Submission
No 23

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

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New South Wales Legislative Council
Standing Committee on Law and Justice
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Dear Committee members,

Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

We are grateful for the opportunity to provide submissions in relation to the above inquiry. The Bill is opposed.

The four pivotal reasons for opposition are related in that they are all connected with the underlying policy rationale for finality of legal proceedings. This is a principle which applies to all areas of law – civil and criminal - but warrants particular safeguarding in relation to attempts to erode the incontrovertibility of acquittals validly and regularly returned. Likely consequences of enactment of the proposed amendments are submitted to be undue intrusion on the right of individual accused persons to not be oppressed by repeated harassment by the state, and destabilisation of public confidence in the administration of justice. The Bill is not consistent with the rule of law or separation of powers (and the appearance thereof).

Finality and Double Jeopardy

In *Rogers v The Queen* (1994) 181 CLR 251; [1994] HCA 42 Deane and Gaudron JJ made the following remarks at 273-4 regarding the broad rule of public policy based on the principles expressed in the maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro eadem causa':

> ' *The first expresses the need, based on public policy, for judicial determinations to be final, binding and conclusive. The second looks to the position of the individual and reflects the injustice that would occur if he or she were required to litigate afresh matters which have already been determined by the courts. It*

is correct to say that res judicata or cause of action estoppel derives from the principles embodied in those maxims, which principles are fundamental to any civilized and just judicial system. There is, however, another related principle, likewise fundamental, which is embodied in the Latin maxim res judicata pro veritate accipitur. That maxim gives expression to a rule of Roman law which has since been recognized as part of our common law. It expresses the need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct.

The principle has particular significance for individuals acquitted of crime, given the accusatorial process. In *R v Carroll* [2002] HCA 55; 213 CLR 635 Gleeson CJ and Hayne J made the following remarks at [21]-[22] under the heading "Some fundamental underpinnings of the criminal law":

> " *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. Blackstone's precept 'that it is better that ten guilty persons escape, than that one innocent suffer' may find its roots in these considerations.*
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> *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, 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 [[1977] AC 547]:*
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> > *'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.'"*

In the same case McHugh J at 635 [128] said:

> ‘ *It is a fundamental rule of the criminal law "that no man is to be brought into jeopardy of his life, more than once, for the same offence". If the prosecution attempts to do so, the accused may plead that he has already been convicted (autrefois convict) or acquitted (autrefois acquit) of the same matter. The rule is an aspect or application of the principle of double jeopardy whose "main rationale ... is that it prevents the unwarranted harassment of the accused by multiple prosecutions". Policy considerations that go to the heart of the administration of justice and the retention of public confidence in the justice system reinforce this rationale. Judicial determinations need to be final, binding and conclusive if the determinations of courts are to retain public confidence. Consequently, the decisions of the courts, unless set aside or quashed, must be accepted as incontrovertibly correct. As Lord Halsbury LC said in Reichel v Magrath, "it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." In addition, the double jeopardy principle "conserves judicial resources and court facilities" (citations omitted)*

The Honourable James Wood AC QC prepared a report in 2015 at the request of the Attorney-General after the introduction into Parliament of the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bil*l 2015 (‘the Wood report’). The 2015 Amendment Bill was rejected by the legislature following the delivery of the Wood report. For good reason all legal bodies on both sides of the accusatorial system of criminal prosecution (ODPP, Bar Association, Law Society, Legal Aid, Public Defenders) opposed this expansion when it was proposed in 2015. The Public Defenders maintain that the arguments against the amendment are compelling.

The principle of finality is of great importance, and the Bill represents a remarkable change which is completely out of step with the emphasis on and reasons for the incontrovertibility of acquittals. If disparity were to exist in the approach towards previously validly entered acquittals, and previously validly entered convictions, then for the reasons outlined above and central to the accusatorial system of law the disparity should be balanced in favour of an ability to review previously validly entered convictions. But this power does not exist. Even in the more fluid situation of a change in the judicial interpretation of law (not legislative change), those convicted of crimes are generally obliged to comply with procedural requirements such as time limitations for appellate review such that they are not able to appeal out of time.

In *R v Unger* [1977] 2 NSWLR 990 Street CJ (with whom Begg and Ash JJ agreed) considered an application for an extension of time in which to appeal against conviction, in

circumstances where a regulation had been held invalid after the conviction. In declining to grant the extension his Honour noted at 993 the statement in *R v Ramsden* (1972) Cr L Rev 547 that:

> " *... alarming consequences would flow from any general policy of permitting the re-opening of cases by granting a substantial extension of time on the ground that a decision of a court of authority had removed a widely held misconception as to the prior state of the law."*

At page 995 his Honour observed that there was a consideration of general principle that, when applied to extensions of time to appeal, had the effect that those alarming consequences did not arise:

> " *The trial having been concluded and the time for appeal having gone by, the general principle is that the matter is regarded as at an end. It is to be borne in mind that the effect of a conviction in a criminal court no less than a verdict and judgment in a civil court, is to merge in that conviction or judgment, as the case may be, all of the material upon which it proceeded. Dixon J as the Chief Justice then was, said in Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73:*
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> *"... if he has already been convicted, then because his liability has merged in the conviction, it no longer depends upon the law under which it arose, and it does not lapse with the revocation of the law. The conviction has become the source of his liability for his offence, and the conviction continues in force because its operation does not depend upon the law creating the offence, but upon the authority belonging to a judgment or sentence of a competent Court."*
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> *This concept of merger is no blind, arbitrary proposition. It is founded deeply in the fabric of the philosophy of the common law. Although in pure theory the overruling or modification by judicial decision of previous conceptions of legal principle does no more than correct a departure from the timeless perfection of the law, the plain fact is that legal principle is constantly evolving and being moulded in the light of the changing and developing social context. Recognizing this, there has always been an unwillingness to permit the re-opening of past decisions. Indeed the process of appeal, either civil or criminal, is a comparatively recent and statutory concept - it finds no basis in the common law itself."*

The same principles are applied in New Zealand: see *R v Knight* [1998] 1 NZLR 583 at 587-588, the United Kingdom: see *Jawad v The Queen* [2013] EWCA Crim 644, *R v Bestel and Others* [2013] EWCA Crim 1305, and Hong Kong: see *Chau Cheuk Yiu v Poon Kit Sang* [2012] HKCFA 42; [2013] 1 HKC 478 at [9] - [11] and [53] - [59]. They are applied to

applications to challenge convictions in light of the *Human Rights Act* 1998 (UK) jurisprudence: see *Kentwell v The Queen* [2014] HCA 37; 313 ALR 451 at [28].

The principle of finality is so important that tests of 'exceptional circumstances', 'substantial injustice' 'substantial injury' have been developed to ensure the rarity of extensions of time in such situations. However as indicated, this body of law relates to the situation where error in the application of the law could very well be shown (because a previous misconception of the law has been removed by later authoritative decision) – not where there has been legislative change. Where there was no arguable error at all at the time of trial but substantial legislative change has occurred (the situation the focus of the current bill), the convicted person has no avenue at all to have the conviction reconsidered.

To give an example, s 65(2)(d) of the *Evidence Act* NSW was amended in response to recommendations made in 2006 by the Australian Law Reform Commission.[1] As originally enacted, the section allowed first hand hearsay representations to be adduced if the maker was unavailable and the representation made was against the interest of the maker. This version of the section allowed an out of court interview by a criminally concerned accomplice of a murder accused, who refused to give evidence at the trial of the accused, to be tendered against the accused. The trial judge's decision was held on appeal to be in accordance with the section, which did not require any additional marker of reliability: see *R v Suteski* [2002] NSWCCA 509; 56 NSWLR 182; 127 A Crim R 371. Special leave to appeal to the High Court was refused: *Suteski v R* [2003] HCATrans 493.

The danger of allowing hearsay representations in circumstances such as this case founded the recommendations of the ALRC referred to above, which resulted in amendment of the section, which now additionally requires that the representation of the unavailable person, against interests, be 'made in circumstances that make it likely that the representation is reliable'. This test would almost certainly have rendered much of the incriminatory hearsay evidence led against Ms Suteski inadmissible. Sentenced to 22 years for murder, she has no entitlement to seek that her conviction be overturned because of a substantial legislative change. Appellate review of convictions on legal grounds requires error, and there was no error in the application of the law as it stood at the time of trial.

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[1] ALRC 'Evidence' Report 102, February 2006

Consequences of Reform and Lack of Clarity

It should not be thought that because the bill is directed at a particular case, being the only one since 2006 where the Court of Criminal Appeal has considered Divisions 1 and 2 of Part 8 of the *Crimes (Appeal and Review) Act*, that the amendment will continue to preserve the expectation that the 2006 qualification of the principle of double jeopardy would be exceptional.

To take a presently pertinent example, on 28 June 2019 in a media release the Honourable Mark Speakman MP, Attorney General, advocated for historic reforms nationally to enable greater admissibility of tendency and coincidence evidence in child sexual assault proceedings.[2] The Attorney General indicated that a new rebuttable presumption would ensure evidence that a defendant who has, or has acted on, a tendency to have a sexual interest in children is presumed to have 'significant probative value' (required for admissibility under s 97 of the *Evidence Act* NSW, Cth, ACT, Vic, Tas, NT). The proposed reforms to the *Uniform Evidence Law* were explained as responsive to the stated objective of the NSW Royal Commission into Institutional Responses to Child Sexual Abuse of facilitating greater admissibility of tendency and coincidence evidence in child sexual assault proceedings. The issues had been discussed by the Council of Attorneys-General on 28 June 2019, with a model bill foreshadowed. Additional forecast reforms included a presumption in favour of joint trials in child sexual assault prosecutions where there are multiple victims and the prosecution is seeking to lead tendency or coincidence evidence.

There are a number of offences of sexual offending against children which carry a maximum penalty of imprisonment for life, so as to come within the purview of s 100 of the *Crimes (Appeal and Review) Act* – currently for example *Crimes Act* NSW s 61JA where victim is a child and s 66A, and multiple historical offences. This anticipated change is arguably even more 'substantial' than the move from the common law test of 'similar fact evidence' to the implementation in 1995 of the tendency and coincidence tests in the *Evidence Act* NSW.

The ramifications of an expectation of reconsideration of every case where a person in NSW has been acquitted of a life sentence offence regarding alleged sexual abuse of a child where an alleged tendency to have a 'sexual interest in children' was not admissible at the time of

[2] Department of Justice, ministerial media release: Evidence Law Reform, 28 June 2019

trial can be seen as radical – for the individual accused, complainants, witnesses and the system.

Further, the term 'substantial legislative change' is not clear. For example, was the amendment of s 79 and introduction of s 108C into the *Evidence Act* by the *Evidence Amendment Act* 2007, to provide that the credibility rule does not apply to expert evidence, such as specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse), a substantial legislative change? It is certainly the case that it is subsequent to this enactment that the prosecution sometimes calls evidence of this nature. As noted above there are a number of offences of sexually offending against children that are life sentence offences. Can the prosecution now commission expert reports in those where acquittals resulted, to provide fresh and compelling evidence that would have been inadmissible at the time regarding child development and behaviour, and seek to have the acquittal quashed and a retrial ordered?

The proposal brings the law into disrepute and actual interference or perception thereof of in the impartiality in legislative development

The currently existing broad acceptance for jury verdicts is vital. It is one thing to speak of a blight on the administration of justice where an accused person acquitted of murder or another life sentence offence thereafter confesses to it, or has a strong connection with the crime provable by advances in DNA technology – the types of situations spoken about in introducing the qualification in 2006, set out in the Wood Report and so on. It is another thing altogether to say that the properly applicable law at the time is such a significant blight on the administration of justice that it warrants such a radical erosion of the principle of double jeopardy. It is difficult to contemplate another scenario in which the law as enacted by democratically elected members of parliament and / or shaped by independent judicial officers of the High Court and highest appellate court of this state, developing the meaning of the common law, is clumped with such deeply negative developments as a confessing murderer.

In *Attorney General for New South Wales v XX* [2018] NSWCCA 198 the Court of Criminal Appeal dealt with a submission by the Attorney General that a construction of the legislation precluding evidence which was available but inadmissible at the time of the original trial

being treated as "fresh" would be productive of a miscarriage of justice in potentially allowing a guilty party to go free. As the Court explained at [244] – [245]:

> ' .. *There is a difficulty with that submission. 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": X7 at [89]; Lee v The Queen (2014) 253 CLR 455; [2014] HCA 20 at [45]-[48], citing Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6; Jago v District Court of New South Wales (1989) 168 CLR 23; [1989] HCA 46; Katsuno v The Queen (1999) 199 CLR 40; [1999] HCA 50. 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. To the contrary, a conviction based on inadmissible evidence would involve a miscarriage of justice.*
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> *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".*

There is nothing problematic in the existence of discussion – even robust disagreement – about the application of the law in individual cases. Law makers are generally assisted by works undertaken by law reform commissions, standing committees, and bodies such as the Sentencing Council which consult stakeholders and consider a wide range of submissions on the issues of law reform. This often includes analysis of the consequences of the application of the existing law in particular cases, and consideration of how justice may be improved in light of such historical fact.

It is another thing entirely for parliamentary law reform to be linked to achieving a particular result in a particular case. Expanding the qualified abrogation of the principle against double jeopardy to allow change of legislation to trigger the right to seek a new trial for a person previously acquitted carries a very significant risk of partial politicisation of law reform by its being tethered to achieving a particular outcome for a particular person or group.

Targeting an individual brings the administration of justice into disrepute and will undermine confidence in its impartial administration. The bill itself does so, and the future potential substantial legislative changes would inevitable do so and politicise the trial process and law making process.

As explained by multiple stakeholders in the preparation of the Wood Report, and accepted, there is a real concern that the Bill if passed would result in Parliament becoming pressured

to amend the *Evidence Act* to 'correct' a high profile matter in which the accused was acquitted: see Wood Report 6.20. A related concern that has not been pointed out is the potentially deterrent impact on legislative change. For example in relation to the proposed amendments to the *Evidence Act* announced a few weeks ago, as noted above, the potential changes should be debated on their merits. This may well be informed by the particulars of past cases, but not with a view to changing the results in those cases. The merits of any Bill should be debated and acted upon with a view to moving forward, not needing to be mindful of how many old acquittals are likely to have to be re-opened and litigated as a result of the legislative change.

The proposed sections 105(1AA) and 105(1AB) are particularly offensive against this principle, in that they are designed to have the effect of compelling the judiciary to find exceptional circumstances in the case of XX.

The Bill is also problematic because it is out of step with other jurisdictions within Australia. For the reasons set out in the Wood Report the English authorities are not instructive.

Complex and time consuming mechanism which interferes with the usual order of decision making and review in criminal matters

Although the Court in *Attorney General for New South Wales v XX* [2018] NSWCCA 198 at [123] noted that Badgery-Parker J correctly applied the common law similar fact evidence rule of common law, that was not a contentious proposition in that case. However issues of admissibility or inadmissibility are often not clear cut. Legislation in accordance with the proposed Bill would require, for example, in the particular case of the Bowraville murders, the Director of Public Prosecutions – whose representative had previously (but unsuccessfully) argued that the evidence relating the murder of Evelyn was admissible in the trial for the murder of Clinton, to be now arguing that it was in fact inadmissible.

Similarly, the issue of whether the evidence would be admissible under the tests of tendency and coincidence evidence pursuant to sections 97 and 98 of the *Evidence Act* is by no means clear cut. So there would necessarily be a disruption to the usual course of a judge at first instance deciding admissibility – with a limited right of appeal by the Crown at the time pursuant to s 5F of the *Criminal Appeal Act* and a right of appeal to the accused person if a conviction occurs and error in that determination can be shown. The consequence of the Bill

would be that the Court of Criminal Appeal as a first instance court decides an issue of admissibility that has not been determined by any first instance judicial officer.

Section 106(5) of the *Crimes (Appeal and Review) Act* provides that at the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person. It would seem then that the issue of admissibility would be argued again before the District or Supreme Court, without reference to the fact that the Court of Criminal Appeal has found the evidence 'admissible'. Yet this whole process is effectively futile as exclusion would prompt a Crown s 5F appeal in which the Court of Criminal Appeal is not likely to deliver a judgment inconsistent with its earlier one on the same topic, of if admitted and the person convicted, an appeal regarding the decision as to admissibility would result also in the Court of Criminal Appeal not likely to deliver a judgment inconsistent with its earlier one on the same topic.

Conclusion

The Bill is fundamentally problematic. Finality is a very important principle in all areas of the law. The Bill selects the one area where it should be *most* closely safeguarded and seeks to make it the least. It erodes the principle in a way that is not available to convicted accused people nor disgruntled parties in other areas of the law.

Yours faithfully,

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