

CRIMINAL CODE (DOUBLE JEOPARDY) AMENDMENT BILL 2006

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the legislation

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

- (a) in the case of a life sentence offence, to enable a person acquitted of an offence to be retried if there is fresh and compelling evidence of guilt,
- (b) in the case of a 15 years or more sentence offence, to enable a person acquitted of an offence to be retried if the acquittal was tainted by the commission of an administration of justice offence, and
- (c) to provide that the Crown may appeal against the acquittal of a person on a question of law where the acquittal was directed by the trial Judge.

Reasons for the Bill, and how achieved

The double jeopardy rule, though long regarded as a fundamental principle of the criminal law, has caused public disquiet from time to time in, at least, the United Kingdom and Australia. In recent times this disquiet 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.

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 have stated that all jurisdictions should wait until a common approach could be agreed upon. However, in September 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*.

This Bill is, in turn, closely based on the NSW Act. It inserts a proposed new Chapter 68 into the Criminal Code, immediately after existing chapter 67 which deals with appeals. Its main sets of provisions, as explained below, correspond to objects (a) to (c) above. Importantly, proposed s 678G provides that only one application can ever be made to reopen an acquittal on the grounds specified in chapter division one, which correspond to objects (a) and (b) above.

Administrative cost to government of implementation

If enacted, the Bill will probably result in occasional reopenings of criminal investigations and occasional applications to the Court of Appeal under proposed new sections 678B, 678C and 678I. It will be surprising if this cannot be accommodated under the current budgets of the Police Service, the director of Public Prosecutions and the Courts

Consistency with fundamental legislative principles

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 can be argued 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.

NOTES ON PROVISIONS

Clauses 1-2 are the usual short title and “principal Act” provisions. The principal Act is referred to below as “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 of the Code to avoid the appearance of contradiction in the Code. The section will make it clear that the double jeopardy rule, which formerly applied with no exceptions, is now to be subject to the specific exceptions provided by the new Chapter 68.

Clause 4 inserts a new Chapter 68 into the Code, consisting of sections 678 to 678M. it is divided into 4 chapter divisions.

Chapter division 1 – Preliminary

Proposed section 678 defines terms used in the new Chapter. The “Court” throughout the Chapter means the Court of Appeal. It is made clear that an “acquittal” includes an acquittal on appeal or by direction of a court. Other terms are discussed under other proposed sections below.

Chapter division 2 – Retrial after acquittal for very serious offence

The term ‘very serious offence’ used in the chapter division heading is not used in the sections, which refer instead to two classes of offence – life sentence offences and 15-year sentence offences. In brief, the Court may order under s 678B that an acquitted person may be retried for a life sentence offence if fresh and compelling evidence (defined in s 678D) is presented, and may order retrial under s 678C for a ‘15 years or more sentence offence’ (which of course includes a life sentence offence) if the accused or another person has been convicted of an administration of justice offence under chapter 16 of the Code. In each case there is a further requirement that it is in the interests of justice (explained in s 678F) for the order to be made, and only one application may ever be made in respect of any one acquittal (s 678G).

Proposed section 678A explains the field of application of the chapter division. It applies where a person has been acquitted of an offence, and retrial would normally be precluded by the rules relating to double jeopardy. Subject to any constitutional limitations, it applies even where the earlier acquittal was in a place outside the State. By express provision it extends to a person acquitted before the commencement of the new provisions.

Proposed section 678B provides that the Director of Public Prosecutions (DPP) may apply to the Court for an order permitting an acquitted person to be retried for a life sentence offence if there is fresh and compelling evidence against the person *and* it is in the interests of justice for the order to be made. Fresh and compelling evidence is defined in *proposed s 678D*: it is fresh if it was not adduced in the original proceedings and could not have been adduced with the exercise of reasonable diligence, and compelling if it is reliable, substantial, and, in context, highly probative. (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. A table of life sentence offences will be provided with this Note.

Proposed section 678C provides that the Court may order a retrial for a 15 years or more sentence offence if the original acquittal was ‘tainted’ *and* if it is in the interests of justice that the order be made. *Proposed s 678E* defines a tainted acquittal as one in respect of which the accused person or another person has been convicted of an administration of justice offence, which means (see proposed s 678) an offence under Chapter 16 of the Code. The apparent breadth of the definition of tainted acquittal will be narrowed in practice by the ruling in *R v Carroll*, above, which will still prevent *the accused person* from being convicted of perjury, or any other administration of justice offence where the proof of the latter offence would essentially involve the retrial of the original charge. However, proof of perjury would usually require the production of fresh and compelling evidence, so in the case of a life sentence offence, where perjury by the accused was alleged, a retrial could be sought on the ground in proposed s 678B.

Proposed section 678F provides matters to be considered by the Court when considering whether it is in the interests of justice that an order should be made under ss 678B or 678C. These are the length of time since the commission of the alleged offence, and whether any police officer or prosecutor has failed to act with reasonable diligence in relation to the application for retrial. In any case the Court must be satisfied that a fair retrial is likely.

Proposed section 678G relates to the procedure on an application for retrial, and provides that only one application for a retrial may be made in respect of any acquittal, and no further application may be made if the accused is acquitted at the retrial.

Proposed section 678H relates to the conduct of retrials under this chapter division.

Chapter division 3 – Appeals on questions of law

Proposed section 678I provides for the third ground on which a retrial may be ordered by the Court. It applies to the trial of any offence by jury, where a person has been acquitted at the direction of the trial judge. In such a case the Attorney-General or the DPP may appeal on a ground that involves a question of law alone. Time limits and a right of the accused to be heard are provided. The section will *not* apply to a person who was convicted before the commencement of the amendments. This right of appeal will be additional to the power in section 669A(2)-(5) to apply for a ruling on a point of law; rulings under these existing provisions have no effect on the acquittal.

Chapter division 4 Miscellaneous

Proposed section 678J applies to aspects of police investigations in relation to possible retrials under chapter division 2. The police may not arrest or question or issue a warrant for arrest of the acquitted person nor search premises or the acquitted person nor carry out any forensic procedure without the written consent of the DPP.

Proposed section 678K, again applying to orders under chapter division 2, provides a presumption in favour of bail if the acquitted person is arrested for the purpose of a retrial.

Proposed section 678L imposes restrictions on publication of information about police investigations and applications for retrial or appeals under the proposed new chapter.

Proposed section 678M requires the proposed new chapter to be reviewed after 5 years.

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.