LAW REFORM COMMISSION

Report
Mechanisms for Review of Alleged Wrongful Convictions or Acquittals

[November 2012]

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About the Commission

THE LAW REFORM COMMISSION OF MAURITIUS consists of –
(a) a Chairperson, appointed by the Attorney-General;
(b) a representative of the Judiciary appointed by the Chief Justice;
(c) the Solicitor-General or his representative;
(d) the Director of Public Prosecutions or his representative;
(e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
(f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
(g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
(h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
(i) two members of the civil society, appointed by the Attorney-General.

Under the direction of the Chairperson, the Chief Executive Officer is responsible for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

The Commission may appoint staff on such terms and conditions as it may determine and it may resort to the services of persons with suitable qualifications and experience as consultants to the Commission.
Executive Summary

Report “Mechanisms for Review of Alleged Wrongful Convictions or Acquittals”

[November 2012]

The Commission has examined, at the request of Hon. Attorney-General, the desirability of having, in Mauritius a Criminal Cases Review Commission, such as the one in UK, which could be an independent public body mandated to review possible miscarriage of justice and which could refer appropriate cases to the proper forum for review. The Commission has reviewed mechanisms for review of alleged wrongful convictions from a human rights and comparative perspective and is recommending that a Criminal Cases Review Commission could be established by statute.

The Commission has also examined, of its own initiative, the issue of wrongful acquittals (including the re-opening of jury acquittals). The Commission has considered the rule against double jeopardy [enshrined in section 10(5) of the Constitution] and reviewed developments in other jurisdictions where statutory exceptions to the rule have been established. The Commission is recommending that legislation could be adopted creating an exception to the rule against double jeopardy by providing for the re-trial – upon the order of a superior court - of a person previously acquitted when there is compelling evidence of a "tainted acquittal" or "fresh and compelling evidence" as to guilt. There should be, however, sufficient safeguards to ensure that the power to quash an acquittal will not be abused.
The Criminal Justice System and Mechanisms for Review of Alleged Wrongful Convictions or Acquittals

Review of Alleged Wrongful Convictions

1. The Commission is of opinion that the current system of criminal appeals for a person who has been wrongfully convicted, or who has been subject to a gross miscarriage of justice, to challenge his or her conviction may not be fully compatible with the right to a fair trial as set out in Article 14(5) CCPR,1 in particular the right to introduce fresh evidence. Difficulties would arise where new or fresh evidence, which bears on the original finding of guilt or the fairness and/or probity of the original proceedings, becomes available after the appeal process has been exhausted.

Under our legal system, no retrial is permissible and pardon remains the only recourse available for a convicted person, even if fresh evidence conclusively shows that the conviction was pronounced erroneously.

This is what Mr Nisuke Ando, Member of the UN Human Rights Committee, had to say about our legal system when delivering his Individual opinion in L.G. v. Mauritius Communication No. 354/1989, 31 October 1990:

“I feel obliged to express my concern about legal systems under which no retrial is permissible and pardon remains the only available recourse in such cases. For one thing, a retrial provides an opportunity for the judiciary to re-examine its own conviction and sentence in the light of fresh evidence and correct its errors. In my opinion, pardon being the prerogative of the executive, the institution of retrial is essential for the principle of independence of the judiciary. Furthermore, retrial

1 The requirements of Article 14(5) CCPR [International Covenant on Civil and Political Rights], which ensure that “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law” have been considered.

The relevant procedural protections in Article 14(5) of the ICCPR include:
- The right to a review of conviction and sentence on law and fact;
- The right to introduce fresh evidence; and
- The right to a statement of reasons.
ensures that the erroneously convicted person is given an opportunity to have his or her case re-examined in the light of fresh evidence, and to be declared innocent. If he or she is innocent, it would be difficult to justify why he or she should need to be pardoned pursuant to the prerogative of the executive”.

2. A mechanism needs to be put in place to review potential miscarriages of justice and wrongful conviction, which would better protect the rights of individuals to a fair trial. The establishment of a Criminal Cases Review Commission is one mechanism by which we could ensure compliance with international human rights standards.


The Commission is a corporate body consisting of not fewer than eleven Members. The members of the Commission are appointed by Her Majesty on the recommendation of the Prime Minister. At least one third of the members of the Commission should be persons who are legally qualified [with at least ten years' standing]; at least two thirds of the members of the Commission should be persons who appear to the Prime Minister to have knowledge or experience of any aspect of the criminal justice system.

The statutory role and responsibilities of the commission are set out in the Criminal Appeal Act 1995 and are defined as:

- Reviewing suspected miscarriages of justice and referring a conviction, verdict or finding or sentence to an appropriate court of appeal where it is felt that there is a “real possibility” that it would not be upheld.
- To investigate and report to the Court of Appeal on any matter referred to the Commission.
- To consider and report to the Secretary of State on any conviction referred to the Commission for consideration of the exercise of Her Majesty’s prerogative of mercy.
The Commission has jurisdiction over criminal cases at any Magistrates’ or Crown Court in England, Wales and Northern Ireland. It will consider whether there is new evidence or argument that may cast doubt on the safety of an original decision. After enquiring into a case, the Commission can refer it back to the appropriate appeal court for reconsideration.

As at 31 May 2012, the Commission had received since its operation in 1997 14778 applications, 14133 applications had been dealt with (including ineligible); there had been 503 referrals to the Court of Appeal, 324 convictions quashed on appeal and 137 upheld; 619 cases were under review.\(^2\)

4. The establishment of the CCRC in England was the world’s first statutory publicly-funded body charged with the task of reviewing alleged miscarriages of justice. It is, perhaps, not surprising, then, that it had been viewed with a great deal of interest from other jurisdictions that see it as a possible extension to their own criminal justice system to solve their miscarriages of justice problem. For instance, the CCRC spawned the Scottish Criminal Cases Review Commission (SCCRC), which started its work in April 1999 under the terms of s. 194A of the Criminal Procedure (Scotland) Act 1995 (U.K.), 1995, c. 46, and the Norwegian Criminal Cases Review Commission (NCCRC), which came into force on January 1, 2004. Moreover, there is an on-going debate for a CCRC-type body in the US,\(^3\) Australia,\(^4\) Canada\(^5\) and New Zealand.\(^6\)

\(^2\) From http://www.justice.gov.uk/about/criminal-cases-review-commission.


\(^4\) L. Weathered, “Does Australia need a specific institution to correct wrongful convictions?” (2007), Australian and New Zealand Journal of Criminology (August).

5. The appropriateness of the CCRC-model as a transplant onto criminal justice systems has, however, been questioned.

One academic commentator, Mr. M. Naughton, has opined that it is unlikely that a wholesale adoption of how it is currently constituted will be a fix for the problem of the wrongful conviction of the factually innocent in other jurisdictions.⁷

Naughton argues that:

“For the CCRC to be a truly independent body to effectively assist potentially factually innocent victims of wrongful conviction in the way that the RCCJ foresaw, the following reforms are required. First, the CCRC needs to be truly independent from the Court of Appeal. This means that the real possibility test has to be removed and the CCRC should be able to refer any cases in which it believes that a wrongful conviction of a factually innocent person might have occurred. Second, this would have a knock-on effect in terms of the CCRC’s remit of how it reviews alleged wrongful convictions, which should not be restricted to fresh evidence. Akin to public enquiries, this would entail thorough re-investigations that seek to get to the bottom of whether claims of innocence are valid or not, as opposed to, mainly, paper reviews of the credibility of evidence. Third, the CCRC must be permitted to acknowledge that forms of evidence, even if deemed to be admissible by trial judges, are potentially unreliable and that juries make mistakes. These points were made in the Reports by the RCCJ and the organization JUSTICE almost 20 years ago but are yet to be put into effect. Fourth, all referrals by the CCRC should be deemed to be first appeals. That is, they should be afforded the same status as the powers of the Home Secretary’s under s. 17 of the Criminal Appeal Act 1968 under the previous system for reviewing alleged miscarriages of justice. This would free the CCRC from the current fresh evidence criteria and further enable it to operate independently and to refer cases of applicants thought to be factually innocent in the wider interests of justice.”⁸
Laurie Elks, a former member of CCRC, has conceded that:

“It may indeed be time to carry out a review of the CCRC’s remit - a review promised at the time of the passing of the 1995 Act. It would for instance be possible to widen the CCRC’s power of referral to include - exceptionally - cases where it suspects that a miscarriage of justice has occurred even where it is not persuaded that the real possibility test has been satisfied. This would compel the Commission to draw its frame of reference in wider terms.”  

6. The establishment of a Criminal Cases Review Commission is not the sole mechanism by which miscarriages of justice and wrongful convictions can be reviewed. Recently, the Legislative Review Committee of the Parliament of South Australia, after examining the Criminal Cases Review Commission Bill which was introduced in Legislative Council in 2010, recommended in its July 2012 Report that a Criminal Cases Review Commission should not be established in South Australia at this time; it further recommended that the Attorney-General does not pursue the establishment of a Criminal Cases Review Commission at a national level. It considered it would be preferable the law be amended to provide that a person may be allowed at any time to appeal against a conviction for serious offences if the court is satisfied that the conviction is tainted or where there is fresh and compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the convicted person. It recommended inter alia the Attorney-General considers establishing a Forensic Science Review Panel to enable the testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person, and for these results to be referred to the Court of Criminal Appeal.


10 Under the Bill, the Commission would have the power to investigate applications on behalf of persons convicted of both summary and indictable offences and sentences. The Commission’s terms of reference under the Bill are threefold: firstly they must consider that there is a real possibility of the conviction or sentence not being upheld; secondly, this must be as a result of an argument, evidence or information not raised in the original proceedings; and thirdly, that an appeal against the conviction or sentence must already have been refused by the court. The Bill provides the Commission with a number of powers of investigation, including the appointment of an investigating officer to assist them, and provision to assist the Attorney-General in the exercise of powers under section 369 of the Criminal Law Consolidation Act 1935, and the court if they seek the Commission’s assistance with an appeal. Concerns were expressed in submissions about the operation of such a Commission, including the scope to hear new evidence, its consideration of the outcome of the trial rather than a person’s innocence, and the lack of provision for informing and engaging victims of crime.
7. The Commission recommends - given the need for a mechanism for the review of potential miscarriages of justice and wrongful convictions - that a Criminal Cases Review Commission could be established, as a statutory body, to review cases of alleged wrongful convictions in respect of serious offences.

The CCRC could be made up of three Members: a Chairperson, who shall be a barrister with at least ten years standing; one of the Members shall be a barrister of at least five years standing; the other Member shall be a person with knowledge or experience of the criminal justice system. The Members would be appointed by the President of the Republic.

The CCRC would have the power to recruit its own staff and to have recourse to the services of experts for its enquiries.

The Commission has taken into account observations made about ways of improving the functioning of the CCRC in England. The Commission therefore recommends that notwithstanding section 93 of the District and Intermediate Courts (Criminal Jurisdiction) Act and section 9 of the Criminal Appeal Act, a person convicted of a criminal offence should be afforded the right to appeal to the Supreme Court or to the Court of Criminal Appeal, as the case may be, against conviction or sentence, where the CCRC is of opinion that a wrongful conviction of a factually innocent person might have occurred.
Review of Alleged Wrongful Acquittals

8. The rule against double jeopardy, as enshrined in section 10(5) of the Constitution, is not absolute.\(^{11}\) Similarly, Article 4(2) of Protocol 7 to the ECHR permits the reopening of an acquittal where new evidence of the defendant’s guilt has become available.\(^{12}\)

9. While the rule against double jeopardy provides certainty and a conclusion for the individual who has been tried, from the community’s point of view the question arises as to whether a person should be allowed to escape justice when new and compelling evidence has emerged subsequent to his acquittal which points to his guilt. Rapid developments in recent years in forensic science and DNA testing have highlighted these concerns. Anomalies arising from strict adherence to the rule has sparked public outcry in some jurisdictions. Changes to the law have therefore been proposed or adopted in a number of jurisdictions.

Justice Walsh of the Supreme Court of Ireland in The People (D.P.P.) v. O’Shea [1982] IR. 384 pointed out that:

“It would be totally abhorrent if a conviction which had been obtained by improper means, such as the corruption or coercion of a jury, should be allowed to stand; it would be equally abhorrent if an acquittal obtained by the same methods should be allowed to stand. If attempts to sway the verdicts of jurors by intimidation or other corrupt means were allowed to go unchecked, they could eventually bring about the destruction of the jury system of trial.

\(^{11}\) Section 10(5) of the Constitution provides that no person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

\(^{12}\) Article 4 ECHR, which relates to “Right not to be tried or punished twice”, provides inter alia that:
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 already been finally acquitted or convicted in accordance with the law and 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.
Persons who are tempted to do so would think twice about it if they were faced with the possibility that such efforts on their part could negative results which they had corruptly achieved. All prosecutions on indictment are, by virtue of the Constitution, brought in the name of the people and it is of fundamental importance to the people that the mode of trial prescribed by the Constitution should be free to operate, and be seen to operate, in a manner in which the law is respected and upheld”.

10. Part 10 of the UK Criminal Justice Act 2003 (Retrial for serious offences) allows a retrial following either a domestic or foreign acquittal, where the evidence is new and compelling, which means highly probative. That Act would also permit a retrial in circumstances where a foreign acquittal has not been set aside.

The Law Commission of England had recommended in its Report on “Double Jeopardy and Prosecution Appeals” [lc267 (2001)] that the rule against double jeopardy should be subject to an exception in certain cases where new evidence is discovered after an acquittal, but only where the offence of which the defendant was acquitted was murder, genocide consisting in the killing of any person, or (if and when the recommendations in our report on involuntary manslaughter are implemented) reckless killing. They also recommended that the new exception should apply equally to acquittals which had already taken place before the exemption came into force.

11. In the Republic of Ireland, section 8(3) of the Criminal Procedure Act 2010 provides that the Director of Public Prosecutions may apply to the Court of Criminal Appeal for a re-trial order where it appears to him that there is new and compelling evidence against a person tried on indictment in respect of a relevant offence, and acquitted of that offence, and it is in the public interest to do so.

The Director of Public prosecutions may also, pursuant to section 9(3) of the Criminal Procedure Act 2010, apply for a re-trial order where it appears to him that there is compelling evidence that the previous acquittal was tainted, and it is in the public interest to do so.
12. In July 2006 the Council of Australian Governments (COAG) recommended reform of the rule against double jeopardy.\(^{13}\)

On 17 October 2006, the NSW Parliament passed legislation abolishing the rule against double jeopardy in cases where:
- Someone has been acquitted of a “life sentence offence” (murder, violent gang rapes, large commercial supply or production of illegal drugs) and there is “fresh and compelling” evidence against that person in relation to an offence;
- Someone has been acquitted of a “15 years or more sentence offence” and there is evidence that the acquittal was tainted (by perjury, bribery or perversion of the course of justice).\(^{14}\)

This reform was prompted by the case of Raymond John Carroll\(^{15}\).

On 18 October 2007, Queensland modified its double jeopardy laws to allow a retrial where fresh and compelling evidence becomes available after an acquittal for murder or a “tainted acquittal” for a crime carrying a 25-year or more sentence. A “tainted acquittal” requires a conviction for an administration of justice offence, such as perjury, that led to the original acquittal.\(^{16}\)

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\(^{13}\) In April 2007, a Double Jeopardy Reform Model was agreed by COAG; Victoria and the ACT, however, reserved their positions on these recommendations.


\(^{15}\) *R v Carroll* (2002) 213 CLR 635 is a decision of the High Court of Australia which unanimously upheld a Queensland appellate court’s decision to stay an indictment for perjury as the indictment was found to controvert the respondent’s earlier acquittal for murder. The court held that charging Raymond John Carroll with perjuring himself in the earlier murder trial by swearing he did not kill the baby Deidre Kennedy was tantamount to claiming he had committed the murder and was thus a contravention of the principles of double jeopardy. The case caused widespread public outcry and prompted calls for double jeopardy law reform. Vide M. Kirby, “Carroll, Double Jeopardy and International Human Rights Law”, (2003) *Criminal Law Journal*.

In 2008, South Australia amended its laws to provide for exceptions to the principle of double jeopardy, by providing for re-trial of a person previously acquitted where acquittal is tainted or where there is fresh and compelling evidence of guilt.\textsuperscript{17} 

The rule against double jeopardy has also been relaxed in other States.\textsuperscript{18} 

13. The Hong Kong Law Reform Commission has recently in its Report on “Double Jeopardy” [February 2012] recommended that in circumstances of "tainted acquittal" or "fresh and compelling evidence" as to guilt, the rule against double jeopardy should be relaxed.\textsuperscript{19} 

\textsuperscript{17} South Australia Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008.  
\textsuperscript{18} Vide Tasmania Criminal Code (Amendment) Act No 33 of 2008; Victoria Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act No 81 of 2011; Western Australia Criminal Appeals Amendment (Double Jeopardy) Act No 9 of 2012.  
\textsuperscript{19} This is what the Hong Kong law Reform Commission had to say:

“The principal justifications for the rule against double jeopardy are as follows:  
(a) Avoids the repeated distress of the trial process - The rule avoids the repeated distress of the trial process, which affects not only the accused, but also his family, witnesses on both sides and the victim.
(b) Reduces the risk of a wrongful conviction - The chances of a wrongful conviction must increase if an individual is tried more than once for the same offence. The likelihood of conviction, whether the defendant was guilty or not, might be greater at a second trial as the prosecution may have acquired, because of the first trial, a tactical advantage. Furthermore, an innocent person may not have the stamina or resources to fight a second prosecution.
(c) Promotes finality in the criminal justice system - It is clearly desirable from the point of view of all parties (whether victims, witnesses or the accused) that there is a point at which the circumstances of the offence can be put behind them, so that life can move on. The rule against double jeopardy promotes confidence in court proceedings and the finality of verdicts.
(d) Encourages the efficient investigation of crime - It could be argued that if the prosecution were able to prosecute once again a defendant who had been acquitted there would be a risk that the initial investigation might not be carried out as diligently as it should have been. The fact that there is but one chance to convict a defendant operates as a powerful incentive to efficient and exhaustive investigation.

While there are sound justifications for the rule against double jeopardy that does not mean that a case cannot be made for relaxation of that rule in certain circumstances. The most obvious is where new and compelling evidence is brought to light after the completion of the original proceedings which points to the guilt of an acquitted defendant. This situation is increasingly likely to arise with the rapid advances in recent years in the scope and quality of scientific evidence, particularly DNA testing, which offers persuasive evidence which was not previously available. Other compelling evidence which may come to light after the conclusion of the original trial may be from a newly identified witness or even a confession
It considered that there should be safeguards to ensure that the power to quash an acquittal will not be abused and that the scope of the relaxation is narrowly tailored to the legitimate purpose. The safeguards are as follows:

(a) the reform only applies to acquittals of serious offences and not all criminal offences;
(b) the consent of the Director of Public Prosecutions is needed before law enforcement agencies can reinvestigate the acquittal case;
(c) only appellate court will have the jurisdiction to quash the acquittal and order a retrial;
(d) new evidence which could have been found by law enforcement agencies acting with reasonable diligence will not meet the "fresh and compelling" evidence exception;
(e) before quashing the acquittal and ordering a retrial, the appellate court must be satisfied that it is in the "interests of justice" to do so;
(f) prohibitions on publication apply to protect the identity of the accused so as to prevent prejudicial publicity from affecting the fairness of any retrial; and
(g) the prosecution will only have one opportunity to apply for a retrial in respect of any particular case that originally resulted in an acquittal.

statement. The question is whether the principles underpinning the rule against double jeopardy can be outweighed by the need to pursue and convict the guilty, a key aim of the criminal justice system …

The relaxation of the rule … would satisfy the rationality test as the restriction of the right is rationally connected with the legitimate purpose of pursuing and convicting the guilty, a key aim of the criminal justice system. The relaxation would also satisfy the proportionality test as the means (relaxation only under the two exceptional circumstances of "tainted acquittal" and "fresh and compelling evidence" as to guilt) is no more than what is necessary to accomplish the legitimate purpose.”
14. Bearing in mind the constitutional and human rights implications, and taking into account developments in other jurisdictions, the Commission has formed the opinion that the rule against double jeopardy could be relaxed. The Commission therefore recommends that legislation could be adopted creating an exception to the rule against double jeopardy by providing for the re-trial – upon the order of a superior court - of a person previously acquitted when there is compelling evidence of a "tainted acquittal" or "fresh and compelling evidence" as to guilt. There should be, however, sufficient safeguards to ensure that the power to quash an acquittal will not be abused.