Submission No 3

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

Organisation: The Law Society of New South Wales

Date Received: 28 June 2019

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:EErg1748994

27 June 2019

The Hon Niall Blair, MLC
Chair
Legislative Council Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Blair,

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

We write to you in relation to the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 ("the Bill"), introduced by the Greens into the Legislative Council on 30 May 2019, and referred to the Standing Committee on Law and Justice for inquiry and report.

The Law Society is cognisant that the Bowraville murders, and the subsequent investigation and legal proceedings, have had significant adverse impacts on the families of the victims and on the wider Bowraville community. The Law Society acknowledges the pain and suffering of the families of the victims.

The Law Society does not support legislative amendments based on a single case. Legislative amendments introduced for what appears to be a narrow objective, can have serious ramifications across the criminal justice system. We are opposed to the Bill as it would undermine the finality of trials as we have detailed below.

The rule against double jeopardy

The High Court of Australia reiterated the foundations of the rule against double jeopardy in *The Queen v Carroll* [2002] HCA 55:

- It is a fundamental rule of law that no man is to be brought into jeopardy of his life, more than once, for the same offence.
- Policy considerations for the rule against double jeopardy go to the heart of the administration of justice and the retention of public confidence in the justice system.
- The main rationale for the rule is that it protects against the unwarranted harassment of the accused by multiple prosecutions.
- Judicial considerations need to be final, binding and conclusive if the determinations of the courts are to retain public confidence, and finality in litigation is a critical and basic principle of adversarial justice.
- The decisions of the courts must be accepted as incontrovertibly correct unless set aside or quashed on appeal and, citing Lord Halsbury in the English case of *Reichel v McGrath* [1889]: "It would be a scandal to the administration of justice, if, the same question having been disposed of in one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again".

- The double jeopardy principle conserves judicial resources and court facilities.

The *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* altered the common law position in relation to double jeopardy, by introducing specific and limited exceptions to the rule. The Law Society opposed the legislation when it was introduced. While the Law Society remains of the view that the common law rule against double jeopardy should have been retained rather than reformed, it considers that section 102 as currently drafted fully addresses the object of the legislation and should not be amended.

The proposed amendments

The Law Society has reviewed the Bill, which seeks to extend an exception to the rule against double jeopardy in relation to an acquitted person where previously inadmissible evidence becomes admissible. The amendments would also allow for a second application for the retrial of an acquitted person to be made in exceptional circumstances.

The Law Society does not support the object of the Bill, which seeks to further broaden the types of matters that can be subject to a retrial. We understand that many other legal stakeholders in the criminal justice system have a consistent view. We note that in his 2015 review of section 102, Justice Wood recommended that the proposed amendment contained in the 2015 Bill, which is repeated in the current Bill, not be adopted.[1]

The proposed amendments would have wide reaching consequences for a plethora of cases and would mean no finality for many acquittals. There are innumerable ways in which a change to the rules of evidence could result in "fresh" evidence following such an amendment. By way of example, a change in approach by the Court of Criminal Appeal to the admissibility of tendency evidence, or an amendment to the *Evidence Act 1995,* could make the evidence "fresh".[2]

The emphasis would shift from the intended effect of the legislation on the discovery of genuine "fresh" evidence to a debate over the admissibility of evidence. This shift may well result in pressure on the legislature to retrospectively amend the *Evidence Act 1995* whenever there is an unpopular verdict in a high-profile trial.

Thank you for the opportunity to comment, we look forward to reviewing the Standing Committee's report on the Bill.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer,

Yours sincerely,

Elizabeth Espinosa
President

[1] The Hon James Wood AO QC, *Review of section 102 of the Crimes (Appeal and Review) Act 2001*, September 2015, p67.
[2] Ibid., p54.