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CARROLL, DOUBLE JEOPARDY AND INTERNATIONAL HUMAN RIGHTS LAW

The Hon Justice Michael Kirby AC CMG*

DOUBLE JEOPARDY: AN ANCIENT RULE

In *Lawrence v Texas*[1] the Justices of the Supreme Court of the United States of America divided over the validity of a Texas statute punishing sexual intercourse between persons of the same sex[2]. The majority upheld the contention that the law was invalid as contrary to the United States Constitution. In doing so, they reversed *Bowers v Hardwick*[3]. In criticising the majority opinion, Scalia J, for the minority,

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* Justice of the High Court of Australia.

1 539 US 1 (2003), 26 June 2003.

2 *Texas Penal Code* Ann § 21.06(a) (2003).

3 478 US 186 (1986).

said that it was impossible to distinguish homosexuality from other traditional "morals" offences. He urged adherence to the *Bowers* principle that: "The law is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated ... the courts will be very busy indeed"[4].

It is true that most legal systems, in their early phase, derived rules from the commandments of a deity or of a monarch or equivalent person[5]. It is in this way that a principle against double punishment was inherited by most legal systems from religious rules attributed to God. Thus, in the Judeo-Christian tradition, in the Book of *Nahum*, a passage in the Old Testament states that: "Affliction shall not rise up the second time". This text was interpreted by scholars to sustain a canon law maxim expressing the presumption: "Not even God judges twice for the same act". There were similar rules in texts even more ancient, such as the Code of Hammurabi[6]. A like principle was observed in Greek law and in the law of the Roman Republic[7]. In the latter, a magistrate's acquittal barred further proceedings of any kind, although a magistrate's conviction could be the subject of appeal to an assembly of Roman

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4 478 US 186 at 196 (1986), cited by Scalia J (dissenting) in *Lawrence*.

5 G Thomas, "Double Jeopardy Policy and History" in G Thomas, *Double Jeopardy: The History, the Law* (1998) 72.

6 Cited Thomas, above n 5, 72.

7 Quoted Thomas, above n 5, 77.

citizens[8]. The justification for the differential was the reservation, ultimately to the people, of decisions over life and death[9].

It was through each of these sources - biblical and ancient law - that the rule against double jeopardy entered the law of England. From the start, the principle was resisted by the powers of the state, embodied at first in the monarch. In the *Constitutions of Clarendon* (1164), King Henry II asserted a right to subject clergy to the King's punishment. Archbishop Thomas à Becket objected, relying on the interpretation of the Book of *Nahum*. Following the murder of Becket, and condemnation of the King's law by the Pope, Henry II modified his claim to punish clerics. In the end, a compromise was achieved under which the conflicting claims of church and state to punish offenders were reconciled by the grant of benefit of clergy.

As that benefit was whittled away, the growing primacy of the state restored the risk of dual punishment. Lord Holt CJ, in 1697, noted that the previous dualism was "severe in overthrowing a fundamental point in law, in subjecting a man that is acquitted to another trial, which is putting his life twice in danger for the same crime"[10].

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8 *Ibid*, 73.

9 *Ibid*, 73.

10 Cited i*bid*, 81.

It was in response to such concerns that the common law developed procedures to reduce the risks of double punishment for the same "deed". By the 17th century, the most important of these was the plea of *autrefois attaint.* So effective did such procedural rules become that Sir William Blackstone was able to summarise the double jeopardy pleas in a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence"[11]. It was that maxim that James Madison expressed in the Fifth Amendment phrase: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb". By way of the Fourteenth Amendment that provision has been held applicable to State as well as to federal law in the United States[12].

Although there is no Australian equivalent to this express constitutional provision upholding a rule against double jeopardy, it is unsurprising, against the foregoing history, that Australian law has long upheld a general principle such as that stated by Blackstone. It has been pointed out that, in Australia, the rule against double jeopardy does not constitute an independent doctrine[13] but a description of the result of many differing rules and principles applicable at different stages of criminal proceedings. Nonetheless, Australian law has an "aversion to

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11 *Ibid*, 84 quoting W Blackstone, *Commentaries on the Law of England* (1789; 1966 reprint), Book 4, c 26, 329.

12 *Benton v Maryland* 395 US 784 (1999).

13 *Pearce v The Queen* (1998) 194 CLR 610 at 629 [66].

placing an individual twice in jeopardy of criminal punishment for the one incident or series of events"[14].

The foundation of this "broader precept or value"[15] may, in the particular case, lie in doctrines of estoppel and merger, in pleas of *autrefois acquit* and *autrefois convict,* in principles redressing an abuse of process, in restrictions upon the admissibility of evidence, in sentencing practices and in approaches to statutory construction. However, no one doubts that these mechanisms come together in a unifying concept that may be described, in general terms, as producing a rule against "double jeopardy"[16]. Subject to valid legislation, the courts of Australia uphold that rule where it applies.

The rule is also reflected in a provision of the *International Covenant on Civil and Political Rights* (ICCPR)[17]. Australia is a party to that Covenant and also to the First Optional Protocol to the Covenant. The latter gives persons the right to communicate to the United Nations Human Rights Committee complaints that the municipal law of countries bound by the Covenant do not comply with its requirements. It will be

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14 *The Queen v Carroll* (2002) 77 ALJR 157 at 171 [84], per Gaudron and Gummow JJ.

15 *Ibid* at 171 [84].

16 *Ibid* at 171 [84].

17 ICCPR Art 14(7). See England and Wales, The Law Commission, *Double Jeopardy and Prosecution Appeals* (LawCom No 267), Cm 5048 28 at 29.

necessary to return to the significance of this obligation. However, sufficient has been said to demonstrate the antiquity, endurance and universal or general acceptance of a rule against double jeopardy, as a principle of justice and a feature which civilised legal systems strive to uphold.

Against this background I turn to the recent decision of the High Court of Australia in *The Queen v Carroll*[18]. It is a decision in which I did not participate judicially. It states, in a way binding on courts, officials and people throughout Australia the operation of the principles against double jeopardy at common law as they apply in this country. It is a decision that has led to proposals for reform of the law which it is my purpose to identify and analyse.

THE PROCEEDINGS IN *CARROLL*

The facts in *Carroll* were comparatively simple. On 14 April 1973 the body of Deidre Kennedy, aged 17 months, was found on the roof of a toilet block near her parents' home in Ipswich, Queensland. She had died from strangulation. She was dressed in female underwear taken from a clothesline in a nearby property. There were bruises on her left thigh that medical experts said were consistent with teeth marks. A single item of public hair was recovered from her body. There was no

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[18] (2002) 77 ALJR 157.

other means of identifying the killer. No arrest was made. Eleven years passed. Despite the best efforts of detectives assigned to the case, no leads could be found to identify the murderer[19].

In February 1984, one of the detectives who had worked on the case had a chance meeting in Toowoomba with two old friends. They were former police officers who had been recruited by the Royal Australian Air Force (RAAF) as defence police. At the time they were investigating a case involving sexual elements at the Amberley airbase in Queensland. They fell into discussion about the case which concerned an accused who had taken a young woman's personal photographs and underwear. The accused was Raymond Carroll, a fitter employed by the RAAF[20].

The detectives, on the basis of what was admittedly a flimsy point of similarity at that stage, interviewed Mr Carroll. He obtained permission to take hair samples and a cast of Mr Carroll's teeth. In 1984, before present DNA tests were available, the hair analysis was inconclusive. However, the dental comparison was considered by three odontologists sufficient to provide a foundation for the commencement of criminal proceedings against Mr Carroll for the murder of the child. In February 1985, he was charged with murder. Both in his interviews with

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19 *R v Raymond John Carroll* (2000) 115 A Crim R 164, 165.

20 J Walker, "Body of Evidence", *Weekend Australian* 15 February 2003, 21.

police and in his subsequent evidence at his trial in the Supreme Court of Queensland, Mr Carroll denied any involvement in the killing.

At the trial, the evidence for the prosecution was based, substantially, upon three items. First, were statements by the accused, in the nature of an alibi, contending that he was in South Australia at the time of the murder. That evidence was to some extent confirmed by classmates of the accused who had attended the course in South Australia[21]. However, an eye-witness claimed to have seen the accused in Ipswich on the day of the murder, which he fixed by reference to a television report of the killing. This conflict was, and remained, a "weakness in the Crown case"[22]. Secondly, the Crown tendered similar fact evidence concerning alleged bite marks on the body of Mr Carroll's own child noticed at an airforce base in Darwin in 1975[23]. The accused objected to the admission of this evidence as failing to meet the applicable rules[24]. Thirdly, and most importantly, there was odontologists' evidence to the effect that the pattern of the bite marks in the body of the deceased girl fitted the cast taken from the accused's teeth. However, there were weaknesses in this evidence too. The specialists disagreed between themselves concerning the teeth that had

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21 *Carroll* (2000) 115 A Crim R 164 at 170 [28].

22 *Ibid* at 170 [28].

23 *Ibid* at 174 [47]-[48].

24 *Pfennig v The Queen* (1995) 182 CLR 461.

been responsible for particular marks. They had to proceed on the basis of photographs of the bruises. No other tactile means was available to match the marks with the accused's teeth. The accused called his own expert evidence to contest the testimony of the Crown's expert witnesses.

Having received all of the foregoing evidence including Mr Carroll's denials, the jury in the murder trial found him guilty of the murder of Deidre Kennedy. He was convicted and sentenced. He appealed to the Court of Criminal Appeal of Queensland. On 27 November 1985, that Court (Campbell CJ, Kneipp and Shepherdson JJ) upheld the appeal. It set aside Mr Carroll's conviction on the basis that a properly instructed jury could not be satisfied beyond reasonable doubt on the evidence before them that the accused was guilty.

Although a view was expressed that it was open to the jury to accept that the accused was in Ipswich on the relevant day, the Court concluded that the testimony concerning the bite marks on the accused's daughter ought to have been rejected and that the disparities in the testimony of the odontologists, and the divergence between the prosecution experts, was such that a conviction based on that evidence was unsafe and unsatisfactory[25]. It followed that a verdict of acquittal was entered. Mr Carroll left the court a free man. In accordance with

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25 *Carroll* (1985) 19 A Crim R 410.

the presupposition of our criminal law, he was entitled to treat the acquittal as a declaration of his innocence of the crime of which he had been accused.

There things would normally have rested. However, those who had been responsible for investigating the murder of Deidre Kennedy and prosecuting Mr Carroll were not satisfied. More than thirteen years later, on 12 February 1999, Mr Carroll was charged with the offence of perjury[26]. The indictment presented to the Supreme Court of Queensland in October 1999 particularised the charge as relating to evidence in "a judicial proceeding, namely the trial of [Mr Carroll] for the murder of [Deidre Kennedy]" in which it was alleged that Mr Carroll had "knowingly given false testimony to the effect that he ... did not kill the said [Deidre Kennedy]"[27].

Mr Carroll did not demur to the count of the indictment. Nor did he plead *autrefois acquit*. The charge of perjury was not the offence of which he had earlier been acquitted by order of the Full Court. Instead, on a pretrial application before Muir J in the Supreme Court of Queensland, he moved for a permanent stay of the new proceedings brought against him on the footing that prosecution of those proceedings constituted an abuse of process.

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26 Pursuant to the Criminal Code (Q), s 123(1).

27 *Carroll* (2000) 115 A Crim R 164 at 167 [60].

Apart from the issues of legal principle raised by the suggested similarity of the points inherent in the accusation of perjury and the earlier acquittal of murder, Mr Carroll relied on discretionary considerations occasioned by the lapse of time inherent in the proceedings. Not only had a further thirteen years passed since the acquittal, some twenty-six years had passed since the death of Deidre Kennedy. Muir J rejected each of these arguments. He concluded that it was not necessary to ground a charge of perjury to show that the false evidence must, or may have, caused the original acquittal. He rejected as inapplicable any appeal to *res judicata* or the doctrine of *autrefois acquit*. He concluded that, in the perjury trial, the Crown case was significantly different and stronger, for a difference offence and that it occasioned no relevant abuse of process. He dismissed the contention that the lapse of time obliged the intervention of the court to stay the proceedings[28].

In consequence of these rulings the trial of Mr Carroll for perjury proceeded before a second jury. Again, Mr Carroll was found guilty by the jury and convicted. Again, he appealed against his conviction. His appeal was heard by the Court of Appeal of Queensland[29]. That Court (Williams JA with whom McMurdo P and Holmes J agreed) again

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28 *Ibid.*

29 *Carroll* [2001] QCA 395.

unanimously upheld Mr Carroll's appeal. It did so upon two bases. The first was one of principle to the effect that the trial should have been stayed as an abuse of process because the "principle of double jeopardy" had been "substantially breached"[30]. The second, which involved a review of the evidence (including the new evidence called at the perjury trial) was based upon a conclusion that, on the facts, the verdict returned by the jury of perjury was "unsafe and unsatisfactory"[31]. For the second time after spending several months serving his second sentence, Mr Carroll was discharged. For the second time, he left the Supreme Court with an order of acquittal. However, on this occasion application was made by the prosecution for special leave to appeal to the High Court of Australia.

The High Court granted special leave to appeal. It confined its attention to the first of the two points upon which the Court of Appeal had decided the case, namely the issue of legal doctrine presented by the suggested aspect of the "principle of double jeopardy"[32]. The High Court did not review for itself the reasons given for the alternative conclusion reached by the Queensland Court of Appeal, based upon its assessment of the evidence at the trial for perjury.

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30 *Carroll* [2001] QCA 394 at [64]-[72].

31 *Carroll* [2001] QCA 394 [72]. The use of this expression has been criticised: *Gipp v The Queen* (1998) 194 CLR 106 at 147-150 [120]-[127].

32 See *Carroll* (2002) 77 ALJR 157 at 162 [52], 176 [115].

REASONS OF THE HIGH COURT

Three opinions were published to support the High Court's eventual order granting special leave but dismissing the appeal of the Crown. The reasons of Gleeson CJ and Hayne J examined the way in which the "double jeopardy principle" has been upheld by the common law by (1) The invocation of the plea of *autrefois acquit* in criminal proceedings[33]; (2) Issue estoppel and preclusion to prevent a second judgment from being obtained in contradiction to an earlier one[34]; and (3) Relief against abuse of process[35]. However, their Honours also referred to certain fundamental considerations of criminal law[36] including the incontrovertibility of an acquittal entered at the conclusion of a duly constituted criminal proceeding.

In the opinion of Gaudron and Gummow JJ, their Honours were at pains to explain the fragmented character of the legal rules that, in our system of law, go together to support a principle preventing "double

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33 *Ibid* at 159 [7].

34 *Ibid* at 162 [29].

35 *Ibid* at 163 [34].

36 *Ibid* at 161 [21].

jeopardy", specifically by following up an acquittal in one trial by a charge of perjury based on testimony given at that trial[37].

The third opinion, written by McHugh J, approaches the issues in contest squarely on the footing of the "fundamental rule of the common law" stated by Blackstone. Despite the differing ways in which the three opinions approached the issues in the appeal, they appear to constitute, together, a significant reaffirmation of the "fundamental rule of the common law" as applicable in Australia in cases such as Mr Carroll's.

FOUNDATIONS FOR THE RULE AGAINST DOUBLE JEOPARDY

By reference to the reasons of the High Court judges in their opinions in *Carroll*, it is possible to identify ten separate grounds or explanations, offered by the law, for upholding a rule against double jeopardy, although the actual crimes considered in the successive trials are different. These reasons of legal principle and policy, as mentioned in the course of the Court's reasoning. Stated briefly, they are:

(1) *Controlling state power:* It necessary to keep the power and resources of the state in proper check, given that, in every case, they will be greater than those of an individual accused of crime[38].

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37 *Ibid* at 171 [84]-[87] with reference to *Rogers v The Queen* (1994) 181 CLR 251 at 273-274; and *Pearce v The Queen* (1997) 194 CLR 610 at 614-615 [9]-[15], 625-626 [53]-[56], 636-637 [89]-[91].

38 (2002) 77 ALJR 157 at 161 [21].

Unless such controls are maintained by the law, there will be a risk that state power will be deployed to subject an accused "to embarrassment, expense and ordeal ... compelling him to live in a continuing state of anxiety and insecurity"[39]. Thus, the principle of double jeopardy is one that helps to define the kind of society that our law defends. In that sense, it is for the benefit of all people, not just the accused;

(2) *Upholding accusatorial trial:* One of the "fundamental underpinnings" of the criminal trial process in common law countries is its accusatorial character[40]. As such, it is not a search for the truth of what occurred so much as a search for a conclusion on whether the prosecution, representing the state, has proved the guilt of the accused to the requisite standard. Many of the proponents of weakening the common law principle against double jeopardy, or providing an exceptional legislative basis for doing so, justify their contention on the footing that such modifications will ensure that, in the end, the courts gets to the truth of particular events. Notions of this kind tend to undermine, and certainly qualify, the basal accusatorial character of our criminal process. That feature is one that continues to give effect

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39 *Green v United States* 355 US 184, 187, 189 (1957) Black J. See Thomas, above n 5, 50.

40 *Carroll* (2002) 77 ALJR 157 at 161 [21].

to Blackstone's precept that "It is better that ten guilty persons escape, than that one innocent suffer"[41].

(3) *Accused's right to testify:* Originally, an accused was forbidden by common law procedures from giving evidence for or against himself or herself[42]. In part, this was to reinforce the accusatorial character of the trial and, in part, to remove any temptation for the accused to endanger his or her immortal soul by giving false testimony to escape punishment. When this element of criminal procedure was changed in the nineteenth century to render the accused competent to give evidence, the statutory provision was meant to enlarge the accused's rights. It was not intended to expose the accused to a new and additional peril of prosecution for perjury that could be used as a sanction in the case of unwelcome outcomes in earlier proceedings[43].

(4) *Desirability of finality:* A criminal trial is a public drama. It is intended to bring closure to a serious and potentially disruptive social event endangering the peace and order of society. This is why, especially in criminal trials before juries, great importance is attached to finality. Ordinarily, finality will be as much for the

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41 *Ibid* at 161 [21] by reference to Blackstone's *Commentaries* (1769) (1966 reprint) Book 4, c 27 at 352.

42 *Carroll* (2002) 77 ALJR 161 at 170 [76].

43 *Ibid* at 170 [76]-[80].

protection of victims or their families as of the accused and desirable from the point of view of society. The law embraces finality in this respect with open eyes, accepting its imperfections. In the *Ampthill Peerage case*[44], Lord Wilberforce explained:

> "Any determination of disputable facts may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but in the interests of peace, certainty and security, it prevents further enquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide ...".

(5) *Confidence in judicial outcomes:* To the extent that convictions, but even more so acquittals, are effectively reopened and resubmitted to a fresh trial, community confidence in the product of jury trial and judicial determination may be weakened or even undermined[45]. This is why "orders and other solemn acts of the courts (unless set aside or quashed) [are] to be treated as incontrovertibly correct"[46]. Sometimes the rule will seem intolerable to those who continue to contest the correctness of the determination. They will have opportunities for appeal and

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44 [1977] AC 547 at 569 cited in *Carroll* (2002) 77 ALJR 157 at 161 [22] per Gleeson CJ and Hayne J.

45 *Carroll* (2002) 77 ALJR 157 at 171 [86].

46 *Ibid,* 171 [86].

possibly judicial review. Increasingly, they may have further opportunities for executive and judicial reconsideration[47]. But when all these opportunities have been exhausted, continuing the challenges by reopening the orders solemnly arrived at in an earlier trial, weakens public confidence in the justice system[48]. It also undermines the proper conservation of judicial resources and court facilities[49].

(6) *Substance not technicalities:* To the suggestion that the double jeopardy rule is addressed to the repeated prosecution of particular offences or limited to offences involving life and death of the accused, it must be pointed out that the substance of the principle is what is at stake. That substance is concerned with the risk to which the accused is exposed. So much was stated by Barwick CJ in *R v Storey*[50], cited with approval by McHugh J in *Carroll*[51]. There, Barwick CJ defined exposure of the citizen to double jeopardy as placing him "at the risk of being guilty of an offence of which he has been acquitted, or of in any sense being

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47 *Eastman v Director of Public Prosecutions (ACT)* (2003) 198 ALR 1 at 16 [64] ff, 28 [105] per Heydon J.

48 *Carroll* (2002) 77 ALJR 157 at 178 [128] per McHugh J.

49 J Friedland, *Double Jeopardy* (1969), 4 cited *Carroll* (2002) 77 ALJR 157 at 178 [128].

50 (1978) 140 CLR 364 at 372.

51 *Carroll* (2002) 77 ALJR 157 at 180 [137].

treated as guilty. It is the use of the evidence given on the prior occasion to canvass the acquittal which, if allowed, would offend the rule against double jeopardy, giving that rule a generous application". It was this approach that led all of the High Court judges in *Carroll* to reject the contention that the principle was avoided in that case because of the differentiation in the successive charges brought against Mr Carroll. The very terms of the indictment on the perjury charge, with its reference to the evidence given in the murder trial, indicated the substantive identity of the subject matter put in issue by the second proceeding.

(7) *Differential punishment:* Conviction of murder in Australia ordinarily carries the punishment of life imprisonment. Conviction of perjury typically carries a lesser sentence. Yet the logic of the Crown's submission that it might proceed against Mr Carroll for perjury involved the suggestion that it could secure a lesser punishment for what was, in substance, an accusation of the truth of the proposition that the accused was guilty of murder. It thus placed the prosecution in the invidious position of seeking to establish the falsity of the denial of guilt of murder but in circumstances where, proof of such falsity would only attract the punishment for perjury, not the punishment apt to murder itself.

(8) *Upholding privilege against self-incrimination:* To punish a person effectively for giving evidence in his trial, and to put that person on

trial once again on an accusation of perjury represents a weakening of the privilege against self-incrimination, itself a basic civil right. It was to overcome this danger that the provision permitting accused persons to give evidence or make unsworn statements in criminal trials was enacted. Those provisions "represented a compromise"[52]. To permit a prosecution for perjury, in respect of the very substance of the subject decided in an earlier prosecution, would undermine that "compromise" in a way not specifically provided for by legislation.

(9) *Increasing conviction chances:* Self-evidently, the larger the number of prosecutions permitted by law, the greater "the possibility that even though innocent [the accused] may be found guilty"[53]. With each prosecution, dealing in substance with the same alleged criminal deed, the Crown, with all of its resources, secures an increased chance of obtaining a conviction. Not only might this be a form of unjust harassment. It could tip the scales in a way inappropriate to the conventional role of the prosecution in our form of society.

(10) *Denial of basic rights:* To allow a second proceeding that cast in doubt an earlier acquittal would also undermine the social

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52 *Ibid* at 170 [78].

53 *Green v United States*, above n 39, cited Thomas, above n 5, 50.

acceptance of acquittals more generally. It would represent a departure from the fundamental rights hitherto enjoyed by Australian citizens. Although, subject to the Constitution, legislatures can so provide, they must do so, if they are to be successful, in clear terms[54]. An examination of the applicable Queensland legislation was found to lack the clear conferral of a right to subject Mr Carroll to a second trial. Whereas in some other jurisdictions law reform bodies have proposed legislative modifications of the principle against double jeopardy for the same or like offences[55], no such legislation has been enacted in Australia. Specifically, there was no such legislation in Queensland.

It was on this footing, and without any express reference to the Australian national obligations under the ICCPR, or to the provisions of that instrument, that the High Court reached its decision upholding the judgment of the Queensland Court of Appeal. As stated, that conclusion was arrived at without any consideration of the additional evidence tendered at the second trial. On the basis of legal principle alone, a second trial was impermissible. The statutory foundation for the power,

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54 *Coco v The Queen* (1994) 179 CLR 427 at 437 cited *Carroll* (2002) 77 ALJR 157 at 181 [146]. See also *Plaintiff S 157 of 2002* (2003) 195 ALR 24 at [30] per Gleeson CJ.

55 The Law Commission (England and Wales), *Double Jeopardy and Prosecution Appeals* (LawCom No 267) (2001); Law Commission of New Zealand, *Acquittal Following Perversion of the Course of Justice* (Report 70) (2001).

and duty, of the Supreme Court of Queensland in such circumstances to stay the second trial as an abuse of process was the preservation by the *Supreme Court of Queensland Act* 1991 (Q) of the inherent powers of the Supreme Court in such matters[56].

Possible further remedies for the disaffected were mentioned in the High Court reasons, such as the pursuit of a civil action that might be available, arising out of the same facts[57]. But so far as the criminal law was concerned, the further prosecution for perjury was held legally impermissible. The permanent stay provided by the Court of Appeal was affirmed

"CAMPAIGN" FOR CHANGE IN THE LAW

Immediately following the High Court's decision a "campaign" was initiated by *The Australian* newspaper. Its proponent was Mr Chris Mitchell, Editor-in-Chief of that national journal and one-time editor of the Brisbane *Courier Mail* newspaper. He was quoted in *The Australian* as stating that "A lot of people in Queensland felt the second trial [for perjury] was a chance for Mrs Kennedy to get some justice"[58]. He said:

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56 *Carroll* (2002) 77 ALJR 157 at 168-169 [70]-[71].

57 The possibility of bringing civil proceedings following *Helton v Allen* (1940) 63 CLR 691 was referred to: *Carroll* (2002) 77 ALJR 157 at 180 [138] per McHugh J; cf C R Williams, "Burdens and Standards in Civil Litigation" (2003) 25 *Sydney Law Review* 165 at 187.

58 Walker, above n 20, 21.

"I guess I felt awkward about a jury's decision being overturned twice and that's compounded by the mishandling of the DNA evidence".

The "mishandling" referred to was the loss by the prosecution of the single pubic hair taken from the body of the Deidre Kennedy said to have been "destroyed by a laboratory bungle"[59]. Although this was not occasioned by any fault or wrong on the part of Mr Carroll, it is possibly correct to say that, had the strand of hair been preserved (as it should have been) DNA evidence could today conclusively state whether the hair came from Mr Carroll or did not. The case for reform of the law must be considered, not so much on the basis of the facts in Mr Carroll's case but on the footing that, after an acquittal, DNA evidence may sometimes now become available to establish scientifically a link between an acquitted person and the crime scene or victim.

In the manner of such "campaigns", the effort of *The Australian* to secure a change in the law was personalised by reference to Mr Carroll's case. Large photographs of him and of Mrs Kay Kennedy, mother of the deceased child, appeared prominently in *The Australian* and in newspapers of the same stable. Leading articles were written calling for the enactment of what was called "Deidre's Law"[60]. This was a proposed statutory change that would permit a second trial of a person

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59 *Ibid*, 21.

60 D MacFarlane, "25,000 Sign Up for Deidre", *The Australian,* 11 June 2003, 6.

acquitted of a serious offence, including murder, subject to unidentified procedural protections, where fresh evidence later became available.

Justifying its "campaign" leading articles in *The Australian* drew a parallel to Emile Zola's defence of Captain Dreyfus, falsely accused of espionage and to the "campaign" by Rupert Murdoch in the 1960s to save Max Stuart, an Aboriginal Australian sentenced to be hanged, also for murder of a young girl[61]. Both were cases of conviction not acquittal. In support of the "campaign" *The Australian* secured the opinions of a number of judges and former judges. Sir Harry Gibbs and Sir Anthony Mason were quoted as accepting the need for a review of the law of double jeopardy[62]. But *The Australian* went further than this. It commissioned and funded legal reports on the options open to Mrs Kennedy to pursue civil remedies. It quoted opinions received from legal counsel, all unfavourable to Mr Carroll. It published criticisms of the Queensland appellate courts said to have been expressed by the trial judge in the first trial (now Mr Angelo Vasta QC), by the original trial prosecutor and by others. These portrayed the appellate judges as "playing Sherlock Holmes in an area beyond their competence and expertise"[63]. The newspaper "campaign" led to coverage of the issue in

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61 *Stuart v The Queen* (1959) 101 CLR 1; cf M Kirby, "Black and White Lessons for the Australian Judiciary" (2002) 23 *Adelaide Law Review* 195. The parallel is drawn by the *Weekend Australian,* 14 December 2002, 20.

62 Walker above n 20, 21.

63 *Ibid,* 21.

other Australian media outlets[64]. It resulted in the initiation of a public petition, said to have gathered 25,000 signatures for the enactment by the Queensland Parliament of "Deidre's Law"[65].

Some media commentators, outside the News Limited group were less than kind about the "campaign". Mr Richard Ackland, one-time host of the ABC's *Media Report*, suggested sourly in the *Sydney Morning Herald* that the "campaign" was a "media stunt" engineered by Mr Mitchell to boost sales[66]. This, in turn, led to severe criticism not only of Mr Ackland but also of the Fairfax media in which his opinion had been published[67]. Perhaps stung by Mr Ackland's criticism, *The Australian*, a week later, invited a comment by Mr Terry O'Gorman, President of the Australian Council for Civil Liberties. He declared that, if the law were changed and a retrial followed "a media campaign of the type *The Australian* is running [in the Carroll case] ..., the retrial will end up being

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64 eg A programme on the Australian Broadcasting Corporation's *Australian Story* on 7 April 2003 described in *The Australian*, 7 April 2003, 3. See also "Double Jeopardy in the Dock", *Sydney Morning Herald,* 18 December 2002, 4.

65 The petition is referred to in *The Australian*, 11 June 2003. According to the report, the Queensland Premier, Mr P Beattie said "The success of the petition showed most Queenslanders wanted an overhaul of the law".

66 R Ackland, "Carroll case questions double jeopardy but single issue of media stunt is not in doubt", *Sydney Morning Herald,* 13 December 2002, 17.

67 "Media has role to play in law reform", *The Australian*, 14 December 2002, 20.

a show trial"[68]. He drew attention to the fact that the Queensland Court of Appeal in the second appeal had characterised the "so-called new evidence [tendered in the perjury trial] as being so weak that it could be not characterised as new evidence".

Nevertheless, the "campaign" occurred at a time close to the conduct of a general election in New South Wales. The election had been called on 10 February 2003 for 22 March 2003. On the very day that it was called, the Premier of New South Wales, Mr Bob Carr, announced that, if re-elected, his government would propose changes to the law of double jeopardy so that it would no longer "protect those who were acquitted of a crime if new information or compelling new evidence emerged"[69]. Mr Carr stated that the changes would be retrospective and would apply to crimes such as murder, manslaughter, gang rape and large-scale drug dealing. The proposal was identified as the Premier's "first law-and-order pledge of the campaign".

Political leaders in other States of Australia immediately came under pressure to follow suit. Mr Ackland, whilst noting the tabling in the British House of Commons of reforms introduced by the Blair government to achieve modification of the law of double jeopardy in

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68 T O'Gorman, "Review risks presumption of innocence", *The Australian*, 20 December 2002, 9.

69 P Totaro, "Carr vows to ditch double jeopardy law", *Sydney Morning Herald,* 10 February 2002, 5.

England, criticised the lack of even-handedness in the reforms being proposed in Australia. As announced, they were limited to challenges to *acquittals* whereas the United Kingdom had already in place a statutory institution to improve the consideration of wrongful *convictions* established by DNA or other evidence. The most that New South Wales had, in that respect, was a non-statutory "innocence panel" that could consider complaints by current prisoners concerning their convictions but without compulsory powers. Mr Ackland suggested that the lack of a balanced and comprehensive proposal of reform indicated that the change in the law was "more of a stunt than a principle"[70].

Nevertheless, the fact that two distinguished law reform agencies, in England and in New Zealand, had suggested the need for modification of the law of double jeopardy, despite its antiquity, justifies attention to the arguments that support and resist such a change to the law.

ARGUMENTS FOR AND AGAINST CHANGE

Arguments for change: In support of the proposal for change, a number of arguments can be advanced. Some of them have been voiced by media, legal and political advocates for reform:

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70 R Ackland, "Backward step follows advance", *Sydney Morning Herald,* 14 February 2003, 13.

(1) *Abolition of capital punishment:* One of the original reasons supporting the principle of double jeopardy was the special horror of exposing an accused person to a second risk of a trial in which he or she stood in danger of capital punishment. The irreversibility of such punishment certainly adds to the practical justification OF the principle. But the substitution of life imprisonment, or other custodial punishment for the offences for which a second trial is envisaged, represents a not insubstantial burden. It requires continuing vigilance despite the abolition of the death penalty.

(2) *Closure:* Whilst closure of legal process is important, so is justice. Several newspaper comments on the *Carroll case* referred to the difficulty experienced by Mrs Fay Kennedy who, it seems, continues to meet Mr Carroll in the community in which they both live. Just as preventing miscarriages that result in unjustifiable convictions caused a sense of injustice, so miscarriages can arise from acquittals later shown to have been unwarranted. Upon this view, a neutral legal principle will provide safeguards against either outcome. On the other hand, the *Carroll case* was by any account exceptional. The extent to which its pain has been kept alive over thirty years by repeated prosecutions and by media "campaigns" must be a matter for conjecture.

(3) *Technical evidence:* An important reason, propounded for supporting a qualification or exception to the double jeopardy rule

is the availability, in recent times, of DNA and other scientific evidence that may help to prove conclusively the guilt or innocence of an accused. Cases have already arisen in Australia where, by reason of DNA evidence, convictions following a jury trial have been set aside by a court[71]. This is a new ingredient. It was not available for the resolution of earlier disputes about guilt. A rational legal system, so it is said, will adjust to permit the new ingredient to be taken into account whether the jury verdict was guilty or not guilty.

(4) *Subsequent confessions:* Another reason to provide exceptions to the prohibition against reopening acquittals may be afforded by cases where, after acquittal, an accused reliably confesses to guilt of the subject crime or even boasts of wrongful acquittal. In the case of boasting, proceedings for contempt may lie, as was point out in *Carroll*[72]. However, the stability of the principle forbidding the reopening of an acquittal is tested by a case where the accused, without boasting, admits to guilt and submits to punishment.

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71 *Button v The Queen* [2001] QCA 46 noted D L Kellie, "Justice in the Age of Technology, DNA and the Criminal Trial" (2001) 25 *Alternative Law Journal* 173 at 174.

72 *Carroll* (2002) 77 ALJR 157 at 172 [88] per Gaudron and Gummow JJ.

(5) *Unpersuasive arguments:* So far as suggestions that modification of the principle against double jeopardy would lead to sloppy police and prosecution performance or to harassment of persons accused of crime, it was suggested that there are many remedies against such official neglect or misconduct. On the other hand, the persistent moves, official and non-official, against Mr Carroll have doubtless taken a toll upon his life. If, as he has always claimed and as his acquittal indicates, he is innocent, he has truly been subjected to an exceptional course of accusation with consequent suffering. Even now, it may not be over. He has had to face not only the power of the state but a vigorous "campaign" waged against him by well resourced media interests.

(6) *Support for change:* On the other hand, distinguished lawyers have supported proposals for change in the law of double jeopardy and for relaxation of its stringency in particular cases[73]. Reforms have been proposed by two highly respected bodies. So the suggestions for change cannot be dismissed out of hand as a media or political "stunt".

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73 L Moosa, "England's Attempt to Relax the Rule Against Double Jeopardy: Balancing Justice and Scientific Advancement with the Cornerstone of Common Law" (2002) 25 *Suffolk Transnational Law Review* 587; I Dennis, "Rethinking Double Jeopardy: Justice and Finality in Criminal Process" (2000) *Criminal Law Review* 933; C Hendricks, "One Hundred Years of Double Jeopardy Erosion: Criminal Colateral Estoppel Made Extinct" (2000) 48 *Drake Law Review* 379.

(7) *Adoption of protections:* No one has argued that the rule against double jeopardy should be relaxed to the extent of permitting a second trial of every acquittal. The suggested reforms have been limited to cases that are descried as exceptional and that pass through specified substantive and procedural gateways. These might include confinement of the change to "the gravest cases"[74]. They might require, as a precondition, conviction of perjury or conspiracy to defeat the course of justice[75]. They might be restricted to cases where the Director of Public Prosecutions has certified for a fresh prosecution and a Court of Criminal Appeal has accepted the proposal and quashed the earlier conviction for reasons that are clearly established. If such substantive and procedural limitations were observed, the numbers of cases involved would be comparatively few. But they would requite, in serious matters, a persistent complaint that a person has escaped justice wrongfully and should now be required to suffer punishment for a crime proved conclusively at a second attempt.

It is arguments such as these, rather than denunciations of critics and questioning of their motives[76] that afford the strongest grounds for modification of the present legal rule against double jeopardy.

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74 New Zealand Law Commission, above n 55, 12 [35]. LawCom 267, 12 [35].

75 *Ibid,* 12 [35].

76 eg *The Weekend Australian* 14 December 2002, 20, in an editorial, accused the "Fairfax and David Syme broadsheets", which had

Footnote continues

Arguments against change: As against these arguments, a number may be deployed to suggest that, on balance, the stringency of the rule against double jeopardy should be adhered to:

(1) *Antiquity of the rule:* Even if it is not accurate to trace the principle in English law back to *Magna Carta*, it can certainly be seen as having an ancient lineage, founded in deep principles of religion, morality and law. This fact, and its long recognition as "fundamental rule" of the common law, provides grounds for much caution before moving to change the rule.

(2) *Sloppy prosecution work:* The accusatorial system of criminal justice enshrines the principle that confines police and prosecution authorities to one opportunity to put their case against the accused. This rule has the salutory effect of ensuring that that a case, when it is presented, is as strong as the state and its agencies can make it. Until such time, people are not troubled by the need to defend themselves repeatedly against public process. To the extent that exceptions are provided, the beneficial rule of

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carried the criticism of Mr R Ackland, of being unconcerned with individuals. It hinted that the Soviet Union has sought assistance from "past journalists" of that publication, as agents of influence in those organisations, indicating that more would be revealed on this score.

restraint is diminished. The lesson of exceptions in other fields of the law is that they sometimes expand leaving the rule in tatters.

(3 *Principle of accusatorial justice:* Associated with this danger is the contention that exceptions to the rule against double jeopardy will become a spearhead for the destruction of the accusatorial principle and the substitution, in its place, of an inquisitorial "search for truth". Whilst this would have supporters, it would alter, in a fundamental way, the relationship between the state, police and prosecution agencies and the individual. The change would not be one conducive to liberty. Such a fundamental disconformity should not be introduced without a serious re-examination of its compatibility with the accusatorial form of criminal trial that is basic to the Australian legal system.

(4) *Danger of media campaigns:* Opponents of change have also pointed to the very instance of the media "campaign" following the *Carroll* decision of the High Court. In his comment on that campaign, Mr O'Gorman declared that it was precisely in the instance of "unpopular defendants" who were "hounded by the media" in order to "achieve a popular result" that steady adherence to the rule against double jeopardy was needed[77]. In a sense, the limitation of the exceptions, at least at the start, to cases of "grave crimes" would ensure that they were likely to be

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77 O'Gorman, above n 68, 9.

highly newsworthy and upsetting, where the accused and their families were unlikely to attract much public support against demonisation by those demanding a second opportunity to attempt to obtain a conviction.

(5) *Suspect political motives:* In addition to these criticisms of the moves for change, questions have been asked about the motives of some of those proposing it. The timing of the proposal in New South Wales was clearly linked to an election campaign where the political parties competed in their law-and-order promises. Such circumstances are not always well suited to the adoption of sound law reform that challenges fundamental principles that have existed for hundreds of years. If change were to be achieved in Australia, there are strong arguments for saying that it should first be considered, as in England and New Zealand, by a law reform body that was free to take into account the dangers as well as the suggested advantages of modifying the old rule and to reach its own conclusions independent of "campaigns". The fact that the changes proposed have been labelled "Deidre's Law" and embraced during election campaigns, without proper inquiry or balance, and without a new statutory regime for wrongful convictions, suggests that emotion and politics rather than abiding legal principle are the motivating factors.

(6) *Jury awareness:* A particular problem is presented by the fact that, a jury, conducting a second trial, would be likely to know that

any new evidence placed before it had been the subject of scrutiny by a mechanism, possibly judicial, to permit the exceptional course of a retrial. Such knowledge would subject the accused to the risk of a presumption of guilt[78]. Certainly, if this had been accompanied by a media "campaign" of the kind that followed the *Carroll* decision in the High Court, it would present difficulties for securing a completely impartial retrial of a person once acquitted. The absence in Australia of statutes of limitations against the prosecution of serious crime, the strict rules that limit the availability of stays and the increasing phenomenon of pre-trial publicity of criminal accusations has made consideration of the context of the proposed reform of the double jeopardy rule imperative[79]. Critics of the proposal assert that it would represent yet another piecemeal change, but in a fundamental respect, that would unbalance an important feature of the criminal trial system that has endured for centuries[80].

In adopting reforms of the law, especially criminal law, it is always important to consider the big picture. Whereas it can be conceded that occasional instances will present where an individual will obtain an unmerited acquittal, such cases have to be considered in their societal

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78 *Ibid*, 9.

79 *Ibid*, 9.

80 This is the reported view of *Justice* (the United Kingdom Section of the International Commission of Jurists), quoted by Gorman, *ibid*, 9.

context. The opponents of change to the rule against double jeopardy eventually say, in words reminiscent of Blackstone, that the occasional defective outcome of the criminal process must be tolerated in order to avoid the instability that would be introduced by permitting exceptions to the rule.

In this sense, the rule of double jeopardy is similar to others that we tolerate and which occasionally have a downside. One instance is the observe of constitutional restrictions upon the dismissal and discipline of judges[81]. Although in particular cases this may lead to a sense of justifiable grievance, it is one that has endured for the great benefit of ensuring an independent and tenured judiciary immune as an institution from mechanisms of excessive discipline that would be open to abuse and would lessen the independence and courage of judges in the discharge of their duties. There is much to be said for viewing the overall operation of the rule against double jeopardy as falling within a similar category.

IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW

There is a further consideration. Article 14.7 of the ICCPR provides:

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81 Australian Constitution, s 72(ii). See *Re Reid; Ex parte Beinstein* (2001) 182 ALR 473.

> "No 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 form of the article was developed from a detailed examination of national law and practice by the Committee preparing the ICCPR, designed to insert in its terms a rule upheld not only in common law countries but also in countries of the civil law and other traditions. In the civil law the rule is seen as including the principle of *res judicata* and the rule of *non bis idem*[82].

The words "finally convicted or acquitted" were adopted to signify "that all ordinary methods of judicial review and appeal have been exhausted and that all waiting periods have expired"[83].

In accordance with its procedures, the Human Rights Committee of the United Nations has issued a *General Comment* on Article 14.7[84]. By that comment, the treaty body charged with implementing the ICCPR, has expressed the view that a reopening of criminal proceedings "justified by exceptional circumstances" did not infringe the principle of double jeopardy reflected in Article 14(7). However, the Committee

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82 "Guide to the 'Traveaux Préparatoires' of the *International Covenant on Civil and Political Rights*" (1987) at 316.

83 *Ibid,* 317.

84 United Nations, Human Rights Committee, General Comment 13/21 on the ICCPR, para 19. This is discussed in Law Com 267, 29.

drew a distinction between the "resumption" of criminal proceedings (which it considered to be permitted by the article) and a "retrial" (which, it pointed out, was expressly forbidden).

Since the adoption of the ICCPR, the *European Convention on Human Rights* (ECHR) has been amended to elaborate the *non bis idem* principle along lines similar to that contained in the *General Comment* on Article 14(7) of the ICCPR. In addition to Articles 6 (the right to a fair trial) and 7 (prohibition on retrospective application of the criminal law), the ECHR now contains a provision of special relevance to double jeopardy. Article 4 of Protocol 7 provides:

> "(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has been finally acquitted or convicted in accordance with the law or penal procedure of that State.
>
> (2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case ...".

Australia is not a party to the ECHR. But it is a signatory to the ICCPR. That treaty does not contain the qualification expressed in the ECHR. The language of Article 14(7) of the ICCPR fully supports the *General Comment* of the Human Rights Committee. It sustains the distinction between "resumption" or "reopening" of criminal proceedings and a fresh "retrial".

So far, the Australian proposals for change of the law in relation to double jeopardy appear to have envisaged a "retrial" for the substantive offence in respect of which the earlier acquittal was secured. So much seems clear in Mr Carr's statement which asserted that the *Carroll* case encapsulated the need to be able "to *retry* someone, even if they have been acquitted". The point is underlined by the promise that "one *retrial* would be allowed"[85].

What, therefore, seems to be contemplated as an Australian legal reform is a fresh hearing of a charge concerning the crime in respect of which an acquittal was earlier entered. This presents the threshold, awkward necessity of removing from the court record the formal order of acquittal which, in the case of a serious crime, would normally rest upon a jury's verdict.

Assuming this formal impediment were overcome, the proposal would then present an apparently direct challenge to the obligation of Australia, accepted in Article 14(4) of the ICCPR. No relevant reservation appears to protect any such derogation[86]. On the face of

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85 Totaro, above n 69, 5.

86 There is no Australian reservation in respect of Art 14(7). There is a reservation to Art 14(6). There is a declaration that "The implementation of the Treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

things, if the change in the law were pursued, it would constitute a breach of Australia's international human rights obligations.

International obligations have conventionally been taken seriously in this country. In the decisions of the courts, they have sometimes been influential in the adoption of important principles of the common law[87]. More importantly, they have exceptionally founded federal legislation which has been adopted to override the incompatible law of a State[88].

Common law courts around the world are paying closer attention to the universal principles of human rights. That fact is illustrated not only in the decisions of the High Court of Australia but also in decisions of the United States Supreme Court[89]. Hitherto it has been regarded as

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87 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. As to taking into account the views of treaty bodies, see *Johnson v Johnson* (2000) 201 CLR 488 at 501-502; [38]-[40]; *Minister for Immigration and Multicultural Affairs v Al Masri* (2003) 197 ALR 241 at 275 [148].

88 Following the decision of the Human Rights Committee in *Toonen v Australia*, the Federal Parliament enacted the *Human Rights (Sexual Conduct) Act* 1994 (Cth) to provide that sexual conduct involving only consenting adults in private was not to be the subject of any arbitrary interference with privacy within the meaning of Art 17 of the ICCPR: See *Croome v The State of Tasmania* (1997) 191 CLR 119.

89 *Atkins v Virginia* 70 USLW 4585 t 4589 fn 2 per Stevens J with whom O'Connor, Kenned, Souter, Ginsburg and Breyer JJ concurring; cf at 4591 per Rehnquist CJ (diss); 4598 Scalia J (Thomas J concurring) (diss); *Lawrence v Texas* 539 US 1 at 16 (2003), per Kennedy J (for the Court) at 12.

a serious thing for Australia to find itself in breach of its obligations under international law, including the ICCPR. Perhaps this is changing[90]. But if it is not, a departure from Article 14(7) of the ICCPR, in the proposed alterations of the Australian law on double jeopardy, in the case of criminal acquittals fully perfected by final court orders, seems certain to attract the attention of the United Nations treaty body if, indeed, such proposals are enacted. The alternative, of keeping all such acquittals for serious offenders provisional, so that they could be reopened by an appeal order years even perhaps decades, after the order was first made, would introduce a dangerous element of instability and provisionally in acquittals. It would be an entirely new concept so far as the finality and equality in Australian criminal proceedings are concerned[91] In the federal sphere it could raise a question in relation to the role of the jury envisaged by s 80 of the Constitution.

It seems that the proposals of some States to modify the law of double jeopardy have been debated at the Standing Committee of Federal, State and Territory Attorneys-General. Whether, at that Committee, the Federal Attorney-General, or his representative has

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90 cf E Willheim, "*MV Tampa*: the Australian Response" (2003) 15 *Intl Journal of Refugee Law*, 191; J Kinsler, "'Killing Off' International Human Rights Law: An exploration of the Australian Government's relationship with United Nations human rights committees" (2002) 8 *Australian Journal of Human Rights*, 79.

91 The New South Wales Bar Association raised the question whether proposals to reform the law of double jeopardy in that State would be contrary to the ICCPR, Art 14(7). See (2003) 101 *Bar Brief* 1, 5.

called to notice the obligations assumed by Australia under Article 14(7) of the ICCPR, as explained in the *General Comment* of the United Nations Committee, is undisclosed. It cannot be assumed that a person, prosecuted at a second trial in Australia in relation to a criminal offence of which that person was earlier acquitted, if convicted at the second trial and denied relief in the Australian courts, would not communicate a complaint about the state of Australian law to the treaty body.

In a statement following the re-election of his government at the March 2003 election, Mr Carr reportedly said that the Australian public wanted security and competence in government and was not concerned with a "civil liberties agenda that shifts power to the judiciary"[92]. Time will tell whether this represents an accurate diagnosis of the public mood and prognosis of legal changes, including to fundamental rules that have hitherto protected civil liberties and civic freedoms to all Australians taken for granted and enshrined in common law and written law.

By a sidewind, at the time the proposals for State legislative change to the law on double jeopardy were under consideration, a case arose in the Federal Administrative Appeals Tribunal illustrating the difficulties that can exist where different countries do not observe the double jeopardy principle. Xiang Dong Wang, an alien immigrant, was convicted and sentenced for raping four women in Australia soon after

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92 Mr R Carr, cited P Kelly, "Carr's formula for Crean victory", *The Weekend Australian*, 28 June 2003, 1.

his arrival from China. The Administrative Appeals Tribunal confirmed an order of deportation, notwithstanding that the *Chinese Criminal Code* would allow Mr Wang to be charged and tried again in China for the same crimes and, if convicted, sentenced to death. Appealing for reconsideration of the deportation order, the *Sydney Morning Herald* on 4 July 2002 remarked that "Placing Mr Wang in double jeopardy and at risk of death does not accord with Australian justice". Yet the question is now posed as to whether this perception of "Australian justice" will remain intact in the face of other media pressure on politicians to change the general criminal law.

One final point should be mentioned, necessarily in passing. In the course of their reasons in *Carroll*, Gaudron and Gummow JJ remarked, in an oblique comment, that the interests at stake in that appeal[93]:

> "... touch upon matters fundamental to the structure and operation of the legal system and to the nature of judicial power".

The reference to the "nature of judicial power", in the context, is one to the inherent features of the functioning of the judicial branch of government such as is established by the Australian Constitution[94]. In

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93 *Carroll* (2002) 77 ALJR 157 at 171 [86] per Gaudron and Gummow JJ.

94 Reference was made in other reasons to the effect which casting doubt on an acquittal, entered by a court, could have on public

Footnote continues

federal courts, or in the exercise of federal jurisdiction, the requirements of the Constitution concerning the exercise of judicial power must always be observed. Similarly, State courts, in the exercise of State judicial power, must remain suitable receptacles for the vesting of federal jurisdiction as the Constitution envisages[95]. Obviously, it would be inappropriate to elaborate the comment in *Carroll*. But it draws attention to the nature of the judicial function, in a country such as Australia, in finally settling serious contested disputes in courts of law. Whether the nature of the judicial power under the Constitution will have anything to say to any legislative attempts that may be made to reopen acquittals is a question that may arise in future cases.

As to the rule against double jeopardy, we can truly say, with Churchill, that we are not at the end of the story; nor even the beginning of the end. We are simply at the end of the beginning.

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confidence in the judicial process. See *Carroll* (2002) 77 ALJR 157 at 178 [128] per McHugh J.

95 *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51).