

07 April 2004

Justice R N Howie  
Chair, Model Criminal Code Officers' Committee  
of the Standing Committee of Attorneys-General  
c/- Criminal Justice Division  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON 2600

Dear Justice Howie

I refer to the Secretary General's previous correspondence in relation to the Law Council of Australia's submission in response to the Model Criminal Code Officers' Committee (MCCOC) discussion paper on double jeopardy law reform.

As you may recall, in preparing our submission the Law Council has sought to consult closely with its both constituent bodies and members of its National Criminal law Committee.

Regrettably this has delayed the finalisation of our submission and consequently we were unable to provide a copy to you within MCCOC's stated timelines.

Nevertheless, I am pleased to enclose for your consideration our final submission on this important issue. The Law Council's submission has also been forwarded to the relevant Commonwealth, State and Territory Ministers for their consideration.

Thank you for providing the Law Council with the opportunity to comment on this important issue and once again I apologise for the delay.

Yours Sincerely



Bob Gotterson, QC  
President



Law Council  
OF AUSTRALIA

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**Discussion Paper: Model Criminal  
Code: Chapter 2: Issue estoppel,  
double jeopardy and prosecution  
appeals against acquittals.**

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Law Council of Australia Submission

Date: 07 April 2004

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## **THE LAW COUNCIL**

1. The constituent bodies of the Law Council are, in alphabetical order:
  - ACT Bar Association;
  - Bar Association of Queensland;
  - Law Institute of Victoria;
  - Law Society of the ACT;
  - Law Society of NSW;
  - Law Society of the Northern Territory;
  - Law Society of South Australia;
  - Law Society of Tasmania;
  - Law Society of Western Australia;
  - New South Wales Bar Association;
  - The Northern Territory Bar Association;
  - Queensland Law Society;
  - the Victorian Bar; and
  - the Western Australia Bar Association.
  
2. The submission that follows has been informed by consultations with these constituent bodies. The Law Council notes that in relation to this discussion paper separate submissions may also be lodged by some of these bodies.
  
3. The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

## EXECUTIVE SUMMARY

4. The Law Council broadly supports reforms in criminal law and procedure which enhance the capacity of the criminal justice system to achieve just outcomes. This extends to the reform of appellate and other review mechanisms available to investigate and remedy miscarriages of justice. However, the Law Council urges caution in overturning principles which have become fundamental protections in our system of criminal justice over the course of centuries.
  
5. A major concern of the constituent bodies of the Law Council is that the various double jeopardy reform proposals being considered by some Australian jurisdictions and the Model Criminal Code Officers Committee (MCCOC) do not represent a response to a demonstrated deficiency of the criminal justice system. Rather, they appear to be largely driven by political and media responses to exceptional cases, such as the High Court's decision in *Carroll v The Queen*. While the *Carroll* case deserves close legal and academic analysis, it is by no means clear that the outcomes in this case would have been any different under a regime in which the double jeopardy rules were reformed.
  
6. The Law Council is not convinced that a case for double jeopardy reform has been made out, in the absence of empirical evidence about numbers of cases in which "wrongful acquittals" have occurred in relation to serious offences. The adoption of a quantitative criterion for distinguishing suitable cases (such as the MCCOC proposal for 'very serious offences' carrying a maximum penalty of life imprisonment or 15 or more years' imprisonment) is largely arbitrary and would operate in an uneven manner across jurisdictions. Even a qualitative understanding of what constitutes a 'serious offence' is malleable and likely to vary over time.
  
7. The Law Council respectfully submits:
  - That the MCCOC discussion paper, while well researched and reasoned, does not present a sufficient case to warrant the adoption of the protective principles outlined above.
  - The reform proposals would represent a significant and dangerous departure from the established principles of double

jeopardy, and suggest a desire to undermine the traditional accusatorial character of the criminal trial system.

- The proposals advanced in the discussion paper are unworkable in practice and will place unwarranted pressures on the justice system.

8. Consequently the Law Council supports the retention of the law relating to double jeopardy as it currently applies. The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 40,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).

## BACKGROUND

9. The Law Council of Australia (the Council) welcomes the opportunity to comment on the Model Criminal Code Officers' Committee (MCCOC) discussion paper on double jeopardy reform.<sup>1</sup> It is noted that these proposals do not constitute a general codification of the double jeopardy rules, but rather take the form of "protective principles to operate in limited circumstances as a guarantee of certain procedural protections before a person who has been acquitted can be retried".<sup>2</sup>

10. The history of the common law double jeopardy rule (or rules) can be traced back some 800 years.<sup>3</sup> The protection from double jeopardy is most clearly enunciated in the pleas of *autrefois acquit* and *autrefois convict*, which enable a person charged with a criminal offence to avoid trial where he or she has already been tried for that offence and either acquitted or convicted. In other words, the matter is *res judicata*, and the earlier verdict is binding on subsequent proceedings. Courts also have an inherent power to stay legal proceedings where there is an abuse of process, such as a prosecution on

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<sup>1</sup> Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals* (November 2003).

<sup>2</sup> *Ibid.* p. 86. Draft provisions relating only to appeals after acquittal are to be found at pp. 88 – 137 (Appendix A), intended to add a new Part 2.8 to the *Criminal Code Act 1995* (Cth).

<sup>3</sup> M Friedland, *Double Jeopardy*, 1969, Clarendon Press: Oxford, cited in the NSW Briefing paper at note 2.

substantially the same factual basis as a prior prosecution, even where the offences charged are different.

11. The abuse of process issue came to recent public prominence with the High Court's decision in *The Queen v Carroll*.<sup>4</sup> The High Court affirmed the Queensland Court of Appeal's decision that it was an abuse of process for the respondent to have been tried for perjury after his original conviction for murder had been overturned on appeal.<sup>5</sup> (Note that Carroll was convicted at trial, not acquitted as is sometimes wrongly claimed). A further unusual aspect of that case was that it was the appellant's own testimony during the murder trial (his denial that he killed the victim) that was said to constitute perjury, so that the second conviction for perjury was in effect a retrial of the murder offence in a different proceeding. The Law Council considers it unlikely that many other cases raising questions about verdicts of acquittal would share these distinctive features.
  
12. Publicity surrounding the *Carroll* case has been influential in recent consideration of double jeopardy reform in Australia. In particular, a petition calling for abolition of the double jeopardy rule (organised by Federal MP Peter Dutton and the mother of the baby girl who was the victim of the murder for which Carroll was initially convicted) attracted over 33,000 signatures before being delivered to the Queensland Parliament in August 2003. Reports, editorials and opinion pieces on double jeopardy appearing in Australian newspapers during 2002/2003 have usually referred (though sometimes inaccurately) to the *Carroll* case.<sup>6</sup>

## **THE MODEL CRIMINAL CODE OFFICERS' COMMITTEE (MCCOC) PROPOSALS**

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<sup>4</sup> *The Queen v Carroll* [2002] HCA 55 (High Court), affirming the decision of the Queensland Court of Appeal.

<sup>5</sup> *The Queen v Carroll* [2001] QCA 394.

<sup>6</sup> E.g. "Editorial: Law of double jeopardy on trial at last", *The Australian*, 10 February 2003 (which wrongly states that Carroll was twice convicted of murder); "Double jeopardy rule faces review", *The Age*, 12 April 2003; "Toddler's mother fights double jeopardy", *The Age*, 6 August 2003; "Row over double jeopardy reforms", *The Australian*, 12 November 2003.

13. The MCCOC proposals contemplate three distinguishable situations in which the rules of double jeopardy would be relaxed:<sup>7</sup>
- (i) **prosecution for an administration of justice offence connected to the original trial**, subject to a requirements that there be fresh evidence of the commission of the administration of justice offence and that the prosecution does not charge the person with the original offence or a similar one in the same proceedings (this proposal effectively overturns the High Court’s decision in *The Queen v Carroll*);
  - (ii) **retrial of the original or a similar offence where there is fresh and compelling evidence**, subject to the requirements that the offence in question be a very serious offence (an indictable offence punishable by imprisonment for life or more than 15 years<sup>8</sup>), that a retrial be in the interests of justice, and that only one retrial application on this basis be allowed; and
  - (iii) **retrial of the original or a similar offence where the acquittal is tainted**, subject to the requirements that the offence in question be a very serious offence (as above) and that, but for the commission of an administration offence, the accused would have been convicted at the original trial.
14. An interesting feature of these principles is that, in virtue of (i) and (iii), a person could be prosecuted for an administration offence arising from an initial trial for a very serious offence resulting in acquittal, and then subsequently retried for the original or a similar offence. If the retrial was itself tainted, a further retrial application would be allowed, as “integrity of the criminal justice system requires a valid trial to be carried out”.<sup>9</sup>

## REFORMS IN OTHER JURISDICTIONS

15. It is noted that similar or related reform proposals have recently been considered in the United Kingdom, New Zealand and New South Wales.<sup>10</sup>

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<sup>7</sup> See Preface to the MCCOC paper, at pp. ii – iv.

<sup>8</sup> Model Criminal Code offences carrying a maximum penalty of life or 15 or more years are listed at pp. 138 – 139 (Appendix B) of the MCCOC paper.

<sup>9</sup> MCCOC paper at p.iv.

<sup>10</sup> The MCCOC paper summarises these developments (e.g. at pp. 44 – 78) as well as presenting its own reform proposals.

Some civil law (inquisitorial criminal trial) systems also have more liberal provisions for prosecution appeals after acquittal.

16. The United Kingdom's proposals were initially contained in a Law Commission Report in March 2001, and developed in a subsequent Bill brought before the Parliament which finally passed into law in November 2003. The *Criminal Justice Act 2003* (UK) now allows prosecutors to apply to the Court of Appeal for an order quashing an acquittal and directing a retrial in cases involving specified serious offences, where reliable and compelling new evidence of guilt emerges, and a retrial would be in the interests of justice. Only one such application may be made in relation to an acquittal.<sup>11</sup>
  
17. The New Zealand reform proposals are restricted to acquittals for serious crimes which are said to be tainted because the accused is subsequently convicted of an offence against the administration of justice (e.g. bribery, perjury, fabricating evidence) related to the original proceedings. Where it is at least probable that the acquittal would not have occurred but for the administration of justice crime, the High Court (NZ) would have power to hear an application to reopen the case.<sup>12</sup>
  
18. In New South Wales, a Parliamentary Library Research Service Briefing Paper published in August 2003 preceded a consultation draft Criminal Appeal Amendment (Double jeopardy) Bill, released on 3 September 2003 with submissions received until 10 October. The Bill embodies a number of reforms to the jurisdiction of the Court of Criminal Appeal, including relaxation of double jeopardy protections in cases involving very serious offences where there is fresh and compelling evidence probative of guilt. Serious offences are defined to include murder and a number of sexual assault and drug offences carrying maximum penalties of life imprisonment, and manslaughter.<sup>13</sup>

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<sup>11</sup> UK Law Commission, *Double Jeopardy and Prosecution Appeals*, Report C267 (March 2001); *Criminal Justice Act 2003*: <http://www.hmso.gov.uk/acts/acts2003/30044--k.htm#77>

<sup>12</sup> New Zealand Law Commission, *Acquittal Following Perversion of Justice*, Report 70 (March 2001): <http://www.lawcom.govt.nz>

<sup>13</sup> See NSW Parliamentary Library Research Service, *Double Jeopardy* (by Rowena Johns), Briefing Paper No 16/03 (August 2003): <http://www.nswccl.org.au/docs/pdf/nsw233300.pdf>; NSW Criminal Law Review Division website:

## RATIONALE FOR DOUBLE JEOPARDY REFORMS

19. Double jeopardy rules serve an important purpose in protecting the individual citizen against the superior power of the state, and in regulating the way in which criminal proceedings are conducted. There is also a long-standing recognition in the criminal law of the need for finality in proceedings.<sup>14</sup>

Further reasons for the rules against double jeopardy have been identified as:

- Control of state power
- Upholding the accusatorial trial system
- Facilitating the accused's right to testify
- Confidence in judicial outcomes
- Prevention of differential punishment
- Upholding the privilege against self-incrimination
- Increasing the chance of conviction of the innocent
- Denial of fundamental rights.<sup>15</sup>

20. The Law Council is not aware of any empirical research conducted in Australia or elsewhere that would clarify the extent to which acquittals in criminal trials could be argued to be questionable on the basis of new or fresh evidence. The converse problem of wrongful convictions and the adequacy of the criminal appeals process to remedy miscarriages of justice has received considerably more attention, with a number of extra-judicial bodies having been created to assist in the identification of cases suitable for review. These include the Criminal Cases Review Commission (CCRC) in the United Kingdom, and a variety of "innocence panels" in the United States and, to some extent, in Australia.<sup>16</sup> Without similar background research and policy

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[http://www.lawlink.nsw.gov.au/clrd1.nsf/pages/double\\_jeopardy](http://www.lawlink.nsw.gov.au/clrd1.nsf/pages/double_jeopardy); Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW), released September 2003:

<http://www.pco.nsw.gov.au/pdf/exposure/b03-068-d07.pdf>

<sup>14</sup> Indeed, the principle is embodied in Article 14(7) of the International Covenant on Civil and Political Rights: see MCCOC paper at p.1.

<sup>15</sup> For a more detailed exposition, particularly in relation to international human rights law, see the Hon. Justice Michael Kirby, "Carroll, double jeopardy and international human rights law", (2003) 27 *Criminal Law Journal* 231.

<sup>16</sup> See websites of the Criminal Cases Review Commission: <http://www.ccr.gov.uk>; the Benjamin N. Cardozo School of Law Innocence Project: <http://www.innocenceproject.org>; the Griffith University Innocence Project: <http://www.gu.edu.au/school/law/innocence>; and the University of Technology in Sydney Innocence Project:

development, the Law Council would be reluctant to see any precipitous changes to the criminal appeals system in order to allow the hearing of appeals against acquittals.

## **EXISTING CRIMINAL APPEAL AND POST-CONVICTION REVIEW MECHANISMS**

21. Courts of criminal appeal are established under statute in each of the Australian States and Territories. They have jurisdiction to hear appeals against conviction and sentence, and in limited circumstances, prosecution appeals against judicial determinations other than acquittal. Courts of criminal appeal can also hear prosecution appeals against leniency of sentences. Importantly, they may consider fresh evidence in assessing whether a conviction should be overturned on the grounds of unreasonable or unsupportable jury verdict, error of law, or other miscarriage of justice.<sup>17</sup>
22. Although the powers of Australian courts of criminal appeal derive from those of the English Court of Criminal Appeal (since renamed the Court of Appeal – Criminal Division), the United Kingdom’s criminal appeal legislation has been significantly reformed during the last century, most notably with the introduction of a broad power to overturn verdicts considered by the court to be ‘unsafe’ in all the circumstances. As a consequence, the adoption of reforms based on legislation currently before the United Kingdom Parliament in relation to double jeopardy may operate somewhat differently in the Australian context.
23. One notable difference is that Australia’s highest appellate court, the High Court, has no power to receive fresh evidence in a criminal appeal.<sup>18</sup> This

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<http://www.uts.edu.au/new/archives/2001/September/05.html>. An Innocence Panel set up in New South Wales with government support has encountered some operational difficulties.

<sup>17</sup> *Criminal Appeal Act 1912* (NSW), s6, and similar “common form” statutory provisions in other States and territories: see G Urbas, “DNA Evidence in Criminal Appeals and Post-Conviction Inquiries: Are new forms or review required?” (2002) 2 *Macquarie Law Journal*, 141 at 143, note 12.

<sup>18</sup> *Ronald v Harper* (1910) 11 CLR 63; *Davies and Cody v The King* (1937) 57 CLR 170; *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1.

limitation means that extra-judicial review mechanisms can play an important role where an appeal to a State or Territory appellate court fails. These include the various informal and formal review bodies discussed above. An unanswered question is what role, if any, such bodies might have in assessing the suitability of cases for review after acquittal. For example, it is certainly conceivable that victims' rights groups would want some say in the selection of cases, particularly where this might require further evidence to be obtained from victims or their families, or the presentation of testimony in any retrial. In addition, the High Court's role would need to be clarified in relation to appeals following retrials. Would fresh evidence be able to be considered if it exculpated an accused convicted on retrial?

24. Some concerns have also been expressed in relation to the possibility that allowing successive prosecutions of a defendant may encourage sloppy police and prosecution work.<sup>19</sup> Without commenting further on this argument, the Law Council notes that the MCCOC proposal incorporates a restriction on one retrial based on fresh evidence indicating guilt. This restriction is itself indicative of the danger for abuse of state power that a too liberal regime of appeals after acquittal may allow.

## **NO SUFFICIENT CASE FOR REFORM HAS BEEN MADE**

25. The Law Council questions whether the High Court's decision in *Carroll's* case provides a sufficient basis alone to erode the established principles of double jeopardy in the manner advanced by the MCCOC discussion paper. It is arguable, perhaps likely, that the outcome in *Carroll* may have been the same under the rules suggested by MCCOC. By its own admission, MCCOC concedes that under the English model, upon which the Australian reforms are based, the outcome in *Carroll* would not have been affected by the reforms, at least in respect of a case based on the 'fresh and compelling evidence' criterion.<sup>20</sup>

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<sup>19</sup> See Kirby (above) at p. 241; and the NSW Council for Civil Liberties submission on the reform proposals in that State:

<http://www.nswccl.org.au/unswccl/issues/double%20jeopardy%20nsw.php>

<sup>20</sup> Ibid at p.60.

26. MCCOC has also proposed that proved interference with juries might ground a re-trial. The Law Council considers that the focus on administration of justice offences connected to an original trial and the emergence of fresh and compelling evidence after an acquittal are both problematic. Proof of jury-tampering, for example, may require revision of statutory restrictions on inquiry into jury deliberations. Cases where perjury is alleged (as in *Carroll*) would depend on fresh evidence of the perjury becoming available after trial, which would in many cases seem to overlap with fresh evidence going towards proof of the original charge. In this circumstance, there does not seem to be any reason of principle why the prosecution should be required to choose between the administration of justice offence and retrial of the original offence. Moreover, since the inherent jurisdiction of courts to prevent an abuse of process would not be removed under the proposals, it is unclear that the High Court's decision in *Carroll* would really be overturned as claimed.
27. While novel cases such as *Carroll* have presented challenges to our legal system, one would question why the law itself has been singled out to bear the fault for the injustice in this matter. Few, if any, questions have been asked of the prosecution or investigative processes surrounding the case.
28. As noted above, another compelling factor unfavorable to the reforms is that no proof is advanced in support of the proposed modifications to suggest that the rule against Double jeopardy has in fact operated unjustly in Australia. The Law Council believes the contrary to be the case. For example, for some time the Attorney-General or DPP in each jurisdiction has had a right of appeal against a sentence obtained in fraudulent circumstances, such as the submission of a fraudulent character reference. In respect of this right, few examples exist where the power has been utilised. It is argued that this presents some evidence of the limited scope of the problem which the proponents for change are relying upon.
29. It is dangerous to advance reforms which are not based on any reliable and non-partisan empirical evidence clearly demonstrating the existence of a problem.

30. In the absence of this evidence, the Law Council submits that no sufficient case has been made in favour of the introduction of the proposed modifications.

### **THE OVERALL INTERESTS OF JUSTICE ARE NOT SERVED BY ERODING THE PRINCIPLES OF DOUBLE JEOPARDY**

31. The modifications as currently presented represent a significant departure from the well established principles of Double jeopardy. Council is concerned that the reforms would alter the traditional accusatorial approach in criminal justice proceedings, in favour of a more inquisitorial style and that they would only serve to undermine public confidence in both the jury system and finality in proceedings.
32. As noted above, Double jeopardy rules are an important safeguard against state abuse of the criminal trial process. The reform proposals represent, in the Council's view, an unwarranted departure from these important principles.
33. The traditional criminal justice trial process has placed an onus on the prosecution to prove an accused's guilt, rather than merely being a search for the truth.<sup>21</sup> The relaxation of the double jeopardy principles would compromise this accusatorial character of criminal trial processes, in favour of a more inquisitorial approach.
34. The reforms would allow authorities the opportunity to bring a case in the knowledge that they could re-litigate the matter should a trial identify any deficiencies in their investigative process. In this sense the modifications sought will lead to uncertainty for those acquitted and undermine the concept of finality in proceedings.
35. The system proposed would mean an acquitted person accused of a "serious offence" may find their matter reopened at any moment. This undermines the integrity of the original acquittal and would no doubt impact upon the daily life of an acquitted accused. Such a system would also be highly susceptible to

political interference and media pressure, which the Law Council asserts, again, would not serve the overall interests of justice and represents bad public policy.

36. It is argued that the overall interests of justice are not served by reforms which undermine public confidence in justice and finality, and which dangerously alter the accusatorial character of the criminal trial system.

### **THE PROPOSALS WOULD PLACE UNREASONABLE DEMANDS UPON THE JUSTICE SYSTEM**

37. The proposed reforms will no doubt place new stresses on a justice system which is already under considerable pressure. While this is not a sufficient basis alone to oppose new policy proposals, it is a point which needs to be considered in the policy formation process. The danger of re-litigating matters is twofold: firstly there will be an expense for the community through the court system and the necessary provision of legal aid; secondly the question arises as to whether an acquitted accused should reasonably be expected to fund a second defence at all.

38. A prime example of the latter concern arises in cases involving “fresh and compelling” scientific evidence. The danger of re-litigation is that an accused person is almost always disadvantaged by a “science criterion”, as most can not afford to test its validity. The state has access to considerable resources and this would place the individual at a distinct disadvantage.

39. The former concern, while not sufficient reason to abandon the reform proposals, is one that governments will need to consider carefully when examining this issue. While the proposed modifications may be an attractive proposition for those wishing to avoid a repeat of the *Carroll* case, one must question whether the justice system will be served overall by dedicating resources to matters which have previously been the subject of a proper judicial determination. Moreover, it could be asked whether there are other compelling areas of need within the justice system more deserving of the

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<sup>21</sup> See Kirby (above), at 236.

public funds and resources which the re-litigation process will necessarily consume.

## **OTHER CONCERNS OF THE LAW COUNCIL**

40. The Law Council questions why the Court of Criminal Appeal should play the role of gatekeeper in hearing applications to re-open matters. It is suggested that such a move would provide no opportunity for an appeal against a Court of Appeal's decision to authorise the reopening of a matter.
41. The example given of DNA evidence as potentially 'fresh and compelling' evidence justifying retrial does little to clarify the kinds of evidence that might satisfy this condition. DNA identification can play a critical role in the investigation and prosecution of some types of offence (such as homicide, assault and sexual assault) but is less likely to emerge in serious fraud cases or other non-violent offences. Even within the category of sexual assaults, for example, DNA identification will not be in issue where only lack of consent is disputed.
42. Finally the Law Council wishes to also add its endorsement to the NSW Bar Association's argument that a directed acquittal or an acquittal in a trial by a judge alone should not be open to appeal in the manner put forward. In relation to a trial by judge alone, a provision of this kind will make trial by judge alone an extremely unattractive option for an accused person because it will open any acquittal to appeal based on identification of any error in law in the judge's reasons. In addition, there will be a further question as to the materiality of any suggested error of law by a trial judge. In effect, it would seem that introduction of a provision such as this will ultimately develop into a general right of appeal based on the reasons given by a trial judge in trial by judge alone where an acquittal has been ordered.
43. In relation to directed acquittals, the Law Council shares the view that it is very much against the public interests that acquittals by jury at the direction of a trial judge should be the subject of review well after the event in

circumstances where the accused is at jeopardy of being put on further trial for the offence. The position of the Crown and the community can be adequately protected by a proper right of interlocutory appeal.

## **CONCLUSION**

44. For the above reasons the Law Council of Australia opposes the modifications proposed in the MCCOC discussion paper on Double jeopardy law reform. We submit that insufficient evidence presently exists indicating a need to change the established principles of Double jeopardy. Indeed we would question if the proposed modifications would even cater for the unique circumstances found in the *Carroll* case. Furthermore, we believe they represent a dangerous departure from established legal principles and would undermine our accusatorial character of the criminal trial system.