THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBG611180

17 May 2012

Director
Criminal Law Review
NSW Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001

Dear Sir/Madam,

Statutory review of Part 8 of the Crimes (Appeal and Review) Act 2001

The Law Society's Criminal Law Committee (Committee) welcomes the opportunity to make a submission to the statutory review of *Part 8 of the Crimes (Appeal and Review) Act 2001*.

CRIMINAL LAW COMMITTEE POSITION

The Committee strongly opposed the amending legislation which changed the double jeopardy rule and commenced on 15 December 2006. The Committee supports the repeal of Part 8 of the *Crimes (Appeal and Review) Act 2001*.

When the legislation was introduced the previous Government stated that the High Court case of *The Queen v Carroll* (2002) 194 ALR 1 demonstrated why the double jeopardy rule needed to be overhauled. The Committee suggests that the history and facts of *Carroll* should have served as a definitive reminder as to why the rule against double jeopardy should have been retained rather than reformed.

The High Court in *Carroll* stated at paragraph 22 that:

> "Many aspects of the rules which are lumped together under the title "double jeopardy" find their origins ... in the recognition of two ... 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".

The long-standing foundations of the double jeopardy principle reiterated in *Carroll* 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).

- 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)).

AMENDMENTS TO THE ACT

The Committee supports the repeal of Part 8. However, if Part 8 is to remain in force, then the Committee recommends a number of amendments which are detailed below. In summary the amendments sought are:

- The only offence that the legislation should apply to is murder.

- The legislation should not apply to people convicted before the commencement of Part 8.

- A time limit of five years from the date of acquittal should be placed on the reopening of the acquittal.

- The opening of a police investigation should be authorised by a Supreme Court Judge, not the Director of Public Prosecutions.

- People affected by the legislation should be entitled to have the costs of their legal representation paid in all proceedings.

Applicable offences

The legislation permitting the retrial of a person who has previously been acquitted should only apply where the offence was murder. Murder, being the most serious harm one person can inflict upon another, is the only offence that should override the values implicit in the rule against double jeopardy.

The Committee **recommends** that:

- The definitions of "*life sentence offence*" and "*15 years or more sentence offence*" in section 98 should be deleted.

- The words "*very serious offence*" in the heading of Division 2 should be deleted and replaced with "*an offence of murder*".

- The words "*of murder*" should be inserted after the word "*offence*" in section 99(1)(a).

- The Note in section 99(1) should be deleted.

- Substitute the words "*an offence of murder*" for "*a life sentence offence*" in section 100(1).

- Delete section 101. Insert "*or tainted acquittals*" in the heading of section 100. Insert the words "*or the acquittal is a tainted acquittal*" after the word "*offence*" in section 101(1)(a).

Section 99 – Application of Division

Part 8 should not apply to people convicted before the commencement of the legislation. The presumption against retrospectivity is an important component of the rule of law. The adverse effect of diluting the rule against double jeopardy on personal rights is exacerbated by the fact that it applies retrospectively.

The Committee **recommends** that:

- Section 99(3) be amended to read:

  "*This section does not extend to a person acquitted before the commencement of this Division.*"

Section 100 - Court of Criminal Appeal may order retrial - fresh and compelling evidence

The legislation does not permit the Court of Criminal Appeal to consider issues relevant to the admissibility of evidence. The Committee is concerned that this may result in evidence that stands a real prospect of being inadmissible being the basis upon which a retrial could be ordered.

The Committee **recommends** that:

- Section 100(1)(a) be amended by inserting the words "*and admissible*" before the word "*evidence*".

Section 102 – Fresh and compelling evidence - meaning

The effect of sections 102(2)(b) and 102(4) may well be that if evidence was not adduced in the first proceedings because it was inadmissible and there is a change in the law relating to the admissibility of such evidence making it admissible, then that same evidence (that is now admissible) is 'fresh'. This would mean that any new precedent (or amendment to the *Evidence Act 1995*) allowing the admissibility of previously inadmissible evidence may result in previously inadmissible evidence in concluded trials (where there was an acquittal) becoming 'fresh' evidence. Such precedents or amendments would therefore have a potentially very significant retrospective effect and this should be avoided.

The Committee **recommends** that:

- Section 102(4) be amended by deleting the word "*not*", and substituting the words "*merely because*" with "*if*".

Section 103 – Tainted acquittals - meaning

The Committee submits that the definition of a tainted acquittal should not refer to a conviction by any person other than the accused person the subject of the relevant acquittal. If "*or another person*" is not removed from section 103(2)(a), the section could operate to cause an acquittal to be tainted in circumstances where, independently and without the knowledge of the accused, another person interfered with the administration of justice.

The Committee is of the view that it would be more efficient to allow the appeal process to take its course before embarking upon a separate application for a retrial. Inserting the words "*and no appeal of the conviction is outstanding*" into section 103(2)(a), and deleting section 103(4) will avoid the situation where a conviction for the administration of justice offence, which is being contested in the appellate courts, is used as the trigger for a retrial. These amendments will also make it clear that an application for an order from the Court of Criminal Appeal cannot be made until any appeals against the accused's conviction of any connected administration of justice offence are finalised.

The Committee **recommends** the following amendments to section 103:

- Section 103(2)(a) delete the words "*or another person*" and insert the words "*(and no appeal of the conviction is outstanding)*" after "*elsewhere*".

- Section 103(4) should be deleted.

Section 105 - Application for retrial - procedure

Section 105 does not stipulate a time limit on the period that may a lapse between the alleged commission of the offence or acquittal and the application for retrial.

The Committee recommends a five year time limit on reopening acquittals. Such a time limit is not only relevant to the interests of justice, but addresses a practical matter as well.

Finality is an important aspect of the criminal justice system. Imposing a limit of five years on the reopening of an acquittal will give certainty to an accused, victims and the community.

The lack of a time limit may create difficulty in ensuring the integrity of evidence: physical exhibits may degenerate or be lost, and storage and retention of exhibits would present a major logistical problem for investigators, the prosecution, trial courts and defence. Issues concerning return of exhibits may be an added complicating factor.

The Committee **recommends** that:

- A new sub-section be inserted in section 105 which provides that:

  "*An application for the retrial of an acquitted person is to be made not later than five years from the date of acquittal of an acquitted person.*"

The hearing of an application for retrial can occur in the absence of the person (section 105(5)). The Committee regards it as fundamental that, if the State is endeavouring to

go behind an acquittal, the person must be both present and legally represented at the hearing of the application. The Court of Criminal Appeal will not be assisted in its task if the person is either absent, or present but unrepresented.

The evidentiary and procedural issues to be considered at the application hearing would necessarily be complex and could have serious repercussions for the person. The legislation should also require full Crown disclosure within a prescribed period before the hearing of the application for retrial.

In addition, the person should not be required to bear the costs of his or her legal representation.

The Committee **recommends** that:

- The person to whom the application relates must be present and legally represented at the hearing.
- The costs of representation must be borne by the State.
- For Crown disclosure and service of initiating proceedings, submissions, brief of evidence, previous transcripts and any other relevant material must be disclosed prior to the hearing.

Section 109 - Authorisation of police investigations

The opening of a police investigation should be authorised by a Supreme Court Judge, not by the Director of Public Prosecutions. The Committee is firmly of the view that the Director of Public Prosecutions should have no role in consenting to police investigations. There should be a clear distinction between the role of investigators and the role of prosecutors, and there should be judicial oversight of investigatory processes and powers.

It appears that section 109 enables police to commence and carry out an investigation that does not involve the matters set out in section 109(2)(a) and (b) without <u>any</u> authorisation, which is entirely inappropriate and cannot be the legislative intent.

Section 109(3)(a) provides the opportunity for police to commence an investigation without written consent. Police should not be permitted to investigate the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence unless a Supreme Court Judge has authorised the investigation.

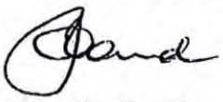
The Committee **recommends** that:

- A Supreme Court Judge, rather than the Director of Public Prosecutions, should authorise any police investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence (sections 109(3) and (5)).
- Section 109(2) should be deleted.
- Section 109(3) should be amended to read:

"*A police officer is not to carry out or authorise any police investigation to which this section applies unless a Judge of the Supreme Court has given written consent to the investigation.*"

Please do not hesitate to contact me if you would like to discuss any aspect of the submission.

Yours sincerely,



Justin Dowd
President