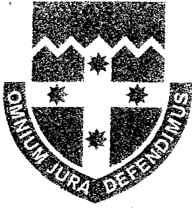

THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBGMM1296456

Direct Line: 9926 0216

4 September 2009

Mr Greg Smith SC MP
Shadow Attorney General
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Smith,

Re: Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2009

Thank you for seeking the Law Society's comments on the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2009* (Bill). The Law Society's Criminal Law Committee (Committee) has reviewed the Bill and brings the following comments to your attention.

Proposed s 68A provides that an appeal court must not dismiss a prosecution appeal against sentence, or impose a less severe sentence than it would otherwise consider appropriate, because of any element of double jeopardy involved in the respondent being sentenced again.

The Committee is completely opposed to proposed s 68A. The Committee supports the retention of the long-standing principle of 'sentencing double jeopardy'. The Committee is not aware of any evidence based justification for the amendment. The amendment implements a COAG recommendation that arose without any public consultation or thorough review examination of the need for reform.

The Committee is of the view that s 68A should be removed from the Bill.

Sentencing principles of double jeopardy

The statutory right of the Crown to appeal against sentence was created in New South Wales in 1924 and is contained in s 5D of the *Criminal Appeal Act 1912*.

The common law has developed to protect the Courts and the individual from abuse of the Crown's right of appeal against sentence. The sentencing principles of double jeopardy arise out of the Court's own review of the inherent injustice in being sentenced again for the same offence and the need for a proportionate discount to occur for the offender. Offenders who have had their matters resolved ought to have substantial certainty as to the status of their sentence.

In *R v Salameh* (unrep, NSWCCA, 9 June 1994), Hunt CJ at CL said:

> "....*[T]he distress occasioned to a respondent to a Crown appeal by twice being put in jeopardy usually requires a discount to be applied by this court. Indeed,*

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so important is this consideration in Crown appeals that this court will not infrequently exercise its discretion to dismiss the appeal because of the unfairness or injustice which would otherwise be occasioned to the respondent by reason of his double jeopardy: R v Holder and Johnston (at 255.256)."

In *R v Wall* [2002] NSWCCA 42 at [70] Wood CJ at CL said:

> *"... it is important to note the principles which apply in relation to the determination of a Crown appeal against sentence:*
> ...
>
> *(d) The Court has a lively discretion to refuse to intervene even if error has been shown, and in deciding whether to exercise that discretion, it should have regard to the double jeopardy that a convicted person faces as a result of a Crown appeal: R v Allpass (1993) 72 A Crim R 561, R v Papazis (1991) 51 A Crim R 242 at 247, and Wong and Leung v The Queen at para 110.*
>
> *(e) A sentence which is imposed as a consequence of a successful Crown appeal will generally be less than that which should have been imposed by the sentencing court: R v Holder and Johnston (1983) 3 NSWLR 245 at 256, and will generally be towards the lower end of the available range of sentence: Dinsdale v The Queen at para 62."*

The proposed section is a legislative incursion, proposed to give the courts the ability to consider appeals unfettered by considerations of the effect of the appeal on the defendant. This is a matter that the Courts considered a just consideration, with a developed body of law as outlined above.

The Court has also discouraged the use of the Crown's right of appeal against sentence on other than rare occasions. The Court of Criminal Appeal has said that a Crown appeal should be rare (*R v Baker* [2000] NSWCCA 85 at [19]). Spigelman CJ said:

> *"...The authorities make it clear that Crown appeals should be rare. It may be that present practice does not reflect that restriction, nevertheless, successful Crown appeals should be rare."*

The NSW DPP Prosecution Guidelines pay regard to the concept of the concept of double jeopardy in relation to appeals against sentence. Guideline 29 provides, inter alia, that:

- a respondent to a prosecution/Crown appeal suffers a species of double jeopardy which is undesirable.
- *prosecution/Crown appeals are and ought to be rare*, as an exception to the general conduct of the administration of criminal justice they should be brought to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic approaches to be corrected and to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice. (emphasis added)

The impact of the proposed legislation is that the Crown appeal may no longer be considered 'rare'. The flow on effect may be that the Courts become overwhelmed with appeals in indictable matters.

No evidence-based justification for reform

As Mr Collier commented in the Agreement in Principle speech, proposed s 68A implements a recommendation by the Double Jeopardy Law Reform COAG Working Group.

However, the 13 April 2007 COAG Communiqué, and the model containing the recommendation to abolish the principle of 'sentencing double jeopardy', provide no explanation or justification for the recommendation. Mr Collier merely states that "Now that our double jeopardy provisions have been in place for some time, it is appropriate to revisit the Act and to undertake further reforms".

John Stanhope, Chief Minister of the ACT, criticised the lack of consultation in developing the double jeopardy recommendations. In a Media Release on 12 May 2007 the Chief Minister said:

> "*It is tempting for politicians to make legal reforms in response to high-profile, emotional cases, but it doesn't always make for good law. The need for such a fundamental reform should be demonstrable, evidence-based and proportionate. That is why I have asked that the issue be referred to the Law Reform Commission for detailed exploration.*"

The Committee completely agrees with the Chief Minister's statement. There has been no public consultation or evidence based explanation reason for this amendment.

Application of amendment

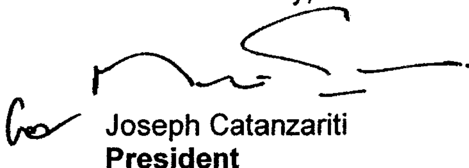
If s 68A is introduced, it should not apply to appeals commenced but not finally determined before the commencement of the legislation (as is currently proposed by clause 16). The presumption against retrospectivity is an important component of the rule of law. The adverse effect of removing considerations of double jeopardy in appeals against sentence is exacerbated by the fact that it will apply retrospectively.

The Committee recommends that Clause 15 be amended to read:

> "*This section does not extend to an appeal that was commenced but not finally determined before the commencement of section 68A.*"

Please contact me if you would like to discuss these matters further.

Yours sincerely,



Joseph Catanzariti
President