

## Second Reading

**The Hon. HENRY TSANG** (Parliamentary Secretary) [5.31 p.m.], on behalf of the Hon. John Hatzistergos: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

### Leave granted.

The Government is pleased to introduce the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2009.

The bill gives effect to proposals to reform the law of double jeopardy that were agreed by the Council of Australian Governments. New South Wales has led the nation in reforming double jeopardy laws, releasing an exposure draft bill in 2003 and passing laws to allow retrials in serious cases in 2006.

The rule against double jeopardy is the legal principle that a person should not be tried twice for the same offence. New South Wales amended the rule by allowing retrials of people in two situations.

Firstly, if a person is acquitted of a life sentence offence and 'fresh and compelling evidence' has subsequently arisen. Secondly, where a person is acquitted of an offence carrying a penalty of 15 years imprisonment or more where the acquittal was 'tainted'.

Following this State's initial reforms, COAG agreed on a series of recommendations for double jeopardy law reform—the vast majority of which drew upon the New South Wales Act. However, there were a number of recommendations that went beyond our existing provisions.

Now that our double jeopardy provisions have been in place for some time, it is appropriate to revisit the Act and undertake further reform.

There are two key reforms in the bill.

The first is to ensure that where an acquittal is 'tainted', the acquitted person can be tried again without interference, whether the tainted acquittal arises in the first trial or any subsequent retrial.

The second is to remove the principle of 'sentencing double jeopardy'. The effect of this will be that, where a lower court has made an error, appeal courts will be allowed to impose a penalty which fully reflects the criminality of the offending, without reducing the sentence because of the sentencing double jeopardy principle. I will expand on this in more detail later.

Together, these reforms will enhance public confidence in the criminal justice system by ensuring that appeal courts will be able to impose the sentence which fits the crime, unfettered by double jeopardy considerations, and that people will not be able to escape justice by interfering with the trial process.

I now turn to the main detail of the bill.

The bill inserts into the Crimes (Appeal and Review) Act a new section 68A, which specifies that an appeal court must not dismiss a prosecution appeal against sentence, or impose a less severe penalty than the court would otherwise consider appropriate, because of any element of double jeopardy.

Under the current common law principles that apply to Crown appeals against sentence, the appeal court has a wide discretion to refuse to intervene and adjust the sentence, even where an error has been shown. In considering whether to intervene, the court currently takes into account the fact that the person is facing 'double jeopardy' in the sense that they are re-sentenced for a second time.

Further, even where appeal courts have decided to intervene and impose a new sentence, under this principle they have historically imposed sentences that are less than that which they would otherwise have imposed, again on the basis that the prisoner is facing being sentenced for the second time.

The Double Jeopardy Law Reform Working Group, which reported to COAG, considered this issue. They gave weight to the argument that, where an appeal court finds that a sentence imposed at first instance is inadequate, but through the operation of sentencing principles (in particular the principle of 'sentencing double jeopardy') the inadequacy remains uncorrected, this does not serve the community's interest in seeing crimes appropriately punished.

The Government agrees, and the provision in the bill will make sure that where an offender has received too lenient a sentence because of an error made by the sentencing court, an appropriate sentence will be imposed on appeal, because the court will not be bound to give an 'automatic discount' because the offender is being sentenced a second time for the same offence.

It is worth noting that, although the term 'double jeopardy' has been used by the courts in relation to this sentencing

principle, there are differences between the principle in retrials and in sentencing. For the affected person, the prospect of being found guilty after having been acquitted is far more onerous than the prospect having the sentence varied. In the Government's view, the public interest in seeing the imposition of an appropriate sentence which fits the crime, outweighs any impact this might have on the convicted offender.

General sentencing principles will continue to apply. Firstly, Crown appeals on sentence are, and should continue to be, rare. Secondly, an appeal court should only intervene where an error has been shown, and, moreover, only intervene where the sentence has been shown to be manifestly inadequate or inconsistent. Only consideration of issues of double jeopardy will be removed by the new provision.

It is also intended that the provision apply to all appeal courts where sentences are considered. However, it is noted that the bill is not intended to apply to the industrial court, which deals with sentencing matters under occupational health and safety legislation. Complex negotiations are currently underway regarding the possible national harmonisation of OH&S law. In this context, it is not considered appropriate to extend this reform to that area of the law at this time.

New section 105 provides that a person can be retried again if their retrial acquittal is 'tainted'. Tainted acquittals occur where a person has been convicted of an administration of justice offence in connection with the acquittal, and it is more likely than not that, but for the administration of justice offence, the person would have been convicted. Administration of justice offences include bribery of, 'or interference with, a juror or witness, perversion of the course of justice and perjury.

Under the current provisions, a person can only be retried once under the double jeopardy provisions. However, under the proposed changes, where a double jeopardy retrial is itself found to be tainted, an application can be made for another retrial. No criminal should be able to escape justice by interfering with jurors or witnesses.

The bill represents a tightening of our ground-breaking double jeopardy laws to ensure that offenders face the appropriate punishment for their crimes and can not cheat the justice system.

I commend the bill to the house.