Submission No 1

INQUIRY INTO CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2019

Organisation: The New South Wales Bar Association

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NEW SOUTH WALES
BAR ASSOCIATION

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27 June 2019

The Hon. Niall Blair, MLC
Chair
Standing Committee on Law and Justice
By Email: law@parliament.nsw.gov.au

Dear Mr Blair

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

The New South Wales Bar Association ('the Association') refers to the proposal for amendment of the *Crimes (Appeal and Review) Act 2001* ('the Act') in the manner outlined in the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019* ('the Bill').

The Association's view

The Bill proposes an extension to the exception to the rule against double jeopardy as it applies to acquitted persons. However, in the view of the Association, the ramifications of the proposal are of far greater breadth. Further, while the Bill would confer power on the Director of Public Prosecutions to bring such further applications, the Association notes that the Director himself opposed the very same changes when they were sought in 2015.

The first part of the proposal was floated in identical terms in 2015. It was expressly considered by the Hon. James Wood AO QC in the *Review of s 102 of the Crimes (Appeal and Review) Act 2001 (NSW)* ('The Wood Report'). Following extensive consultation and review it was not recommended. The Parliament then rejected the 2015 Bill.

The second part of the proposal goes farther than the 2015 proposal, and allows second retrial applications in "exceptional circumstances". It also deems exceptional circumstances to exist where there has been amendment to Division 2 of Part 8 of the *Crimes (Appeal and Review) Act 2001* following a first application under that Division.

The Association supports retention of the current section and opposes the proposed amendment. The current section strikes an appropriate balance between the important principle of finality and the discovery of fresh and compelling evidence warranting the overturning of an acquittal. The provision is one that should operate only in the most exceptional of circumstances.

The Bill however, is a model whereby any substantive change in the law of evidence would render an acquittal open to be overturned. As the Bill includes a provision for retrospectivity, this could call into question many acquittals in this State pre-1995, given that in 1995 the *Evidence Act* introduced a very large number of substantive changes to the law of evidence by both codifying aspects of the existing common law and also rendering changes to it, such as in the law of tendency and coincidence evidence and the admissibility of certain types of hearsay evidence.

Selborne Chambers B/174 Phillip Street Sydney NSW 2000 DX 1204 Sydney T +61 2 9232 4055 E enquiries@nswbar.asn.au nswbar.asn.au ABN 18 526 414 014 ACN 000 033 652

Moreover, many acquittals since 1995 will also be called into question by every substantive amendment to the *Evidence Act* since that date (and there have been a number). Furthermore, future amendments to the *Evidence Act* and *Crimes (Appeal and Review) Act* will open up future acquittals for review.

The operation of existing legislative provisions is also frequently revisited by appellate court authority. On one view the Bill, through proposed s 105 (1AA), contemplates that changes to the *interpretation* of existing legislative regimes may also justify a subsequent retrial application upon satisfaction that this constitutes exceptional circumstances.

In essence, the nature of the proposed amendment would render many past acquittals open to appeal in the future upon further substantive change to the laws of evidence and it raises the spectre of opening future acquittals up for review. The proposed amendments also permit second applications to reopen an acquittal in exceptional circumstances. This would effectively mean that any acquittal of a life sentence offence is rendered susceptible to review upon legislative change of this kind. The Association is particularly concerned at the prospect of political pressure being brought upon Government to amend the law whenever there is an acquittal that generates media criticism (and in particular media criticism which may be uninformed by the underlying evidence available in a case). The Association is also concerned at the prospect of amendments to *Crimes (Appeal and Review) Act* following refusal of an application to overturn an acquittal, which the Bill then deems to be an "exceptional circumstance" warranting re-visitation of an already refused application to retry an acquitted person. The dilemma this immediately poses for the rule of law and separation of powers is obvious and reinforces the need for opposition to the Bill.

The Association also observes that the proposal to amend the definition of "fresh" and the policy reasons said to be behind such a need for the exception to finality for acquittals cannot fail to have equal application to *convictions*. That is, the justifications advanced for the Bill apply with equal force to conviction appeals. The adoption of such a change will inevitably have enormous repercussions for conviction appeals that appear not to have not been considered by the proponents of the Bill.

<u>The double jeopardy principle</u>

To highlight in clear terms the importance of finality in the criminal justice system, Chief Justice Gleeson and Justice Hayne in *The Queen v Carroll* (2002) 213 CLR 635 described the "fundamental underpinnings of the criminal law" as follows:

> [21] A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious...
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> [22] Many aspects of the rules which are lumped together under the title "double jeopardy" find their origins not so much in the considerations we have just mentioned as in the recognition of two other no less obvious facts. Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression. Further, finality is an important aspect of any system of justice. As the New Zealand Law Commission said in a recent report dealing with the possibility of statutory relaxation of the rule against double

jeopardy in the case of acquittals procured by perjury or perversion of the course of justice[17], the need to secure a conclusion of disputes concerning status is widely recognised, and the status conferred by acquittal is important. The Commission quoted what was said by Lord Wilberforce in *The Ampthill Peerage*[18]:

> "Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality."

Further, as the Association has previously submitted, the power and resources of the State against the individual rationale for the rule or rules are elemental to the fairness of our justice system. The rationale described within the rule against double jeopardy, it is that described by Black J in *Green v United States* [(1957) 355 US 184 at 187-188]:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and order and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Retrospective application to persons who were acquitted prior to the introduction of Part 8 of the Act also breaches Art 14(7) of the International Covenant on Civil and Political Rights (ICCPR), which Australia has ratified. Art 14(1) provides:

> No one shall be liable to be tried and punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Where double jeopardy exceptions existed at the time of acquittal, arguably an accused is never "finally acquitted in accordance with the law", and therefore double jeopardy exceptions will not necessarily breach the ICCPR. However, where double jeopardy exceptions are introduced *after* acquittal the accused person has been "finally acquitted in accordance with the law".

The proposal represents a sustained attack on finality given that not only may an application be made, but in the event of the failure of that application and "exceptional circumstances", a second application may be made. As set out above, any subsequent amendment to Division 2 (of Part 8) of the *Crimes (Appeal and Review) Act* is deemed to constitute exceptional circumstances. That is, through legislative amendment, the court may be forced to reconsider a second application although there is no change in the factual circumstances of a matter.

Analysis

The erosion of the principle of finality by the proposed exception to that principle in its application to acquittals will inevitably reduce public confidence in not only the courts and the criminal justice system but the rule of law.

The DPP, in his 2015 submission to the Wood review, submitted that the proposal would significantly expand the number of acquittals subject to application and allow the DPP to re-litigate issues on which the primary court had ruled, rather than what was not or could not have been adduced. This the Director recognised would in turn represent "a further erosion of the principle of finality and would also erode public confidence in the administration of justice", citing Chief Justice Mason in *Rogers v The Queen* (1994) 181 CLR 251 at 256-7. There his Honour noted that any such subsequent criminal proceeding "is not only inconsistent with the principle that a judicial determination is binding, final and conclusive (subject to fraud and fresh evidence), but also calculated to erode public confidence in the administration of justice by generating conflicting decisions on the same issue".

The UK has a different regime

Proponents of the model often cite changes to the *Criminal Justice Act 2003* (UK) as a model or reason for a change to the Act. As stated by the Hon. James Wood AO QC, doing so fails to recognise differences in the law and understanding of key terminology from those in our jurisdiction. First, the Director of Public Prosecutions in NSW already had (and has) a power to test a trial judge's rejection of admissibility of key prosecution evidence that did not exist in the UK at the time of their amendments.

Secondly, the UK first proposed amendments by the introduction of a provision whereby the appellate court had to be satisfied of "new and compelling" evidence. "New" was defined as "evidence that was not available or known to an officer or prosecutor at or before the time of the acquittal". That is, the definition in the first proposed UK legislation was similar or identical to "fresh" evidence as understood in this jurisdiction: *Mickelberg v R* (1989) 167 CLR 259 at 301 per Toohey and Gaudron JJ (Mason and Brennan JJ agreeing). In this context, it is critical to note that in NSW there is a difference in the common law meaning between "fresh evidence" and "new evidence". When introduced, there was an additional provision that statutorily mandated in the UK that "Evidence is new if it was not adduced in the proceedings in which the person was acquitted...". That is, the UK provision as introduced in 2005, statutorily expanded the definition of "new" evidence. The evidence also still had to be "compelling". The 2005 UK provision also included an interests of justice test that mandated regard to be had to whether it is likely that any such new (and compelling) evidence "would have been adduced" but for a "failure by an officer or by a prosecutor to act with due diligence or expedition".

Another significant difference between the jurisdictions is the level of public legal representation available to accused persons in the UK system. Comparable safeguards that exist with respect to legal representation of accused persons in the UK do not exist in NSW (and would require considerable increase in legal aid funding to come close to approximating in this State). This makes comparison between regimes which propose incursions on the rights of accused persons particularly dangerous between NSW and the UK.

In short, there are several differences between the jurisdictions such that a claim of equivalence between the proposed amendment and the UK provisions cannot be supported. Many differences were drawn out in the Wood Report. As noted above, the 2015 Amendment Bill, in relevantly

identical terms to the first part of the current proposed Bill, was considered and rejected by the legislature following the Wood Report which exposed some of the differences between the jurisdictions.

Retrospectivity

In addition to the very real dangers of retrospectivity as set out above, what is proposed should be considered in light of what has been described by Justice Gaudron in the matter of *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 as "a travesty of the judicial process". Her Honour said this:

> "Equally, it would be a travesty of the judicial process if, in proceedings to determine whether a person had committed an act prescribed by and punishable by law, the law proscribing and providing punishment of that act *were a law invented to fit the facts after they had become known*. In that situation, the proceedings would not be directed to ascertaining guilt or innocence (which is the function of criminal proceedings and the exclusive function of the courts), but to ascertain whether Parliament had perfected its intention of declaring the act in question an act against the criminal law. That is what is involved if a criminal law is allowed to take effect from some time prior to its enactment" (emphasis added).

What is proposed by the Bill is that an accused person would no longer have to simply meet the case as notified to him or her in advance of trial, adduced in accordance with the rules of evidence and procedure as they stood in the trial and make his or her defence accordingly. There would be no security of acquittal in those circumstances. A change in the law of evidence *after* his or her trial which may be prescribed to "fit the facts after they had become known" would render the acquittal open to review on application of the prosecution following the accused having met the case against him or her and being acquitted at trial. The repercussions for another fundamental right, namely the right to silence, in such instances are patent.

Justice McHugh in *Polyukhovich* at [27] specifically referred to US Supreme Court authority[1] that such ex post facto legislation is not prohibited if it "mollifies the rigor of the criminal law: but *only those* that create or aggravate the crime; or increase the punishment, *or change the rules of evidence,* for the purpose of conviction" are prohibited (emphasis added).

There would be a complete erosion of fair trial principles and the efficient administration of trials wrought by the proposed amendment.

In addition to the provision also constituting a breach of Art 14(1) of the ICCPR in its retrospective application (as addressed above), there is an additional breach in the prospect of the retrial of a person who has been acquitted on a trial conducted in accordance with law (including the laws of evidence) at the time of the original trial on the basis that those laws have since changed.

Further difficulties

There are sixty to seventy murder charges a year in NSW. The proposed changes may well lead to a situation in which prosecuting authorities may routinely seek to tender material then thought to be inadmissible in order to preserve its potential use in some future trial following acquittal should there be a change in law following an acquittal, facilitating the use of such evidence. Conflicting views as to the reason for not adducing evidence on the basis of judgments as to admissibility may arise.

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[1] *Calder v Bull* (1798) 3 US 386 at 391.

Judgments ruling evidence inadmissible that were correct at the time of the ruling could be rendered incorrect.

The politicisation of murder trials will be inevitable with pressure on the legislature to amend the *Evidence Act* in order to facilitate a retrial. The qualitative change from the nature of the current provisions, which maintains the broad community acceptance of jury acquittals while providing an exception to ensure that matters such as advances in science or post acquittal confessions are captured, to those proposed, demonstrates that the current balance should be maintained.

Bowraville

The decision of the Court of Criminal Appeal in the "Bowraville" case concerning the murders of Clinton Speedy and Evelyn Greenup and alleged murder of Colleen Walker was handed down on 13 September 2018: *Attorney General (New South Wales) v XX* [2018] NSWCCA 198 ('*XX*'). The Attorney-General sought special leave to appeal to the High Court of Australia. On 22 March 2019, the High Court refused to grant special leave to the Attorney General to appeal from that decision.

The proponents of the amendment have been frank about their purpose – to facilitate a further application or reconsideration of the matter of *XX*. This in turn, is based on a proposition that the matter of *XX* has to date brought the justice system into disrepute. However, any assumption that the proposed Bill would lead to a successful application in the matter of *XX* is misconceived.

As to the proposition that the matters of *XX* have been miscarriages of justice or brought the justice system into disrepute, the Court of Criminal Appeal in *XX*, made these observations in determining the application:

> "[224] As has been pointed out by the High Court on a number of occasions, an accused person is entitled to a trial "according to law"... Such a trial is a trial based on evidence admissible according to law. There is no miscarriage of justice by reason of the fact that had inadmissible evidence been admitted, the result might have been different...
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> [225] Once this is understood, it follows that there can be no miscarriage of justice in limiting the circumstances in which an acquittal is to be set aside to a situation where evidence was not available at the trial and could not have been made available with the exercise of reasonable diligence. Such a limitation, in our opinion, does not "bring the justice system into disrepute".

The proposed amendments, on the other hand, would bring the administration of justice into disrepute by rendering the criminal law unworkable, free from finality and susceptible to executive interference.

Additionally, and finally, as the Association wrote in its letter to the Committee in 2015 in relation to the Bowraville matters: "it is far from clear whether the evidence in question would pass the threshold for '*compelling*' (Report of the Standing Committee on Law and Justice on the *Family Response to the Murders in Bowraville* pp. 76, 77). It is questionable whether the amendment would have any bearing on the Bowraville case".

The Association notes that multiple prior Attorneys-General (informed by several Crown Advocates and the Solicitor General) and NSW DPPs, have previously declined to make the application. Public statements by or on behalf of many of these persons about the lack of prospects of success of a retrial

application for reasons other than the definition of "fresh" (including problems with the reliability of the evidence and that it was not sufficiently "compelling") were set out in detail in the 2014 Report of the NSW Legislative Council Standing Committee on Law and Justice's Inquiry into the Family Responses to the Murders in Bowraville at [2.31], [6.1] [6.2], [6.21 27], and in Submissions to the Inquiry from the NSW Government at p 3 and NSW Police at p 32. When an application was brought by the Attorney, as noted above, it was refused by the Court of Criminal Appeal and special leave to appeal from that decision was also refused by the High Court of Australia.

The Association notes that in these circumstances, the proposed amendments may not have the desired effect in the particular case of *XX,* while in the meantime upending innumerable other acquittals and, by extension of policy, convictions.

Legislative amendment directed to achieving a particular outcome in a particular case is generally a poor basis for substantive changes to the criminal law, most particularly where it involves infringements of long standing fundamental rights and principles that will have impacts well beyond the individual case.

Conclusion

For the reasons above, the Association opposes the proposed amendments to the Act. Sections 102 and 105 should not be amended.

If you have any questions please contact the Association's Executive Director, Mr Greg Tolhurst

Yours sincerely

Michael McHugh SC
Senior Vice President