NSW Law Reform Commission
REPORT 77 (1996) - DIRECTED VERDICTS OF ACQUITTAL

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Terms of Reference and Participants

To the Honourable Jeff Shaw QC
Attorney General for New South Wales

Dear Attorney

Directed verdicts of acquittal

We make this final Report to the reference to this Commission dated 17 March 1995.

Professor Michael Tilbury

(Commissioner-in-Charge)

Professor David Weisbrot

(Commissioner)

Professor Brent Fisse

(Commissioner)

August 1996

Terms of Reference

On 17 March 1995, the Commission received the following terms of reference:

> To inquire into and report on whether the Crown should have a right of appeal where there is a directed verdict of acquittal.
>
> In conducting this review the Commission should have regard to:
>
> (i) the incidence of directed verdicts of acquittal;
>
> (ii) the double jeopardy rule and the rights of an accused person;
>
> (iii) the impact of the administration of justice on public confidence in the judiciary of any proposals for reform; and
>
> (iv) any related issues.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act* 1967. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

> The Hon G J Samuels AC QC (until 28 March 1996)
>
> Professor Brent Fisse
>
> Professor Michael Tilbury*

Professor David Weisbrot

(* denotes Commissioner-in-Charge)

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1. Introduction

THE ISSUE

1.1 The common law rule that there is no right of appeal against a directed verdict of acquittal applies in New South Wales. The Commission's brief has been to investigate whether the law should be altered to allow the Crown a right of appeal.

THE DISCUSSION PAPER

1.2 In June 1995 the Commission released a Discussion Paper ("DP 37"), in which it proposed that the law as it stands with regard to directed verdicts should not be altered, and that no right of appeal be introduced.[1] Submissions from the public were invited.

RESPONSE TO DP 37

1.3 Thirteen submissions were received, nine in favour of and four opposed to the proposal contained in DP 37.[2] Submissions which supported our proposal were received from individual legal practitioners and academics, as well as representative bodies, such as the Law Society of New South Wales and the New South Wales Bar Association. In general, those opposed to the proposal were prosecutors. As might be expected, those who disagreed with our proposal provided more detailed reasons for their views than many of those who indicated their support.

DEVELOPMENTS SINCE DP 37

1.4 Since the release of our Discussion Paper, legislative change was mooted in South Australia. The *Criminal Law Consolidation (Appeals) Amendment Bill* was introduced into the South Australian Parliament in September 1995. The Bill contained a provision allowing for a right of appeal against an acquittal where the trial was heard by a judge sitting alone, that is, without a jury.[3] The provision was defeated in the Upper House of Parliament and omitted from the Bill as ultimately enacted.[4]

FOOTNOTES

1. New South Wales Law Reform Commission, *Directed Verdicts of Acquittal* (Discussion Paper 37, 1995).

2. The Appendix contains a complete list of submissions received.

3. Cl 6 and 7.

4. *Sunday Mail* (Adelaide) (3 December 1995) at 2.

2. Arguments for and Against a Right of Crown Appeal

INTRODUCTION

2.1 Most of the arguments for and against the introduction of a Crown right of appeal against a directed verdict of acquittal centre on one basic issue: the degree of protection from prosecution to be afforded to an accused who has been acquitted. To most of those in agreement with the proposal in our Discussion Paper that there should be no such right of appeal, the existing protection at common law preventing a Crown appeal is a fundamental safeguard of the accused's rights. The directed verdict of acquittal should be final so as to allow the person affected to get on with his or her life. To those in disagreement, the protection afforded the accused is too inflexible and requires balance by allowing exceptions, where appropriate, in the interests of society. The various comments contained in submissions tend to crystallise under two general headings pertaining to the rights of the accused and of the public.

RIGHTS OF THE ACCUSED

Double jeopardy

2.2 Double jeopardy is the prosecution of a person twice for the same offence. Martin L Friedland writes in the introduction to his work on this subject:

> The history of the rule against double jeopardy is the history of criminal procedure. No other procedural doctrine is more fundamental or all-pervasive ... Double jeopardy plays a major role in such areas as ... new trials [and] Crown appeals ...[1]

Professor Friedland suggests that the adoption of the concept into the common law probably dates from the twelfth century and was previously well known in ecclesiastical law.

2.3 Several of the submissions in support of our proposal in DP 37 stressed the importance of defending the double jeopardy principle.[2] However, not all regarded double jeopardy as an absolute concept. As one submission pointed out,[3] double jeopardy does not operate to preclude a Crown appeal against a verdict of acquittal entered by the Court of Criminal Appeal. It went on to state that:

> Such a situation can be distinguished from an acquittal entered at trial on the basis that the decision of the Court of Criminal Appeal is part of the appeal process, but it seems to me that such a distinction in terms of double jeopardy is not one that can logically be maintained. I can see no practical difference between an acquittal entered by the Court of Criminal Appeal based upon a question of law answered in favour of the appellant and a directed verdict by the trial judge at a trial.

2.4 *R v Benz*[4] was cited as authority for the proposition that the principle of double jeopardy does not prevent the Crown appealing from an appeal. There, Chief Justice Mason stated that an acquittal recorded by a Court of Criminal Appeal, unlike one returned by a jury, is not sacrosanct. His Honour cited with approval the following extract from Professor Friedland's work:

> It was the accused, who had been convicted at trial, who was responsible for bringing the case into the appellate courts. Whereas there is an easily-seen division between trial and appeal, the distinction between an appeal and an appeal from an appeal is less clear. Once the case is in the appellate hierarchy there is no logical reason why the matter should not be determined - assuming that the point involved is of sufficient importance to warrant the attention of the Court - by the very highest tribunal. There can be no surprise or unfairness; the accused simply takes the appellate structure as he finds it. If the House of Lords agrees with the Court of Criminal Appeal then the accused has no complaint; if it disagrees, then the accused is simply back in at least as good a position as he was before invoking the appellate process.[5]

2.5 In the same case, Justice Deane quoted with approval the statement by Justice Dixon in *R v Wilkes*[6] that the Court should be careful to remember "that it is not in accordance with the general principles of English law to allow appeals from acquittals, and that it is an exceptional discretionary power vested in this Court". Justice Deane said:

> Those comments ... in *Wilkes* should not be seen as empty rhetoric which can be formally acknowledged and effectively ignored. They are authoritative statements of the approach which considerations of fairness and of traditional principle require this Court to observe when asked by a State to subject a person, who has been acquitted or granted a new trial by the State's own ultimate criminal court, to the ordeal of renewed jeopardy or to the risk of being deprived of the chance of acquittal on a new trial. The rule of practice they embody represents an important component of the barrier which divides the due administration of the criminal law and oppression.[7]

2.6 The application in *Benz*, to appeal against the decision of the Appeal Court overturning the conviction, was lost by a majority of three to two. However, all of the judgments agree that it is only in an exceptional case that such an application would be granted. Chief Justice Mason, who favoured granting the application, made it clear that there is a distinction between granting an appeal from an acquittal at first instance and granting an appeal following the quashing of a conviction. In most cases this distinction stems from the sanctity accorded a jury decision. In the case of a directed verdict of acquittal, where the jury's verdict is (according to the submission referred to above)[8] "merely a technicality", a "rubber stamp" of the decision of the trial judge, the Commission is of the view that there is still the need to distinguish. This is because the ultimate consequence of allowing an appeal from a directed verdict of acquittal may be a retrial. The accused's position in that event is unlikely to be exactly the same as it was at the original trial, and, in fact, more likely to be prejudiced in comparison with the earlier position. For, as Justices Gaudron and McHugh point out, the Crown now has "the opportunity to use the evidence on a different basis from that on which it was used at the first trial".[9] In addition, the intervention of the "error" may well have deprived the accused of an undirected jury verdict of acquittal.

2.7 Another submission which warned against attaching too much importance to double jeopardy in the present context observed that "[t]he jeopardy is only realised if the appeal is to be upheld".[10] This line of argument appears to follow the approach of a famous American judge, Oliver Wendel Holmes. Friedland explains:

> If, on policy considerations, a Crown appeal is thought desirable, the double jeopardy label can be avoided by adopting the Holmsian approach to the problem: 'Logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause.'[11]

2.8 But this argument proves too much. Logically, it leads to the conclusion that the accused remains liable to further prosecution even after acquittal in the ordinary way. In the Commission's view, the argument fails to address the rationale underlying the application of the double jeopardy principle in the present context. The development of the principle has gone beyond prohibiting multiple punishment for the same offence, to adopting practices to prevent undue prolongation of the criminal process. To allow otherwise is to risk harrassment of an accused, who is, after all, presumed innocent. Injustice could even result from, for example, a false guilty plea or from a failure to address the evidentiary problems which necessarily arise on a retrial following a successful appeal against acquittal.[12]

Evidentiary problems

2.9 If a retrial were to follow a successful appeal against an acquittal, new evidentiary rules would need to be formulated to ensure that the accused is not prejudiced. Martin Sides QC, Senior Public Defender, gives the example of an accused who is convicted on a lesser charge but acquitted of a more serious charge by an erroneous direction. If the evidence given by the accused at her or his first trial can be led by the Crown at the retrial, this may lead to unfairness. As Friedland notes, the accused:

> may be at a greater disadvantage than he was at the first trial because he will normally have disclosed his complete defence at the former trial. Moreover, he may have entered the witness-box

> himself. The prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defence evidence to use at the second trial.[13]

2.10 At the same time, it must be asked whether fresh evidence or evidence not led at the first trial should be admissible on retrial. Sides comments "it would be most unfair [if it were admitted,] as an acquittal by the jury at the first trial, if other than a directed acquittal, could not be disturbed upon the basis of fresh evidence."

The accused's position relative to the State[14]

2.11 Submissions voiced two main concerns which related to the powerlessness of the individual accused relative to the State. One focused on the rights of the accused. Marsdens Solicitors, supporting our proposal, warned generally of "a continual erosion of the rights of an accused person provided in our traditional common law".[15] Martin Sides QC, Senior Public Defender,[16] and "Justice Action"[17] referred in addition to the stress which an appeal and possible retrial would impose on accused persons and, perhaps, those connected with them.

2.12 The other concern focused on the specific issue of financial cost. The State has comparatively enormous financial resources available for the investigation and prosecution of the crime. An accused, in contrast, is likely to carry an enormous burden if, in addition to defending himself or herself at trial, the additional expense of an appeal (and potential retrial) is to be borne. It should be remembered that even in cases where Legal Aid contributes to legal costs, the financial burden can still be felt by the accused in other substantial ways, for example, the disruption to normal employment or business.

2.13 It must be appreciated that any appeal from a directed verdict of acquittal can only be based on an alleged error of the trial judge. It is therefore questionable whether the accused should be made to "pay" for it in the ways outlined above. If, in fact, there were no mistake, and, ultimately, an appeal court were to find the original verdict of acquittal sound, then the accused has faced an unnecessary emotional and financial burden.

RIGHTS OF THE PUBLIC

2.14 A criticism levelled at the Discussion Paper was, that while it contained sections detailing arguments against a Crown right of appeal and supporting the rights of the accused, no corresponding sections outlining arguments favouring a right of appeal, or in support of the rights of the general public were included.[18] We attempt to address this criticism here, drawing heavily on arguments contained in the submissions.

Miscarriage of justice

2.15 Earlier, we asked whether it was fair to submit an accused to the appeal process and possible retrial because of a judicial error. Some submissions raised the question of whether it is just that an accused obtain a "windfall", that is, an unwarranted directed verdict, because of a judicial error.[19] Depending on the circumstances, the public may regard this as a miscarriage of justice for failing to impose a sanction for wrongdoing, or to safeguard the public in cases where the danger posed by a guilty party would have rendered a custodial sentence appropriate. Members of the public may be left with the impression that a guilty person has escaped justice because of a legal technicality, a perception which can lead to a weakening of public confidence in the judicial system. Submissions favouring a right of appeal took the view that the possibility for errors on *either* side to be corrected was essential for the interests of both the accused and the public to be served.

Rights of the victim

2.16 The feelings of the victim and his or her family should also be taken into consideration, not just those of the accused. Wrongful acquittal of the alleged perpetrator may lead to a legitimate sense of grievance by the complainant.[20]

A limited right of appeal

2.17 Most of the submissions favouring a right of appeal suggested that such appeals should be available only in very limited circumstances. They also generally endorsed the Tasmanian and Western Australian

statutory provisions allowing for Crown appeals.[21] The former Crown Advocate, Mr R Howie QC, expressed this view in the following way:

> The Court of Criminal Appeal itself could regulate the use of such an appeal by ensuring that a retrial is ordered only in appropriate cases where the public interest requires that the accused be placed on trial again so that the matter can be properly determined by a jury. The Court has always exercised a healthy discretion in relation to sentence appeals by the Crown and has ensured that such appeals are relatively rare. The Court of Criminal Appeal exercises a wide-ranging discretion in deciding whether to order a retrial after a successful appeal by a convicted person. No doubt the Court would exercise a similar discretion in determining the outcome of a successful appeal by the Crown after a directed verdict and would take into account any matters such as oppression and unfairness to the accused when making a determination whether or not to set aside a verdict of acquittal, notwithstanding that error had been shown.[22]

2.18 The only submission favouring the Commission's approach which directly addressed this issue was that of the New South Wales Bar Association, which stated:

> The balance is between an unfettered general right of the Crown to appeal and one limited by considerations of general public interest and importance of the question raised by the Crown appeal. The problem with the second approach is, of course, that it is necessarily arbitrary in terms of which accused is on the receiving end of a Crown appeal. It may well depend on a quirk of fate that a set of facts give rise to a novel or important point of view.[23]

Moreover, in the Bar Association's view, the Tasmanian and Western Australian provisions "have led to a confusion of opinion as to the circumstances in which an appeal ought to be allowed to the Crown".[24]

Inconsistencies in the present system

Justices Act 1902* (NSW) *s 101

2.19 Some submissions alleged that the law governing Crown appeals against acquittals contains inconsistencies. Section 101 of the *Justices Act 1902* (NSW) was cited as an example. This provides that any party to a proceedings, may apply to have a case stated to the Supreme Court from a determination by a Justice which is wrong on a point of law. A determination includes a dismissal of the proceedings.[25] Power to dismiss an information is conferred on the magistrate by s 80, and although the wording of the section has it that the magistrate shall determine the whole matter "(a)fter hearing what each party has to say and the witnesses and the evidence adduced", it appears nevertheless that it is "not essential to hear all the evidence for the prosecution before dismissing a charge where it is clear from its nature as stated to the magistrate it can carry the case no further".[26]

2.20 In relation to dismissal of an information by a magistrate under s 101 of the *Justices Act 1902* (NSW), one submission states:

> Although there may be historical reasons why the prosecution can in effect appeal against an acquittal from a court of summary jurisdiction, those reasons no longer appear to be relevant in light of the fact that we have professional full-time judicial officers as magistrates in the Local Courts and having regard to the seriousness of the matters that a magistrate can deal with summarily either with or without the consent of the defendant.[27]

2.21 While the foregoing is intended to show apparent inconsistencies in the present system, it might be taken as an argument for *no longer* allowing appeals against such dismissals, in line with proceedings on indictment, because of the competency of magistrates presiding over Local Courts.

2.22 Some submissions expressed a view on the calibre of the judiciary and the implications of this for a possible right of appeal by the Crown. It appears that the greater the writer's confidence in the ability of our judges, the less is his or her perceived concern regarding a right of appeal against their directions to acquit. According to one submission:

> The role of the judge should not be undermined. He/she is a person of extensive legal training and accomplishment. It is a position of the highest authority and awarded to those most deserving of it. Such people have vast experience from their work as legal practitioners and command the respect of their peers. A verdict of acquittal must necessarily be the result of consideration by a trained and experienced legal mind.[28]

In contrast, another submission contained the following warning:

> It has to be said that the risk of legal error also increases with the expansion of the bench and the increased possibility of the appointment of judges of uneven ability and experience in criminal law.[29]

2.23 Friedland writes that in the judicial error cases "the initial presumption must be [that] ... an accused should not have to pay the price of a second trial because of a lack of judicial competence in the particular case", but adds:

> This conclusion is based on the assumption that there is a reasonably high level of competence and integrity in the judiciary. The general level of the administration of justice must, however, influence the decision whether to provide for government appeals. If cases are heard by non-lawyers then some system for permitting an appeal by the prosecutor on points of law is not unreasonable. It is probably for this reason that an appeal by the prosecutor is permitted in England from courts of summary jurisdiction. Similarly, the wide power of appeal given to the Crown in Canada may be in part attributable to the fact that in Canada over ninety per cent of the indictable offences are tried by magistrates, a fair proportion of whom are legally untrained.[30]

2.24 As discussed in the next chapter, the comparatively small number of directed verdict cases gives no indication of any problem with respect to the administration of justice generally or the capacity of the judiciary in particular.

Criminal Appeal Act 1912* (NSW) *s 5C and s 5F

2.25 Other examples cited of alleged inconsistencies are s 5F of the *Criminal Appeal Act 1912* (NSW), which confers on the Crown the right to appeal against an interlocutory judgment or order made during proceedings, such as granting a permanent stay of the indictment, and s 5C, which allows for an appeal against the quashing of an indictment. One view put to the Commission stated:

> While a decision to quash an indictment or to grant a permanent stay may not technically be the same as an acquittal, I do not think the difference is so great in a practical sense that this inconsistent approach to decisions of trial judges should be retained.[31]

2.26 A direction of acquittal may be given by a trial judge at any time during the trial, but occurs most commonly at the close of the Crown case, in response to a submission by the accused that there is no case to answer.[32] The quashing of indictments and the granting of stays can come much earlier in the proceedings, before the court has had the opportunity to hear the prosecution's case against the accused. It seems reasonable, therefore, that the Crown should have a greater right of redress against rulings adverse to its case which were made prior to the case's conclusion. As was also stated in the Discussion Paper, a submission of "no case to answer" can succeed:

> only where evidence for the Crown, taken alone and at its highest, is insufficient to establish beyond reasonable doubt the guilt of the accused. In determining such an application the judge will assume that the jury will accept the *whole* of the proofs in favour of the Crown which the evidence on its face is capable of establishing.[33]

The public interest in retaining the current law

2.27 The expression "the public interest" was often invoked in submissions favouring a right of appeal by the Crown. These submissions express the concern that directed verdicts of acquittal could be inimical to the public interest in the present situation, that is, where no appeal lies.

2.28 In the Commission's view, however, it oversimplifies the issue to argue that allowing Crown appeals against directed verdicts amounts to no more than a preference for the rights of one group over another. It cannot be argued that there is no public interest in ending all prosecutions with a verdict upon a trial. The point is to examine whether there are *competing* public interests. A legal system that provides safeguards to prevent harassment of accused persons is one that gives confidence to the public it is designed to serve that the administration of justice is carried out in accordance with strict rules consonant with the maintenance of the rule of law and not subject to caprice. It has long been recognised that one result of retaining within our legal system an unyielding adherence to certain cardinal principles is that, on occasion, a guilty person may avoid punishment. It should, in fairness, also be pointed out that conviction of innocent persons is not unknown. The current rule preventing Crown appeals against acquittal also has the practical benefit of not imposing further on scarce financial and court resources.

2.29 An appeal mechanism that aids the administration of the criminal law generally and avoids "rogue" judgments corrupting the body of precedent already exists. Section 5A(2)(a) of the *Criminal Appeal Act 1912* (NSW) permits the Attorney-General or Director of Public Prosecutions to submit to the Court of Criminal Appeal "any question of law arising at or in connection with" a trial at which the accused has been acquitted. Any determination by the Court is treated as precedent only, and does not affect the trial verdict.[34]

FOOTNOTES

1. M L Friedland, *Double Jeopardy* (Clarendon Press, Oxford, 1969) at 3.

2. Concern over violation of the double jeopardy principle also formed the basis of opposition to the South Australian Government's attempt to introduce provisions allowing for a limited right of appeal against acquittal: South Australia, *Parliamentary Debates* (Hansard) House of Assembly, 22 November 1995 at 676, 679.

3. R N Howie QC, Crown Advocate *Submission* (18 August 1995) at 2.

4. (1989) 168 CLR 110 at 112.

5. Friedland at 293. In drawing on Professor Friedland's work, the Commission does not wish to imply that the views stated in his book accord with those of the Commission. On the contrary, Professor Friedland states that there *should* be a right of appeal by the Crown in a limited number of cases, such as "when an error has been committed at the trial which has virtually prevented the jury from considering the case on the merits. This would include cases where the judge has improperly ruled or directed the jury that the charge does not constitute an offence or that the evidence is insufficient to warrant a conviction or that a plea in bar should be sustained" (at 310). He does, however, issue a caution. "One danger in conceding any form of Crown appeal is that after it has been in operation for some time the legal profession tends to forget that the remedy is an exceptional one and the procedure becomes accepted as normal and routine. This appears to be happening in Canada where Crown appeals have now been in operation for over thirty years ... A further danger is that to concede a right of appeal to the Crown in even a limited number of cases makes all acquittals uncertain until the time for appeal goes by. A solution to this objection ... is to require that the prosecutor inform the accused at the time of the acquittal that there will or may be an appeal" (at 295-96).

6. (1948) 77 CLR 511 at 516-517.

7. *R v Benz* (1989) 168 CLR 110 at 120.

8. R N Howie QC, Crown Advocate *Submission* (18 August 1995) at 2.

9. *R v Benz* at 146.

10. N R Cowdery QC, Director of Public Prosecutions *Submission* (22 August 1995) at 2.

11. *Kepner v US* (1904) 195 US 100 at 134 (dissenting), cited in Friedland at 295.

12. See paras 2.12-2.13.

13. Friedland at 4.

14. See also DP 37 at para 4.13.

15. Marsdens Solicitors *Submission* (3 August 1995).

16. M L Sides QC, Senior Public Defender *Submission* (3 October 1995) at 1.

17. Justice Action *Submission* (22 August 1995) at 1.

18. N R Cowdery QC, Director of Public Prosecutions *Submission* (22 August 1995) at 2.

19. Confidential *Submission* (9 August 1995) at 1.

20. M F Adams QC *Submission* (4 August 1995) at 1.

21. These provisions are discussed in DP 37 at Chapter 3.

22. R N Howie QC, Crown Advocate *Submission* (18 August 1995) at 4.

23. New South Wales Bar Association *Submission* (21 July 1995) at 2.

24. New South Wales Bar Association *Submission* (21 July 1995) at 2.

25. *Hope v Bathurst City Council* [1980] 1 NSWLR 535.

26. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (Butterworths, Sydney, 1989) at para 1097.4.

27. R N Howie QC, Crown Advocate *Submission* (18 August 1995) at 1.

28. P Blazey-Ayoub *Submission* (4 August 1995) at 1.

29. N R Cowdery QC, Director of Public Prosecutions *Submission* (22 August 1995) at 3.

30. Friedland at 297-298.

31. R N Howie QC, Crown Advocate *Submission* (18 August 1995) at 2.

32. DP 37 at para 2.5.

33. DP 37 at para 2.7 (emphasis added).

34. See DP 37 at paras 2.2 and 4.3f.

3. Conclusion

3.1 The Commission has given further consideration to the arguments for and against the proposal outlined in the Discussion Paper, especially those opposed to the Commission's proposal which have been raised in submissions. Having done so, the Commission remains of the view that a longstanding rule, founded upon fundamental conceptions of the rule of law, ought to be upheld. The Commission finds unconvincing arguments calling for change which are based on imprecise reference to so-called "inconsistencies" in the criminal process, or on appropriating the mantle of "the public interest". The paramount, and therefore overriding, consideration is the rule against double jeopardy, which, in this instance, should not be compromised.

3.2 The statistical data set out in paragraphs 4.15 to 4.17 of the Discussion Paper illustrates that the number of directed verdicts of not guilty in New South Wales is small, applying to only 2.03% of all charges in the District and Supreme Court in 1992. The Commission used this finding to bolster its proposal that a Crown right of appeal not be introduced, by arguing, amongst other things, that such appeals would be uncommon. Several submissions agreed that the small incidence of verdicts by direction did not warrant disturbing the rule against double jeopardy.[1] By contrast, other submissions took the view that the comparatively small number of directed verdicts was rather a reason to *create* a right of appeal,[2] or was at least irrelevant, law reform not being dependent on arguments of scale.[3]

3.3 Friedland writes "[t]oo many improper acquittals tend to weaken the administration of justice".[4] He quotes Justice Holmes, in a dissenting opinion favouring a government appeal, arguing that "[a]t the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny".[5] In New South Wales, where the number of directed verdicts is comparatively small, and it is reasonable to accept that a jury would have acquitted of their own accord in at least some of these cases, there is little evidence to suggest that the justice system is being weakened by too many improper acquittals.

3.4 The Commission is of the view that to permit appeals from an acquittal would be a major change to the present law. To undertake major changes in the law to accommodate a rare problem requires a very strong case, which, in our view, has not been made out.

3.5 The Commission is aware of the understandable community outrage which would result in the event of a worst case occurring, the acquittal by manifest error of an accused charged with an extremely serious offence, without an opportunity for the jury to deliberate properly upon the evidence, or for the Crown to appeal the acquittal. Such a scenario, is, however, very unlikely. Martin L Sides QC, Senior Public Defender, notes that in his experience it is very rare for a judge to direct a verdict in a murder case.[6] Our data does not indicate the nature or severity of the charges on which acquittals were obtained by direction. The reasonable assumption must be that the more serious the charge, the less likely the judge would be to intervene and direct a verdict where there is credible evidence to be put to the jury.

RECOMMENDATION

A Crown right of appeal from a directed verdict of acquittal should not be introduced in New South Wales.

FOOTNOTES

1. Legal Aid Commission of New South Wales *Submission* (9 August 1995) is one example.

2. M F Adams QC *Submission* (4 August 1995) at 2.

3. N R Cowdery QC, Director of Public Prosecutions *Submission* (22 August 1995) at 2.

4. Friedland at 298.

5. Friedland at 298.

6. *Submission* (3 October 1995) at 1.

Appendix

1. Mr M F Adams QC (4 August 1995)
2. Ms P Blazey-Ayoub (4 August 1995)
3. Confidential (9 August 1995)
4. N R Cowdery QC, Director of Public Prosecutions (22 August 1995)
5. R N Howie QC, Crown Advocate (18 August 1995)
6. Justice Action (22 August 1995)
7. A R Lauer, Commissioner, NSW Police Service (25 August 1995)
8. Law Society of New South Wales (15 August 1995)
9. Legal Aid Commission of New South Wales (9 August 1995)
10. Marsdens, Solicitors (3 August 1995)
11. New South Wales Bar Association (21 July 1995)
12. Trevor Nyman & Co, Solicitors (7 August 1995)
13. M L Sides QC, Senior Public Defender (3 October 1995)