Speech by

Peter Wellington

MEMBER FOR NICKLIN

Hansard Thursday, 19 April 2007

CRIMINAL CODE (DOUBLE JEOPARDY) AMENDMENT BILL

Second Reading

Mr WELLINGTON (Nicklin—Ind) (10.25 am): I move—

That the bill be now read a second time.

Members will remember that I presented a bill of the same name last year. As a result of discussions with the Attorney-General and officers of his department, I have decided to withdraw that bill and instead present this one to the House. Members are no doubt well aware of the widespread community disquiet with the doctrine of double jeopardy, at least as it has applied in particular controversial cases. The doctrine certainly has an important place in our law of criminal procedure: if everyone who had been acquitted of a criminal charge had to live in fear that the authorities might, at any time, seek to prosecute him or her again, it would be a terrible world. Yet there are times when there should be exceptions.

In England the controversy over the killing of Stephen Lawrence led to two inquiries into police investigations and the law of double jeopardy. In 1999 Sir William Macpherson called for the abolition of the double jeopardy rule in cases where 'fresh and viable' evidence came to light after an acquittal. In 2001 the Law Commission recommended that it should be possible to order a retrial in cases of murder where there was reliable and compelling new evidence of guilt, and also recommended reform of procedure for retrials after 'tainted' acquittals. The Criminal Justice Act 2003 put these recommendations into effect. As Mrs Faye Kennedy, mother of murdered baby Deidre Kennedy, has said—

It's an English law and that law has already been changed over in the UK, so I can't see why we can't follow suit.

Here in Queensland, the controversy surrounding the Carroll decision in the High Court has seen petitions presented to this House calling for reform of the law, and both the Standing Committee of Attorneys-General (SCAG) and the Council of Australian Governments (COAG) have been considering the issue. Premiers and Attorneys-General of Queensland and other states have conceded several times that some reform was necessary but have stated that all jurisdictions should wait until a common approach could be agreed upon. But, while everyone else was waiting, New South Wales jumped the gun, enacting the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006. I know the government was unhappy with some aspects of my first bill, which was a fairly close copy of the New South Wales one. However, the way has been cleared for a less uniform approach by the resolution at the latest COAG meeting, just last Friday, which agreed that reform should take place but 'the scope of reforms will vary amongst jurisdictions reflecting differences in the particular structure of each jurisdiction's criminal law'. I believe that may clear the way for the House to consider this bill, in which I have departed from the New South Wales precedent in some respects.

I seek leave for the remainder of my second reading speech to be incorporated in *Hansard*.

Leave granted.

In this bill I have tried to draw the balance between the two principles—that the guilty should be convicted and that acquitted persons should not live the rest of their lives under threat of retrial—more finely. The earlier bill provided for a retrial where 'fresh and compelling evidence' had come to light in any case where the accused was to be tried for a 'life sentence offence'. That applies only to a few very serious offences in New South Wales, but it means rather more offences here. In this bill I propose that the fresh evidence retrial should only apply to prosecutions for murder. The other ground for retrial is that the original acquittal was 'tainted', in the sense that the acquitted person or someone else has since been convicted of an 'administration of justice offence' such as perjury or conspiracy to pervert the course of justice. In the 2006 bill, following the New South Wales example, I proposed that this should apply to all offences where the maximum penalty was 15 years or more. I now propose that this should apply only to 25-year offences; there is a summary of what offences fall into this category in the Explanatory Notes. In the case of both these grounds for retrial, a retrial can only be ordered by the Court of Appeal, and the prosecution will have to show to that Court that one of the two grounds exists, and that in all the circumstances it is in the interests of justice for the order to be made.

Perhaps the most significant change is that the New South Wales Act applies, and the 2006 bill proposed to apply, retrospectively. There is an argument that if the law is to be changed so as to enable the revisiting of concluded trials, it is perfectly logical to extend that to trials that have already occurred, but I know that the retrospective application of the reform was one of the aspects that caused particular concern among those concerned with civil liberties, so in this bill the reforms will only apply where the acquittal occurs after the amendments have commenced (though they will apply if the alleged crime had occurred before the commencement date).

The bill includes many other safeguards for acquitted persons including—

- no police investigations involving any arrest, questioning or search of the acquitted person, or any forensic procedure carried out on the person or property of the acquitted person can be undertaken unless first authorised by the Director of Public Prosecutions;
- a person who has been found not guilty by reason of insanity is excluded from the definition of "acquittal";
- time limits apply to the making of the application for retrial (within 28 days of the accused being charged) and to the presentation of an indictment (within 2 months of the retrial order);
- a presumption in favour of bail;
- restrictions apply to publishing information identifying the acquitted person while under investigation, or while subject to an application for a retrial, until the end of the retrial; and
- strict limits apply to the number of retrials that can be ordered under the exceptions—one retrial only, unless an administration of justice offence is then proven to have occurred in relation to the retrial.

On the other hand, this does remove the total immunity of an acquitted person from ever being retried, even if compelling new evidence of murder is found or if it is proved that conduct of the accused or other people had subverted the original trial. It is the totality of that immunity that has seemed to many people to be contrary to the interests of justice. If this bill is passed, we will be largely following the English and New South Wales examples, but we will be modifying them to suit the local criminal law in light of discussions which have occurred across Australia over several years. I commend the bill to the House.