is the view of the Human Rights Committee who has placed emphasis on the word 'finally' to provide for appeals against an acquittal. The majority of overseas jurisdictions already provide for appeals against an acquittal. Within Australia, our common law principles, particularly in *Carroll*, are being challenged by the legislature. Queensland and New South Wales now provide for exceptions under statute. It is likely that Victoria will soon have similar provisions.

These reforms show that the underlying rationales and principles of double jeopardy are perhaps not strong enough to warrant the strict maintenance of the rule. However, it is vital to remember the important reasons for protection from double jeopardy. If we forget, we risk the rapid erosion of a principle which has been long evolving for our protection.

The rule against double jeopardy is a good example of competing rights and interest considerations. As a defence lawyer, it is easy to focus on accused person's rights with inadequate regard to the community interest. As a product of the work environment, this can be a simple and narrow-minded approach. It is important to

remember the community's interest in factually correct outcomes and the right to protection from serious offenders wrongfully acquitted. While the current provisions in Queensland and New South Wales are an appropriate balance between accused person's rights and those of the community, there must be strong resistance against any future erosion of this long-standing principle. The balance has been appropriately struck.

A significant emphasis in this paper has been placed on the necessary control mechanisms for any applications for a re-trial. These are vital to ensure the correct balance of competing rights and interests is maintained. The Court of Appeal has a significant responsibility to safeguard against any future erosion of the rule against double jeopardy. This is particularly the case where we live in a society dominated by 'law and order' political campaigns which rarely pay due regard to accused person's rights.

The writer is deeply concerned that further and unnecessary abrogation of the principle against double jeopardy is inevitable in our current political environment. Some are already warning about the 'sliding effect' for the abrogation of this rule; "As sure as night follows day, the dilution of this principle will lead to demands for further "reforms", especially in the context of a law and order election campaign when political parties try to out-do each other on tough new proposals."⁷⁶

As a young lawyer, it is hoped that any further abrogation of this principle occurs only after considered debate and community consultation. Legal professionals, academics and everyday citizens have a responsibility to protect fundamental human rights. Suspected criminals of serious offending are not the best vehicle for a rights campaign. However, important rights must exist independent of a person's moral or legal standing in the community.

⁷⁶ McMahan, M., "Abandoning double jeopardy: 800 years of fundamental protection gone" (2007) *Proctor*, 7-8, 8.

Annexure 1: Michael Byrne QC Interview Questions

Overview - my paper will argue that a limited exception to the rule against double jeopardy is acceptable under international human rights law and where strict control mechanisms are in place, it constitutes a rational and acceptable abrogation of a human right.

Questions:

1. Article 14(7) of the ICCPR provides that '[N]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.' The Human Rights Committee have held that the word "finally" allows States to appeal an acquittal and seek a re-trial of a defendant where there are strong grounds to appeal an acquittal (i.e. fresh and compelling evidence). This is effectively allowing for an exception to the rule against double jeopardy.

Do you believe that this is appropriate?

Do you believe that human rights generally can have qualifications and/or exceptions?

2. Carroll was acquitted of murder by our QCA. However, subsequent advancements in DNA technology and forensic odontology showed that there was very little doubt that Carroll was responsible for the death. As the prosecutor at the time, you were barred from pursuing him for murder and also, his conviction for perjury was quashed by the High Court.

How do you rationalise the emphasis that the High Court placed on his rights, as opposed to the rights of the victim's family and the community's desire for justice?

3. Shortly after the decision in Carroll, Queensland and New South Wales introduced legislation allowing exceptions to double jeopardy? Do you feel

that the current statutory exceptions provide a good balance between accused person's rights and the community's right to seek justice in appropriate cases?

4. Some of the key rationales and principles for double jeopardy include:
 - a. preventing hardship with repeated prosecutions
 - b. ensuring finality in criminal litigation
 - c. reducing the risk of wrongful convictions
 - d. promoting efficient investigations
 - e. the power imbalance between the State and the defendant (including the tactical advantages for the Crown at a re-trial where the defence case is known)

Of these principles, which do you feel are most important and why?

Are any of them so important that the rule against double jeopardy should be maintained absolutely?

5. What do you see as the key reasons for allowing exceptions to double jeopardy?
6. Double jeopardy has existed under English common law for about 800 years. The recent reforms have allowed exceptions to the rule.

Are you concerned that there will be a sliding effect where, in time, legislation will be passed allowing:

- a. lesser offences to be re-litigated or;
 - b. the threshold for 'compelling and fresh' to be lowered?
7. What safeguards do you believe are necessary where exceptions to double jeopardy are allowed?
 - a. The most serious offences?

- b. The court's inherent power to stay proceedings (because of delay or prejudicial publicity)?
- c. Fresh evidence?
- d. Compelling evidence?
- e. Appeals Cost Fund Applications?

8. Any other comments?

**Annexure Two: Record of Interview between Dan Rogers and Michael Byrne
QC, 19 August 2011.**

DR: Are you happy for me to start?

MB: Yes

DR: As I said earlier, my paper argues that a limited exception to the rule against Double Jeopardy is acceptable under International Human Rights Law and where there are certain strict control mechanisms in place it is a rational and acceptable abrogation of this human right. My first question was in relation to the particular provision of the ICCPR. It provides that no-one should be liable to be tried or punished again for an offence for which they have already been finally convicted or acquitted in accordance with the law and procedures of a particular country. The Humans Rights Committee have in a couple of decisions that I have read interpreted the word finally to allow states to an appeal against an acquittal and also to seek a retrial of a defendant where there are strong grounds to appeal the acquittal such as fresh and compelling evidence so it effectively under International Law allows for an exemption to the rule against double jeopardy. Do you think that this is appropriate?

MB: I suppose my first response is that it's a somewhat circular situation

DR: Yes

MB: How can one be finally convicted or acquitted in the avenue for appeal is allowed for, so where there is that perception or qualification then I think that the article 14(7) really has no effect

DR: Yeah sure

MB: And to answer one of the questions posed by you in the written document is no I don't believe that Human Rights generally can have qualifications and/or exceptions

DR: Yes

MB: Accept the human right and there it stands

DR: Yeah sure. Is your concern that the Human Rights Committee by interpreting the word finally as allowing for appeals effectively undermines the whole purpose of the article?

MB: Yeah one or the other

DR: Yeah okay, that makes sense. The qualification undermines it's status as a human right?

MB: Yes

DR: As I said to you on the phone, I read Carroll and your paper about Carroll and perjury. I've given you there in the list of questions the brief facts that you're aware of. I was interested in your views on how you might rationalise the emphasis that the High Court placed on Carroll's rights as against the rights of the victim's family and the community who sought greater justice in that case.

MB: My view at the time and it remains my view

DR: Mm hm

MB: Is that the High Court took an overly legalistic approach to it

DR: Yes

MB: They adopted the Double Jeopardy Rule without question presumably because it was pedigree

DR: Mm hm

MB: That was despite as you would have seen in the actual decision the argument on behalf of the Crown for whom I was then appearing was that other jurisdictions, comparable jurisdictions such as Canada and very strong decisions had gone away from that

DR: Yes

MB: New Zealand had, various states of America had and that was a trend of authority, I thought it was strange that the High Court would take that formalistic and traditional approach. All High Courts are creatures of their time and I would be surprised if the current High Court which is much more liberal would adopt such an approach

DR: Okay alright and...

MB: To finish that and to answer the other part of your questions is that the Double Jeopardy Rule was based upon an era where the odds were very much against the accused person

DR: Yes

MB: So his rights if he is given an acquittal were sacrosanct or paramount, these days that's not so if there is real forensic evidence then why shouldn't the victims or the victim's families rights be given at least equal footing of that as the accused person

DR: Yep sure no that makes sense, our state and New South Wales quickly introduced legislation I believe in response to the community concern about the High Court's view of Carroll or of a Carroll situation do you think that our current exemptions to the rule against double jeopardy are appropriate?

MB: I do, I think those laws are, as you probably found in your research if not a direct certainly reflect the efforts put in by Faye Kennedy the mother of Deidre after that trial. She campaigned long and hard to get the changes and the changes as I said in the article which you've read or that was pre the changes but it was supporting changes along those lines that as long as you have appropriate checks and balances in the system then as you foreshadowed in the earlier question you get a balancing of rights with a view ultimately to getting the right result

DR: Yes

MB: Dare I say the just results

DR: I agree with you on that. I can't help but be brought back to the issue of the human right being abrogated. If there's a certain strict exception to the rule that still in my mind is an abrogation of the human right against double jeopardy. Do you think that it should have qualifications if it is viewed as a human right?

MB: I think that there's a problem with the perceived right as succinct with the exception

DR: Okay

MB: I don't think there should be that right as something set in stone

DR: Yes

MB: I think the right should be more that persons within the community are entitled to equal and fair treatment by the criminal justice system, if that means trying people again based on cogent evidence

DR: Yes

MB: Then why should that not be an equal right to a person who's been acquitted say by fraud say by perjury, say by averting the Justice system, why should their acquittal be sacrosanct

DR: Yep, and following that reasoning would you agree that the State also has a right to citizens to protect them where a person, well where there is evidence that a person has been acquitted and remains in the community and remains a danger to the community that the State's got a right to protect its citizens through seeking a re-trial?

MB: That's an excellent point, they have a right and arguably a duty

DR: Yeah

MB: To protect their citizens

DR: Yeah

MB: And that comes back as you say to why I have a problem with their being article 14(7) in current form

DR: Yeah

MB: It strikes me as a misconceived concept of what a community and society is all about

DR: Yeah no I agree and my view was the way in which the Human Rights Committee have tried to get around it is probably not the best way but probably the only way they could see to qualify it

MB: Without altering the article, I think that's right

DR: Yeah

MB: And it seems to strike a fair result but it is inappropriately circular

DR: Yep, it is, it is, I've listed there at question 4 some of the key rationales and principles of double jeopardy which I've spoken about in my draft paper, I was interested in your view. Of those which do you feel are most important in terms of the principle itself?

MB: I do, you listed 5 there

DR: Mm hm

MB: a) preventing hardship with repeated prosecutions, no I don't think that's overly important, that's part of society enforcing its rules and regulations

DR: Yes

MB: In criminal matters particularly serious criminal matters you'll always have legal aid available

DR: Yes

MB: Hopefully, so the hardship is, is it's there but it's not a financial hardship but it's a hardship that many people bear in the system now because of mistrials, because of appeals or whatever so I don't think that's an issue. I think the second one assuring finality in criminal litigation, I think that is a key one and I think that's what underpinned the doctrine of double jeopardy and I think that's to a large extent the one that the High Court hung its hat on in saying that there needs to be an end

DR: Mm hm

MB: The third reducing the risk of wrongful convictions, I don't see how double jeopardy does that, I think it's quite the contrary

DR: The persons who argued that this was a possible rationale suggested that where there's not a high threshold for fresh and compelling new evidence and States are allowed to just have another go by virtue of their ability to seek a second trial there might be a small increased risk in wrongful convictions but do you agree that with our threshold for fresh and compelling evidence being high that it's not really an issue

MB: No, not at all and so it's not an issue relevant to sustaining double jeopardy

DR: Yep

MB: The 4th is promoting efficient investigations again I think that's, people throw that out as some sort of justification

DR: Mm hm

MB: But honestly you work with what you've got

DR: Yeah

MB: If new evidence comes to light that's often not the fault of the original investigators

DR: Yep

MB: Because technologies develop and improve

DR: Mm hm

MB: So if we are to get over the threshold which is a high one then that to me means that new material's come forward

DR: Yep

MB: So promoting efficient investigations is a furphy so far as double jeopardy is concerned

DR: And do you agree that the requirement for new evidence to be fresh and not reasonably available at the time is a good way to get around this rationale

MB: I think that's why for many years it's probably not as long as double jeopardy but it's certainly a long doctrine that evidence needs to be fresh

DR: Yeah

MB: In the terms you've defined, although it has to be said that like in the case of wrongful convictions where there is a reference back to the Court of the Appeal by the AG or the Governor and again the freshness is diluted

DR: Yes

MB: To allow evidence which is likely to result in an acquittal to be admitted

DR: Yes

MB: And that's there as well that's just a part of getting the balances and the checks in the right places

DR: Yes okay

MB: The 5th one is the power imbalance between the state and the defendant, as I said earlier I think that is a major plank for double jeopardy in the first place, there was 400 years ago an incredible imbalance and quite frankly that continues as you would know as a criminal lawyer yourself today, even the best resourced defendants are at a disadvantage and so that is something that speaks for double jeopardy but it's not something which should stand in the way of various rights of people in society

DR: Yep sure, one example that I write a little bit about in my paper is the tactical advantages for the Crown that come from a retrial and my thinking there was this - that where you've got a state with all its resources and powers prosecuting an individual, then the individual has certain limited rights such as the right to silence which can mean that at trial defence has the tactical advantage of surprise and also not having to disclose their case. Where that's lost because of an order granting a retrial, do you feel that that's an unfair advantage against the defendant?

MB: I do and as I said that's why this balance goes on even today, there remains that whichever way you look at it the Prosecution's going to have more resources than an accused person

DR: Yes

MB: Having said that though we're seeing more and more that that tactical advantage is being diluted

DR: Yes

MB: Examples are having to disclose expert reports, having to give notice of challenging DNA evidence, these things are such that there is no tactical advantage now

DR: Yeah

MB: With the abrogation in effect of committals

DR: Mm hm

MB: That advantage has been lost with the proposals that defence disclose, open their case, I think as time goes on that tactical advantage as it now is in that the right to have last address if you...

DR: Yeah

MB: Don't call evidence, I think all those things will be eroded away

DR: Yep

MB: So again that plank for double jeopardy will perhaps go away

DR: Yep okay good the 5th question was just a general one, the key reasons for allowing an exception in your mind what were those

MB: I think that's what we discussed before if you have a person who is truly and I used that word advisably, truly guilty of a very serious offence involving violence against a person for example homicide then as you pointed out before balance is important and the right of the community and the duty and care of the government, that to me is a powerful reason why there should be exceptions as long as the threshold point is reached

DR: Yep

MB: And there is supervision by the Courts

DR: Yes

MB: Of new prosecutions

DR: Okay good, this really does flow onto my next question which is that I have a concern where this principle has been around for so many years and that it is only quite recent that there has been exceptions to it, I was concerned that it might have a sliding effect particularly where let's say a popular reform in terms of law and order politics and if it was to be eroded any further I'd be concerned that that would be well received by the community

MB: I agree, in the current climate throughout Australia there is a big law and order push

DR: Yes

MB: To use that term, and I think the Courts are coming under pressure politically to do something about that. There's a recent example, I can't think of the name of the case but the High Court in England has recently abrogated the community of witness experts against suit

DR: Yep

MB: That was done even though that doctrine existed prior to the evolution of the law of negligence

DR: Yeah

MB: So as we talked about before I think the law and the Courts are becoming more focussed on an issue if there's a wrong

DR: Yeah

MB: Then there should be a way to deal with that

DR: Yep

MB: That's happened there in the civil sense and I think in the criminal sense we'll have a lot more public baying for there to be you know this march for the truth just as we're having a march towards mandatory penalties

DR: Yes

MB: And yes but I think that our current ones, thresholds and standards are fine but for them to be whittled away is political rather than a judicial move at this stage

DR: Yeah sure

MB: I do have concerns

DR: Yeah me too. In terms of the current threshold would it be right for me to say that it reflects an appropriate balance between the rights of the community to see justice and see convictions for those serious matters where the community's rights are most seriously engaged but that if it was reduced then perhaps the person's rights not to be retried supersedes the community's right to seek justice for say a minor assault

MB: I agree

DR: Yes

MB: And there would be very little justification for example to extend the exceptions to offences against property

DR: Yes

MB: And other than serious offences against a person

DR: Yep okay great. I've listed in question 7 some of the safe guards that are currently in existence including that it's limited to the most serious offences the Court still has the inherent power to stay proceedings

MB: I think that's important

DR: And then the fresh and compelling evidence, of those which did you think were the key ones

MB: The most serious offences, I think it should be restricted to serious offences against a person

DR: Mm hm

MB: The Court's inherent power to stay is important

DR: Yeah

MB: And Court's I think as this becomes a more usual practice I think you'll see the Courts exercising that power, the High Court has said on a number of occasions that the categories aren't closed and this a great example of where they're opening up a new one

R: Yeah

MB: So that's a good safe guard, the fresh and compelling evidence as we've discussed, that's good but there is, it would be a serious abrogation of a person's rights, leave aside society, leave aside victims it would be a serious erosion of a person's rights if the Crown could re-litigate a trial without fresh and compelling evidence so that's important. The appeal cost fund application, I'm not sure where you're coming from with that, is it...

DR: There have been a few people that have advocated that where a retrial is ordered after someone has been acquitted then a person who is not represented by legal aid and not entitled to reapply to legal aid should have their costs of the original trial paid back to them to cover the cost of the retrial by virtue of the order for a retrial

MB: I see, I understand now, that's very good, it would require I assume an amendment to the appeal cost fund Act

DR: Yes

MB: And that is something that I'd never thought of before but that's something that should be put forward by an appropriate body to the government

DR: Yeah and I think it would alleviate that hardship argument

MB: Quite true

DR: Yes, so that's why I've spoken about it in my paper, alright well were there any other comments that you had about the questions I raised or...

MB: No they were very insightful Dan and...

DR: Thanks

MB: You have to promise to give me a copy of the paper

DR: Yeah I will, thank you very much for your time.

MB: Pleasure to talk.

Bibliography

1. Australian Law Reform Commission, “*Evidence*” (1985) ALRC 26, 1
2. Author unknown, “Double jeopardy man guilty of Vikki Thompson murder”, *BBC Online*, 13 December 2010
3. Author Unknown, “Double Jeopardy” *The Age*, 6 June 2011
4. Bagaric, M. & Neal, L., “Double Jeopardy in Australia: The Illusion of an Absolute Protection and the Prosecution Process as Punishment” (2005) *Canberra Law Review*, 8, 87-110, 88
5. Burton, K., “Reform of the Double Jeopardy Rule on the Basis of Fresh and Compelling New DNA Evidence in New South Wales and Queensland” (2005) *IJCULR*, 1, 84-107
6. Burton, K., “Double Jeopardy, The Queensland Reform” (2008) *Proctor*, 21-22
7. Byrne, M., “Double Jeopardy and Perjury” (2006) *Precedent*, 72, 21-24
8. Cook, Coutts & Poole, “Submission of the University of New South Wales Council for Civil Liberties to the NSW Attorney General’s Community Consultation of the Draft Criminal Appeal Amendment (Double Jeopardy) Bill (2003)” University of New South Wales Council for Civil Liberties
9. Corns, C., “Retrial of Acquitted Persons: Time for Reform of the Double Jeopardy Rule?” (2003) *Criminal Law Journal*, 27, 80-99
10. Crown Prosecution Service, “William Dunlop pleads guilty in first double jeopardy case”, 11 September 2006, available electronically at http://www.cps.gov.uk/news/press_releases/152_06/ (last viewed 22 August 2011)
11. Dennis, I., “Rethinking Double Jeopardy: Justice and Finality in Criminal Process” (2000) *Criminal Law Review*, 933-951
12. Edgley, M., “Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy” (2007) *Queensland University of Technology Law Journal*, 7, 1-27
13. Emmerson, Ashworth & McDonald, “*Human Rights and Criminal Justice*” (2007)
14. Honourable Justice Michael Kirby, ‘Carroll, Double Jeopardy and International Human Rights Law’ (2003) *Criminal Law Journal*, 27, 231, 232.

15. Keane, A., "Reform of the 'double jeopardy' law has caused unjustified fury"
The Times, 30 June 2003
16. Law Com, C.P. No. 158 (The Stationery Office, 2000)
17. Loreburn, L.C., "H.L.Deb." (1997) Vol. 179, col. 1473
18. The Honourable Wayne Martin, "Current Issues in Criminal Justice" (2009)
Speech delivered to the Rotary District Conference, 21 March 2009
19. McMahon, M., "Abandoning double jeopardy: 800 years of fundamental protection gone" (2007) *Proctor*, 7-8
20. Nason, D & Emerson, S., "Mason Joins Push for Review", *The Australia*, 13 December 2002
21. New South Wales Government, "*Royal Commission into the New South Wales Police Service: Final Report*" (1997)
22. Parkinson, C., "Double Jeopardy Reform: The New Evidence Exception for Acquittals" (2003) *University of New South Wales Law Journal*, 41, 1-13
23. Parliament of New South Wales Legislation Review Committee,
"*Consultation Draft Bill – Criminal Appeal Amendment (Double Jeopardy) Bill 2003, Draft Report*" (2003)
24. Queensland, Royal Commission into Possible Illegal Activities and Associated Police Misconduct, "*Final Report*" (1987)
25. Roberts, P., "*Double Jeopardy Law Reform: A Criminal Justice Commentary*" (2002)
26. Yallop, R., "Split verdicts on Retrials" (2003) *The Australian*, 11 February 2003

Cases, Comments and Views

1. *Al-Kateb v Godwin* [2004] HCA 37
2. *Babkin v Russia*, "Communication No. 1310/2004: Russia CCPR/C/92/D/1310/2004, 24 April 2004" Human Rights Committee Views, available electronically at
http://www.worldcourts.com/hrc/eng/decisions/2008.04.03_Babkin_v_Russian_Federation.htm (last viewed 1 August 2011)
3. *Caltex Refinery Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118

4. *Mallard v R* (2005) 224 CLR 125
5. *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1993) 112 ALR 529
6. *Nolan v MBF Investments Pty Ltd* [2009] VSC 244
7. Office of the High Commissioner for Human Rights, “General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14):. 13/04/1984. CCPR General Comment No. 13. (General Comments)” available electronically at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument) (last viewed 29 June 2011)
8. *Osman v United Kingdom* (1999) 1 F.L.R. 193, European Court of Human Rights
9. *R v Carroll* [2002] HCA 55
10. *Sorby and Another v Commonwealth of Australia and Others* (1983) 152 CLR 281
11. *Tillman v Australia*, “Communication No. 1635/2007: Australia CCPR/C/98/D/1635/2007, 18 March 2010” Human Rights Committee Views, available electronically at <http://www.hrlrc.org.au/court-tribunal/un-human-rights-committee/tillman-v-australia-un-doc-ccprc98d16352007-12-april-2010/> (last viewed 12 August 2011)

Legislation, Treaties and Covenants

1. *Canadian Charter of Rights and Freedom*
2. *Charter of Human Rights and Responsibilities Act 2006 (VIC)*
3. *Constitution of Japan (1947)*
4. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, available at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> [last viewed 22 August 2011]
5. *Criminal Code Act 1899 (Qld)*
6. *French Code of Penal Procedure*
7. *The Penal Procedural Code (Strafprozessordnung)*
8. *Police Powers and Responsibilities Act 2000 (Qld)*

9. *International Covenant on Civil and Political Rights (ICCPR)*, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)
10. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a10.html> [last viewed 13 July 2011]