



Submission to the statutory inquiry into Part 8 of the Crimes (Repeal and Review) Act 2001 (the Act).

The New South Wales Council for Civil Liberties (CCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all. To this end the NSWCCL attempts to encourage public debate and influence government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies. CCL is grateful for the invitation to make a submission to this inquiry. We raise the following matters:-

A. Problems of principle and practice.

1. The legislation as presently embodied in Part 8 Crimes (Repeal and Review) Act 2001 (the Act) is contrary to the common law as it has developed over generations of cases here, in England and other common law countries. It is also in contravention of Article 14(7) of the International Covenant on Civil and Political Rights. The prohibition on double jeopardy is well established in human rights law and appears in many national constitutions and Bills of Rights. The UN Human Rights Committee has commented that the retrial of a criminal case is strictly prohibited in accordance with the principle of *ne bis in idem*. The prohibition on retrospective criminal laws is also well established in human rights law as well as appearing in many national constitutions and Bills of Rights.

Australia has signed the International Covenant on Civil and Political Rights ('the ICCPR') and has made no reservations concerning double jeopardy or retrospectivity. Australia is therefore obliged 'to respect and to ensure to all individuals within its territory...the rights recognised' in the ICCPR, including the prohibitions against double jeopardy and retrospectivity.

2. The legislation has unlimited retrospective operation—there is no time limit imposed on when the trial said to be the subject of the acquittal occurred. This is not reasonable—for how long must an acquitted person retain evidence that might conceivably be needed in his or her defence? How is a person acquitted long before the legislation was enacted to recover evidence that might be necessary in a new trial?

3. The legislation distorts long accepted criminal law procedures by eroding the principle of finality and introducing a new kind of verdict—the conditional acquittal.

In denying the principle [of double jeopardy], we are creating something new. [W]e are creating the conditional acquittal...A person who stands trial will not be able to leave the court sighing with relief. Many of us have had the experience of a client almost collapsing at the end of a trial, and we have been able to say to

him or her 'It is over. You can rebuild your life.' We will not be able to say that any more.¹

The United Kingdom Law Commission commented:

The finality involved in the rule against double jeopardy represents an enduring and resounding acknowledgement by the state that it respects the principle of limited government and the liberty of the subject. The rule against double jeopardy is on this view, a symbol of the rule of law....The rule serves to emphasise commitment to democratic values.²

4. The legislation undermines public confidence in the jury system.

5. It will be impossible to appeal an acquittal without prejudicing the acquitted person's retrial. Ordinary retrials are inevitably be-devilled by media and internet reports. Although the Act prohibits the prosecution from telling the jury they are hearing a retrial and prohibits any report of the fact of or the findings of the appeal to the Court of Criminal Appeal, any first trial is likely to have received a good deal of publicity in view of the seriousness of the offences; there may well have been calls in the media for an appeal against acquittal; it will be practically impossible to empanel a jury that will not be in a position to infer that the superior court has found that the fresh evidence is compelling.

There has so far been no case where an appeal against an acquittal has been made to the CCA. However the Attorney General has been reported to be considering an appeal against the acquittal of Jay Hart in relation to the Bowraville murders. The case has been discussed on Four Corners, Australian Story, The Weekly, Nine MSM and the Daily Telegraph and a number of lesser media; there has been discussion on talkback programmes. There has been much talk about justice for the murdered Aboriginal children. How will twelve persons be found who have not been influenced by this discussion?

The legislation should be repealed.

B. If Part 8 is to be retained the CCL submits that:-

(i) S98 be amended to remove paragraphs (b) aggravated sexual assault in company and (c) various offences under the Drug Misuse and Trafficking Act from the definition of "life sentence" offences;

(ii) S 99(3) be amended to introduce a time limitation on the acquittals subject to review; and

(iii) S 100(3) – covering manslaughter- be deleted.

¹ Baroness Helena Kennedy QC of The Shaws, United Kingdom Parliamentary Debates, House of Lords, 17 July 2003.

² *Double Jeopardy and Prosecution Appeals* Law Com 267 (2001)



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C. Costs

The cost to an accused of defending him or herself at the Court of Criminal Appeal (CCA), and if necessary at a retrial, will necessarily be very high. The CCL submits that in a case where an application for a retrial is unsuccessful, the accused should be entitled to costs; and when a retrial is held but the accused is acquitted for a second time, costs should be awarded in respect of both the application hearing and the second trial. Amendments should be made to include specific provisions to this effect in Part 8 as well as amending Ss 70 and 72 of the Act.

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