**AUSTRALIAN LAW REFORM COMMISSION SUBMISSION**

**FAIR TRIAL: APPEAL FROM ACQUITAL**

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I DOUBLE JEOPARDY

Long before the conception of double jeopardy, ancient civilizations addressed the dilemma of serious crime in the community by enacting “blood feuds” to avenge the death of their loved one. Part of the reason for the demise of this practice was the fact that these feuds had the potential to go on and on without enabling closure for victims’ families, thus denying finality of events for everyone concerned. The equivalent manifestation of these events today is a trial at court of law of the party convicted of the offence, followed by a decision by the tribunal of fact (the jury) based on the evidence available and guidance in matters of law, the latter being provided by the judge.

In essence, double jeopardy prohibits an acquitted person from being retried for the same or similar offence arising out of the same factual scenario. It has been a cornerstone of the English common law since the 12th century and continues to thrive today in Australian States and Territories.[[1]](#footnote-1) Remarkably, approximately 800 years later, during the 21st century, double jeopardy was modified in State and Territory legislative provisions.[[2]](#footnote-2) Arguably, the impetus for these reforms was the public outrage at the unjust outcome of the High Court decision in *R v Carroll.[[3]](#footnote-3)*

In that notorious High Court case, Mr Carroll’s appeal was upheld resulting in his remaining free despite being found guilty of the murder of a toddler in his original trial. In light of this and other similar results at appeal we submit the following discussion. Justices Gleeson and Hayne wrote of the potential imbalance of power between the prosecution and the accused, noting that the former had much greater power and resources than any individual in the accusatory process.[[4]](#footnote-4) There is some recognition by society that balance needs to be struck between acquitting the innocent and in the process freeing a person who is actually guilty.[[5]](#footnote-5)

Peter Dutton MP and Deirdre Kennedy’s Mother Faye continue to fight for reform of the rule against double jeopardy.[[6]](#footnote-6)

II WHAT CRITERIA IS USED TO BALANCE INDIVIDUAL AUTONOMY AND SOCIAL WELFARE IN THE CONTEXT OF DOUBLE JEOPARDY?

The Australian Law Reform Commission’s Interim Report entitled, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* suggests that a balance must be struck between individual rights of an accused person who has been acquitted and the social interest that accused persons are convicted and sentenced appropriately.[[7]](#footnote-7)

Paragraph [10.135] of the Australian Law Reform Commission’s Interim Report entitled, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* states:

‘Professor Gans suggested two general criteria that might be used to assess the question of justification [for limiting double jeopardy]. These are, first, ‘does the law contain appropriate constraints to ensure that the prosecutor cannot take advantage of the process to simply make repeated attempts to try a defendant until he or she is fortuitously convicted?’, and second, ‘do defendants have at least the same ability to appeal against a final conviction?’.

The first question underscores the importance of the finality principle, which will be briefly outlined below. The legislative exceptions to double jeopardy, for example, in Queensland,[[8]](#footnote-8) value finality by only permitting one retrial. The finality principle is certainly a worthwhile criterion in balancing individual autonomy and social welfare in the context of double jeopardy.

The second question focusses on an appeal from a conviction, rather than an appeal from an acquittal. This submission, and indeed the Australian Law Reform Commission’s Report, is concerned with an appeal from an acquittal.

Associate Professor Marilyn McMahon[[9]](#footnote-9) asserts that prosecution appeals should be instituted only in exceptional circumstances[[10]](#footnote-10) and that statutory provisions conferring such rights will be strictly construed.[[11]](#footnote-11) Regardless, recent reforms pertaining to double jeopardy have led to the revision of this principle.[[12]](#footnote-12) The recognition that there is a significant difference between setting aside a conviction and setting aside an acquittal was reflected in *R v Jessop.*[[13]](#footnote-13) The distinction reflects Blackstone’s classic maxim, ‘it is better that ten guilty persons escape than one innocent person suffer’.[[14]](#footnote-14)

Individual autonomy and social welfare are two competing interests, and balancing them is challenging and depends on the context. Arguably, the arguments for and against double jeopardy, which are briefly outlined above, provide a useful starting point in determining how to balance these two competing interests. Further, identifying the salient features of the State and Territory statutory exceptions to double jeopardy, including the procedural safeguards, provides a framework for justifying how to limit double jeopardy, which in turns informs how individual autonomy has been balanced against social welfare in practice.

A  *What are the Arguments for Double Jeopardy?*

The finality principle is the fundamental principle supporting double jeopardy. The finality principle prevents a retrial of an acquitted person. The policy underpinning the finality principle is that State and Federal agencies should not be allowed to continually harass an accused person in an effort to obtain a conviction.[[15]](#footnote-15) Finality promotes closure, confidence in judicial outcomes, underpins the sanctity of the jury verdict,[[16]](#footnote-16) efficiently uses community resources and curbs the unfettered power of the State. Ultimately, the finality principle resonates with an efficient criminal justice system.[[17]](#footnote-17)

Further, the finality principle reinforces the importance of police officers conducting diligent investigations in preparation for the first trial of an accused person, promotes prosecutorial diligence and reduces the risk of a wrongful conviction.[[18]](#footnote-18) It has been suggested that abolishing double jeopardy, and thus, the principle of finality, could lead to increased police corruption[[19]](#footnote-19) with officers undertaking less thorough investigative efforts as a result of having more than one opportunity to try an accused person.

Arguably, abolishing double jeopardy and thus the finality principle may be unfair[[20]](#footnote-20) to an accused person, particularly if a retrial has attracted a heightened awareness by the media and public, challenging the impartiality of jurors.

B*What are the Arguments against Double Jeopardy?*

A key argument against double jeopardy is the need to capitalise on advances in forensic science, which provide fresh and compelling evidence after an accused person has been acquitted.[[21]](#footnote-21) Lincoln and Bennetts[[22]](#footnote-22) argue that contemporary DNA testing has advanced to the extent that even very degraded samples can be accurately identified. The technology has become more cost effective with time. Later testing of original samples, for example in the case of *Carroll*[[23]](#footnote-23) ‘may offer evidence that would not have been available at an original trial’. Similarly, police investigative and criminal profiling techniques are continually improving. The criminal law needs to keep abreast of developments in science and technology.[[24]](#footnote-24)

Further, there is an emerging emphasis on the needs of the victims of crime as being central to the process of justice,[[25]](#footnote-25) with the potential for acquitted accused persons harassing previous or new victims being raised as a matter of concern. Such conduct is psychologically distressing for victims, and a retrial of an accused person, particularly in these circumstances may better achieve a practical balance between truth and justice.[[26]](#footnote-26)

C *What Procedural Safeguards exist under current State and Territory Exceptions to Double Jeopardy?*

In the context of setting aside an acquittal and permitting a retrial of an accused person, the State and Territory exceptions to double jeopardy provide some procedural safeguards. These include one retrial is allowed; offence must be a very serious offence (generally resulting in a serious level of harm or punishable by a high maximum penalty); the department of public prosecutions (DPP) must consent to re-investigations; the DPP must apply to the Court of Criminal Appeal for a retrial; the evidence must be fresh and compelling and not just new or there must be a tainted acquittal; the retrial must be in the interests of justice.[[27]](#footnote-27)

III RECOMMENDATION

It is submitted that the arguments for and against double jeopardy, and procedural safeguards under current State and Territory Exceptions can inform how to balance individual autonomy and social welfare, and thus justify how to limit double jeopardy.

If you have any questions or concerns, please email: kburton3@usc.edu.au

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1. Chris Corns, ‘Retrial of Acquitted Persons: Time for Reform of the Double Jeopardy Rule?’ (2003) 27 *Crim LJ* 80, 86. Regarding Queensland, refer to *Criminal Code* (Qld) s 17. [↑](#footnote-ref-1)
2. For example, *Criminal Code* (Qld) Ch 68. [↑](#footnote-ref-2)
3. [2002] HCA 55. [↑](#footnote-ref-3)
4. Ibid [21]. [↑](#footnote-ref-4)
5. Ibid [24]. [↑](#footnote-ref-5)
6. Niti Prakash, ‘R v Carroll: Double Jeopardy Under Fire’ [2003] 22 *University of Queensland Law Journal* 267. [↑](#footnote-ref-6)
7. Australian Law Reform Commission, *Traditional Rights and Freedoms –Encroachments by Commonwealth Laws, Interim Report No 127 (2015)* [10.134]; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ‘Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals, Discussion Paper, Chapter 2’ (2003). [↑](#footnote-ref-7)
8. For example, in Queensland refer to *Criminal Code* (Qld) s 678G(1). [↑](#footnote-ref-8)
9. Marilyn McMahon, ‘Retrials of persons acquitted of indictable offences in England and Australia: Exceptions to the rule against double jeopardy’ (2014) 38(3) *Criminal Law Journal* 159. [↑](#footnote-ref-9)
10. *Griffiths v The* *Queen* (1977) 137 CLR 293. [↑](#footnote-ref-10)
11. *R v Margaria* [2003] WASCA 253 [10]. [↑](#footnote-ref-11)
12. *DPP v Karazisis* (2010) 31 VR 634 [120]. [↑](#footnote-ref-12)
13. *R v Jessop* [1974] Tas SR 64, 87. [↑](#footnote-ref-13)
14. Blackstone, *Commentaries* (first published 1769, 1966 ed) 352. [↑](#footnote-ref-14)
15. Robyn Lincoln and Steven Bennetts, ‘Should the double jeopardy rule be in jeopardy?’ (2003) 9(2) *The National Legal Eagle* 11. [↑](#footnote-ref-15)
16. *R v Benz* (1989) 168 CLR 110, 112. [↑](#footnote-ref-16)
17. Kelley Burton, ‘Reform of the Double Jeopardy Rules of the Basis of Fresh and Compelling DNA Evidence in New South Wales and Queensland’ (2004) 11 *James Cook University Law Review* 84, 89. [↑](#footnote-ref-17)
18. Michelle Edgley, ‘Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy’ (2007) 7(1) *QUT Law & Justice Journal* 108. [↑](#footnote-ref-18)
19. Robyn Lincoln and Steven Bennetts, ‘Should the double jeopardy rule be in jeopardy?’ (2003) 9(2) *The National Legal Eagle* 11.. [↑](#footnote-ref-19)
20. Ibid. [↑](#footnote-ref-20)
21. Kelley Burton, ‘Reform of the Double Jeopardy Rules of the Basis of Fresh and Compelling DNA Evidence in New South Wales and Queensland’ (2004) 11 *James Cook University Law Review* 84, 91. [↑](#footnote-ref-21)
22. Robyn Lincoln and Steven Bennetts, ‘Should the double jeopardy rule be in jeopardy?’ (2003) 9(2) *The National Legal Eagle* 11. [↑](#footnote-ref-22)
23. *R v Carroll* [2002] HCA 55. [↑](#footnote-ref-23)
24. Kelley Burton, ‘Reform of the Double Jeopardy Rules of the Basis of Fresh and Compelling DNA Evidence in New South Wales and Queensland’ (2004) 11 *James Cook University Law Review* 84, 91. [↑](#footnote-ref-24)
25. Robyn Lincoln and Steven Bennetts, ‘Should the double jeopardy rule be in jeopardy?’ (2003) 9(2) *The National Legal Eagle* 11. [↑](#footnote-ref-25)
26. Kelley Burton, ‘Reform of the Double Jeopardy Rules of the Basis of Fresh and Compelling DNA Evidence in New South Wales and Queensland’ (2004) 11 *James Cook University Law Review* 84, 90. [↑](#footnote-ref-26)
27. Kelley Burton, ‘Reform of the Double Jeopardy Rules of the Basis of Fresh and Compelling DNA Evidence in New South Wales and Queensland’ (2004) 11 *James Cook University Law Review* 84, 92. For example, see the exceptions to double jeopardy in Queensland and New South Wales. [↑](#footnote-ref-27)