



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: CrimJErg942941

14 April 2015

Mr David Shoebridge, MLC
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Shoebridge,

Consultation Draft Bill – the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015

The Law Society's Criminal Law Committee has reviewed the draft Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015, and provides its comments in the attached submission form.

Thank you for the opportunity to comment. Questions should be directed to Rachel Geare, Policy Lawyer for the Committee, at rachel.geare@lawsociety.com.au or 9926 0310.

Yours sincerely,

John F. Eades
President

Draft Bill - Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015

1. Do you support the objects of the Bill?

The Criminal Law Committee ("the Committee") strongly opposed the legislation which changed the double jeopardy rule and commenced on 15 December 2006. The Committee continues to support the repeal of Part 8 of the *Crimes (Appeal and Review) Act 2001*. The Committee understands that the Greens are sympathetic to the circumstances of the Bowraville murders (as is the Committee), but does note that the Greens opposed the change to the double jeopardy rule in 2006.

The Committee has reviewed the draft Bill, which proposes an extension to the exception to the rule against double jeopardy in relation to an acquitted person where previously inadmissible evidence becomes admissible. The Committee does not support the object of the draft Bill, which seeks to further broaden the types of matters which can be subject to a retrial.

The Committee notes that the long-standing foundations of the double jeopardy principle are reiterated in *The Queen v Carroll* (2002) 194 ALR 1 at 128, and in the Committee's view they remain legitimate:

- 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 (Blackstone, *Commentaries* (1769)).
- 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 (*Rogers v The Queen* (1994) 181 CLR 251).
- The main rationale for the rule is that it protects against the unwarranted harassment of the accused by multiple prosecutions (*Rogers v The Queen*).
- Judicial considerations need to be final, binding and conclusive if the determinations of the Courts are to retain public confidence (*Rogers v The Queen*; see also *Connelly v Director of Public Prosecutions* [1964] AC 1255). Finality in litigation is a critical and basic principle of adversarial justice: (*D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1 at [34]-[36]).
- The decisions of the Courts must be accepted as incontrovertibly correct unless set aside or quashed on appeal (*Rogers v The Queen*) and citing Lord Halsbury in the English case of *Reichel v McGrath* [1889] 14 AC 665: "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 (Friedland, *Double Jeopardy* (1969)).

2. Will the draft Bill be effective in implementing Recommendation 8 of the Committee's Report?

Recommendation 8 suggests that the Government conduct a review of section 102 of the *Crimes (Appeal and Review) Act 2001*, and in doing so consider the merit of expressly broadening the scope of the provision to enable a retrial where a change in the law renders evidence admissible at a later date. To the Committee's knowledge the Government has not



conducted a review of section 102, or prepared a report on its findings. In the Committee's view, the draft Bill does not implement Recommendation 8.

The Committee considers it unlikely that the effect of the proposed legislative amendments would result in grounds for a retrial in the Bowraville case. Previous applications to both the Director of Public Prosecutions and Attorneys General have been unsuccessful. If, following the amendments, the evidence was capable of becoming "fresh" evidence, it does not appear to be "compelling" as required by section 102(3) (see paragraphs 6.2 and 6.27 of the Report).

3. What would be the likely impacts (positive and negative) of the draft Bill on the criminal justice system, beyond its application to the Bowraville case?

The Committee 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.

The proposed amendments would have wide reaching consequences for a plethora of cases and will mean no finality for many acquittals. By way of example, a change in approach by the Court of Criminal Appeal to admissibility of tendency evidence could make the evidence "fresh". A further example is a case where there was a determination that on the Crown case as run at the time, the evidence was unfairly prejudicial. On a different Crown case, in which the evidence could no longer be said to be unfairly prejudicial, the evidence would be "fresh".

If the legislation is passed, it could lead to an increase in ad hoc legislative changes in response to single cases.

Given the significant and potentially far reaching implications for any changes to the law in this area, the Committee emphasises the need for consultation with relevant stakeholders and a considered approach to any proposed amendments.

4. Are there any better, alternative models to achieve the same outcome?

The Committee is of the view that the issues are highly complex and any alternate model should be subject to review by the NSW Law Reform Commission.

5. Any further comment.

If the Government supports Recommendation 8, then given the highly complex nature of the issues involved, the Committee suggests that a review be conducted by the NSW Law Reform Commission to allow for a thorough, consultative process.

