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Ms Julie Field
Acting Executive Director
Department of Justice and Community Safety
GPO BOX 158
CANBERRA ACT 2601

Dear Ms Field

RE: PROPOSALS FOR REFORM OF DOUBLE JEOPARDY LAWS

Thank you for your referral of the proposal by the Director of Public Prosecutions (DPP) for reform to Double Jeopardy Laws. The issues raised by the DPP are vexed and the engagement of the wider community in discussions is appropriate.

Broadly, Civil Liberties Australia (CLA) is supportive of most of the proposals by the DPP, but has suggested some additional safeguards.

Crown appeals

At present, in the ACT, if a judge makes an error of law that causes an accused to be acquitted, there is no recourse open to the prosecution to have the accused retried other than lodging a reference appeal. The outcome of a reference appeal can effect the precedent that the judge's decision might have but it cannot effect the outcome.

For example, if a judge was to erroneously exclude important evidence, or misdirect a jury on an important point of law, and as a result of that error an accused was to be acquitted when they otherwise would not have been but for the judge's error, then there is nothing the Crown can do about it.

This makes the ACT unique, as most jurisdictions would allow a Crown appeal in such circumstances, the result of which might lead to a re-trial.

On the other hand, if a judge makes an error that is detrimental to an accused, that accused person has full appeal rights, with the outcome being that the decision can be reversed and an acquittal entered, or a new trial ordered.

CLA is of the view that the status quo can be unjust, and can lead to guilty people escaping justice because of judicial errors. This, in turn, can bring the justice system into disrepute.

The right to a fair trial cuts both ways. An accused has the right to expect a fair trial. If an accused is innocent, then it is, of course, in the public interest that his or her innocence be revealed as a result of the trial process.

CLA considers that the community has a right to a fair trial as well.

The community has a right to expect that the trial judge will uphold the law, and if an accused is guilty, that he or she be found so, and an appropriate sentence be imposed. The community has a right to expect that dangerous criminals who have committed the offences they are alleged to have committed do not escape justice because of judicial error. Where those errors do occur the community has a right to expect that they will be corrected on appeal.

However, CLA does note that in allowing full Crown appeals, there can be a considerable expense incurred by an accused in defending the case a second time. The accused will need to pay for solicitors and counsel to defend the appeal and possibly a re-trial. If they are not the subject of a grant of legal aid, this can be a considerable expense, compounded by the fact that they would have already had to pay for the first trial. It has to be remembered that just because the Crown lodges an appeal, it does not follow that it will be upheld – the supposed error that the Crown contends occurred may not have occurred at all.

All things considered, CLA's view is that the Crown could be given appeal rights which can, in appropriate circumstances, lead to a re-trial. However, as a safeguard, CLA recommends that the Crown be required to indemnify an accused's legal costs should the Crown lose the appeal or any subsequent re-trial.

Exceptions to double jeopardy

As a general rule, a person should not be re-tried after being acquitted during a lawful trial (i.e. a trial where no errors of law occurred). The policy reasons for this are obvious, and the rule is intended to achieve the following:

- a. preventing the state from employing its superior resources to wear down and erroneously convict innocent persons;
- b. protecting individuals from the financial, emotional, and social consequences of successive prosecutions;
- c. preserving the finality and integrity of criminal proceedings, which would be compromised were the state allowed to arbitrarily ignore unsatisfactory outcomes;
- d. restricting prosecutorial discretion over the charging process; and
- e. eliminating judicial discretion to impose cumulative punishments that the legislature has not authorised.

It is important to note that the right against double jeopardy, which is contained in Section 24 of the *Human Rights Act 2004*, is not absolute. Section 28 provides that the right may be subject to "reasonable limits" that can be "demonstrably justified in a free and democratic society."

There will be occasions where, after an acquittal, new evidence comes to light which would likely lead to a conviction on a re-trial. Sometimes this evidence is missed because the original police investigation was incomplete or lacking. However, sometimes further evidence becomes available which was never going to be available during the original trial. The best example of this is the realisation of DNA evidence in relation to a matter which was tried before DNA technology was available to police. There will also be other matters where the police would not have been able to find evidence had they made all reasonable inquiries.

In such cases, CLA does not believe it is just that a person who has committed a serious offence is able to evade a re-trial. It too brings the legal process into disrepute, may cause considerable angst amongst the families of victims, and can expose the community to the danger of further offending from a violent offender that has not been incarcerated.

CLA would support an exception to the double jeopardy in the following limited circumstances:

- a. A person has been tried and acquitted of a serious violent offence (i.e murder, attempted murder or assault occasioning grievous bodily harm); and
- b. Since the last trial further evidence has come to light; and
- c. if admitted in a new trial, the further evidence would substantially strengthen the prosecution case; and
- d. The evidence would not have been available or realised by the police at the time of the original trial had they exercised all reasonable diligence in the conduct of their investigation; and
- e. The Crown undertakes to indemnify the accused of all legal costs associated with the re-trial.

By limiting appeals to cases where the police could not have discovered the evidence had they exercised all reasonable diligence, this should avoid the risk of the State acting oppressively in using its superior resources to consistently try a person, and also prevent sloppy police investigations. Similarly, by requiring the Crown to indemnify an accused's legal expenses on a re-trial should prevent the State from exposing an accused, who is in fact innocent, to crippling legal expenses.

With these safeguards in place, CLA considers that the limitations on the right to a retrial may be justifiable and proportionate under Section 28 of the *Human Rights Act*. However, as part of any reform, the requirements of the Act would need to be closely reviewed and a Statement of Compatibility detailing such considerations would need to be provided to the Assembly and the community.

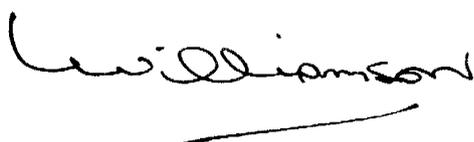
Sentence Appeals

CLA does not support the proposals for reform in this area.

The rule on double jeopardy does not prevent a court from hearing sentencing appeals; rather, it simply requires the appeal court to proceed with caution.

The court's discretion to intervene in a sentence on appeal should be exercised in light of the fact that the accused is entitled to expect finality in their sentence, and whether they will lose their liberty, or the extent to which they might lose it, is in jeopardy a second time during the sentencing appeal.

Yours sincerely

A handwritten signature in black ink that reads "Lance Williamson". The signature is written in a cursive style and is positioned above a horizontal line.

Lance Williamson
Director