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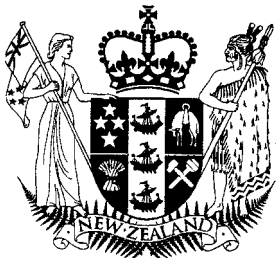

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Criminal Procedure Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 264 of the Standing Orders of the House of Representatives

1. I have undertaken an examination of the Criminal Procedure Bill (PCO 5170/13) ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). I conclude that the proposed new sections 378B to 378D (Part 1, clause 7 of the Bill) of the Crimes Act 1961 appear to be inconsistent with the "double jeopardy" right contained in s 26(2) of the Bill of Rights Act and these proposed new sections do not appear to be justifiable in terms of s 5 of the Bill of Rights Act.

2. As required by section 7 of the Bill of Rights Act and Standing Order 264, I draw these inconsistencies to the attention of the House.

The Bill

3. The Bill reforms the law of criminal procedure in a number of respects, but the major reforms concern (1) the double jeopardy rule; (2) jury trial; (3) new criminal disclosure rules; (4) provision for increased committal on the papers. The Bill also contains a number of miscellaneous amendments.

The Bill of Rights issues

The rule against double jeopardy in s 26(2) the Bill of Rights Act

4. Section 26(2) of the Bill of Rights Act provides:

> "No one who has been finally acquitted or convicted of, or pardoned for, an offence should be tried or punished for it again."

5. It affirms the rule against double jeopardy already given effect to in ss 357 to 359 Crimes Act 1961 (relating to pleas of previous acquittal and previous conviction).

6. The double jeopardy rule is of great significance and importance.[1] It is seen as a fundamental building block of the criminal justice process and a basic safeguard of civil liberty in our legal system. The fundamental purpose of the double jeopardy rule is to protect individuals against the excessive use of state power: the state, with all its resources and powers, should not be allowed to continually subject an individual to repressive and repeated prosecutions by the state. A citizen, once tried, is entitled to the comfort of knowing that once acquitted of an offence that is the end of the matter. It also protects the legal system by conserving judicial and prosecutorial resources and by reflecting the principle that there must be a degree of finality to the criminal justice process.

The proposed exceptions outlined

7. The Bill proposes two exceptions to the general prohibition on double jeopardy: retrial of an acquitted person will be allowed where (1) the acquittal was obtained through a perversion of the criminal justice system by the acquitted person ("tainted acquittal" exception); or (2) the offence is a serious one and fresh and compelling evidence emerges post-acquittal that implicates the acquitted person in the commission of the serious offence ("fresh compelling evidence" exception).

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[1] *Double Jeopardy and Prosecution Appeals* UK Law Commission (LAWCOM No 267); *Acquittal Following Perversion of the Course of Justice,* New Zealand Law Commission (R 70) (2001)).

8. The proposals in the Bill to allow exceptions to the double jeopardy rule in respect of tainted acquittals and fresh compelling evidence are clearly a *prima facie* infringement of s 26(2) the Bill of Rights Act.

Limits on s 26(2) Bill of Rights Act: general considerations

9. While the double jeopardy rule is of fundamental importance it is apparent that it is not an absolute rule. Whether couched in terms of "reopening" or "rehearing" there is international recognition that in certain circumstances it is not necessarily an infringement of the rule to eventually be retried for a crime one has been acquitted of. In that regard, s 26(2) of the Bill of Rights Act is based on art 14(7) of the International Covenant on Civil and Political Rights ("ICCPR"). When determining the appropriate interpretation of art 14, the UN Human Rights Committee has found that most State parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principal *ne bis in idem* as contained in art 14(7).[2] The double jeopardy rule found in art 4(2) of the Seventh Protocol to the European Convention on Human Rights ("ECHR") provides that no one should be liable to be tried or punished again for an offence for which they have already been finally acquitted or convicted. However, the same article goes on to provide that that rule should not prevent the "reopening" of the case if there is "evidence or new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case." When discussing art 4 ECHR, the UK Law Commission observed that:[3]

> Article 4(1) prohibits the bringing of a second prosecution on the same facts. That prohibition is, *prima facie*, absolute. The effect of Article 4(2), however, is that a member State's law may permit a case to be 'reopened', but only on certain specified grounds. It does not permit a new prosecution. Even reopening is permitted only on certain specified grounds – namely that new evidence has been found, or that there was a fundamental defect in the original proceedings. In any other circumstances, the reopening of the case is prohibited no less than would be the bringing of a second case.

10. Against the fundamental purposes of the double jeopardy rule outlined above, one must also consider the important objective of public confidence in the criminal justice system and the interests of the victim of offending. While most human rights are necessarily focussed on protecting the individual from State excesses, the State, as representative of the public, also has an interest in the conduct of a fair hearing and the prevention of wrongful gain from offences against the administration of justice.

Section 5 the Bill of Rights Act

11. The question which arises therefore is not whether the proposed exceptions to the double jeopardy rule prima facie infringe s 26(2) (clearly they do) but rather whether they can be considered a justified limit on that right in terms of s 5 of the Bill of Rights Act.

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2 HRC General Comment 13 (21st session, 1984), para 19.

3 Above n1, page 34, paragraph 3.21

12. Section 5 of the Bill of Rights Act states that:

> "Subject to s 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In essence, the inquiry is two-fold: First, whether the provision serves an important and significant objective; and second, whether there is a rational and proportionate connection between that objective and the provision.

Proposed exception to double jeopardy rule: tainted acquittal

13. The proposed tainted acquittal exception amends the Crimes Act to allow a retrial to be ordered where a person has been convicted of an offence against the administration of justice and that offence relates to the hearing of an earlier criminal charge in respect of which the person was acquitted (new s 378A(2)). "Offences against the administration of justice" include such things as s 101 (bribery of a judicial officer) and ss 108 and 109 (perjury). A retrial requires High Court approval against stated criteria. Finally the new exception will only be available in respect of acquittal offences occurring **after** the legislative amendments introducing the exception come into force (new s 378A(5)).

Does the proposed exception represent a rational and proportionate response to that objective?

14. The key to this exception is that the acquittal was only obtained by an orchestrated perversion of the trial from which the acquittal emerged. In these circumstances it is not a legitimate acquittal and is not deserving of the basic protection. The process safeguards, and the fact that the usual rules apply on any retrial should one be authorised, satisfy me that the measure is a proportionate response.

Proposed exception to double jeopardy rule: fresh compelling evidence

15. I turn now to the proposed exception to the rule against double jeopardy when fresh compelling evidence is discovered after an acquittal. As noted earlier, for obvious reasons, I consider the proposal is a *prima facie* breach of s 26(2) of the Bill of Rights Act. The question is whether the proposal contained in the Bill is justifiable in terms of s 5 of the Bill of Rights Act.

16. It is important to note that the fresh compelling evidence proposal is qualitatively different from the earlier exception concerning tainted acquittals. The present proposal relates to acquittals obtained after a proper process and which were available decisions on the evidence proffered. The task of justifying an exception in these circumstances is more onerous than in the case of tainted acquittals as the exception goes to the core of the purposes informing s 26(2). I note in passing that the Law Commission in its paper on double jeopardy in tainted acquittal cases doubted that a fresh compelling evidence exception could be justified.[4] This conclusion differs from the conclusion reached by the UK Law Commission which considered that an exception to the double jeopardy rule in cases of fresh compelling evidence could be sustained in respect of a narrow range of offences.

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[4] Above para 1.

17. The proposed fresh compelling evidence exception to the double jeopardy rule has the following elements:

17.1 The exception to the double jeopardy rule will only allow an accused person to be tried a second time for specified serious offences (defined as being an offence punishable by a term of imprisonment of 14 years or more) (new s 378B(1)) and only if compelling new evidence of that person's guilt is discovered subsequent to the acquittal.

17.2 The evidence will only be considered "new" if it was not known at the time of the first trial, and could not reasonably have been discovered with the exercise of due diligence (new s 378B(2)).

17.3 The evidence will be considered "compelling" if it is a reliable and substantial addition to the evidence heard at the first trial, and with a high degree of probability implicates the acquitted person in the commission of the offence (new s 378B(3)).

17.4 Police will require the Solicitor-General's consent to reinvestigate a previously tried case (new s 378C(2)), although there is provision for urgent investigative action without consent in exceptional cases (new s 378C(6)).

17.5 The Solicitor-General must be satisfied that fresh compelling evidence of guilt exists and that a retrial would be in the public interest before applying to the Court of Appeal to reopen the case (new s 378D(4)).

17.6 The Court of Appeal may only grant leave for retrial if it in turn is independently satisfied there is compelling new evidence of guilt and that a retrial would be in the interests of justice (new s 378D(1)).

17.7 If the person is again acquitted there can be no further application for retrial (new s 378D(5)(c)).

17.8 No retrial application can be granted by the Court of Appeal if the acquittal occurred prior to the commencement of the proposed legislation (new s 378D(6)).

17.9 There is a discretion to impose reporting restrictions on all matters relating to Crown retrial applications where the interests of justice so require (new s 378E).

Is the prima facie breach of s 26(2) justified?

18. Given I consider the proposal is a *prima facie* breach of s 26(2), the question therefore becomes whether it is a reasonably justified limit in terms of s 5. Given the high public importance of the rule I consider any exception to the rule can only be justified under s 5 in rare and limited cases.

19. The extent of the significance and importance of the double jeopardy rule has already been outlined above.

20. Turning now to the importance and significance of the objective behind the exception, the purpose of the exception would appear to be the recognition of the

greater public interest in obtaining a conviction when an individual has broken one of society's most fundamental laws by committing a serious offence against another. The state, in attempting to rectify an acquittal on a charge for such an offence that may well be wrong in fact, is recognising the public interest in notions of "justice" for a victim and society and confidence in the judicial system. I am of the view that an objective of this type might be considered important or significant in respect of certain types of the most serious offending, such as murder. Once however the range of offences to which the exception applies is widened beyond the most serious then one must entertain serious doubts about the importance and significance of the objective, because the more qualifying offences to which the "exception" applies, the less meaningful the protection given by s 26(2) will become. In short, the wider the net is cast, the more the core values of s 26(2) are undermined.

Is the proposal a proportionate response?

21. Assuming there to be a rational connection between the ability to apply for a retrial and the objective outlined above, the key issue is whether the proposal is a proportionate limit on the s 26(2) right. Factors put in favour of the proposal are:

    21.1 Retrial can only take place if there is new evidence (ie there can be no retrial where the case involves a simple re-run of the first trial).

    21.2 The proposal applies to "serious offences" (ie those offences punishable by 14 years imprisonment or more) only;

    21.3 The threshold is pitched at a high level in that the evidence must be "new" and "compelling";

    21.4 Court sanction is necessary before a case is to be retried;

    21.5 The Solicitor-General must be satisfied that the necessary threshold inquiry test is met before seeking the leave of the Court;

    21.6 There can be only one retrial;

    21.7 The United Kingdom has recently passed broadly similar legislation,[5] and other jurisdictions such as Australia are currently considering equivalent proposals.[6]

22. However, in my view the Bill must be regarded as failing the proportionality test. In particular, the proportionality of the proposal (i.e. the reasonableness of the extent to which the proposal erodes the double jeopardy right) is undermined by the significant number of offences, or criminal charges, which are captured by the proposal. A review of our current offence provisions indicates that the 14 years plus qualification captures more than 40 offences in the statute book. This can be contrasted with the approach of the United Kingdom legislation, which contains a

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5 Criminal Justice Act 2004, Part 10.

6 MCCOC, *Discussion Paper on Issue Estopel, Double Jeopardy and Prosecution Appeals against Acquittals* (November 2003).

list of offences that is significantly more limited in terms of number and type of offence.[7]

23. The significance of the 14 year plus approach adopted in the Bill should not be underestimated. There are three principal objections:

23.1 First, the circumstances of many of the charges are unlikely to warrant the 14 year imprisonment penalty if the accused is found guilty. Traditionally, many New Zealand offence provisions have been drafted with the expectation that the seriousness of a particular crime would be reflected in the sentence given by the court upon conviction. Therefore, it is difficult with respect to some of the qualifying offences, to sustain an argument that the circumstances of the majority of charges under the relevant offence are usually serious enough to warrant imposition of a maximum penalty at the top end of the allowable maximum of 14 years imprisonment (e.g. blackmail). However, the proposal will result in all persons who were accused and acquitted of these charges, regardless of the seriousness of the relevant circumstances surrounding the charge, having to live with the possibility of continued police investigation, renewed prosecution and other onerous consequences of exposure to the criminal justice system.

23.2 Second, the Bill's chosen method of identifying qualifying offences (viz is the maximum penalty for the offence one of 14 years imprisonment or more?) will result in the automatic capture of any other future offences that may be enacted with a maximum penalty of 14 years or more imprisonment. Further, by the simple expedient of lifting the maximum penalty of existing offences up to 14 years Parliament can extend the reach of the "exception" to the double jeopardy rule to many more offences than are currently captured. By contrast, the use of a specific schedule of applicable offences (as in the UK legislation) would require officials and Parliament to specifically consider whether any future offences should be caught by the fresh compelling evidence exception to the fundamental double jeopardy right.

23.3 Third, I am not convinced that all of the offences that would currently qualify for the exception are of a type that could justify departure from the double jeopardy principle. As noted above, the offending which could justify departure from the principle must be of the most serious type. I are not convinced that blackmail, aggravated burglary and so on fall clearly enough into such a category.

24. On this last point, it should be noted that the United Kingdom Joint (Parliamentary) Committee on Human Rights concluded (when considering the human rights compatibility of the proposed fresh compelling evidence exception to double jeopardy contained in the Criminal Justice Bill) that "the range of offences to which an exception to the double jeopardy principle might apply is a

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[7] See Schedule to the Criminal Justice Act 2004.

matter for political judgement, not a matter of human rights".[8] I do not accept this view, but do note it for completeness.

25. I consider that a specific and limited schedule of offences must be regarded as a minimum requirement of any scheme that makes an exception to double jeopardy for fresh compelling evidence cases. I consider that this adds to the acceptability of the United Kingdom legislation and I also note that recent policy recommendations on the proposed Australian legislation have favoured a limited specified schedule of applicable offences to ensure that removal of this fundamental right continues to be an exception rather than the norm.

26. In conclusion, it may have been possible to achieve a reasonable limitation of the double jeopardy right by reference to a specific and narrow list of offences, where the predominant nature of the captured offending is serious enough to warrant the erosion of this fundamental right. However, I do not consider that the proposal in the Bill which defines "serious offences" by reference to maximum penalties can be considered to be a reasonable and proportionate limit of the double jeopardy right in terms of s 5 of the Bill of Rights Act. Therefore, I consider that new sections 378B to 378D in cl 7 of the Bill appear to be inconsistent with s 26(2) of the Bill of Rights Act and are incapable of justification under s 5.

Hon Margaret Wilson
Attorney-General

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[8] Joint Committee on Human Rights – Criminal Justice Bill (Second Report of Session 2002-03), HL Paper 40, HC 374, para 46.