

DOUBLE JEOPARDY LAW REFORM: MODEL AGREED BY COAG¹

1. The rule against double jeopardy should be reformed so that a person acquitted of an offence would not be protected by the rule of double jeopardy from:
 - a. retrial of the original offence or prosecution for a similar offence where there appears to be fresh and compelling evidence (in circumstances further outlined below);
 - b. retrial of the original offence or prosecution for a similar offence where the acquittal is “tainted” (in circumstances further outlined below); or
 - c. prosecution for an administration of justice offence where that offence is connected to the original trial (in circumstances further outlined below).

"Fresh and Compelling Evidence" Exception

2. This exception should apply to acquittals for only the most serious categories of offences, including murder, manslaughter, the trafficking or manufacture of large commercial quantities of drugs, and the most aggravated forms of rape and armed robbery.

Definitions

3. Fresh and compelling evidence:
 - a. Evidence is “fresh” if it was not adduced in the proceedings in which the person was acquitted, and it could not have been adduced in those proceedings with the exercise of reasonable diligence.
 - b. Evidence is “compelling” if it is reliable, substantial, and highly probative of the case against the acquitted person (in the context of the issues in dispute in the original proceedings).
 - c. Evidence is not precluded from being fresh and compelling merely because it would have been inadmissible in the earlier proceedings against an acquitted person.

"Tainted Acquittal" Exception

4. This exception should apply to acquittals for serious offences, being the offences in each jurisdiction corresponding to the offences outlined at Appendix B to the Model Criminal Code Officers' Committee discussion paper of November 2003 (see Appendix (i)).

Definitions

5. An acquittal is “tainted” if:
 - a. the accused person or another person has been convicted (in this jurisdiction or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted; and
 - b. it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

"Administration of Justice Offences" Exception

6. This exception should apply to acquittals for all indictable offences.

¹ Victoria and the ACT reserved their positions on these recommendations.

Definitions

7. This exception should apply if there is fresh evidence of the commission of an administration of justice offence by an acquitted person in connection with the proceedings in which the person was acquitted.
8. An “administration of justice offence” includes any of the following:
 - a. bribery of, or interference with, a juror, witness or judicial officer;
 - b. perversion of (or conspiracy to pervert) the course of justice; and
 - c. perjury.
9. In circumstances which would admit of a prosecution for an administration of justice offence (where double jeopardy would otherwise have been an impediment to prosecution) or an application for retrial under these laws, the prosecution would only be able to bring one of those two proceedings.

Safeguards

“Interests of justice” test

10. A court may only order a retrial if it is satisfied that “in all the circumstances it is in the interests of justice for the order to be made”.
11. An order for a retrial is not in the interests of justice unless the court is satisfied that a fair retrial is likely in the circumstances.
12. In determining whether it is in the interests of justice for an order for a retrial to be made, the court must have regard in particular to:
 - a. the length of time since the acquitted person allegedly committed the offence; and
 - b. whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for a retrial of the acquitted person.

Requirement for DPP authorisation before police can reinvestigate an acquitted person

13. A police officer is not to carry out or authorise a police reinvestigation of an acquitted person unless the Director of Public Prosecutions (DPP) has:
 - a. advised that in his/her opinion the acquittal would not be a bar to the trial of the acquitted person in this jurisdiction for an offence; and
 - b. given his/her written consent to the investigation.
14. In this context, “police reinvestigation” means any investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence, that involves:
 - a. any arrest, questioning or search of the acquitted person (or the issue of a warrant for the arrest of the person); or
 - b. any forensic procedure carried out on the person or any search or seizure of premises or property of or occupied by the person;whether with or without the consent of the acquitted person.
15. The DPP must not give his/her consent to a police reinvestigation unless satisfied that:
 - a. there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation; and
 - b. it is in the public interest for the investigation to proceed.
16. There should be an “urgency” exception to the requirement for DPP authorisation of police reinvestigation, to allow a police officer to take investigative action without DPP consent if:

- a. the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced; and
 - b. it is not reasonably practical to obtain DPP consent before taking the action.
17. Further safeguards should apply to this urgency exception:
- a. the DPP must be advised as soon as practicable of any investigative action taken on the basis of urgency; and
 - b. the DPP's consent is required for the continuation of a reinvestigation commenced under the urgency exception.

Prohibition against further retrials

18. Not more than one application for a retrial may be made in relation to an acquittal.
19. An application based on "fresh and compelling evidence" cannot be made in relation to an acquittal resulting from a retrial under these laws.
20. An application based on a "tainted acquittal" can be made in relation to an acquittal resulting from a retrial under these laws, if a person has been convicted of an administration of justice offence in connection with the retrial.

Restrictions on publication

21. The court may prohibit publication of any matter, if it appears to the court that such publication would give rise to a substantial risk of prejudice to the administration of justice in a retrial.

Time limits on applications for retrials

22. An application for a retrial is to be made not later than 28 days after the acquitted person is charged with the offence or a warrant has been issued for the person's arrest in connection with such an offence.
23. The court may extend this period with good cause.
24. An indictment for the retrial of a person that has been ordered by the court cannot, without the leave of the court, be presented after the end of the period of two months after the order was made.
25. The court must not give leave unless it is satisfied that:
 - a. the prosecutor has acted with reasonable expedition; and
 - b. there is good and sufficient cause for the retrial despite the lapse of time since the order was made.

Prohibition on referring to court's findings in ordering a retrial

26. At the retrial of the accused person, the prosecution is not entitled to refer to the fact that the court has found that (as the case may be):
 - a. there appears to be fresh and compelling evidence against an acquitted person; or
 - b. more likely than not, the accused person would have been convicted but for the commission of the administration of justice offence.

Coverage of Acquittals from Other Jurisdictions

27. The exceptions to the rule against double jeopardy should apply to acquittals in other jurisdictions (subject to Constitutional limitations).

Retrospectivity

28. The “fresh and compelling evidence” and “tainted acquittals” exceptions should apply retrospectively.
29. The “administration of justice offence” exception should apply retrospectively.

Appendix

Offences under the Model Criminal Code carrying a maximum penalty of life or 15 or more years imprisonment

Offence	Clause in Model Criminal Code
Aggravated robbery	3.2.9
Aggravated burglary	3.2.11
Arson	4.1.7
Bushfires	4.1.8
Sabotage	4.3.3
Threaten sabotage	4.3.4
Murder	5.1.9
Manslaughter	5.1.10
Causing death by criminal negligence	5.1.11
Child destruction	5.1.14
Intentionally causing serious harm	5.1.17
Recklessly causing serious harm	5.1.18
Setting traps or devices to kill	5.1.30
Kidnapping	5.1.33
Prohibited female genital mutilation	5.1.37
Unlawful sexual penetration	5.2.6
Compelling sexual penetration	5.2.7
Sexual penetration of child	5.2.11
Aggravated indecent touching	5.2.12
Persistent sexual abuse of a child	5.2.14
Aggravated sexual penetration of young person by person in authority	5.2.22
Aggravated sexual penetration of mentally impaired person by person responsible for care	5.2.29
Trafficking in commercial quantity of controlled drug	6.2.3
Manufacture of commercial quantity of controlled drug	6.3.6
Sale of large commercial quantity of controlled precursor for purposes of manufacture of controlled drug	6.3.6(1)
Sale of commercial quantity of controlled precursor for purposes of manufacture of controlled drug	6.3.6(2)
Cultivation of commercial quantity of controlled plant	6.3.12
Sale of large commercial quantity of controlled plant	6.3.15(1)
Sale of commercial quantity of controlled plant	6.3.15(2)
Supply of commercial quantity of controlled drug to child for trafficking	6.4.2(1)
Supply of controlled drug to child for trafficking	6.4.2(2)
Procuring child to traffic in commercial quantity of controlled drug	6.4.3(1)
Procuring child to traffic in controlled drug	6.4.3(2)
Concealing, conversion and transfer of property directly or indirectly derived from drug offence	6.6.4
Slavery	9.1.3
Sexual servitude	9.1.5

PROSECUTION APPEALS AGAINST ACQUITTALS: MODEL AGREED BY COAG²

1. Legislation in all jurisdictions should allow the prosecution to appeal against an acquittal, at least on a question of law against an acquittal for an indictable offence:
 - a. by a jury at the direction of a trial Judge; or
 - b. by a Judge alone.
2. Depending on their assessment of matters of principle, jurisdictions may wish to consider implementing further modifications along the lines of:
 - a. the Western Australian Criminal Law and Evidence Amendment Bill 2006, which would allow the prosecution to appeal against an acquittal in a trial before a Judge and jury for a serious offence (14 years or more), on the ground that there was an error of fact or law made by the trial Judge; or
 - b. the Tasmanian *Criminal Code*, which allows the prosecution to appeal by leave of the Court or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against an acquittal on a question of law.
3. Whether or not jurisdictions implement reforms as outlined in recommendation 2, they may also wish to consider, depending on local circumstances, enacting reforms to allow the prosecution to appeal against any interlocutory judgment or order made in a trial for an indictable offence, including a ruling on the admissibility of evidence where such a ruling eliminates or substantially weakens the prosecution's case.

PROSECUTION APPEALS AGAINST SENTENCE: MODEL AGREED BY COAG

1. All jurisdictions should implement reforms to provide that when a court is considering a prosecution appeal against sentence, no principle of "sentencing double jeopardy" should be taken into consideration by the court when determining whether to exercise its discretion to impose a different sentence, or in determining what sentence to impose.

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