THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:JErg1038833

28 July 2015

The Hon James Wood AO QC
c/- Sallie McLean
NSW Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Mr Wood,

Review of the operation of section 102 of the *Crimes (Appeal and Review) Act 2001*

Thank you for the opportunity to make a submission to the review of the operation of section 102 of the *Crimes (Appeal and Review) Act 2001* ("Act"), which provides an exception to the common law rule against double jeopardy.

I write to you on behalf of the Criminal Law Committee of the Law Society of NSW ("the Committee"). The Committee represents the Law Society on criminal law issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

At this point, I take the opportunity to note that the Law Society is conscious of the circumstances leading to this review. 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.

However, the Committee is unable to support any further amendment to section 102 of the Act, in particular due to the likely unintended consequences of any such change. In this submission, the Committee provides a brief background of the rule against double jeopardy and the legislative changes to the common law in the NSW context; and addresses the specific issues for consideration set out in your invitation to comment.

1. Background

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

- 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*; *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]: "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)).

The *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006* altered the common law position in relation to double jeopardy, by introducing specific and limited exceptions to the rule. The Committee strongly opposed the Bill when it was introduced, and continues to support the repeal of Part 8 of the Act.

Section 100 of the Act allows the Court of Criminal Appeal, on the application of the Director of Public Prosecutions, to order the retrial of a person acquitted of a life sentence offence if there is "fresh and compelling" evidence against the acquitted person, and "in all the circumstances it is in the interests of justice for the order to be made".

Section 102 defines "fresh and compelling" as follows:

> **102 Fresh and compelling evidence-meaning**
>
> (1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.
>
> (2) Evidence is "fresh" if:
>
> (a) it was not adduced in the proceedings in which the person was acquitted, and
> (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.
>
> (3) Evidence is "compelling" if:
>
> (a) it is reliable, and
> (b) it is substantial, and
> (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.
>
> (4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

While the Committee 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. Amending the legislation would severely undermine procedural fairness and the concept of finality in criminal proceedings.

The Committee understands that many other stakeholders in the criminal justice system have a consistent view.

2. The legal or other ramifications of defining adduced as "admitted" particularly on the finality of prosecutions

The Committee is of the view that defining "adduced" as "admitted" is contrary to the ordinary meaning of the word. "Admitted" evidence falls under the category of "adduced" evidence. Adduced evidence may or may not also be admitted evidence, but evidence cannot be "admitted" without having been first "adduced".

Defining "adduced" as "admitted" places the emphasis on the issue of the admissibility of evidence rather than the intended consequences of the discovery of genuine "fresh" evidence. The effect of the rules of evidence in a trial involving a life sentence offence would therefore be subject to continual review following any change in those rules. The inevitable consequence is to remove the finality of the verdict in trials for the most serious of offences.

The Committee considers that if prosecution evidence was inadmissible under the law at the time of the trial, a retrial should not be available on the basis that the rules of evidence have changed and the evidence would now be admissible. The Committee also notes that, in an appeal against conviction, a convicted person cannot rely upon a change in law following the trial to overturn the conviction.

There are innumerable ways that 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 admissibility of tendency evidence, or an amendment to the *Evidence Act 1995*, may result in previously inadmissible evidence becoming "fresh" evidence.

Further, such an amendment would inevitably result in pressure on the legislature to retrospectively change the law of evidence whenever there was an unpopular verdict in a high profile trial so that evidence held to be inadmissible at the trial would be admissible at a retrial. Changes in such circumstances would lead to unpredictable and undesirable outcomes.

The Committee also notes that defining "adduced" as "admitted" could result in arguments about: (a) whether the prosecutor was correct in his or her decision that the evidence was inadmissible and did not seek to tender it; or (b) circumstances where the prosecutor may have argued the admissibility issues poorly, and the judge ruled against admitting the evidence. This could permit the prosecution to relitigate issues that were already ruled on in the first trial and undermine the concept of finality in criminal proceedings.

3. The matters considered by the English courts under the equivalent UK legislation

The UK provisions under Part 10 of the *Criminal Justice Act 2003* refer to "new" and compelling evidence, as opposed to "fresh" and compelling evidence.

In 2012, the then Legislation, Policy and Criminal Law Review Division of the Department of Attorney General and Justice conducted a statutory review of the provisions of Part 8 of the Act. The review noted that the provisions adopted in New South Wales were more restrictive than those found in the UK Act, which require only that evidence be "new" rather than "fresh":

> It is noted that these provisions are more restrictive than those found in the UK Act which requires only that evidence be 'new' rather than 'fresh'. Under this test evidence available but not presented in the original trial due to error may be sufficient.[1]

[1] Legislation, Policy and Criminal Law Review, Department of Attorney General and Justice, *Review of Part 8 of the Crimes (Appeal and Review) Act 2001*, 2012, p 15.

As part of its review of various models for reform of the principle of double jeopardy, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General commented on the distinction between "fresh" and "new" evidence, and specifically recommended the use of the term "fresh" rather than "new" as it had a higher threshold:

> While it is common for people to refer to "fresh evidence" and "new evidence" interchangeably, it happens that there is a technical legal distinction between "fresh" and "new" evidence. In essence, the distinction is between evidence that could not have been brought to the primary trial (fresh evidence) and evidence that existed at the time of the primary trial but was not, for whatever reason, adduced at that trial (new evidence).
> ...
>
> The Committee is of the opinion that, given the departure from fundamental general principle being suggested here, it should recommend the more limited exception. [2]

The UK case of *R v B* [2012] 3 All ER 205 appears to be the only decision where the UK courts have considered the meaning of adduced under Part 10 of the *Criminal Justice Act 2003*. In that case the trial judge misapplied the law and excluded evidence in the first instance that should have been admitted. The Committee does not consider that this decision should be relied upon as an authority that in the UK adduced means admitted in all cases.

In any event, the Committee considers that, given the difference in definition, the UK legislation is not instructive in the NSW context.

4. The merit of replacing section 102 of the *Crimes (Appeal and Review) Act 2001* with provisions in section 46I of the *Criminal Appeals Act 2004* (WA)

Section 46I of the *Criminal Appeals Act 2004* (WA) provides as follows:

> **46I Meaning of fresh and compelling evidence**
>
> (1) For the purposes of section 46H, evidence is fresh in relation to the new charge if —
>
> (a) despite the exercise of reasonable diligence by those who investigated offence A, it was not and could not have been made available to the prosecutor in trial A; or
> (b) it was available to the prosecutor in trial A but was not and could not have been adduced in it.
>
> (2) For the purposes of section 46H, evidence is compelling in relation to the new charge if, in the context of the issues in dispute in trial A, it is highly probative of the new charge.
>
> (3) For the purposes of this section, it is irrelevant whether the evidence being considered by the Court of Appeal would have been admissible in trial A against the acquitted accused.

The Committee considers that section 46I(1)(b), which provides that evidence is fresh if it was available but was not adduced, is highly problematic. The provision would result in arguments about whether the prosecutor was correct in his or her decision that the evidence was inadmissible and did not seek to tender it.

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[2] Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, Discussion Paper, *Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, November 2003, p76.

The Committee sees no merit in replacing section 102 with the Western Australian provisions. Western Australia is the only Australian jurisdiction to adopt a definition of "fresh evidence" inconsistent with the COAG Working Group recommendations.[3]

5. The merit of expressly broadening the scope of the provision to enable a retrial where a change in law renders evidence admissible at a later date

The Committee does not support this proposal as it would comprehensively undermine the finality of trials.

The Committee considers that section 102 is appropriately drafted, and allows for the possibility of a retrial where there is compelling, fresh material such as new DNA evidence.

As discussed above, this proposal would result in the emphasis being shifted 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 to legislate unpredictable and undesirable amendments to the *Evidence Act 1995*.

The Committee thanks you once again for the opportunity to comment and would welcome the opportunity to be involved in further consultations on this important review. Any questions can be directed to Rachel Geare, policy lawyer for the Committees at rachel.geare@lawsociety.com.au or (02) 9926 0310.

Yours sincerely,

Michael Tidball
Chief Executive Officer

[3] Council of Australian Governments, "Double Jeopardy Law Reform: Model agreed by COAG", April 2007, p1.