Dear Chief Minister

I refer to your letter of 9 March 2007 regarding potential reforms of the existing law concerning double jeopardy.

While the discussion paper by the Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General (MCCOC) released in 2004 makes some beguiling arguments for some limited reform our Association opposes the suggested reforms.

The rationale of the double jeopardy rule in all its manifestations is fundamental to the basic principles of criminal law. The suggested reforms and the further reform introduced in NSW of allowing a new trial when new evidence is found all undermine the rule and diminish the protections for the citizen against the state that currently exist.

All the proposals have been the subject of submissions from the Law Council and a number of Bar Associations in recent years and I have sent copies of those submissions to your office. These submissions make clear the reasons why such "reforms" should be opposed and our Association supports these submissions.

As you know s 24 of the Human Rights Act (ACT) provides

"No one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law"

The Human Rights Act is based on similar legislation in many other parts of the world and reflects Article 14 (7) the International Covenant on Civil and Political Rights that our country signed many years ago.

Recently the High Court considered the reasons for the rule in R v Carroll (2002) 213 CLR 635.

Gleeson CJ and Hayne J at 643 said

"A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept "that it is

better that ten guilty persons escape, than one innocent suffer" may find its roots in these considerations.'

They go on to say

> "Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression."

They referred to the New Zealand Law Commission Report of 2001 on "Acquittal Following Perversion of the Course of Justice" and agreed with its explanation of the need for finality and the status to be given to an acquittal.

The other judgments all explained that the principle was fundamental and underpinned the safeguards for an accused person in the criminal process. Other safeguards have been the presumption of innocence, the burden of proof beyond reasonable doubt and the right to silence.

There are other policy reasons why there should be such a rule including the need to ensure the prosecution does all it can to ensure all available evidence is adduced and the trial is not used as a dry run.

The submission of the Law Council to MCCOC in 2004 a copy of which I enclose opposed any erosion of the current rules. At paragraphs 28-30 it is pointed out that no proof is advanced in support of the proposed modifications to suggest that the rule against double jeopardy has in fact operated unjustly in Australia. It said there was evidence to the contrary and it was dangerous to advance reforms which are not based on any reliable and non partisan evidence. We agree.

There are also submissions by the Queensland Bar and the Victorian Bar to like effect. I enclose them.

Recently in a submission about Mutual Assistance the Law Council opposed extradition to a country where the rule against double jeopardy had been removed. I enclose a copy of this submission which is at paragraphs 25-37. As they point out the UK is affected by this.

Finally the proposals of the states do not address some very real practical concerns.

If contrary to our submission any changes are made these considerations need to be addressed.

They include

1 To guard against the burden on legal aid and the likelihood that further re-litigation would act to induce an accused to plead guilty or not be able to defend, the State should pay his or her costs involved. This would also act as a brake on a any tendency to be vindictive by a disappointed prosecution

2 The Defendant must be present at any application or appeal

3 Harassment by further investigation must be prevented by requiring authority from the Attorney General or delegate or other independent public official before it can be instigated.

4 Any leave to appeal should be restricted to a question of law that directly led to the decision to acquit

5 Only very serious offences should be the subject of such exceptions. This cannot depend on a prison term set as the penalties are often increased by some legislatures for what may not be regarded as very serious crimes comparatively. This point is made in a NSW Bar submission a copy of which is enclosed. The crime would be murder very serious drug matters aggravated sexual assault and like matters.

6 There needs to be tight time restraints to minimise the harm caused by lack of finality.

7 Strict due diligence must be established by the prosecution at the time of the first trial before any leave to reargue guilt ought to be considered.

The various submissions that are enclosed make a number of related points.

The right not to be tried twice has been regarded as a fundamental right for over 800 years. Its importance is exemplified by it inclusion in Human Rights legislation. In the absence of compelling statistics that may undermine the Blackstone maxim quoted by Gleeson CJ and Hayne J in Carroll it is dangerous to experiment with provisions because of some perceived public concern about one or two specific cases.

I hope the above is of assistance and if you would like any more specific input please let me know.

YF

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