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STANDING COMMITTEE ON LAW AND JUSTICE

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

Report 71

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Standing Committee on Law and Justice

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

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Terms of reference

1. That the Standing Committee on Law and Justice inquire into and report on the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019.

The terms of reference were referred to the committee by the Legislative Council on 30 May 2019.[1]

[1] *Minutes*, NSW Legislative Council, 30 May 2019, p 152.

Committee details

Committee members

The Hon Niall Blair MLC	The Nationals	*Chair*
The Hon Greg Donnelly MLC	Australian Labor Party	*Deputy Chair*
The Hon Anthony D'Adam MLC	Australian Labor Party	
The Hon Wes Fang MLC	The Nationals	
The Hon Trevor Khan MLC	The Nationals	
The Hon Rod Roberts MLC	Pauline Hanson's One Nation	
Mr David Shoebridge MLC	The Greens	
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Chair's foreword

In this inquiry the Standing Committee on Law and Justice was tasked with examining the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 (hereafter the Bill), a private members bill introduced into Parliament by Mr David Shoebridge MLC in May 2019.

The Bill seeks to amend the current law in New South Wales by extending the exceptions to the double jeopardy principle introduced in 2006, where the offence charged carries a life sentence and where there is fresh and compelling evidence. The Bill was crafted to address the legislative barriers to a retrial of an individual, referred to as XX, in a joint trial for the three children murdered in Bowraville in 1990-1991, Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux.

Five years ago, in 2014, the committee undertook an inquiry into the family response to the murders in Bowraville which documented the unique injustice of the Bowraville cases and the profound and lasting effects on the families. This inquiry did not revisit those issues, but took them as given. Our task was to examine the technical, legal implications of the Bill's proposed amendments to the current law.

The committee acknowledges the Bowraville families' profound grief, their overwhelming need for justice and the many setbacks they have encountered on their long journey to this point. We also acknowledge their fighting spirit and hope in the justice system despite its failings for them.

The committee was determined to try to find a clear path forward that might provide justice for the families. However, on the basis of the evidence gathered during this inquiry from a range of legal stakeholders, we have come to recognise that this is a highly complex area of criminal law. In examining the Bill, the committee had to consider the impact of the proposed changes not just on this one case, but on other parts of the criminal justice system.

Having explored these complex legal issues in detail, and noting that almost all stakeholders identified significant problems with the Bill's wording, the committee considers that the Bill as drafted should not proceed. However, some committee members see merit in the alternative model proposed by the Jumbunna Institute for Indigenous Education and Research, and we have recommended that the NSW Government consider that model. Should the NSW Government or anyone else wish to prepare another bill, the inquiry has documented the evidence we received from a range of legal stakeholders on the key issues to be carefully considered. This report stands as a resource to assist that process.

I thank all who participated in this inquiry, both legal stakeholders and members of the Bowraville families and community. I also thank my committee colleagues for their thoughtful and respectful approach to this inquiry, and I thank the committee staff for their professional support.

Hon Niall Blair MLC
Committee Chair

Recommendations

Recommendation 1 **41**
That the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 not proceed.

Recommendation 2 **73**
That the NSW Government consider the alternative reform model proposed by the Jumbunna Institute of Indigenous Education and Research.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 30 May 2019.

The committee received 29 submissions and 2 supplementary submissions.

The committee held one public hearing at Parliament House in Sydney. It also held a private meeting with the families of Colleen Walker-Craig, Evelyn Craig and Clinton Speedy-Duroux in Bowraville.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.

Chapter 1 Background

The common law rule against double jeopardy precludes a person from being prosecuted and retried for a criminal offence following a previous trial and acquittal for the same offence. The rule is based on the principle that acquittal of a criminal offence must be treated as final or incontrovertible.[2]

The law as it stands in New South Wales provides that a case may be retried for a life sentence offence if the NSW Court of Criminal Appeal is satisfied, on the application of the Director of Public Prosecutions (DPP) that first, there is fresh and compelling evidence against the acquitted person in relation to the offence, and second, in all the circumstances it is in the interests of justice for the order to be made.[3]

This chapter sets the scene for the substantive examination of the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 (the Bill) set out in the following two chapters. It explains the context of the inquiry and the committee's task in undertaking it, then sets out a timeline of events leading up to the introduction of the Bill. Next it provides background information on double jeopardy law, the Bowraville case that the Bill was crafted to address, the 2018 NSW Court of Criminal of Criminal Appeal decision regarding the Bowraville matters and subsequent High Court ruling, followed by an overview of the Bill itself. The chapter concludes with a brief overview of double jeopardy models in other noteworthy jurisdictions.

The inquiry

1.1 The Bill is a private members bill introduced into Parliament by Mr David Shoebridge MLC on 30 May 2019. The Legislative Council immediately referred the Bill to the Standing Committee on Law and Justice for inquiry and report.

1.2 Almost 30 years ago, between September 1990 and January 1991, the three Aboriginal children, Colleen Walker-Craig (aged 16), Evelyn Greenup (aged four) and Clinton Speedy-Duroux (aged 16) were murdered in Bowraville (although Colleen's body has never been found). An accused person (hereafter XX) was tried and acquitted of the murder of Clinton in 1994 and of Evelyn in 2006. Since that time the families of all three children have sought to have XX retried for the murders of all three children together.

1.3 In 2014 this committee undertook an inquiry into the family response to the Bowraville murders (hereafter the Bowraville inquiry) which focused on the families' experience of the criminal justice system and their ongoing quest for justice. The committee made numerous recommendations aimed ats systemic improvements in policing and investigations, prosecutions and the courts. It also recommended that the NSW Government review section 102 of the *Crimes (Appeal and Review) Act 2001* (hereafter the CARA or the Act), which sets out the meaning of 'fresh and compelling' evidence by which the NSW Court of Criminal Appeal determines whether to order that an acquitted person be retried for a life sentence offence.[4]

---

2 Hon James Wood AO QC, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001 (NSW)* (2015) (hereafter *Wood review report*), p 16.

3 *Crimes (Appeal and Review) Act 2001* (NSW), s 100(1).

4 In making its determination, the Court must also be satisfied that in all of the circumstances it is in the interests of justice for the order to be made.

1.4 Some five years later, after a decision by the Court of Criminal Appeal not to allow a retrial in respect of the Bowraville murders, and a subsequent High Court ruling that upheld that decision, the committee (with a significant change in membership) has been tasked with examining a bill which seeks to amend the double jeopardy law in New South Wales to provide a further opportunity for appeal. The committee's role in undertaking this inquiry is to examine the technical, legal implications of the Bill's proposed amendments to the current law, not just in respect of the Bowraville cases but for others who may fall within the purview of the legislation.

1.5 Whilst our focus has necessarily been on the technical aspects of the Bill, given the broader context of the Bill's drafting, the committee has been mindful of its need to respectfully engage with the families of Colleen, Clinton and Evelyn in order to facilitate their input into the inquiry, as well as their understanding of our role. To this end the committee travelled to Bowraville on 24 June 2019 to re-establish a relationship, to acknowledge the families' experiences to date, and to explain the inquiry's purpose and process. A report on key messages from that meeting has been published on the inquiry website.

1.6 At the outset of this report the committee acknowledges the profound and ongoing grief of Colleen, Clinton and Evelyn's families and the irreplaceable loss of their children, taken from them in the most violent way. We also recognise that their pain has been compounded by failures in the criminal justice system, most notably the poor police investigation at the time of the murders and deep seated cultural insensitivities during the prosecution and trial processes. Their pain has been further exacerbated and prolonged through the various advancements and setbacks that have marked their ongoing quest for justice. Throughout this quest the families have shown incredible dignity, resilience and resolve. As they told the committee, 'We've been at this since 2006. We know it's a step in a journey. It's always been our families' activism that's meant the next leg of the process. You'll see us again at the next stage.'

1.7 The families told the committee that they will keep fighting until they get some form of justice. Their continued determination shows that they have faith not in the system but in themselves. They told the committee, 'We're not just victims. We're fighters'.[5]

Timeline of events

1.8 Set out below is a timeline of events leading up to the introduction of the Bill to the Legislative Council.

13 September 1990	Colleen Walker-Craig disappeared after attending a party in Bowraville.
3 October 1990	Evelyn Greenup disappeared from her home following another party in Bowraville.
31 January 1991	Clinton Speedy-Duroux disappeared following another party in Bowraville.

5 Standing Committee on Law and Justice, *Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019: Report on key messages from the Law and Justice Committee meeting with family members in Bowraville*, 24 June 2019, p 3.

4 February 1991	A local man, XX, was interviewed by police and identified as the primary person of interest.
8 April 1991	XX was charged with the murder of Clinton.
16 October 1991	XX was charged with the murder of Evelyn.
1993	The DPP sought to prosecute XX in a single trial containing two indictments relating to the murder of Evelyn and Clinton. The Crown sought to rely on similar fact evidence to prove that both murders were committed by the same person, arguing that the evidence in one case was admissible in the other because there was a 'striking similarity, an underlying unity' between the two crimes. The presiding judge, in the absence of statutory guidance at the time, relied upon case law that emphasised protection against the risk of prejudice to the accused. Unconvinced that the similar fact evidence was sufficiently strong to prove that the crimes were committed by the same person, the judge ordered that the evidence was not admissible and that the trials run separately.[6]
1994	The murder of Clinton was tried in the Supreme Court and XX was acquitted by jury verdict. The DPP then 'no billed' the charges against the accused for the murder of Evelyn, preventing the case from proceeding to trial.[7]
1995	The *Evidence Act 1995* replaced the common law rules of propensity and similar fact with its section 101(2) providing the new, more permissive test for the admissibility of tendency and coincidence evidence.[8]
1996	The NSW Police Force established Strike Force ANCUD to reinvestigate the three murders. The team soon determined that the three cases were most likely linked and XX again became the focus of the investigation.[9]
2006	Following a joint coronial inquest into the death of Evelyn and the suspected death of Colleen, XX stood trial for the murder of Evelyn. Although the *Evidence Act*'s new tendency and coincidence rules were broader than the common law test, they still prevented certain evidence regarding XX's previous behavior from being admitted for consideration in court. Evidence relating to Clinton's murder was also inadmissible due to the application of double jeopardy laws.

6 *Wood review report*, pp 11-12.

7 *Wood review report*, p 12.

8 *Wood review report*, p 12.

9 Standing Committee on Law and Justice, NSW Legislative Council, *The family response to the murders in Bowraville* (2014), p 9.

	As XX had now been acquitted of both murders, under the double jeopardy laws at the time no further proceedings could be taken against him for either crime.[10]
17 October 2006	Amendments to the double jeopardy law were passed by the NSW Parliament, inserting a new Part 8 into the CARA to make provision for the retrial of an accused person in certain circumstances. This included provision for an acquitted person to be retried for a serious crime including murder where there is 'fresh and compelling' evidence (section 100(1)). The amendments potentially opened a new path for the prosecution of XX for the murders of Evelyn and Clinton at least.[11]
June 2007	The DPP determined that it would not support the NSW Police Force's request for a retrial of the murders of Clinton and Evelyn along with an ex-officio indictment for the murder of Colleen, as the evidence outlined in the Police submission was not sufficiently 'fresh and compelling'.[12]
October 2010	A request by Allens law firm on behalf of the families that Attorney General John Hatzistergos exercise his powers under section 115 of the CARA to apply to the Court of Criminal Appeal for an order of a retrial and ex-officio indictment was declined.[13]
February 2013	A request by Allens on behalf of the families that Attorney General Smith exercise his powers under section 115 of the CARA to apply to the Court of Criminal Appeal for an order of a retrial and ex-officio indictment was declined.[14]
November 2013	The Legislative Council referred the inquiry into the family response to the murders in Bowraville to the Law and Justice Committee.
November 2014	The Law and Justice Committee tabled its report. Its recommendations included that the NSW Government review the double jeopardy law in New South Wales, specifically section 102 of the CARA to clarify the definition of 'adduced' evidence, which is considered in determining whether evidence is 'fresh'.
4 June 2015	Mr David Shoebridge MLC introduced a private members bill, the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015, which was negatived by the Legislative Council on 5 May 2016.
5 June 2015	The Hon Gabrielle Upton, then Attorney General and Minister for Justice, commissioned an independent review of section 102.

10 Law and Justice Committee, *The family response to the murders in Bowraville*, pp 10-11.
11 Law and Justice Committee, *The family response to the murders in Bowraville*, p 11
12 Law and Justice Committee, *The family response to the murders in Bowraville*, pp 11-12.
13 Law and Justice Committee, *The family response to the murders in Bowraville*, p 12.
14 Law and Justice Committee, *The family response to the murders in Bowraville*, pp 12-13.

September 2015	Retired judge the Hon James Wood AO QC handed down his report, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001*. Mr Wood concluded that it was premature to amend section 102.[15]
16 December 2016	On the advocacy of the Bowraville families, then Attorney General Upton made an application to the Court of Criminal Appeal under s 100(1) of the CARA for an order for a retrial of XX for the alleged murders of Clinton and Evelyn jointly on an indictment for the murder of Colleen.[16]
13 September 2018	The Court of Criminal Appeal handed down its decision in *Attorney General of New South Wales v XX*.[17] The critical issue was the meaning of 'adduced' in section 102. The application was dismissed.
20 September 2018	Mr David Shoebridge MLC introduced a private members bill, the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2018, which lapsed on prorogation.
22 March 2019	The High Court of Australia dismissed an application brought by the current Attorney General Hon Mark Speakman MP for special leave to appeal the Court of Criminal Appeal's judgment. The High Court decision stated that it had 'no reason to doubt the correctness' of the Court of Criminal Appeal decision.[18]
30 May 2019	The Crimes (Appeal and Review Amendment (Double Jeopardy) Bill 2019 was introduced into the Legislative Council by Mr David Shoebridge MLC. The same bill was previously introduced in 2018 and shares some features with that introduced in 2015. The Bill was referred by the House to the Law and Justice Committee for inquiry and report.

Double jeopardy

1.9 The double jeopardy rule is a long established principle of criminal law that prevents a person acquitted or convicted of a criminal offence from being tried again on the same or very similar charges and on the same facts. The rule is over 800 years old and is recognised in the laws of common law and civil law jurisdictions around the world, as well as in international law.[19]

1.10 Article 14(7) of the United Nations International Covenant on Civil and Political Rights provides that:

15 *Wood review report*, p viii.

16 Submission 14, NSW Government, p 17.

17 *Attorney General for New South Wales v XX* [2018] NSWCCA 198.

18 *Attorney General for New South Wales v XX* [2019] HCA Trans 52.

19 Submission 14, NSW Government, p 2.

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[20]

1.11 The UN Human Rights Committee has stated that Article 14(7):

> … does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.[21]

Principles

1.12 Double jeopardy encapsulates four fundamental principles in the criminal law, as delineated in the judgement of Gleeson CJ and Hayne J in the High Court of Australia decision in *Queen v Carroll:*

> (1) the powers and resources of the State as prosecutor are much greater than those of the individual accused;
>
> (2) the consequences of conviction are very serious;
>
> (3) without safeguards the power to prosecute could readily be used by the executive as an instrument of oppression; and
>
> (4) finality is an important aspect of any system of justice.[22]

The present law in New South Wales

1.13 In New South Wales, statutory exceptions to the double jeopardy principle were introduced into Part 8, Division 2 of the CARA in 2006. Sections 100-106 of the CARA are set out in Appendix 4. Those exceptions are confined to cases where the offence charged carries a life sentence, and where there is fresh and compelling evidence or a tainted acquittal.[23]

1.14 Apart from the application to the Court of Criminal Appeal made by the Attorney General and decided in 2018 in respect of the Bowraville case, no other applications to quash an acquittal have been made under these provisions of the CARA.[24] Provisions of the legislation are detailed below.

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20 Submission 14, NSW Government, p 3, quoting United Nations, International Covenant on Civil and Political Rights, 1966, Article 14(7).

21 Submission 14, NSW Government, p 3, quoting United Nations Human Rights Committee, *General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, July 2007, (CCPR/C/GC/32), para 56.

22 Submission 14, NSW Government, p 4 and Submission 2, Office of the Director of Public Prosecutions, p 2, citing R *v Carroll* [2002] HCA 55, paras 21-23.

23 *Wood review report*, pp 24-26.

24 *Wood review report*, p 26.

Context for the 2006 reforms of the *Crimes (Appeal and Review) Act 2001*

1.15 The 2006 reforms to introduce statutory exceptions to double jeopardy law occurred within a national and international context.

1.16 The change occurred after a long period of consultation, on the recommendation of Council of Australian Governments (COAG), which sought a national framework for the reform of double jeopardy legislation across Australia. The reforms provided a legislative response to the controversial 2002 High Court decision *R v Carroll*, which disallowed the prosecution of a person for perjury who had been acquitted of murder in the original trial. They were also significantly influenced by the introduction of similar legislation in England and Wales in 2003 (discussed in a later section).[25]

Part 8 Division 2's provisions

1.17 Pertinent provisions in the CARA's Part 8 Division 2 are set out below.

1.18 Section 100(1) of the Act provides that a case may be only retried for a life sentence offence if the Court of Criminal Appeal is satisfied, that first, there is fresh and compelling evidence against the acquitted person in relation to the offence, and second, that in all the circumstances it is in the interests of justice for the order to be made.[26]

1.19 Under s 102(2), 'fresh' evidence is defined as that which:

- was not adduced in the proceedings in which the person was acquitted, and
- could not have been adduced in those proceedings with the exercise of reasonable diligence.

1.20 'Compelling' evidence under s 102(3) is defined as that which:

- is reliable, and
- substantial, and
- in the context of the issues in dispute in the proceedings in which the person was acquitted, is highly probative of the case against the acquitted person.

1.21 Under section 102(4) of the Act, evidence that would be admissible on a retrial is not precluded from being fresh and compelling merely because it would have been inadmissible in the earlier proceedings against the acquitted person. In other words, a judge's decision as to the admissibility of evidence in a trial does not bind the decision regarding whether evidence is fresh and compelling.

1.22 Section 104 of the Act sets out the matters to be considered by the Court when determining whether it is in the 'interests of justice' for an order to be made for the retrial of the acquitted person. Under this provision:

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25 *Wood review report*, p 18, citing *R v Carroll* [2002] HCA 55. For further information see Law and Justice Committee, *The family response to the murders in Bowraville report,* pp 63-64. In addition, the background and purpose of the reforms is set out in detail in Submission 14, NSW Government, pp 11-13.

26 *Crimes (Appeal and Review) Act 2001* (NSW), s 100(1).

- it is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances, and
- the Court, in making its determination, is to have regard to:
  - the length of time since the acquitted person allegedly committed the offence, and
  - whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for the retrial of the acquitted person.

Double jeopardy exceptions and the Bowraville cases

1.23 It is the position of the three Bowraville families that there is 'fresh' and 'compelling' evidence sufficient to meet the criteria required for the retrial of XX in relation to all three murders.[27]

1.24 The committee's 2014 report noted that certain evidence in respect of the three murders has never been put before a jury:

- the substantial 'tendency and coincidence' evidence demonstrating the similarities between Clinton's disappearance and death and those of Evelyn and Colleen – uncovered by police during the investigations
- alleged admissions made by XX – uncovered during the 2007 reinvestigation
- the 'Norco Corner evidence' placing a man matching the description of XX standing over a young Aboriginal male matching Clinton's description in the hours after he was last seen alive – which, although reported to police shortly after Clinton's disappearance, was neither fully investigated nor made available to the prosecutor in the first trial.[28]

1.25 Of great significance to the families' endeavours to have the case retried is that in 1995, two years following the decision of the judge presiding over the first trial of XX that the counts in relation to Clinton and Evelyn would be tried separately, New South Wales enacted the *Evidence Act 1995* (NSW), which introduced rules with respect to the admissibility of tendency and coincidence evidence. This replaced the common law rules for the admissibility of propensity and similar fact evidence. Most significantly, section 101(2) of the *Evidence Act* provides that tendency and/or coincidence evidence about a defendant adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. This test is generally considered to be more permissive than the common law test for the admissibility of similar fact evidence used in the 1993 decision to separate the trials.[29]

1.26 To date, a key issue in whether a retrial of XX is to occur is the meaning of 'adduced' in section 102. There is no definition of 'adduced' in the Act. In their arguments for a retrial, advocates for the families have characterised 'adduced' as meaning 'admitted' into evidence, consistent

27 Law and Justice Committee, *The family response to the murders in Bowraville*, pp 62-63.

28 Law and Justice Committee, *The family response to the murders in Bowraville*, pp 39 and 42.

29 Submission 14, NSW Government, p 3, citing the *Wood review report*, para 1.13.

with the interpretation of the United Kingdom's *Criminal Justice Act 2003*, that is, that evidence not previously admitted into evidence is deemed to be 'fresh'.[30]

The Wood review

1.27 In response to this committee's 2014 recommendation that the NSW Government review the double jeopardy law, specifically section 102 of the CARA to clarify the definition of 'adduced' evidence, then Attorney General Upton commissioned the Hon James Wood AO QC to undertake an independent review of section 102. Mr Wood QC handed down his report in December 2015.

1.28 Mr Wood QC, who was specifically tasked with considering the legal and other ramifications of defining adduced as 'admitted', took the view that:

> "adduced" in s 102 … cannot be understood to mean anything other than tendered to the court. "Adduced" in this context does not mean "admitted" – these terms represent two different steps: a party adduces (or tenders) evidence to the court and the court then either admits or rejects that evidence.[31]

1.29 Mr Wood QC stated that he understood that an amendment to redefine or replace 'adduced' with 'admitted' could clear the way for an application to quash an acquittal in three scenarios, where:

> (1) The court wrongly rejects admissible evidence and as a consequence the accused is acquitted.
>
> (2) The prosecution had evidence that was available but chose not to tender it because it was assumed not to be of probative value or to be inadmissible, and the accused is acquitted. The significance of this evidence changes, and/or it later becomes admissible through a change in the law.
>
> (3) Evidence is tendered to the court; the court correctly rejects it as inadmissible in the light of the current law. The accused is acquitted. The evidence becomes admissible at a later date as a result of a change in the law.[32]

1.30 Mr Wood QC formed the view that under the CARA, an application to quash the acquittal would be rejected in all three scenarios and that, further, amending the word 'adduced' to 'admitted' could 'enliven an application under s 102 in relation to the second and third scenarios above.' Further, in his view, the legislature made a 'deliberate choice' when introducing the 2006 amendments:

> … to confine fresh evidence to evidence arising through recent developments such as a post-acquittal confession, newly-discovered DNA evidence, or the emergence of an eyewitness whose existence was previously unknown. This corresponds with the selection of the word "adduced", the natural meaning of which extends to evidence that was tendered or proffered to the court.[33]

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30 Law and Justice Committee, *The family response to the murders in Bowraville*, pp 72-73.

31 *Wood review report*, p 13.

32 *Wood review report*, p 60

33 *Wood review report*, p 61.

1.31 Mr Wood QC also specifically considered the proposal contained in Mr Shoebridge's 2015 bill (referred to as option 2, and which is partly replicated in the 2019 Bill) and concluded:

> I am alert to the Bowraville situation and the potential impact that an amendment in accordance with option 2 may have on considering an application for a retrial under s 102. However, the term "fresh" was carefully considered and intentionally inserted into the provision because of its restrictions. An amendment would have ramifications beyond Bowraville, as it potentially paves the way to revive a number of acquittals where similar fact evidence was rejected. Accordingly, I cannot recommend that s 102 of CARA be amended in accordance with option 2.[34]

1.32 Noting that there was 'strong opposition' from those primarily legal stakeholders that he consulted with to any amendment,[35] Mr Wood QC further concluded that:

> [I]t is premature to amend s 102 without knowing how the NSW Court of Criminal Appeal will apply it. There are a number of concerns with the proposed changes to the definition of "fresh", primarily broadening the types of evidence that could constitute "fresh" evidence has the potential to destabilise the principle of finality in prosecutions, which will impact upon defendants, victims and the community's confidence in the courts.
>
> In my view, the existing legislation appears to serve its policy objectives, and delicately balances the rights of a person acquitted of a serious offence with the pursuit of justice. I suggest that the statutory definitions to the rule against double jeopardy be reviewed again at a later date, when Australian courts have had the opportunity to apply and interpret the relevant sections.[36]

1.33 This review is timely given the recent legal proceedings.

Attorney General for New South Wales v XX

1.34 Attorney General Upton's 2016 application to the NSW Court of Criminal Appeal under section 100(1) of the CARA sought an order for a retrial of XX for the alleged murders of Clinton and Evelyn jointly on an indictment for the murder of Colleen. The basis for the application was that there was 'fresh and compelling' evidence against the respondent in relation to those offences.

1.35 The Attorney General sought to rely on the following evidence as fresh:

- 'the Walker evidence' – relating to the disappearance of Colleen that was not adduced in the trial of Clinton or that of Evelyn, including from numerous witnesses about the events on the night of her disappearance
- 'the informer evidence' – in which four informers told the police that XX had made admissions to them in relation to the offences

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34 *Wood review report*, p 67. A third option, the model operating in Western Australia, was also considered and rejected.

35 *Wood review report*, pp 52 and 68. Of the 12 stakeholders who made a submission to the review, seven opposed any amendment to section 102, two supported amendment and three did not express a view.

36 *Wood review report*, p viii.

- 'the other admissions evidence' – from three individuals that XX had threatened and/or made other admissions to them
- 'the lies evidencing consciousness of guilt evidence' – referring to XX's answers to questions from a journalist in relation to the deaths of Colleen and Evelyn, and part of his evidence at Clinton's trial.[37]

1.36 Representatives for the Attorney General argued that 'adduced' means 'admitted', 'so that fresh evidence would extend to evidence which had not been admitted in the earlier proceedings and could not have been admitted in those proceedings with reasonable diligence'.[38] They held that the advent of the *Evidence Act* created a new statutory framework by which the evidence said to make up the 'Walker evidence' could now be admitted in the other trials, and that the evidence in the Speedy-Duroux trial was fresh in the Greenup trial and vice versa.[39]

1.37 The Court of Criminal Appeal held that adduced means 'tendered' or 'brought forward' and that therefore fresh evidence means evidence that was not available at the time of the trial in which the accused was acquitted.[40]

1.38 The Court dismissed the application on the basis that there was no 'fresh' evidence in relation to the murder of Evelyn Greenup. Further, since the Attorney General had put his case on the basis that it was necessary to seek an order for both offences to be retried at the same trial in order for it to succeed, the Court held that it was not open to consider whether there was 'fresh and compelling' evidence in relation to the murder of Clinton Speedy-Duroux alone.[41]

1.39 The Court held that even though the restrictive rules of admissibility had changed with the *Evidence Act*, the evidence that was available to the prosecution at the time of the original trial could never be considered to be fresh evidence on an application for a retrial. It expressly rejected an interpretation that would have allowed evidence to be considered to be fresh if it was previously inadmissible but made admissible due to a later change in the law.[42]

1.40 The court did not consider the question of whether the totality of evidence in respect of all three murders was compelling, or whether it was in the interests of justice to set aside the acquittals.[43]

The object and provisions of the Bill

1.41 As noted in the timeline of events above, the Bill was previously introduced by Mr Shoebridge in 2018 and shares some features with the Bill he introduced in 2015.

37 *Attorney General for New South Wales v XX* NSWCCA 198, at 36-68.

38 *Attorney General for New South Wales v XX* NSWCCA 198, at 179.

39 *Attorney General for New South Wales v XX* NSWCCA 198, at 179.

40 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 2-3.

41 *Attorney General for New South Wales v XX* [2018] NSWCCA 198, Judgement summary, p 1.

42 Mr David Shoebridge, Second reading speech, Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2018, *Hansard*, 20 September 2018.

43 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 14.

Object

1.42 The object of the Bill is to amend the CARA to extend an exception to the rule against double jeopardy in relation to an acquitted person where previously inadmissible evidence becomes admissible.

Provisions

1.43 The Bill proposes to extend the definition of 'fresh' in section 102 to evidence that was inadmissible in the proceedings in which the person was acquitted but, as a result of a substantive legislative change in the law of evidence since the acquittal, would now be admissible if the acquitted person were to be retried.

1.44 The Bill also proposes to amend section 105 of CARA to allow for a second application for the retrial of an acquitted person to be made in exceptional circumstances.[44]

1.45 The text of the amendments is set out on the following page. A modified version of the CARA provisions incorporating the Bill's proposed amendments is included in Appendix 5.

3 Amendment of Crimes (Appeal and Review) Act 2001 No 120

(1) **Section 102 Fresh and compelling evidence—meaning**

Insert after section 102 (2):

(2A) Evidence is also ***fresh*** if:

(a) it was inadmissible in the proceedings in which the person was acquitted, and

(b) as a result of a substantive legislative change in the law of evidence since the acquittal, it would now be admissible if the acquitted person were to be retried.

(2B) Subsection (2A) extends to a person acquitted before the commencement of that subsection.

(2) **Section 102 (4)**

Omit the subsection.

(3) **Section 105 Application for retrial—procedure**

Insert after section 105 (1):

(1AA) Despite subsection (1), the Court of Criminal Appeal may allow a second application for the retrial of an acquitted person to be made under this Division in relation to an acquittal if the Court is satisfied that exceptional circumstances apply.

(1AB) For the purposes of subsection (1AA), exceptional circumstances are taken to include any substantive legislative change to this Division made since the previous application.

44 Explanatory notes, Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019.

Double jeopardy law in other jurisdictions

1.46 In recent years Australia, New Zealand, England and Wales, Scotland and Ireland have all introduced statutory exceptions to the double jeopardy rule, with each permitting a retrial when there is fresh and compelling evidence against an accused person and it is in the interests of justice, or where there has been a tainted acquittal.[45]

Within Australia

1.47 Consistent with the recommendations of COAG that drove the New South Wales reforms, all Australian jurisdictions adopted the definition of 'fresh evidence' under the New South Wales Act, with the exception of Western Australia. The *Criminal Appeals Act 2004* (WA) provides:

> **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.

England and Wales: The *Criminal Justice Act 2003*

1.48 Reforms to double jeopardy law in England and Wales commenced in 1999, prompted by the acquittal of three people accused of the racially motivated murder of Stephen Lawrence in 1993. Following a Law Commission inquiry, the process culminated in the passage of the *Criminal Justice Act 2003* (England and Wales) (CJA).[46]

1.49 Part 10 of the CJA commenced in 2005. Key elements are listed below:

- the double jeopardy exceptions may apply to up to 50 'serious offences', including certain homicide offences, sexual assaults, child sexual assaults, and drug offences
- evidence must be 'new and compelling'
- new evidence is assessed in accordance with current rules and standards of evidence, and it is those standards and rules of evidence that would apply in a retrial

45 *Wood review report*, pp 17-18.

46 *Wood review report*, p 29.

- evidence which is otherwise new and compelling is not to be excluded from consideration of the court solely because it would not have been admissible at the previous trial
- the DPP can only consent to an application if satisfied that there is evidence that appears to satisfy the requirement of s 78 and s 79 and, additionally, that it is in 'the public interest' for the application to proceed
- it must be in the interests of justice for the Court of Appeal to order a retrial, which is to be determined having particular regard to, among other things, whether it is likely that the new evidence would have been adduced in the earlier proceedings but for a failure by an officer or by a prosecutor to act with due diligence or expedition.[47]

1.50 In respect of safeguards, it is also noted that the England and Wales model does not require the Attorney General's consent for an application for a retrial, and the matter is not dealt with by the highest criminal court.[48]

'Fresh' versus 'new' evidence

1.51 According to Justice Wood, the central difference between the New South Wales and England and Wales frameworks is the latter's use of the term 'new'. He compared the two provisions as follows, with the red text indicating points of difference:

England and Wales	**New South Wales**
s 78 New and compelling evidence	s 102 Fresh and compelling evidence – meaning
(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.	(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 **new** if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related)	(2) Evidence is **fresh** if:
…	(a) it was not adduced in the proceedings in which the person was acquitted, and
(5) for the purposes of this section, it is irrelevant whether any evidence would have admissible in earlier proceedings against the acquitted person.	(b) it could not have been adduced in those proceedings with the exercise of reasonable diligence
	…
	(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 earlier proceedings against the acquitted person.[49]

47 *Wood review report,* p 30, citing *Criminal Justice Act 2003* (England and Wales), Schedule 5, ss 76, 78 and 79.

48 David Shoebridge, Second reading speech: Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019, *Hansard*, 30 May 2019.

49 *Wood review report*, p 31.

1.52 Justice Wood observed that:

> There is a technical legal distinction between "fresh" and "new". Fresh evidence equates to evidence that could not have been brought to the primary trial. New evidence is evidence that may have existed at the time of the primary trial, but was not, for whatever reason, brought to that trial. Cases from England and Wales below support the proposition that "new" does not necessarily mean "newly-discovered".
>
> The definition of "fresh" has three parts:
> - It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
> - The evidence must be such that there must be a high degree of probability that there would be a different verdict.
> - The evidence must be credible.[50]

1.53 The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOCC) discussion paper that fed into the COAG double jeopardy reforms identified the differences between 'new' and 'fresh', with England and Wales adopting the lower threshold:

> In essence, 'new' evidence is simply evidence that was not presented at the original proceedings (for whatever reason). 'Fresh' evidence is evidence that is 'new' with an additional condition: it could not have been presented at the original proceedings despite competent police and/or prosecution work. The United Kingdom double jeopardy reforms have opted for the lower threshold of 'new' evidence.[51]

1.54 The MCCOC identified two consequential differences:

- If the 'new' evidence test is applied, a defendant may be retried if a crucial piece of existing evidence was not presented at trial owing to a mistake by police or the prosecution, but if a 'fresh' evidence test is applied, no retrial may occur on that basis.
- Evidence not led by the prosecution at the original trial as a matter of tactics cannot be 'fresh' evidence for the purposes of a retrial.[52]

1.55 Justice Wood further noted that the difference between 'new' and 'fresh' may impact on the way 'adduced' is interpreted in the two jurisdictions, stating:

> For example, as the term 'new' does not inherently prevent evidence existing at the time of trial from coming within its purview, the resulting interpretation of 'adduced' by the Court of Appeal in England and Wales may be more permissive than a NSW Court.[53]

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50 *Wood review report* , p 32.

51 Law and Justice Committee, *The family response to the murders in Bowraville*, p 65, quoting Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper*, November 2003, p 109.

52 *Wood review report*, p 32, citing Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper*, p 76.

53 *Wood review report*, pp 32-33.

Scotland

1.56 Scotland's double jeopardy exceptions were introduced in the *Double Jeopardy (Scotland) Act 2011*. Its provisions differ from those of England and Wales and Australian jurisdictions. There are three exceptions, applying more broadly than in other jurisdictions, covering:

- tainted acquittals (section 2)
- subsequent admissions (section 3) and
- new evidence (section 4).

1.57 The first two apply to all offences while the 'new evidence' exception is limited to acquittals on indictment.

1.58 Consistent with most other jurisdictions, the exceptions apply retrospectively.[54] Only one application may be made under the new evidence exception, but multiple applications can be made under the other two.[55] According to Professor David Hamer of the Sydney Law School, University of Sydney:

> In effect, 'new evidence' is defined in similar terms to 'fresh evidence' in Australia. 'The court may set aside the acquittal only if satisfied that … the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence' …[56]

54 Answers to questions on notice, Professor David Hamer, University of Sydney, received 6 August 2019, p 1, citing *Double Jeopardy (Scotland) Act 2011*, s 14.

55 Answers to questions on notice, Professor Hamer, p 1, citing *Double Jeopardy (Scotland) Act 2011*, s 4(5).

56 Answers to questions on notice, Professor Hamer, p 2, quoting section 4(7)(b), *Double Jeopardy (Scotland) Act 2011*.

Chapter 2 Should the Bill proceed?

Almost 30 years since the three Bowraville children were murdered, the families' countless attempts to achieve justice culminated in a decision of the High Court of Australia in March 2019. The High Court upheld the September 2018 decision of the NSW Court of Criminal Appeal not to allow an appeal against the acquittal of XX so that the cases of Evelyn Greenup and Clinton Speedy-Duroux could be retried together with that of Colleen Walker-Craig. The Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 (hereafter the Bill), a private members bill introduced by Mr David Shoebridge MLC, was drafted to address the technical aspects of the current law on which the application for a retrial was dismissed, and to enable a further application to be made.

As noted in chapter 1, the committee's task in undertaking this inquiry is to examine the technical, legal implications of the Bill's proposed amendments to the current law, not just in respect of the Bowraville cases but also for others that may fall within the purview of the amended legislation.

This chapter examines the evidence that the committee received from both family members and various legal stakeholders in examining whether the Bill should proceed to consideration by the Parliament. First it documents the views of the families, the legal fraternity and other legal stakeholders on the Bill as a whole. Next it explores participants' views on whether a legislative amendment should be crafted to address a specific case. It then documents the concerns that almost all legal stakeholders had with the wording of the key mechanism by which the Bill would enable previously inadmissible evidence to be considered 'fresh' under section 102 of the *Crimes (Appeal and Review) Act 2001* (hereafter the CARA). The chapter then considers the Bill's application to other potential life sentence offences, before exploring other legal hurdles that the Bowraville families face in their quest for justice.

Views on the Bill as a whole

2.1 In this section the committee documents the broad views of the Bowraville families and other community members, the legal fraternity, and other legal experts with respect to Bill as a whole.

Family members' perspectives

2.2 The families of Clinton, Colleen and Evelyn all strongly supported the Bill as a means by which the law could be amended to allow them to seek and obtain a retrial of XX, in which all three cases can be heard together.

2.3 When the committee met with the families in Bowraville they implored us to help them in their quest for justice by supporting the Bill. They emphasised that that their ongoing quest is about making sure that what happened to them does not happen to other families, and so that they can obtain a resolution in respect of the murders.

2.4 One family member stated, 'We've always done what the law has asked us to do. When is it going to stop and work in our favour?' Another said, 'We've done right by the law, respected the law. Now were asking the law to start respecting us.' Another told the committee, 'When

something goes wrong the law should fix it. That's what we were taught. It's about the law now, fixing it, making it right for everybody. It won't bring our kids back but it will make this right'.[57]

2.5 A family member referred to the United Kingdom's double jeopardy law and called for it to apply here, as broadly intended by the Bill.[58]

2.6 Numerous family members also made written submissions to the inquiry, each of which emphasised the devastating effects of not having achieved justice, despite having fought for it for so long.

2.7 Ms Leonie Duroux and other members of the Duroux family suggested that the double jeopardy exemptions introduced in 2006 were intended to help the Bowraville families and others, but 'These laws haven't worked for anyone since they were brought in … Ours is the only case that they ever used the laws for and they didn't work'.[59] The family expressed frustration that had Parliament amended the law via Mr Shoebridge's (very similar) 2015 bill, the NSW Court of Criminal Appeal decision might very well have been in their favour. They called for the law to be changed to be more in line with the UK system.[60]

2.8 Ms Penny Stadhams, aunt of Evelyn Greenup, also expressed deep frustration that the 2006 changes have not been effective in allowing a retrial and stated, 'Justice for us is for the Parliament to do what it said it was going to do and fix the balance between victims and the people who commit these crimes'.[61]

2.9 In a similar vein, Mr Thomas Duroux, Clinton's father, called on the Parliament to achieve a better balance in the law:

> These laws will stand in the way of other families like mine if they're not changed to get the balance right. This is not just for our families, but for everyone. If we can get justice, maybe we can all pull together and help one another. We're fighting this whole time for the right reasons. We need the Parliament to finish the job they started and make sure the laws work right.[62]

2.10 Ms Michelle Jarrett, another aunt of Evelyn Greenup, called for the double jeopardy law to be changed so that the families can get their day in court with all three cases heard together:

> The Courts need the whole story. We've only got bits and pieces so far. They've only heard Clinton's story on its own. They've only heard Evelyn's story on its own merits. They have not heard Colleen's and we've never gotten the full story because of the inept police investigation at the beginning. To get the full story, we need to change this word that seems to hold a lot of power and that has the balance of power of justice for us.

57 Standing Committee on Law and Justice, *Inquiry into the Crimes (Appeal and Review) Double Jeopardy Bill 2019: Report on key messages from the Law and Justice Committee meeting with family members in Bowraville,* 24 June 2019, (hereafter *Report on key messages*, 24 June 2019), p 2.

58 Law and Justice Committee, *Report on key messages*, 24 June 2019, p 3.

59 Submission 22, Leonie Duroux, Allen Kirk, Elijah Duroux, Marbuck Duroux, Tnikka Butler and Name suppressed, p 1.

60 Submission 22, Leonie Duroux, Allen Kirk, Elijah Duroux, Marbuck Duroux, Tnikka Butler and Name suppressed, p 1.

61 Submission 29, Ms Penny Stadhams, p 1.

62 Submission 28, Mr Thomas Duroux, p 1.

> There needs to be a clearer definition of what the word means … This law isn't gonna decide if he's guilty or not but it'll give us the opportunity to get our foot in the door.[63]

2.11 This, Ms Jarrett argued, will enable the law to serve its proper purpose of delivering justice, modernising for the benefit of the community:

> These laws are written, I believe, to get justice, to serve justice, not to inflict more injustices. An injustice has been done and someone's gotta fix it … The law has to change to suit the times and they can't stay back in the dinosaur ages … The community needs the justice system to get on with the job and fix a law that is not working.[64]

2.12 Numerous other submission authors, members of the Bowraville community and others, expressed their support for the families and their support for the Bill.[65]

Concerns about the Bill from legal agencies and organisations

2.13 The overwhelming majority of members of the legal fraternity were of one voice in their opposition to the Bill. The Office of the Director of Public Prosecutions (ODPP), the Public Defenders, Legal Aid NSW, the NSW Bar Association, and the NSW Law Society all argued that the law as it stands in the CARA should remain unchanged. Jumbunna Institute for Indigenous Education and Research and Professor David Hamer of the Sydney Law School, University of Sydney, supported the direction of the reform. Stakeholders' views on specific implications of the Bill are documented in the following chapter; for now the focus is on their broad views.

2.14 Mr Peter McGrath SC, Acting Director of Public Prosecutions, listed a number of grounds on which his office rejected the Bill:

> The DPP opposes the bill, accepting unreservedly the motivation of its proponents and the background of this Bowraville case. My submission is that the bill is not in the interest of the community and will adversely affect the integrity of the criminal justice system in this State … The present law concerning double jeopardy in this State strikes the right balance: fresh and compelling evidence, which could not, with appropriate investigatory or prosecutorial diligence, have been adduced in earlier proceedings. The present law is in accordance with international criminal laws and with human rights covenants.[66]

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63 Submission 26, Michelle Jarrett, p 1.

64 Submission 26, Michelle Jarrett, p 1.

65 Submission 27, Mr Barry Toohey, p 1; Submission 4, Mr Michael Smee, p 1; Submission 6, Ms Jen Costello, p 1; Submission 8, Name suppressed, p 1; Submission 9, Ms Lorraine Osborne, p 1; Submission 10, Name suppressed, p 1; Submission 11, Name suppressed, p 1; Submission 12, Mr Robert Stewart, p 1; Submission 13, Mrs Michelle Hanson, p 1; Submission 15, Ms Mavis Symonds, p 1; Submission 16, Mr Stephan Moore, p 1; Submission 17, Name suppressed, p 1; Submission 18, Name suppressed, p 1; Submission 19, Name suppressed, p 1; Submission 20, Name suppressed, p 20.

66 Evidence, Mr Peter McGrath SC, Acting Director of Public Prosecutions, 24 July 2019, p 20; see also Submission 2, Office of the Director of Public Prosecutions, p 1.

2.15 In a similar vein, Legal Aid NSW emphasised that the principles underpinning the double jeopardy rule are so fundamental that any exceptions must be crafted with great precision.[67] It explained the way the current exemptions operate, then argued that the current law strikes the right balance so that ultimately, only strong cases are able to proceed to retrial:

> The current law seeks to strike an appropriate balance in relation to what is a significant alteration to the rule against double jeopardy. It provides an avenue of redress where compelling evidence has emerged after a person has been acquitted of an offence with a penalty of life imprisonment. The law requires that this evidence be both 'fresh' and 'compelling' and for a retrial to be in the 'interests of justice.' The combination of these requirements ensures that only strong cases proceed to retrial … Legal Aid NSW considers that the current exception to the rule against double jeopardy provides sufficient scope to meet the above mentioned objectives, including to encourage the diligent initial investigation and prosecution of serious offences. We consider that the Bill would undermine safeguards which were intentionally established to ensure that only strong cases proceed to retrial.[68]

2.16 Legal Aid also considered that the Bill infringes on the human rights principle that a person not be tried and punished again for an offence for which they have already been acquitted (see paragraph 1.10-1.11). Moreover, it argued that together, the Bill's provisions and its retrospective action 'undermine the rule of law and could result in proceedings that would bring the administration of justice into disrepute'.[69]

2.17 These criticisms were echoed by the NSW Bar Association, which underscored that if passed, the Bill would render many past acquittals open to appeal, would undermine the rule of law and the separation of powers, and 'would bring the administration of justice into disrepute by rendering the criminal law unworkable, free from finality and susceptible to executive interference'.[70] Ms Gabrielle Bashir SC, Junior Vice President and Co-Chair of the Association's Criminal Law Committee, argued that the Bill offends against the double jeopardy principle 'that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence'.[71]

2.18 The Public Defenders also argued that the Bill represents 'a radical erosion of the principle of double jeopardy'.[72] Ms Belinda Rigg SC, Senior Public Defender for NSW, representing both the Public Defenders and Legal Aid NSW, advised the committee that at the heart of all the objections of both organisations is the Bill's risk to the fundamental principle of finality in the legal system:

> The Public Defenders and Legal Aid oppose the bill. The main reasons for this are all connected with the importance of the principle of finality in our legal system. This is a principle which is multifaceted and is essential for the stability of the community. It is essential for the proper development of the law and for the fair application of the rule of law. Historically this principle has found particular poignancy in relation to the

67 Submission 24, Legal Aid NSW, pp 8-9.

68 Submission 24, Legal Aid NSW, p 5.

69 Submission 24, Legal Aid NSW, p 6.

70 Submission 1, NSW Bar Association, pp 2 and 6.

71 Evidence, Ms Gabrielle Bashir SC, Junior Vice President and Co-Chair, Criminal Law Committee, NSW Bar Association, 24 July 2019, p 28.

72 Submission 23, The Public Defenders, p 7.

> incontrovertibility of acquittals in an accusatorial system such as ours. Those principles apply so as to not have repeated harassment of individuals lead to instability and insecurity, bearing in mind the serious consequences of criminal prosecutions and the resources of the state in prosecuting someone as compared to the individual.[73]

2.19 A number of the matters documented are above are addressed in detail in the remainder of this report.

Other legal perspectives

2.20 Professor Luke McNamara and Mr Brian Whelan of the Centre for Crime, Law and Justice in the Faculty of Law, University of New South Wales, observed that the Bowraville murders 'highlight the ramifications of underlying inadequacies in respect of police investigation and prosecution – a matter acknowledged by the NSW Police Force'.[74] They argued that the Bill is not the best solution to the complex problems characterising Aboriginal people's experience of the criminal justice system, including the failures of that system to address criminal violence against them. The authors reasoned:

> The current 'fresh and compelling' evidence regime has been deliberately designed as a very narrow window of opportunity for retrial after acquittal. It is not intended to be commensurate with all the factors that may produce what are sometimes referred to as 'unmeritorious acquittals' – recognising that to attempt to do so, would come at too great a cost in terms of the presumption of innocence and the principle of finality. Rather than relying on changes in evidence law (and admissibility) as the mechanism for widening the parameters of the 'fresh and compelling' exception to the immunity against re-prosecution after acquittal, we submit that greater emphasis should be placed on forward-looking and proactive reforms to law and practice to minimise the risk of unmeritorious acquittals in the first place.[75]

2.21 Remedies for the systemic problems in the criminal justice system are explored at the end of the following chapter. These authors further summarised their concerns in respect of the Bill:

> [T]he proposed relaxation of the current provisions protecting against double jeopardy is an instance of introducing a law of general application in response to discrete instances of apparent injustice … this approach to law-making is imprudent, with the capacity to diminish the integrity of the NSW criminal justice system. It poses a risk to the principle of finality and the presumption of innocence, increases the potential for targeting of certain individuals, and may produce unintended effects.[76]

2.22 On the other hand, Professor David Hamer, Sydney Law School, University of Sydney, who specialises in evidence law, highlighted the narrowness of the double jeopardy exceptions across Australian jurisdictions including New South Wales. He noted that the exceptions embodied in the CARA were intended to rebalance the competing goals, on the one hand, to safeguard individual autonomy and prevent repeated prosecutions as a means of state oppression, and on

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73 Evidence, Ms Belinda Rigg SC, Senior Public Defender for NSW, The Public Defenders, 24 July 2019, p 46; see also Submission 23, The Public Defenders, p 1.

74 Submission 5, Professor Luke McNamara and Mr Brian Whelan, Centre for Crime, Law and Justice in the Faculty of Law, University of New South Wales, p 3.

75 Submission 5, Professor McNamara and Mr Whelan, p 4.

76 Submission 5, Professor McNamara and Mr Whelan, p 2.

the other, to serve victims' and society's interests in accurate law enforcement.[77] Professor Hamer noted that the restrictions on double jeopardy applications extend beyond the emergence of 'fresh and compelling evidence' to application only in the case of life sentence offences and the court's consideration that 'in all the circumstances it is in the interests of justice for the order [for a retrial] to be made'.[78]

2.23 For Professor Hamer, the fact that in New South Wales only one application for a retrial under section 100 has ever been brought – *Attorney General for New South Wales v XX*, the Bowraville case, which did not succeed – points to the desirability a slight expansion of the exception, with the goal of achieving a better balance between the competing interests noted above. He thus argued in favour of the Bill, summarising his position as follows:

> I support the slight expansion of the fresh and compelling evidence exception to the double jeopardy protection so that it covers freshly admissible evidence. Defendants' interests have to be balanced against other interests, including those of the victims and the victims' families. The protection against double jeopardy is not a fundamental right, at least not in the sense of being absolute and immune from exceptions. One of the chief aims of double jeopardy protection is finality and closure but where there is fresh and compelling evidence of an acquitted person's guilt, including freshly admissible evidence, well then finality and closure are illusory. The Bowraville case shows this clearly.
>
> It has been suggested that to expand the double jeopardy exception would bring the system into disrepute but the way that the system has handled the Bowraville case has already damaged its reputation.[79]

2.24 In addition, Professor Hamer's submission and oral evidence observed an 'incoherence' in the double jeopardy exception under the CARA as it currently operates, and as interpreted by the Court of Criminal Appeal. Specifically, he reasoned that that sections 102(2) and 102(4), which relate to 'fresh evidence', as interpreted by the Court of Criminal Appeal 'are in tension'.[80] Professor Hamer considered that the Bill's proposed extension of the definition of fresh evidence would improve the coherence of the double jeopardy exception, addressing a number of inconsistencies in the current law's treatment of different evidentiary scenarios documented in his submission. It would do this by extending the definition to all evidence that was inadmissible at trial but has since become admissible.[81]

2.25 Following the hearing Professor Hamer challenged the Bar Association's suggestion in evidence that many of his propositions are premised on a rejection of the rule of law. He observed that, 'The rule of law is a contested complex abstraction' and underscored the complexity of the

77 Submission 21, Professor David Hamer, Sydney Law School, University of Sydney, p 9.

78 Submission 21, Professor Hamer, p 2, quoting *Crimes (Appeal and Review) Act 2001* (NSW), ss 100(1)(b), 104.

79 Evidence, Professor David Hamer, Sydney Law School, University of Sydney, 24 July 2019, p 38.

80 Submission 21, Professor David Hamer, pp 3-4, citing *Attorney General for NSW v XX* [2018] NSWCCA 198 at 225 and 243; Evidence, Professor Hamer, 24 July 2019, p 38.

81 Submission 21, Professor Hamer, pp 5-6.

issues under discussion.[82] In doing so he pointed to the potential value of law reform in response to the disadvantage at the heart of the Bowraville matters:

> One of the key goals of the rule of law is to ensure that the law applies equally to all. Many commentators acknowledge the risk that the pursuit of formal equality can mask substantive inequality. It may be necessary, in some situations, for the law to differentiate between people or groups of people in the pursuit of genuine equality. The Bowraville case is a case in point.[83]

2.26 The Jumbunna Institute for Indigenous Education and Research at the University of Technology (hereafter Jumbunna), which has worked closely with the Bowraville families, endorsed the aims of the Bill in principle, but offered an alternative amendment to the CARA, discussed in detail in the following chapter. Jumbunna's model had two key elements: first, amending the definition of fresh in section 102 by changing 'adduced' to 'admitted'; and second, amending section 105 to allow multiple applications for a retrial, but only one retrial.[84]

2.27 Jumbunna proposed that the most compelling argument for any qualification to double jeopardy laws is the imperative to bring criminal offenders to justice, as a recognition of the damage such offending does to victims and to society. It cited the High Court in *R v Carroll*:

> At the very root of the criminal law system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it. It follows that those who are guilty of a crime for which they are to be held responsible should, in the absence of reason to the contrary, be prosecuted to conviction and suffer just punishment.[85]

2.28 In keeping with this, Jumbunna contended that 'the interests of justice include the importance of achieving factually correct verdicts in very serious cases and the interests of victims in seeing an offender brought to justice and having their experience vindicated'.[86]

2.29 Distinguished Professor Larissa Behrendt, Professor of Law with Jumbunna, emphasised the imperative to address the law if it does not serve the interests of the most disadvantaged in society and the justice system:

> We take the view that if the law does not work for the most marginalised and those who have the greatest difficulty accessing justice, then the law should be reviewed; not to accommodate one particular case but to ensure the overall justice, fairness and integrity of the legal system.[87]

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82 Answers to questions on notice, Professor David Hamer, Sydney Law School, University of Sydney, received 6 August 2019, p 3.

83 Answers to questions on notice, Professor Hamer, p 4.

84 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 1-2.

85 *R v Carroll* (2002) 213 CLR 635, quoted in Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 9-10.

86 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 10.

87 Evidence, Distinguished Professor Larissa Behrendt, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, 24 July 2019, p 2; see also Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 2-3; see also Answers to questions on notice, Professor Hamer, p 6.

2.30 Like Professor Hamer, Jumbunna observed that after more than a decade of the CARA's double jeopardy exceptions being in place, there has not been one successful application under the law, and one application only ever brought to court. It stated, 'Prima facie, this demonstrates that, to the extent to which the amendment of the law was intended to reflect a rebalancing of the rights of the accused with the state, it has failed to do so'.[88]

2.31 Jumbunna then posited that the Bowraville case highlights that the law has served to protect an acquitted person not through any principle of policy – such as the interests of justice or a concern for the reliability of evidence – but because of the timing and order in which the Bowraville matters were run, well before any of the double jeopardy exceptions existed in New South Wales. Jumbunna suggested that the current law has actually prevented a jury from examining a body of evidence concerning three very serious crimes:

> The stark reality is that the law as it currently stands has not allowed a jury to examine a body of evidence that, in the submission of the community and the NSW Police, represents a strong circumstantial case that an acquitted accused was in fact guilty of serial murder done in the context of a pattern of sexual assaults perpetrated against young women.[89]

2.32 Jumbunna noted the substantial and systemic flaws in the police investigations of each of the three murders, as well as the systemic discrimination demonstrated during the trials related to Clinton and Evelyn's murders, as documented in detail in this committee's 2014 report on the family murders in Bowraville. It argued that 'there should be a mechanism in the law for redress for victims of crime where initial investigations and trials are flawed … because of systemic discrimination within such processes'.[90] In her evidence, Distinguished Professor Behrendt defended the legitimacy of the Parliament in enabling this by changing the law:

> [W]e do not accept the questioning [of other stakeholders] that the legislation is a matter for Parliament. Of course it is. Parliament should be involved in rebalancing the rights of the accused with the rights of victims of crime to ensure justice. We have seen the Bowraville case give us an example of the very instance where Parliament needs to be taking a proactive view in balancing the many rights and testing whether we have that line right.[91]

2.33 Jumbunna further suggested that the Bill is attractive in that it is a limited expansion of the double jeopardy exceptions and brings the current law into line with the Government's understanding of the effect of the provisions when they were passed, as indicated by their submissions in *Attorney General v XX*.[92]

2.34 Distinguished Professor Behrendt suggested that the 2006 changes to allow double jeopardy exceptions under the CARA were made with a view to remedying the Bowraville case, observing that 'through a very long and tortuous process' this has not been the outcome. She proposed that the amendments are an opportunity to deliver on that intention. Distinguished Professor Behrendt noted that the Hon James Wood AO QC's 2015 review of section 102 of the CARA

88 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 14.

89 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 14.

90 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 13.

91 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 54.

92 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 15.

had concluded with his suggestion 'that the statutory definitions to the rule against double jeopardy be reviewed again at a later date, when Australian courts have had the opportunity to apply and interpret the relevant sections'.[93] She emphasised to the committee that having tested the legislation in the Court of Criminal Appeal and the High Court, 'We are at that point now that Justice Wood identified. It is a matter for Parliament to now consider whether the line is drawn in the right place'.[94]

2.35 Asked to respond to other inquiry participants' calls for the current law to be retained, Distinguished Professor Behrendt reiterated her view that the law needs to deliver justice to the most marginalised, and that history has shown that it is reasonable for the law to evolve over time:

> One of the things that has been mentioned a lot today was about the importance of maintaining the status quo. In thinking about that, I would reiterate our comment this morning that if the law does not work for the most marginalised and those who have the greatest difficulty accessing justice, then that law should be reviewed. I think that is something that the Committee and the Parliament is well versed to be able to do. I would also add that the status quo argument, of course, only takes you so far, which has been pointed out at various times today. If we had kept that, then we would not have seen the overturning of the doctrine of terra nullius and other significant things. We come to that point of view about the importance of the status quo with some scepticism.[95]

2.36 Finally, Distinguished Professor Behrendt responded to suggestions that the amendments envisaged in the Bill risk calling the law into disrepute by echoing Professor Hamer's opening point:

> [T]here has also been much said about the extent to which public confidence might be undermined in the system if the provisions were changed along the lines that are suggested. It has been noted, and we would add our voice to that, that it is evident from the submissions made from the Bowraville families that confidence in the system has already been eroded and this is an opportunity to address that.[96]

Should the law be amended to address a specific case?

2.37 There was significant debate among the legal stakeholders as to whether it was appropriate that the criminal law be amended to address one particular case – the notion that 'hard cases make bad law'. Numerous inquiry participants argued that the Bill would ultimately call the law into disrepute as it is specifically intended to enable the Bowraville cases to go to retrial.

2.38 Mr McGrath SC of the ODPP argued strongly that it is inappropriate to amend the law to address a particular case, highlighting the potential ramifications of the Bill's amendments for acquittals of other serious crimes:

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93 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 54, quoting Hon James Wood AO QC, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001 (NSW)* (2015) (hereafter *Wood review report*), p viii.

94 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 54.

95 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 54.

96 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 54.

> Importantly, it must be recognised that the bill seeks to effect this fundamental and profound change to the prosecution of offences, which carry a possible life sentence, a change not just affecting prospective prosecutions but prosecutions that have long since been finalised for one reason only: to attempt to change the result of one particular case. It is bad policy and bad lawmaking. No matter how disturbing are the facts of, the results of and the effects of the Bowraville investigation, prosecutions and trials, it is just bad lawmaking to attempt to effect a change in the law for the purpose of ultimately changing the result of one case.[97]

2.39 Legal Aid acknowledged the deep distress felt by victims of crime and their families when they believe that a person has been wrongly acquitted, explicitly recognising the pain and frustration of the families of the Bowraville victims. But like the ODPP it cautioned against legislating to address one specific case, warning that this erodes well established legal principles, may have broader impact, and risks significant injustice to others acquitted of crimes.[98] Legal Aid proposed that the Bill would ultimately 'enable the State to attempt to reprosecute XX a third time, and to effectively re-litigate the recent High Court decision in the matter',[99] and contended that in doing so, the Bill would bring the administration of justice into disrepute:

> The limited nature of the current exceptions to the rule against double jeopardy, including the limit of one application to re-try an acquitted person, protects individuals against repeated attempts by the State (with its considerable resources) to prosecute them. The Bill would remove that important protection. Tailoring a law to enable such repeated attempts to prosecute an individual arguably brings the administration of justice into disrepute.[100]

2.40 The Law Society of New South Wales stated simply that it does not support legislative amendments based on a single case, which can have serious ramifications across the criminal justice system.[101] The Bar Association put it this way:

> Legislative amendment directed to achieving a particular outcome in a particular case is generally a poor basis for substantive changes to the criminal law, most particularly where it involves infringements of long standing fundamental rights and principles that will have impacts well beyond the individual case.[102]

2.41 The Public Defenders noted that in *Attorney General v XX*, the Court of Criminal Appeal considered the Attorney General's argument 'that a construction [of section 102] as precluding evidence that was available but inadmissible at the time of the original trial being treated as "fresh" would produce a miscarriage of justice in potentially allowing a guilty party to go free.' They further noted that the Court of Criminal Appeal disagreed, having stated:

> There is no miscarriage of justice by reason of the fact that, had inadmissible evidence been admitted, the result might have been different. To the contrary, a conviction based on inadmissible evidence would involve a miscarriage of justice.

97 Evidence, Mr McGrath SC, 24 July 2019, p 20; see also p 29.

98 Submission 24, Legal Aid NSW, p 3.

99 Submission 24, Legal Aid NSW, p 7.

100 Submission 24, Legal Aid NSW, p 7.

101 Submission 3, Law Society of NSW, p 1.

102 Submission 1, NSW Bar Association, p 7.

> Once this is understood, it follows that there can be no miscarriage of justice in limiting the circumstances in which an acquittal is to be set aside to a situation where evidence was not available at the trial and could not have been made available with the exercise of reasonable diligence. Such a limitation, in our opinion, does not "bring the justice system into disrepute".[103]

2.42 The Public Defenders then argued that it was highly problematic for parliamentary law reform to be linked to achieving a particular result for a specific case:

> Expanding the qualified abrogation of the principle against double jeopardy to allow change of legislation to trigger the right to seek a new trial for a person previously acquitted carries a very significant risk of partial politicisation of law reform by its being tethered to achieving a particular outcome for a particular person or group.
>
> Targeting an individual brings the administration of justice into disrepute and will undermine confidence in its impartial administration. The bill itself does so, and the future potential substantial legislative changes would inevitably do so and politicise the trial process and law making process.[104]

2.43 The Public Defenders noted stakeholder views documented in the Wood review that were the Bill passed it could in the future create pressure on Parliament to further amend the *Evidence Act 1995* to 'correct' a high profile acquittal. They further argued that 'The proposed sections 105(1AA) and 105(1AB) are particularly offensive … in that they are designed to have the effect of compelling the judiciary to find exceptional circumstances in the case of XX'.[105] (See Appendix 5.)

2.44 There was debate in the hearing as to whether the Bill offended against the Kable principle. This principle was embodied in the decision of the High Court case *Kable v Director of Public Prosecutions for NSW*, which upheld the separation of legislative and judicial powers such that Parliament must not encroach upon the role of the judiciary. Professor Hamer considered that the Bill, although prompted by a particular case, is expressed in general terms and would not present difficulties under the Kable principle.[106]

2.45 Responding to concerns that the Bill was drafted with the specific intention of allowing a second application for appeal in the Bowraville matters, Professor Hamer accepted the concerns about the separation of powers but did not consider them to be overwhelming, noting that due process would continue to apply:

> The bill would not dictate the result in the Bowraville case. It would not impinge upon due process. It would simply allow a second application in the Bowraville case, or potential second application, and for that to be considered under a slightly different set of principles, but the new principles that it establishes appear appropriate principles. If a second application were to be made the Court of Criminal Appeal would still be acting judicially. It would not be acting as an instrument of the Government. It would not be acting under the Government's direction.[107]

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103 Submission 23, The Public Defenders, p 8, quoting *Attorney General of New South Wales v XX*, at 244.

104 Submission 23, The Public Defenders, p 8; see also Evidence Ms Rigg SC, 24 July 2019, p 55.

105 Submission 23, The Public Defenders, p 9.

106 Submission 21, Professor Hamer, p 13, citing *Kable v DPP (NSW)* (1996) 189 CLR 51.

107 Evidence, Professor Hamer, 24 July 2019, p 38; see also Submission 21, Professor Hamer, p 13.

2.46 The committee specifically asked Professor Hamer whether he considers the Bill to be crossing the line in the separation of powers because there is one particular case in which a remedy is seen to be desirable, and further, whether this would have an impact on a fair trial. He responded that he did not see it as crossing the line because the Bill is not determining the outcome. He further noted that individual cases are often the catalyst for law reform (whether via Parliament or the courts), citing the Stephen Lawrence case that was the catalyst for the UK's double jeopardy provisions. He emphasised that the Parliament just has to ensure that the laws also work effectively, not only for the particular case, but also for cases more broadly:

> You are not determining the outcome. The risk in focusing on an individual case and trying to achieve a just outcome for an individual case is that you make bad law—hard cases make bad law. But hard cases don't necessarily make bad law. You have got to make sure that the law you come up with is appropriate law. Even though the Bowraville case has raised this question—it has been a situation that challenges the way that the law currently operates—the questions that the Bowraville case raises are more general questions. Provided that that is kept in mind and any amendments that are passed as a result of the Bowraville case stand up on their own merits, and that you would be happy for the amended law to operate to any future cases that arose, then I think that it is appropriate to consider the amendments.[108]

2.47 Following the hearing Professor Hamer advised that Scotland's *Double Jeopardy (Scotland) Act 2011* was supported by the Scottish Government with a particular individual who had been acquitted in mind, Angus Sinclair.[109]

2.48 By contrast, Ms Bashir SC of the Bar Association raised questions about the Bill's implications in respect of the Kable principle, quoting from the High Court judgment in *Kable* to underscore the significance of equal justice to public confidence in the law, and the imperative that the courts are perceived to be free from legislative or executive interference in judicial decisions. She stated:

> It is true that the bill does not invoke the name of XX, nor could it. The name is suppressed. However, the aim of the legislation is clear and the fact that there has been only one application ensures that the target of what is effectively an exception against triple jeopardy—we call it in those submissions—can only apply to one person. If this faces considering a proposal to design and enact a further exception to target a particular case following from an unwanted result, there are questions raised under Kable, how does it promote equal justice? I will draw into that the unsolved murders that are being looked into, for example, but also equal justice with other acquitted persons. Are there questions raised as to the separation of powers? … We do not have the same confidence that there are no problems under Kable. We do not go so far as to give an advice on Kable. We simply say there are questions raised. The legislation will, in terms of the triple jeopardy provisions, that is the section 105 proposed amendments, effectively place XX outside of the general regime for trials and acquittals, and as we understand it, that person alone.[110]

2.49 Representatives of Jumbunna did not resile from the fact that their model of amendments to the CARA (discussed in the following chapter), including its provision for multiple applications for a retrial, had been crafted to enable the Bowraville matters to proceed. Distinguished

108 Evidence, Professor Hamer, 24 July 2019, p 43; see also Submission 21, Professor Hamer, pp 13-14.

109 Answers to questions on notice, Professor Hamer, p 3.

110 Evidence, Ms Bashir SC, 24 July 2019, p 31.

Professor Behrendt advised that they had constructed the model carefully and as lawyers who respect the rights of the accused and the fundamental principles of the criminal law:

> But the forcefulness with which other members of the profession embrace those principles, of course we do too. We do not walk away from them lightly but we do not believe we are in this instance. Bowraville throws up a mirror; really that is what it does. It puts in stark relief the way in which the most vulnerable in our community can fall through the cracks … The proposal we came up with … of course making sure it would capture Bowraville, was one that left the discretion of whether a case goes forward to the judiciary in exceptional circumstances that would allow for the fact that, yes, this is an exceptional case. But that is not to say that it will only ever be the only exceptional case. If there was another case like this, you would want to have a similar outcome … we are also mindful that it is easy to come here today and say Bowraville is an exception so you cannot make law based on one case, which we do not say anyway.[111]

2.50 Distinguished Professor Behrendt further argued that by amending the law, Parliament would be sending a clear and positive message to address an injustice:

> This would be one such instance where a gross injustice that has been very visible and sends a clear message, especially to particular members of the public, about the failures of the system, and it would be seen as fixing that.[112]

2.51 Finally, Jumbunna representatives rejected the separation of powers concerns of other stakeholders,[113] with Mr Longman explaining the *Kable* case to emphasise that the proposed changes to the CARA do not remove judicial discretion from the decision as to whether to allow a retrial:

> The evil of Kable is it was the Parliament telling the court how to exercise its judicial discretion. This is not the terrain we are in. The terrain we are in is Parliament setting the test down, which then goes to the court to interpret in the context of an individual case, particularly in circumstances where no-one is suggesting a change to this provision that would take away the residual discretion of the court. We could set the test for the court and the court could say: We find all of this evidence meets the test but we still choose not to send it back. I do not see that there is a concern in that regard.[114]

The wording of the Bill

2.52 Almost all legal stakeholders identified significant problems with the wording of the key mechanism by which the Bill would enable previously inadmissible evidence to be considered fresh.

2.53 As noted in chapter 1, the Bill proposes to insert into section 102 of the CARA:

> (2A) Evidence is also fresh if:

111 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 56.

112 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 59.

113 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 58.

114 Evidence, Mr Craig Longman, Head of Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, 24 July 2019, p 58.

> (a) it was inadmissible in the proceedings in which the person was acquitted, and
>
> (b) as a result of a substantive legislative change in the law of evidence since the acquittal, it would now be admissible if the acquitted person were to be retried.

2.54 This element of the Bill is intended to overcome the blockage to date for the Bowraville matters caused by the word 'adduced'.

2.55 Chapter 1 also noted that a substantive change in evidence law occurred with the introduction of the *Evidence Act* which, among other things, established a new more permissive test for the admissibility of evidence than that which was used by the judge who ordered that the similar fact evidence linking the murders of Evelyn and Clinton was not admissible and that the trials be run separately.[115]

2.56 A number of inquiry participants were very concerned that the Bill's use of the words 'substantive legislative change in the law of evidence' lacked clarity and risked significant uncertainty in how the amendments would be applied in practice, were they passed into law. A related concern, that the Bill will open the floodgates to appeals, is discussed in the following section.

2.57 The ODPP noted two particular concerns with the Bill's wording:

> The phrase a "substantive legislative change in the law of evidence" is potentially very broad and uncertain. Firstly, the word "substantive" qualifies the degree of change to some extent but will nevertheless invite debate as to whether the change is in fact substantive or something less.
>
> Secondly the "law of evidence" is not confined to changes to provisions of the Evidence Act, as evidentiary provisions are found throughout the various pieces of legislation relevant to criminal prosecutions.[116]

2.58 The ODPP advised that substantial changes to provisions in the *Evidence Act* would, for instance, include changes to hearsay exceptions, the right to silence, tendency and coincidence evidence, and confidential communications. It proposed that further substantial changes to legislation impacting on criminal proceedings could include potentially controversial issues such as the use of evidence given by an accused under compulsion, and the powers of investigators.[117]

2.59 Mr McGrath SC, the Acting DPP, highlighted concerns about the proposed wording further in his hearing:

> What does a substantive legislative change in the law of evidence mean? Does the word "substantive" have any work to do? The law of evidence is found in many pieces of legislation. The Criminal Procedure Act 1986 governs the admissibility of evidence in many types of proceedings, particularly sexual assault and child sexual offences, to the more serious of which life penalties apply. The Crimes Act 1900 contains provisions relating to defences and partial defences of lawful authority or excuse, self defence and intoxication, and also makes provisions in relation to substantial impairment by

115 *Wood review report*, p 12.

116 Submission 2, Office of the Director of Public Prosecutions, pp 6-7.

117 Submission 2, Office of the Director of Public Prosecutions, pp 6-7; see also Law Society of New South Wales, p 2.

> abnormality of mind and extreme provocation—the partial defences. Are these provisions laws of evidence? These are two pieces of legislation; there are many more.[118]

2.60 The ODPP further suggested that the changes proposed in paragraph 2A could be more wide ranging than is currently contemplated by the Bill. It proposed that the amendments will create an additional consideration for the legislature in introducing all future amendments to evidence law, as to whether the changes are caught by the provision and need to be expressly excluded in respect of double jeopardy matters. This would, the ODPP proposed, add burden to otherwise uncontroversial legislative changes.[119]

2.61 In a similar vein, the Law Society proposed that the emphasis would shift from the intended effect of the CARA on the discovery of genuine 'fresh' evidence to a debate over the admissibility of evidence.[120]

2.62 Legal Aid noted that the term 'substantive' is not defined in the Bill and could have broad application. Pointing out that the law of evidence is rapidly evolving, it suggested that each change to legislation will bring the possibility that a new cohort of acquitted individuals may face retrial:

> For example, changes to the law of tendency and coincidence evidence could mean that a number of defendants who were acquitted of sexual assault offences that carry a penalty of life imprisonment may be liable to applications for retrial. The 'substantive legislative change' in the law could include either the introduction of the tendency and coincidence legislative provisions in 1995. Alternatively, it could include the proposed changes to tendency and coincidence law in relation to child sexual assault that were recently announced by the NSW Attorney General. The Bill could make a significant number of individuals susceptible to retrial.[121]

2.63 The Public Defenders were also very concerned that the absence of clarity attached to 'substantive legislative change' will have unforeseen consequences for acquitted cases and may create an onus on the DPP to bring forward appeals. Citing changes to the admissibility of evidence in child sexual assault matters recently proposed by the NSW Attorney General, to give effect to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, it warned:

> The ramifications of an expectation of reconsideration of every case where a person in NSW has been acquitted of a life sentence offence regarding alleged sexual abuse of a child where an alleged tendency to have a 'sexual interest in children' was not admissible at the time of trial can be seen as radical – for the individual accused, complainants, witnesses and the system … Can the prosecution now commission expert reports in those where acquittals resulted, to provide fresh and compelling evidence that would have been inadmissible at the time regarding child development and behaviour, and seek to have the acquittal quashed and a retrial ordered?[122]

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118 Evidence, Mr McGrath SC, 24 July 2019, p 21.

119 Submission 2, Office of the Director of Public Prosecutions, p 7.

120 Submission 3, Law Society of New South Wales, p 2.

121 Submission 24, Legal Aid NSW, p 8.

122 Submission 23, The Public Defenders, pp 6-7.

2.64 Ms Rigg SC emphasised this concern in the hearing, asking, 'Is the DPP to then review every acquittal in such a case and have investigations done as to whether those people, any of them, could be said to have had a sexual interest in children?[123]

2.65 Officers of the Department of Communities and Justice also commented on the words 'substantive legislative change'. Mr Mark Follett, Director, Law Enforcement and Crime Team in the Law Reform and Legal Services Division, advised that he understood there to have been 27 changes to the *Evidence Act* since its introduction.[124] Whether or not these met the threshold of 'substantial' would need to be judicially determined.[125]

2.66 Apprehension with the Bill's terminology was shared by stakeholders who supported the Bill's intentions. Jumbunna observed that the Bill's reference to a 'substantive' change with little guidance as to whether a change would meet that standard would potentially lead to uncertainty as to how the law will apply. It noted that 'the law of evidence' is not defined and suggested that it could be interpreted as referring more broadly than the *Evidence Act*.[126] Professor Hamer also questioned the wording:

> I do not want to get too caught up on technicalities here, however, the expression 'substantive legislative change' may present unwarranted difficulties in interpretation. First, the term 'substantive' appears unnecessary. Arguably any change in evidence law that makes evidence freshly admissible should be considered 'substantive'. Second, the requirement that the change be 'legislative' may also present difficulties. Given the existence of the *Evidence Act 1995*, it seems any substantive change in evidence law would have to have reference to legislation. This expression appears to draw a distinction between changes to the legislation, and changes to how the legislation is interpreted and applied. In some cases the distinction may be more clear cut than in other cases. The increased admissibility of propensity (tendency and coincidence) evidence is as much to do with changed attitudes by judges as it is the shift from common law to the *Evidence Act 1995* (NSW) and its amendment.[127]

2.67 As discussed in the following chapter, Jumbunna preferred a different model of amendments to the CARA to enable the same outcome, the main element of which is to simply replace 'adduced' with 'admitted' in section 102's definition of 'fresh' evidence. Professor Hamer indicated qualified support for Jumbunna's model, which he saw as addressing some of the problems of the Bill.[128] Notably, the NSW Police Force supports this amendment, with Acting Assistant Commissioner Smith, Commander of the State Crime Command, advising the committee that it has advocated this change since the Wood review reported in 2015.[129]

123 Evidence, Ms Rigg SC, 24 July 2019, p 52.

124 Evidence, Mr Mark Follett, Director, Law Enforcement and Crime Team, Legal Reform and Legal Services Division, Department of Communities and Justice, 24 July 2019, p 19.

125 Evidence, Ms Kathrina Lo, Deputy Secretary, Law Reform and Legal Services Division, Department of Communities and Justice, 24 July 2019, p 19.

126 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 16.

127 Submission 21, Professor Hamer, p 5.

128 Submission 21a, Professor Hamer, pp 5-6.

129 Evidence, Acting Assistant Commissioner Stuart Smith, Commander, State Crime Command, NSW Police Force, 24 July 2019, p 12.

The floodgates argument

2.68 As noted above, the Public Defenders, Legal Aid and the Bar Association were each very concerned about the potential net-widening effect of the Bill. The Public Defenders warned that the Bill risks the qualifications to the double jeopardy principle built into the CARA in 2006 no longer operating on an exceptional basis.[130]

2.69 The Bar Association went so far as to argue that ultimately the Bill renders any acquittal for a life sentence offence susceptible to appeal, both past and future acquittals:

> In essence, the nature of the proposed amendment would render many past acquittals open to appeal in the future upon further substantive change to the laws of evidence and it raises the spectre of opening future acquittals up for review. The proposed amendments also permit second applications to reopen an acquittal in exceptional circumstances. This would effectively mean that any acquittal of a life sentence offence is rendered susceptible to review upon legislative change of this kind.[131]

2.70 The Bar Association further reasoned:

> The Bill … is a model whereby any substantive change in the law of evidence would render an acquittal open to be overturned. As the Bill includes a provision for retrospectivity, this could call into question many acquittals in this State pre-1995, given that in 1995 the *Evidence Act* introduced a very large number of substantive changes to the law of evidence by both codifying aspects of the existing common law and also rendering changes to it, such as in the law of tendency and coincidence evidence and the admissibility of certain types of hearsay evidence.
>
> Moreover, many acquittals since 1995 will also be called into question by every substantive amendment to the *Evidence Act* since that date (and there have been a number). Furthermore, future amendments to the *Evidence Act* and *Crimes (Appeal and Review) Act* will open up future acquittals for review.[132]

2.71 Other inquiry participants drew on the England and Wales experience to dispute the floodgates argument. Both Distinguished Professor Behrendt and Mr Longman of Jumbunna, whose alternative model to the Bill, as noted above, was based on the England and Wales legislative framework, highlighted the modest number of applications brought in the United Kingdom, despite its wider application.[133] Mr Longman identified the necessity for new evidence to also be compelling as having an important limiting effect, and noted, 'We are talking about a jurisdiction that is far greater than New South Wales. We are talking about legislation that covers more offences than are covered here'.[134]

130 Submission 23, The Public Defenders, pp 6-7.

131 Submission 1, NSW Bar Association, p 2.

132 Submission 1, NSW Bar Association, pp 1-2.

133 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 3.

134 Evidence, Mr Longman, 24 July 2019, p 3. See also Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 17-18.

2.72 Professor Hamer also disputed the floodgates argument as 'without substance',[135] suggesting that this outcome was highly unlikely because the exception envisaged in the Bill remains very narrow:

> Many of the submissions opposing the expansion of the exception have suggested that it would open the floodgates to prosecution appeals against acquittals. This appears very unlikely. Even with the slight expansion the exception would remain a very narrow exception to the protection against double jeopardy.[136]

2.73 At the hearing Professor Hamer continued to emphasise that the very narrow exemptions to double jeopardy already allowed in Australian law will only be broadened slightly by amending the definition of 'fresh' evidence. Like Mr Longman, he cited the UK experience and identified the requirement for evidence to also be compelling as a critical factor limiting the number of applications for retrial:

> [T]he current Australian exceptions are so narrow that, after more than a decade, there has only been one application. The UK exceptions are broader, have been in place longer, operate in a larger jurisdiction, and there have only been a dozen or so applications. The proposed extension of the 'fresh and compelling evidence' exception to cover freshly admissible evidence appears unlikely to change this. To the limited extent that the scope of the exception is broadened, this appears warranted … it appears extremely doubtful that, were the Bill passed, these would generate many applications to overturn acquittals. For an acquittal to be overturned, the evidence needs to be not only fresh, but also compelling … It would be rare for compelling evidence to become freshly admissible evidence because such probative evidence, most likely, would have been admitted under earlier law.[137]

2.74 Mr McGrath SC of the ODPP also did not agree that the Bill's passage will open the floodgates to murder acquittals, citing the UK experience.[138] However, as noted in chapter 2's section exploring the Bill's application to other potential life sentences, he drew the committee's attention to the very significant increase in volume of serious child sexual assault offences being prosecuted in recent years and noted his expectation that were the Bill to become law, it would be the catalyst for a review of all acquittals in potential life penalty cases.[139]

The Bill's potential application to other life sentence cases

2.75 Next the committee considers whether the Bill's provisions might apply to a cohort of individuals who have been acquitted of very serious offences, namely some sexual offences. While the committee sought and obtained additional information from both the NSW Police Force and the ODPP[140] about a potential cohort to which the Bill (or Jumbunna's alternative model) might apply, we were not able to shed light on the size of this group.

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135 Submission 21, Professor Hamer, pp 2 and 8.

136 Evidence, Professor Hamer, 24 July 2019, p 38.

137 Submission 21, Professor Hamer, pp 9-10.

138 Evidence, Mr McGrath SC, 24 July 2019, p 21.

139 Evidence, Mr McGrath SC, 24 July 2019, p 21.

140 Answers to question on notice, NSW Police Force, received 6 August 2019; Addendum to answers to questions on notice, NSW Police Force, received 13 August 2019; Answers to questions on notice,

2.76 As noted in chapter 1, Part 8 Division 2 of the CARA (in which sections 99 to 104 sit) pertains to retrials after acquittal for a 'very serious offence'. Appeals sought on the basis of fresh and compelling evidence (section 100) only pertain to retrials for a life sentence offence.

2.77 As noted in the previous section, the ODPP, the Public Defenders, Legal Aid and the Bar Association all suggested that the Bill had perhaps unanticipated application to other serious offences beyond murder. This, they saw, could render a significant cohort of individuals open to applying for a retrial, with the Public Defenders arguing that the Bill risks creating an onus on the ODPP to reprosecute cases where previously inadmissible evidence was now deemed to be fresh.[141]

2.78 Legal Aid observed that the number of offences carrying a maximum penalty of life imprisonment has increased since the double jeopardy provisions were introduced in 2006 and now includes:

- aggravated sexual assault in company (s 61JA of the *Crimes Act 1900* (NSW))
- sexual assault against a child under 10 (s 66A of the *Crimes Act 1900* (NSW))
- persistent child sexual abuse (s 66EA of the *Crimes Act 1900* (NSW)).[142]

2.79 Mr McGrath SC advised the committee that the volume of serious child sexual assault prosecutions has increased very significantly in recent years and that there has been significant change in respect of the admissibility of evidence in respect of such matters:

> In relation to serious sexual offences carrying life sentences, the volume of prosecutions for those sorts of offences, particularly against children, has increased dramatically—I use the word "dramatically" advisedly—in recent years in the New South Wales District Court. The laws of evidence relating to the trials of those serious sexual offences have also undergone substantial amendments—the vast majority of which have been directed at assisting the admissibility of evidence and the likelihood of conviction. Without making the floodgates argument it is worth considering that there is an historically all-time high number of offences being prosecuted in this State to which the legislation could potentially apply.[143]

2.80 Mr McGrath SC confirmed his view that, 'Were the Bill to become law it could not help but lead to calls for reviews of all acquittals in potential life penalty cases going back some years'.[144]

2.81 As noted in the previous section, the Attorney General has flagged his intention to introduce changes to evidence law to give effect to the recommendations of the Royal Commission in order to facilitate greater admissibility of tendency and coincidence evidence in child sexual assault proceedings. These reforms have come about via the Council of Australian Governments (COAG) Council of Attorneys General, and are intended as national uniform law. The intended reforms are aimed at enabling juries to consider relevant, compelling evidence

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Office of the Director of Public Prosecutions, received 7 August 2019; Response to further request for information, Office of the Director of Public Prosecutions, received 12 August 2019.

141 Evidence, Ms Rigg SC, 24 July p 56; Submission 23, The Public Defenders, p 7.

142 Submission 24, Legal Aid NSW, p 9.

143 Evidence, Mr McGrath SC, 24 July 2019, p 21.

144 Evidence, Mr McGrath SC, 24 July 2019, p 24.

in child sexual abuse prosecutions, including the evidence of multiple complainants. They include:

> A new rebuttable presumption would ensure evidence that a defendant has, or has acted on, a tendency to have a sexual interest in children is presumed to have 'significant probative value'. Targeted legislative guidance, based on the findings of the Royal Commission, would help dispel misconceptions that have minimised the perceived value of this evidence in the past.
>
> Judges would be required to exclude tendency or coincidence evidence about a defendant if its probative value does not outweigh the danger of unfair prejudice to the defendant.
>
> Additional reforms would include a presumption in favour of joint trials in child sexual assault prosecutions where there are multiple victims and the prosecution is seeking to lead tendency or coincidence evidence.[145]

2.82 Professor Hamer confirmed that the Bill's proposed changes could potentially apply to a cohort of historic child sex offenders, given the significant procedural and evidentiary changes that have occurred with respect to those cases, and when asked, agreed that the principles underpinning the Bill would be applicable in respect of such cases:

> I think the general principles that are being advanced in the bill would be appropriate for those cases. I think that was a point that was raised in The Public Defenders' submission. They had specific reference to potential changes to the law following the royal commission. Under those changes to the law in child sexual assault cases, evidence of other alleged victims would be deemed to have significant probative value. Then it would be up to the defence, effectively, to argue that evidence should be excluded because it is deemed to have significant probative value.[146]

Other hurdles

2.83 The committee now turns to the evidence we received regarding other hurdles that applicants must satisfy to obtain an order for a retrial for a very serious offence.

2.84 As documented in chapter 1, section 100 of the CARA stipulates that in order for the Court of Criminal Appeal to order a retrial, the court must be satisfied that:

- the evidence against the acquitted person is not only fresh but is also 'compelling', and
- in all the circumstances it is in the interests of justice for the order to be made.[147]

2.85 Compelling evidence is defined as evidence which is 'reliable', 'substantial' and 'highly probative of the case against the acquitted person.'[148]

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145 Media Release, Hon Mark Speakman MP, Attorney General, Minister for the Prevention of Domestic Violence, 'Evidence law reform', 28 June 2019, pp 1-2; see also Submission 23, The Public Defenders, pp 6-7.

146 Evidence, Professor Hamer, 24 July 2019, p 44.

147 *Crimes (Appeal and Review) Act 2001* (NSW), s 100(1)(a) and (b).

148 *Crimes (Appeal and Review) Act 2001* (NSW), s 102(3).

2.86 The interests of justice test set out in section 104 requires that the court must be satisfied that a fair retrial is likely in the circumstances. It applying this test, the court must consider the length of time since the acquitted person allegedly committed the offence, as well as whether any police officer or prosecutor has failed to act with reasonable diligence in connection with the application for a retrial.

2.87 Jumbunna elucidated the meaning of 'reliable', 'substantial' and 'highly probative':

- For evidence to be 'reliable' it must be 'sufficiently trustworthy or accurate such that it provides the Court with a sound basis, when considered together with other evidence as necessary, for drawing conclusions.'
- 'Substantial' as a qualitative notion denotes evidence of substance, meriting 'being accorded weight as part of the consideration of the issue to which it relates.'
- 'Highly probative', based on the approach in England and Wales, is likely to mean such that a conviction is highly probable and any acquittal by a jury at a subsequent trial would appear to be perverse.[149]

2.88 According to Jumbunna, the interests of justice test 'represents a powerful protection against the concern that multiple prosecutions could result in innocent persons being convicted or an abuse of power by the police or prosecution.'[150]

2.89 Jumbunna identified a number of considerations made by the Court of Criminal Appeal in *R v Catt*, which would likely be considerations in determining where the interests of justice lie in an application under the fresh and compelling exception:

- the seriousness of the criminality or offending;
- the strength of the body of evidence relied upon by the Crown;
- the public interest in ensuring those committing serious offences are charged and convicted;
- the degree of public recognition of the case through media coverage, noting in particular whether the case had 'achieved a wide coverage in the media' and that it was important in that case to demonstrate to the public that 'despite all the problems of a flawed police investigation, the substance of the charges will be determined and that seemingly serious criminal conduct will be investigated and the alleged perpetrators brought to trial'; and
- the worry and expense to the accused.[151]

2.90 There was a recognition among a range of stakeholders that should the Bill pass, these various requirements embody significant further hurdles for the Bowraville cases to traverse before the Court of Criminal Appeal would grant an order for a retrial of XX.

2.91 Ms Rigg SC advised the committee that while she cannot comment on the quality of the evidence in the Bowraville matter as she has not reviewed the evidence, on the whole, cases

149 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 3-4.

150 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 5, citing section 104.

151 *R v Catt* [2005] NSWCCA 279 at 384, cited in Submission 25, Jumbunna Institute for Indigenous Education and Research, p 5; see also Evidence, Mr Longman, 24 July 2019, p 62 and Evidence, Ms Larisa Michalko, Director and Criminal Law Specialist, Law Reform and Legal Services Division, Department of Communities and Justice, 24 July 2019, p 14.

such as this are never clear cut as plainly wrong convictions or plainly wrong acquittals. She proposed that looking beyond the vexed issue of whether the Bowraville evidence sought to be brought to retrial is fresh, were the Bill to pass, both the Court of Criminal Appeal and, if the matters actually got to trial, the court in which the murder trial was heard, would inevitably have a great deal to consider:

> These are difficult issues. That is why I have raised as well the really drawn-out process that would have to happen before the Court of Criminal Appeal if the proposed amendments were to occur. There would have to be long arguments about whether certain aspects of evidence were in fact inadmissible at the time; whether they are admissible now; the District or Supreme Court then, if there is a retrial, has the matter argued all over again; there is then an appeal about it.[152]

2.92 Speaking about applications for retrial of other life sentence offences, Professor Hamer advised that evidence that was compelling at the time of an original trial would have likely been admissible under the pre-existing law:

> Even if as a result of change in evidence law evidence that was excluded then is now freshly admissible, that would not provide a basis for a successful application to have the acquittal set aside. The evidence would also have to be compelling. I really don't think there are too many areas of evidence law that have been changed such that not only is evidence freshly admissible, compelling evidence is freshly admissible. Because if the evidence was compelling it probably would have been admissible under the pre-existing law.[153]

2.93 The Bar Association reiterated its position, conveyed during the Committee's 2014 inquiry, that it is far from clear whether the Bowraville evidence in question would pass the threshold for 'compelling', and therefore questionable whether the amendment would have any bearing in respect of that case. It noted that multiple prior Attorneys General (informed by several Crown Advocates and the Solicitor General) and DPPs have previously declined to make an application to retry XX, and that public statements from these actors regarding the perceived poor prospects of success were also documented in this committee's 2014 report. Beyond the issue of 'fresh', these included problems with the reliability of the evidence and whether it was sufficiently 'compelling'. Further noting the refusal of the Court of Criminal Appeal to allow the application for a retrial, and the subsequent High Court refusal to allow special leave to appeal from that decision, the Bar Association suggested that in all these circumstances, the proposed amendments may not have the desired effect in the particular case of XX, whilst at the same time 'upending innumerable other acquittals and, by extension of policy, convictions'.[154]

2.94 In a similar vein, Mr McGrath SC underscored to the committee that there are significant questions as to the compellingness, as well as the freshness, of the evidence that formed the basis for the *Attorney General v XX* application. Noting that he was speaking very cautiously and that he had not reviewed the brief of evidence, Mr McGrath observed:

> The sad reality is—and I will speak very carefully because I am the acting head of the independent prosecution agency that may yet be tasked with the task of reviewing the

152 Evidence, Ms Rigg SC, 24 July 2019, p 52.

153 Evidence, Professor Hamer, 24 July 2019, p 44.

154 Submission 1, NSW Bar Association, p 7.

> evidence for a further retrial—should the bill be passed, there is no guarantee that a further prosecution would proceed or let alone would be successful.
>
> I stress I have not examined the brief of evidence. No issue has been prejudged but in considering the application of present tendency and coincidence laws to the evidence, which was sought to be led at the trials under the old common law regime, it has been [previously] considered.[155]

2.95 He noted that in 2007 the former DPP, Nicholas Cowdery QC, had reviewed the Bowraville evidence rejected at the previous trials in light of the *Evidence Act's* tendency and coincidence provisions, and had concluded:

> Specifically, in my view the suggested tendency and coincidence evidence is not fresh, it is not compelling in the required sense and legal changes since the Speedy [Duroux] trial … do not affect the admissibility of the evidence identified.[156]

2.96 Mr McGrath SC advised the committee that specifically in relation to the compellingness of the 'Norco Corner evidence' explained in paragraph 1.24, Mr Cowdery had concluded:

> Further, even accepting that any admissible evidence concerning the Norco Corner incident is fresh, in my view it is not compelling in the required sense.[157]

2.97 In light of this, Mr McGrath SC voiced concern that the Bill's proposed changes would give 'false hope and false expectations to victims' family members and investigators that there can or will be an appeal from an acquittal'.[158]

2.98 As noted at the start of this section, Jumbunna acknowledged the significant hurdles yet to be overcome by the Bowraville evidence, even if the Bill were to be passed. Indeed, its representatives pointed to the other tests in section 102 as important procedural safeguards that neither the Bill nor Jumbunna's alternative model seek to amend. Distinguished Professor Behrendt advised the committee that amending the definition of fresh is simply intended to provide a process by which the Bowraville matter can get back to court, and from there, the courts retain their discretion:

> We believe that this is an option that will provide the space for the arguments to take the case forward. It then would fall to the courts again to make the decision about whether the case could go forward … We have no control over what happens, as no-one does once it gets to the courts and there is discretion.[159]

2.99 Distinguished Professor Behrendt advised that ultimately, the families are simply seeking to have their day in court, with XX retried on the three cases at once. She concluded her evidence by telling the committee that she considers it remarkable and highly persuasive that despite their experience of the justice system, the families of Colleen, Evelyn and Clinton continue to look to that system to give them justice:

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155 Evidence, Mr McGrath SC, 24 July 2019, p 20.

156 Evidence, Mr McGrath SC, 24 July 2019, p 20.

157 Evidence, Mr McGrath SC, 24 July 2019, p 20.

158 Evidence, Mr McGrath SC, 24 July 2019, p 20.

159 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 59.

> [A]s you know—you have seen Bowraville—these are people with very little resources and very little access to justice, yet they have fought a tremendous battle. They have always been adamant and they have said over and over to us and to you that, for them, justice in this case is a day in court. That is what they want. Any other compromise, everything else that has been given that they have appreciated and needed—the support for healing, the memorials—they have been steadfast. The fact that they have never been side-tracked by compensation or money—they cannot be bought away from this, given how little resources they have—I think it is a commitment to the fact that, for them, ironically for a system that has really let them down, they still believe it is the only place in which they can get justice. I find that a very compelling case.[160]

Committee comment

2.100 There was wide agreement among inquiry participants that the Bill as drafted is not supported. While there was opposition to the Bill among many in the legal community, there were also those who supported the objectives and principles in it, but had alternative proposals for the detail of how these might be achieved.

2.101 The committee feels profound and sincere empathy with the families of Colleen, Evelyn and Clinton, borne out of our 2014 inquiry, our meeting with the families during this inquiry, and the heartfelt and highly credible written submissions they have made to us. We recognise the families' visceral need for justice, heightened by the many setbacks they have encountered in their lengthy battle. We acknowledge the devastating price they continue to pay in terms of poor physical and mental health and life opportunities, which they fear will be visited in the next generation if justice is not delivered soon. And we acknowledge that the families' quest for justice can never be satisfied until the murderer of their children is found guilty and punished.

2.102 The committee also found the Jumbunna representatives' evidence to be highly credible, culminating in Distinguished Professor Behrendt's observations as to the hope that the families continue to maintain in the justice system despite its many disappointments for them, as well as their very limited resources. The committee witnessed firsthand the families' hope – and their fighting spirit, despite all the challenges.

2.103 It is apparent to the committee that at the root of this unique injustice are the inadequacies of the police investigation that immediately followed each of the murders, borne from systemic discrimination. Despite the valiant work of Strikeforce ANCUD from 1996 to reinvestigate the matters and bring forward a better brief of evidence, along with the sincere regret and efforts to make amends on the part of the NSW Police Force, the Bowraville cases have perhaps always been thwarted by the quality of the evidence able to be marshalled, much less heard and tested in court.

2.104 Apart from the available evidence, the passage of time is perhaps the greatest impediment to overturning this injustice. Almost thirty years on, even if legislation with the broad intentions of the Bill were to pass, and fresh evidence were to be redefined, there would be many significant hurdles for the Bowraville cases to overcome. The Attorney General would need to decide bring another application. Then, even if the Court of Criminal Appeal were to determine the evidence at issue to be fresh, it would also need to consider it compelling. It would further need to consider that a retrial is in the interests of justice, that is, that a fair trial is likely in the

[160] Evidence, Distinguished Professor Behrendt, 24 July 2019, p 59.

circumstances, having regard to the length of time since the crime was committed. Then, in the event that the Court did order a retrial, the DPP would need to be sufficiently convinced, having reviewed the brief of evidence, to prosecute the case. Then finally, were the Bowraville cases to surmount all these obstacles, actually go to retrial and be put before a jury, there are questions as to whether the brief of evidence could withstand the testing that would necessarily occur there.

2.105 Putting these obstacles aside, some members of the committee saw merit in Jumbunna's model of amendments that captures the families' wishes. We note that while most stakeholders agreed that changing 'adduced' to 'admitted' in the definition of fresh had significant advantages over the Bill, numerous stakeholders had concerns about the Jumbunna model's second element, to allow multiple applications for a retrial. The committee acknowledges that unless both of these elements were adopted into law the Bowraville families would be very disappointed.

2.106 A key issue for the inquiry was whether it is appropriate that the Bowraville cases, as tragic as they are, should be the basis for a change in the law. There was widespread discomfort among stakeholders that the law be amended to address a specific case. On the other hand, as was pointed out to the committee, the double jeopardy exemptions of England and Wales as well as Scotland, were introduced in response to individual cases; albeit we note that Scotland does not permit retrials on the basis of evidence that was inadmissible at trial that has subsequently become admissible. Indeed the initial 2006 reforms in New South Wales were supported in the Parliament, based, in some significant part, on the Bowraville cases. This is a matter to be considered in responding to the Bill and other potential law reforms, but it is not determinative of the matter.

2.107 This dilemma could potentially be overcome if there are other injustices in respect of life sentence offences that could be captured by Jumbunna's model. The committee received evidence that there could well be a group of serious child sex offenders, already acquitted, about whom there is evidence that could be considered fresh, should the law be changed to reflect the objects of this Bill. Not only would this widen the proposed law's application and allay concerns about building law on a single case; the committee believes it would also garner considerable community support. The recommendations of the Royal Commission, together with the reforms soon to be introduced by the Attorney General, highlight that there is already a will across all Australian jurisdictions, led by New South Wales, to see historical child sex offenders, including very serious offenders, to be brought to justice. The Royal Commission also highlighted that many of the victims of these crimes and their families are, like the Bowraville families, among the most disadvantaged in our community.

2.108 The committee considers that the Bill as drafted should not proceed. However, the potential existence of a cohort of individuals acquitted of very serious offences where previously inadmissible evidence could now be considered fresh, warrants further investigation. Despite the efforts of the ODPP and the NSW Police Force, the committee has not been able to identify a specific cohort of acquitted persons to which a new bill might pertain. We believe it probable that this group exists, although to what extent, we are not clear.

Recommendation 1

That the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 not proceed.

2.109 Looking forward, it is not the committee's role to redraft this Bill, nor draft a new one. Should the NSW Government or anyone else wish to prepare another bill, the inquiry has identified a number of matters that should be carefully considered. The evidence we gathered from a range of participants in respect of these issues is documented in the following chapter.

2.110 On balance, while the committee does not believe the Bill as drafted should proceed, we consider the potential other options later in this report.

Chapter 3 Considerations for the future

This chapter begins by exploring Jumbunna's alternative proposal to the Bill, that the meaning of fresh in section 102 of the *Crimes (Appeal and Review) Act 2001* (hereafter the CARA) be amended by changing 'adduced' to 'admitted'. It then considers inquiry participants' views on the implications of both the Bill and Jumbunna's model for the principle of finality in criminal law. Next the chapter sets out participants' views on the retrospective elements of both proposals, which would extend their respective changes to enable an appeal to be brought in respect of a person acquitted before those changes became law.

Three further issues are then documented: whether the amendments in respect of those acquitted of a serious crime should also extend to those who have been convicted – referred to as symmetry; the suggestion that the Bill will create pressure on the legislature to change evidence law in response to unpopular acquittals; and concerns that amendments to the CARA will undermine uniformity with other Australian jurisdictions. The chapter concludes by noting the evidence the committee received regarding systemic improvements to the justice system in respect of policing, prosecution and the courts, which were a very significant focus of our 2014 inquiry.

Jumbunna's model: changing 'adduced' to 'admitted' in section 102

3.1 As noted in the previous chapter, representatives of the Jumbunna Institute for Indigenous Education and Research at the University of Technology Sydney (hereafter Jumbunna) strongly supported the aims of the Bill, arguing for an expansion of the definition of fresh in section 102 of the CARA.[161] However, they advocated an alternative model of amendment reflecting the legislative approach of England and Wales' *Criminal Justice Act 2003* (hereafter the CJA), by changing the word 'adduced' to 'admitted' in section 102.[162] It is noted that while the CJA uses the word 'adduced' it has been interpreted in that jurisdiction to mean 'admitted'.[163]

3.2 Jumbunna's model has two elements, the first being:

> Amend the definition of 'fresh' in section 102(2) to replace the word 'adduced' with the word 'admitted' so that section 102(2) would now read:
>
> (2) Evidence is 'fresh' if:
>
> (a) it was not admitted in the proceedings in which the person was acquitted, and
>
> (b) it could not have been admitted in those proceedings with the exercise of reasonable diligence.[164]

3.3 As part of this element, Jumbunna proposed that:

161 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 1 and 14.

162 Evidence, Distinguished Professor Larissa Behrendt, Professor of Law, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, 24 July 2019, p 2; Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 1-2.

163 Submission 21a, Professor David Hamer, Sydney Law School, University of Sydney, p 5.

164 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 1-2.

> Section 102 should have a subsection inserted that extends the above change to any person acquitted prior to the introduction of the amendments.[165]

3.4 The second element, discussed in detail in the following section of this chapter on the principle of finality, was put in general terms and provides a mechanism to enable future applications for a retrial of XX to be brought:

> Multiple applications should be allowed under Part 8 … by removing a limitation on the number of applications that can be made but providing that no accused can be retried more than once under the [fresh and compelling evidence exception].[166]

Rationale

3.5 Distinguished Professor Larissa Behrendt, Professor of Law at Jumbunna, proposed that Jumbunna's model will 'ensure the overall justice, fairness and integrity of the legal system', with the England and Wales legislation providing 'a solid precedent that was crafted without reference to any particular case'.[167] Noting that the Crown advocated this interpretation of fresh evidence in both the Court of Criminal Appeal and High Court of Australia, Jumbunna representatives proposed that this model is consistent with the way the Crown has said the law should already be operating in New South Wales.[168]

3.6 Mr Craig Longman, Jumbunna's Head of Legal Strategies and Senior Researcher, suggested that the NSW Court of Criminal Appeal had taken quite a narrow approach in its consideration of fresh and compelling evidence in *Attorney General for New South Wales v XX*. He explained the two interpretations of fresh considered by the Court of Criminal Appeal, the former of which it adopted:

> The central problem in the legislation as it arose in the Bowraville case, *Attorney General for NSW v XX* [2018] NSWCCA 198, was an issue that had been previously flagged in questions of how the principles of double jeopardy should be balanced with the rights of the State and the interest of victims—that is, the question of freshness. Whether the evidence that should be capable of being relied upon on in an application to set aside an acquittal should be the evidence that was, in effect, available to prosecutors and police at the time that the initial trial was run or, alternatively, whether it should be the evidence that was admitted before a jury when the jury determined guilt in delivering a verdict.[169]

3.7 Jumbunna thus proposed that its model offers a 'common-sense approach' in that if evidence has never been presented to a jury, prima facie an application for a retrial should not be prohibited from being made on the basis of that evidence, with the Court then able to examine the question of reliability, changes to evidence law and other protections embodied in the

165 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 21.

166 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 1.

167 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 2.

168 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 8; Evidence, Distinguished Professor Behrendt and Mr Craig Longman, Head of Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, 24 July 2019, p 6.

169 Evidence, Mr Longman, 24 July 2019, p 2.

interests of justice test.[170] While respecting the jury verdict, the model recognises that any such verdict is delivered on the basis of admissible evidence only. The Court would retain the capacity to protect the rights of the acquitted accused because of the retained requirement that an order to repeal an acquittal be in the interests of justice.[171]

3.8 Mr Longman contended that the England and Wales model is preferable to that adopted by the Court of Criminal Appeal because it is able to take account of the systemic discrimination underpinning the poor investigation that lies at the heart of the Bowraville cases. Drawing a parallel between the emergence of DNA evidence in forensic science and the emergence of a new understanding of systemic racism against Indigenous people in the criminal justice system, as well as the significant evolution that has occurred in the way that serial offending is investigated, Mr Longman emphasised that the England and Wales approach would enable the Court of Criminal Appeal to consider the circumstances in which the Bowraville evidence was obtained when determining whether it is in the interests of justice that an appeal be allowed (under section 104):

> We say the evidence that arose, arose very much in a parallel way as evolution of scientific investigation. There has been no suggestion from anyone who has presented evidence today that a new DNA test that suddenly generates new evidence should not fall legitimately within the fresh or compelling evidence exception … Because the UK position does not prevent the court from considering the circumstances in which the evidence was originally obtained or new evidence was obtained or how the prosecution was run. These are all legitimate questions for the court. What it does do though is it puts these in the same decision and the same process of reasoning as looking at the other interests of justice. That includes, as we said earlier, interests that arise under the double jeopardy principle.[172]

3.9 Mr Longman elaborated on how the England and Wales model allows the court greater freedom to consider the interests of justice:

> In the UK, for instance, the court says if the evidence was not before the jury prima facie we can look at it and we can ask ourselves: Where do the interests of justice lie in this particular case? In doing that one of the questions that they ask themselves is: How was this police investigation run and how was the prosecution run? Was this evidence admissible? Should it have been adduced at the time? But they are not the only questions that the court asks itself. It also asks itself: How powerful is this evidence looking at it in conjunction both with what was before the jury and what we now know? One of the things we have seen in the UK, for example, is circumstances where a court can consider an entire corpus of evidence that arises from scientific developments as well as, what you might call, human developments. For instance, DNA evidence that is now available in conjunction with a witness attending in circumstances where a witness, for example, had fled the jurisdiction.[173]

3.10 Mr Longman proposed that Jumbunna's model would provide a more flexible test and enable the Court to take a more holistic approach to its decision whether to allow a retrial:

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170 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 17.

171 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 16-17.

172 Evidence, Mr Longman, 24 July 2019, p 56; see also Submission 25, Jumbunna Institute for Indigenous Education and Research, p 15.

173 Evidence, Mr Longman, 24 July 2019, pp 2-3.

> We say that is the more appropriate case because it provides a more flexible test for what is the most senior criminal court in New South Wales to look at all of the circumstances and answer the question: Recognising how important the rule of law is and how important the protections of double jeopardy are, nonetheless is this the kind of case where we are talking about such serious offending and such powerful evidence that we should set aside an acquittal and return it to a jury to determine guilt?[174]

3.11 Mr Longman noted that under Jumbunna's model, New South Wales, unlike England and Wales, would retain the discretion of the Court of Criminal Appeal not to order a retrial:

> In the United Kingdom if the court finds that there is new evidence, and it is compelling, they must order a retrial if it is in the interests of justice. In New South Wales the legislation still retains a discretion for the Court of Criminal Appeal to say, "Even though this case meets all of the tests set out under legislation, for other reasons, we decline to order a retrial".[175]

3.12 Invited by the committee to comment on whether there were examples in England and Wales that have raised public or legal controversy when a retrial has been allowed, Mr Longman advised that there have been no such cases, attributing this to the high threshold for 'compelling' evidence that operates there:

> There have been no examples of that. It is worth remembering just how powerful the threshold question of compelling evidence is in this context. The requirement that the evidence be highly probative, in conjunction with the UK's capacity to look at how initial investigations were done, means that it is explicitly the case in the UK. Their equivalent of the Director of Public Prosecutions has said on record in the case of *R v A* that really the only cases that we think fit the model in the UK are cases in which the evidence is so compelling that on a retrial, if an acquittal were to follow, it would almost be perverse.[176]

3.13 Mr Longman further noted that the UK cases were also considered by the Hon James Wood AO QC in his review of section 102 of the CARA (hereafter the Wood review) and the Court of Criminal Appeal, but neither criticised them as unjust:

> [T]hose cases were considered in both the Wood report and in the Court of Criminal Appeal. There were comments made about those cases but those comments never included any suggestion that any of those cases looked like a gross injustice or the State stepping beyond its appropriate bounds and trying to prosecute an individual for political reasons, which are some of the concerns that have been raised here. There is just no evidence of that occurring in the UK.[177]

3.14 Jumbunna set out the effect of its proposal within the preconditions to be met before an order for a retrial is made:

> If the amendments we propose are adopted, the law would change so as to provide that the following preconditions were met before an application under the [fresh and compelling exemption] could succeed:

174 Evidence, Mr Longman, 24 July 2019, p 3.

175 Evidence, Mr Longman, 24 July 2019, p 3.

176 Evidence, Mr Longman, 24 July 2019, p 3.

177 Evidence, Mr Longman, 24 July 2019, p 3.

- The [fresh and compelling exemption] would only be available in relation to the most serious offences;
- The Crown could only rely for the application on evidence that had not been considered by the jury which acquitted the accused;
- To be compelling, the evidence relied upon, along with other admissible evidence, would have to be highly probative, meaning that a conviction on a retrial was likely such that a jury verdict on the retrial would appear to be perverse;
- An application could only succeed where the Court of Criminal Appeal was satisfied a fair retrial was likely; and
- Whilst multiple applications under the [fresh and compelling exemption] could be brought, following a retrial on any successful application, no further attempts to set aside that acquittal would be allowed.

In our submission that amended position, though expanding the exceptions under double jeopardy, represents an appropriate balance between protections for Accused and the interests of justice.[178]

Other perspectives

3.15 Other inquiry participants commented specifically on Jumbunna's proposal to change 'adduced' to 'admitted' in the definition of fresh evidence, and also on the broader England and Wales model on which it is based. Both sets of comments are documented here.

3.16 Acting Assistant Commissioner Stuart Smith, Commander of the NSW Police Force's State Crime Command, advised the committee that in 2015 the then Commissioner for Police, Andrew Scipione, responding to the Wood review, put on record the NSW Police Force's support for replacing 'adduced' with 'admitted' in the CARA. He further advised that the current Commissioner for Police, Michael Fuller, shares this view:

> I can only reaffirm that in 2015 a commissioner took the step of supporting this amendment. We are still at that point today. We still hold that position.[179]

3.17 Mr Peter McGrath SC, Acting Director of Public Prosecutions, was clear that he preferred the CARA to remain unchanged, consistent with the approach to fresh evidence adopted by both the Court of Criminal Appeal and the Wood review. He also underscored a number of differences between the UK and New South Wales systems, cautioning against 'taking too great a notice of the UK experience'.[180]

3.18 Mr McGrath SC did, however, express a preference for Jumbunna's model over the Bill in that the former avoided the significant problems with wording discussed in the previous chapter, that is, the possibly unintended expansion of the cases that would fall within the purview of the legislation, and the 'inappropriate artificiality' of deeming evidence to be fresh because of a later change in the law. Nevertheless, the Acting DPP made two particular comments in respect of the Jumbunna model.

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178 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 20-21.

179 Evidence, Acting Assistant Commissioner Smith, Commander, State Crime Command, NSW Police Force, 24 July 2019, p 15; see also p 12.

180 Mr Peter McGrath SC, Acting Director of Public Prosecutions, 24 July 2019, p 22.

- He questioned whether the apparent broadening of the range of evidence that may found an application for a retrial on the basis of fresh evidence would actually eventuate, given the CARA's other requirements before a retrial may be ordered.
- He did not support the second part of Jumbunna's proposal to allow multiple applications for a retrial, as detailed in a later section.[181]

3.19 The NSW Bar Association also argued against England and Wales' CJA as the model for change to the CARA, citing the Hon James Wood AO QC's position that doing so fails to recognise differences in the law and understanding of key terminology in New South Wales. Aside from key dissimilarities in respect of 'new' and 'fresh' evidence, it identified two noteworthy differences between the two jurisdictions:

- The Director of Public Prosecutions in NSW already has a power to test a trial judge's rejection of admissibility of key prosecution evidence, via section 5F (3A) of the *Criminal Appeal Act 1912* (NSW), discussed in detail in a later section, that did not exist in the UK at the time of their amendments.[182] (It is noted that this provision gives a right to the Attorney General or the DPP to immediately appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.)[183]
- The level of public legal representation available to accused persons is significantly greater in the England and Wales system, such that proposed 'incursions on the rights of accused persons' are especially dangerous in the NSW context.[184]

3.20 Ms Gabrielle Bashir SC, Junior Vice President and Co-Chair of the NSW Bar Association's Criminal Law Committee, pointed out that section 5F (3A) specifically relates to evidence being rejected at trial, and advised that this is a significant and effective weapon for the prosecution used 'prior to the completion of a trial, or occasionally following a pre-trial ruling to any acquittal or conviction being entered by the jury'. She added that it, 'avoids the difficulties associated with traversing an acquittal'.[185]

3.21 The Bar Association subsequently undertook a study of the extent to which section 5F (3A) is utilised, and advised the committee that in the fifteen years since this provision came into force, 52 appeals have been brought by the ODPP, with a further five by the Commonwealth DPP.[186]

3.22 In addition, Ms Bashir SC noted that England and Wales' broader definition of 'new' evidence was rejected under the Scottish model of double jeopardy law:

181 Answers to questions on notice, Mr Peter McGrath SC, Acting Director of Public Prosecutions, received 7 August 2019, p 2.

182 Submission 1, NSW Bar Association, p 4.

183 Evidence, Ms Larisa Michalko, Director and Criminal Law Specialist, Law Reform and Legal Services Division, Department of Communities and Justice, 24 July 2019, p 11.

184 Submission 1, NSW Bar Association, p 4.

185 Evidence, Ms Gabrielle Bashir SC, Junior Vice President and Co-Chair, Criminal Law Committee, NSW Bar Association, 24 July 2019, p 29.

186 Addendum to answers to questions on notice, NSW Bar Association, received 14 August 2019, pp 1-6.

> It is significant that the expanded definition of the UK "new evidence" has been expressly not permitted in Scotland. Scotland subsequently enacted the Double Jeopardy (Scotland) Act 2011. In that Act it was expressly provided that evidence that was inadmissible which has subsequently become admissible does not fall within its definition of "new" evidence. Scotland has gone along the lines of what we have and it has done so having understood the experience in England and Wales.[187]

3.23 Following the hearing, the Bar Association further advised:

> Under s 4(4) of the Scottish Act, "new" evidence cannot be evidence that was inadmissible at trial and as subsequently become admissible evidence. This section expressly prohibits retrials on the basis of evidence that was inadmissible at the point of the original trial but subsequently becomes admissible because of developments in the law of evidence.[188]

3.24 Ms Belinda Rigg SC, Senior Public Defender of NSW, representing both the Public Defenders and Legal Aid NSW, indicated that Jumbunna's proposal to change 'adduced' to 'admitted' would, 'if the substance of the changes is desired, perhaps be a neater way of achieving it. However, my submission is still one opposed to the substance of the change'.[189]

3.25 Both Ms Rigg SC and Mr McGrath SC also highlighted the *Criminal Appeal Act's* section 5F (3A) as a significant differential between the UK and New South Wales legislative frameworks, with the former arguing that the absence of such a mechanism in the UK explains a number of the earlier decisions there.[190] Mr McGrath SC explained the practical impact on how the DPP presents its case:

> [I]f a judge is thought to have wrongly ruled inadmissible, very important evidence that will substantially undermine the prosecution case—for example, tendency and coincidence type evidence or confessional evidence—the prosecution has the opportunity of seeking the Court of Criminal Appeal to review that ruling before the trial commences before the jury, so that if that ruling is established to be erroneous according to existing law it can be sent back to the judge for a proper ruling. In those circumstances we, unlike in the UK, have the benefit of being in a position of being able to put forward our best prosecution case.
>
> In those circumstances this is what we prepare to do. We expect that we will have one shot at this trial, and we marshal our best evidence and, in fairness to the justice system and the accused and all the participants, give it our best go. If that is insufficient according to the laws of the day that—subject to there being a tainted acquittal or subject to truly fresh and compelling evidence coming forward which could not have been, with due diligence, discovered—should be the finality of the matter.[191]

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187 Evidence, Ms Bashir SC, 24 July 2019, p 30; see also Answers to questions on notice, NSW Bar Association, received 6 August 2019, pp 3-6.

188 Answers to questions on notice, NSW Bar Association, p 3.

189 Evidence, Ms Belinda Rigg SC, Senior Public Defender of NSW, representing the Public Defenders and Legal Aid NSW, 24 July 2019, p 51.

190 Evidence, Ms Rigg SC, 24 July 2019, p 47.

191 Evidence, Mr McGrath SC, 24 July 2019, p 22.

3.26 By contrast, Professor David Hamer of the Sydney Law School, University of Sydney, indicated his support for Jumbunna's model.[192] As discussed in the previous chapter, he supported a broadening of the CARA's double jeopardy provisions in the interest of a better balance between the competing interests of acquitted persons and those of victims and families. Following the hearing, Professor Hamer noted one ambiguity that arises from paragraph (b) in Jumbunna's proposal. This related to the possibility that a prosecutor adduced the evidence at trial but it was wrongly excluded by the trial judge. He suggested that if the proposal is to go forward this should be addressed, but beyond that, endorsed Jumbunna's proposal on three counts:

- it is simpler than that in the current Bill
- it avoids the potentially difficult issue of determining whether a change in admissibility has arisen from a 'substantive change in evidence law'
- it may also reduce the possibility of difficult historical questions as to whether evidence would have been admissible at the time of the trial.[193]

3.27 In respect of Scotland's model, Professor Hamer acknowledged that its definition of 'new' evidence is similar in effect to that in existing Australian law, and that it does not permit retrials on the basis of evidence inadmissible at trial that has subsequently become admissible. However, he noted that the Court in *Sinclair* indicated that freshly admissible evidence could be relied upon at the retrial.[194]

The principle of finality

3.28 There was significant debate during the inquiry as to the implications of the Bill (and also Jumbunna's model) for the principle of finality in the justice system.

3.29 As noted in chapter 1, the double jeopardy rule is founded on the principle that an acquittal of a criminal offence must be treated as final or incontrovertible.[195] Chapter 1 also indicated that the principle is embodied in Article 14(7) of the International Covenant on Human and Political Rights, which states, 'No one shall be liable to be tried or punished again for an offence which has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'[196] It further indicated, however, that the United Nations has stated that this article 'does not prohibit the resumption of a criminal trial justified by exceptional

192 Evidence, Professor David Hamer, Sydney Law School, University of Sydney, 24 July 2019, pp 41.

193 Submission 21a, Professor Hamer, p 6; see also Evidence, Professor Hamer, pp 41-42, citing *Her Majesty's Advocate v Sinclair* [2014] HCJAC 131.

194 Answers to questions on notice, Professor David Hamer, Sydney Law School, University of Sydney received 6 August 2019, p 4.

195 Hon James Wood AO QC, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001 (NSW)* (2015) (hereafter *Wood review report*), p 16.

196 International Covenant on Civil and Political Rights, 1966, Article 14(7), quoted in Submission 14, NSW Government, pp 2-3.

circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.'[197]

3.30 The Bill's proposed amendments to section 105 of the CARA would allow a second application for a retrial to be brought to the Court of Criminal Appeal in exceptional circumstances:

> (1AA) Despite subsection (1), the Court of Criminal Appeal may allow a second application for the retrial of an acquitted person to be made under this Division in relation to an acquittal if the Court is satisfied that exceptional circumstances apply.
>
> (1AB) For the purposes of subsection (1AA), exceptional circumstances are taken to include any substantive legislative change to this Division made since the previous application.

3.31 As noted at the start of this chapter, the second element of Jumbunna's model proposes an alternative change to section 105, that it be amended to allow multiple applications for a retrial, but only one retrial.[198]

3.32 This section documents the debate on finality arising from the Bill. It then sets out the participants' comments on the second element of Jumbunna's model.

The legal fraternity's perspectives

3.33 As noted in chapter 2, Ms Rigg SC, representing both the Public Defenders and Legal Aid NSW, advised the committee that underpinning all of both organisations' objections to the Bill was its threat to the principle of finality. Noting that this principle does not apply to other areas of law, she argued that finality is so fundamental to criminal law that any erosion of it is 'deeply destabilising' to the criminal justice system.[199] The Public Defenders further emphasised the importance of finality to public confidence in that system, quoting the High Court decision in *R v Carroll:*

> Policy considerations that go to the heart of the administration of justice and the retention of public confidence in the justice system reinforce this rationale. Judicial determinations need to be final, binding and conclusive if the determinations of courts are to retain public confidence. Consequently, the decisions of the courts, unless set aside or quashed, must be accepted as incontrovertibly correct.[200]

3.34 The Public Defenders argued that 'the Bill represents a remarkable change which is completely out of step with the emphasis on and reasons for the incontrovertibility of acquittals' in our accusatorial system of criminal prosecution.[201]

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197 United Nations Human Rights Committee, *General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, July 2007 (CCPR/C/GC/32), para 56, quoted in Submission 14, NSW Government, p 3.

198 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 1-2.

199 Evidence, Ms Rigg SC, 24 July 2019, p 56.

200 Gleeson CJ and Hayne J, *R v Carroll*, quoted in Submission 23, The Public Defenders, p 3.

201 Submission 23, The Public Defenders, p 3.

3.35 Challenged as to whether the principle of finality really is so fundamental any more, given the numerous incursions that have been made to allow appeals in various circumstances under law, Ms Rigg SC underscored the very limited ways in which the criminal law has been modified to allow appeals, in very narrow circumstances, so that those who are acquitted have the assurance of that acquittal:

> The appellate rights that exist at the moment strike the appropriate balance, in my submission … [There] are some inroads in relation to the principle of finality but they have been very specific. Historically over the past 200 years they have been mainly to consider wrongful convictions. So far as there has been permission to question the incontrovertibility of acquittals, that has been with very, very important safeguards in place that are not to just leave a person having an endless idea that their acquittal is temporary or transient.[202]

3.36 Legal Aid NSW noted that the second reading speech on the 2006 amendments to the CARA affirmed the principle of finality and its benefits for the accused, as well as for the victim and the community:

> [The purpose of the rule of double jeopardy] is to ensure that criminal proceedings can be brought to a conclusion, and the result in a trial can be regarded as final. It protects individuals against repeated attempts by the State to prosecute. The rule encourages police and prosecutors to be diligent and careful in their investigation and to gather as much evidence as possible against the accused. In this sense, it promotes fairness to the accused and justice for the victim and the community ...[203]

3.37 Legal Aid was very concerned by the Bill's amendments to section 105 to allow a second application for a retrial in exceptional circumstances, underscoring that, 'The limited nature of the current exceptions to the rule against double jeopardy, including the limit of one application to re-try an acquitted person, protects individuals against repeated attempts by the State (with its considerable resources) to prosecute them.'[204] It indicated that the United Kingdom legislation specifically prohibits multiple applications.[205] In keeping with this position, as noted in chapter 2's section on whether the law should be amended to address a specific case, Legal Aid was particularly disturbed that the Bill would 'enable the State to attempt to prosecute XX a third time, and to effectively re-litigate the recent High Court decision in this matter'.[206]

3.38 The Office of the DPP also opposed the Bill on the grounds of finality, arguing that the current law strikes 'an appropriate balance between the principles of finality and the discovery of fresh evidence that would materially impact on criminal proceedings'.[207] Like the Public Defenders, the Office of the DPP then quoted from the High Court judgement in *R v Carroll* to highlight the centrality of finality to the justice system, given the inevitable 'gap' between justice and truth:

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202 Evidence, Ms Rigg SC, 24 July 2019, pp 52-53.

203 Hon Morris Iemma MP, Second reading speech, Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill, Legislative Assembly, 19 September 2006, quoted in submission 24, Legal Aid NSW, p 4.

204 Submission 24, Legal Aid NSW, p 7.

205 Submission 24, Legal Aid NSW, p 6.

206 Submission 24, Legal Aid NSW, p 7.

207 Submission 2, Office of the Director of Public Prosecutions, p 1; see also Evidence, Mr McGrath SC, 24 July 2019, p 20.

> Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth … and these are cases where the law insists on finality.[208]

3.39 Mr McGrath SC drew on the point that finality is also to the benefit of victims and families, cautioning that by clawing it back, the Bill's proposals risk raising false hopes on the part of families of victims and others:

> In the face of acquittals families of murder victims, police investigators and victims of the most serious sexual offences and their families may be led to think that the acquittal is not the end of the matter, that there can be an appeal against the acquittal if the law of evidence changes or if the government changes a law in relation to the admissibility of evidence that was ruled inadmissible and that they will be able to get another go … I would suggest that the change [envisaged in the Bill] could not help but engender a false hope that an acquittal is not the end. If there is some evidence that people thought ought to have been admissible and was not, there will be a possibility of false hope engendered by some change to the law in the future.[209]

3.40 Finally, Ms Bashir SC emphasised that the state should not be allowed to make repeated attempts to convict a person for an alleged offence, arguing that by eroding finality, the Bill would erode confidence in the administration of justice.[210] The Association's submission asserted:

> The proposal represents a sustained attack on finality given that not only may an application be made, but in the event of the failure of that application and "exceptional circumstances", a second application may be made. As set out above, any subsequent amendment to Division 2 (of Part 8) of the Crimes (Appeal and Review) Act is deemed to constitute exceptional circumstances. That is, through legislative amendment, the court may be forced to reconsider a second application although there is no change in the factual circumstances of a matter.[211]

3.41 Ms Bashir SC highlighted that in England and Wales, as well as Scotland, only one application for a retrial is permitted, in contrast to both the Bill and Jumbunna's model.[212]

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208 Lord Wilberforce, The Ampthill Peerage [1977] AC 547 at 569, quoted by Gleeson CJ and Jayne J in *R v Carroll* [2002] HCA 55, cited in Submission 2, Office of the Director of Public Prosecutions, p 2 and Submission 23, The Public Defenders, p 2.

209 Evidence, Mr McGrath SC, 24 July 2019, p 25.

210 Evidence, Ms Bashir SC, 24 July 2019, p 29; see also Evidence, Mr Michael McHugh SC, Senior Vice President, NSW Bar Association, 24 July 2019, p 35 and Submission 1, NSW Bar Association, p 4.

211 Submission 1, NSW Bar Association, p 3.

212 Evidence, Ms Bashir SC, 24 July 2019, p 30; Answers to questions on notice, NSW Bar Association, p 3.

Alternative approaches to finality

3.42 Professor Hamer responded to concerns from the legal fraternity about finality by highlighting that retrials are actually not so unusual under the current legislation, with convictions quite commonly set aside and a retrial ordered by the Court of Criminal Appeal.[213] In addition, he confirmed, when asked by the committee, that under the CARA there is already capacity for appeal against acquittal from a judge alone trial. Professor Hamer further agreed, when it was posited to him, that the law does not currently work to provide finality as an absolute, unambiguous principle, in that acquittal by a judge or by a jury is still the same outcome for the defendant, but the law only allows appeal against the former. He responded by explaining the ideal of finality then observing its reality for victims, families and broader society in the context of fresh and compelling evidence of an acquitted person's culpability:

> [F]inality isn't an end in itself. The reason that finality is seen as desirable is that it provides society with closure and it provides society and affected parties the opportunity to get on with their lives. But if you've got fresh and compelling evidence of guilt, well, then, in spite of it, the acquittal then doesn't provide that closure; it doesn't provide people peace and security. So finality, in that situation, is illusory.[214]

3.43 Professor Hamer also agreed with the suggestion that rather than bringing the criminal justice system into disrepute by degrading finality, as opponents of the Bill have argued, not providing an avenue to bring an acquitted murderer or serious sex offender to justice when the evidence available suggests that they are culpable, itself brings the justice system into disrepute. Indicating that the High Court now talks in terms of preserving the integrity of the justice system, Professor Hamer argued for carefully limited opportunities for verdicts in respect of serious offences to be corrected:

> But in talking about the integrity of the criminal justice system, the integrity of the system can be questioned where defendants that have been acquitted of extremely serious offences, those acquittals appear factually incorrect. I mean, that would challenge the integrity of the criminal justice system because, ultimately, the criminal justice system, its function, is to convict the guilty and to acquit the innocent. That is its ultimate function … [I]n the case of very minor offences, finality might have more importance, because it isn't worth continually revisiting charges and questioning verdicts—acquittals and convictions—with minor offences. But with more serious offences—arguably to preserve the integrity of the system—there should be limited, carefully constrained opportunities for verdicts to be corrected.[215]

3.44 Mr Longman of Jumbunna responded to the Public Defenders' point that a defendant is entitled to the benefit of their acquittal, arguing that double jeopardy provisions recognise that in exceptional and serious cases it is appropriate to encroach upon the rights of the accused:

> [O]ne of the observations made by the Public Defenders—and I think this is the appropriate perception—is that you are entitled to the benefit of your acquittal. The act of acquittal merges with the evidence that was led against you and with the substantive criminal law that existed at the time. But the very nature of double jeopardy provisions recognises that in rare and exceptional and serious cases one needs to draw a line

213 Evidence, Professor Hamer, 24 July 2019, p 41.

214 Evidence, Professor Hamer, 24 July 2019, p 41.

215 Evidence, Professor Hamer, 24 July 2019, p 41; see also Submission 21a, Professor Hamer, p 4.

> between the rights of the accused to finality—and recognising there are rights of others to finality—with the right of the State to prosecute.[216]

3.45 Distinguished Professor Behrendt replied to others' arguments that the proposed amendments to the CARA would erode finality with very serious consequences, by proposing that finality is just one important consideration in matters of justice:

> We do not accept the argument about the erosion of the principle of finality. We think it is one factor among many that get balanced in thinking about whether something is in the interests of justice. We certainly would reject the idea that such a change would undermine the whole system.[217]

3.46 Distinguished Professor Behrendt went on to question whether the absolute view of the legal fraternity regarding finality is shared more broadly, and suggested that it is acceptable for the law to change if it will improve the justice system:

> I think what has been reflected elsewhere today is perhaps not the common view. It is certainly not the view taken by members of the public who have been victims of crime. I think it overstates the place of that principle … there have been many changes to some of these things that the fraternity says are absolutes—central principles that cannot be moved—and there have been lots of times in which the Parliament has stepped in to put caveats or exceptions, often to improve the way that the justice system works. [218]

3.47 She argued for amending the law as a signal to victims and the broader community that serious failures of the justice system should be addressed, concluding, 'I think that that is a stronger message than what the average person in the street would think about the justice system and the undermining of the sense of finality, which is a bit of a fiction anyway.[219]

One retrial versus one application

3.48 Within the context of the debate about finality, there was specific discussion among stakeholders about Jumbunna's proposal that section 105 of CARA be amended to allow only one retrial (and thus multiple applications) rather than the Bill's proposal to allow a second application in exceptional circumstances. At present the CARA allows only one application for a retrial.

3.49 Jumbunna explained that while the Bill's proposal to allow for a second application to be made in exceptional circumstances is acceptable, it's preferred model is to remove the limitation on the number of applications for a retrial.

3.50 Jumbunna suggested that its model may be more consistent than the Bill with the CARA overall (which treats acquittals given on a jury verdict differently to those arising from a judge alone trial or a directed verdict) in that its model prioritises the sanctity of a jury verdict.[220] Those differences in the treatment are as follows:

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216 Evidence, Mr Longman, 24 July 2019, p 6.

217 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 59.

218 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 59.

219 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 59.

220 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 19.

> The Act sets up different legislative schemes for acquittals given on a verdict by a jury and acquittals from either a judge alone trial or a directed verdict.
>
> Division 2, which applies to jury acquittals, imposes a higher threshold to be met by the Crown by limiting the number of applications that can be made and imposing a requirement that an order be in the interests of justice.
>
> In contrast, Division 3, which applies in relation to acquittals from judge alone trials and directed verdicts, has no requirement that orders be in the interests of justice nor limits the number of applications that can be made to set aside such an acquittal.[221]

3.51 Jumbunna thus proposed to remove any limitation on applications under the fresh and compelling evidence exceptions, but provide that an accused can only face one retrial under that exception, with a subsequent jury verdict a complete bar to any further prosecution.[222] In other words, whilst multiple applications under the fresh and compelling test could be brought, once a retrial occurred, no further attempts to set aside that acquittal would be allowed.[223]

3.52 Mr Longman argued that the general principles of finality and retrospectivity (discussed in the following section) must be considered in the context of other parts of the CARA's double jeopardy law:

> You have to look at these general principles of finality and retrospectivity in the context of the compromises and the balance that has already been implemented by the existing law. When one looks at that one sees that the principle of finality in those other circumstances is not permanent and there is no limitation on the number of applications. For instance, under section 107, where an application can be brought to set aside an acquittal that is conferred by a judge-alone or a directed acquittal, not only is it capable of being used multiple times; it has in fact been used multiple times in New South Wales. [224]

3.53 He referred to the case of *R v PL* in which two prior acquittals were set aside for the same course of conduct and the accused was retried a third time and convicted:

> So there is a case, which we referred to in our submissions and is referred to elsewhere in other submissions, where the judge misdirected the jury on the elements of manslaughter. The individual was acquitted, an application was brought to set the acquittal aside, which was successful, and a retrial occurred. Again, there was a mistake of law. Another application was brought to set the acquittal aside and on the third trial the individual was convicted. Now, there is nothing in the judgements of those cases that suggests that this was considered to be a miscarriage of justice.[225]

3.54 As indicated above, Ms Bashir SC of the Bar Association noted that England and Wales, as well as Scotland, only permit one application for retrial, and did not support this aspect of the

221 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 19-20.

222 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 20.

223 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 21.

224 Evidence, Mr Longman, 24 July 2019, p 5.

225 Evidence, Mr Longman, 24 July 2019, p 5. Mr Longman advised that in the first trial the indictment carried a charge of murder and manslaughter as an alternative. The manslaughter charge that subsequently made its way through the other cases.

model.[226] Similarly, Ms Rigg SC was clear that she did not support Jumbunna's proposal for multiple applications but only one retrial:

> That is not supported. The problem with multiple applications is that even though there is a difference between undergoing the appellate process and undergoing a trial with a jury verdict, it still does not answer the problem of an acquitted person having the acquittal basically as not final because it means that at some point it can still be called into question again. It is still a deep impingement, in my submission, on the double jeopardy principle.[227]

3.55 On the other hand, Professor Hamer expressed support for Jumbunna's proposal for a limit of one retrial, whilst also appreciating the current Bill's limitation of further applications to exceptional circumstances, suggesting that both should be accommodated:

> Yes, I like the idea of limiting it to one retrial. I think that would certainly be worth considering. But at the same time I think it would be good to—as the current bill does—limit further applications to those exceptional circumstances. If there has been one application and that has been unsuccessful then a further application should only be permitted in exceptional circumstances, as the bill currently provides. Perhaps there should be an additional provision [in the Bill] that there should only be one retrial.[228]

3.56 Jumbunna subsequently proposed that the Bill be amended to reflect Professor Hamer's suggestion, as follows:

> The Bill's proposed limitation of a second application under Part 8 of the Act in exceptional circumstances be retained; and
>
> Our proposed complete bar on any subsequent trial that proceeds to verdict also be incorporated.[229]

3.57 Jumbunna advised that the 'practical reality' of the amendments would be that:

> It would only be in exceptional circumstances that a second application could be made to set aside an acquittal under Division 2 of Part 8; and
>
> An Accused could never face more than one retrial to verdict before a jury in relation to a specific acquittal.[230]

Retrospectivity

3.58 The next area of significant discussion during the inquiry concerned the principle of retrospectivity. This debate focused on the legitimacy of clause 102 (2B) in the Bill, which proposes to extend the change in meaning of 'fresh' in section 102 (2A) to enable an appeal to be brought in respect of a person acquitted before the commencement of the provision. As

226 Evidence, Ms Bashir SC, 24 July 2019, p 30; Answers to questions on notice, NSW Bar Association, p 3.

227 Evidence, Ms Rigg SC, 24 July 2019, p 51.

228 Evidence, Professor Hamer, 24 July 2019, p 42.

229 Submission 25a, Jumbunna Institute for Indigenous Education and Research, p 1.

230 Submission 25a, Jumbunna Institute for Indigenous Education and Research, pp 1-2.

noted in the first section of this chapter, Jumbunna's model also included a provision which would make its changes retrospective.

Concerns about retrospectivity

3.59 Legal Aid NSW opposed the retrospective application of the amended definition of fresh, citing the rule of law and human rights principles:

> A fundamental feature of both the rule of law in Australian society and under international human rights principles is that criminal laws should operate prospectively. Retrospective laws are not consistent with the rule of law principle that the law should be public, prospective and capable of being known by those who are subject to it. As a result of such principles, legislation with retrospective operation should be rare and accompanied by proper justification.[231]

3.60 Similarly, Mr McGrath SC of the ODPP contended that the Bill's proposed amendment seeks to overturn the effect of a jury decision via a retrospective action that appears to change the rules to get a different result:

> The Bill seeks to overturn the finality of litigation represented by a criminal verdict … It does so not by using the later emergence of fresh and compelling evidence, something that is recognised throughout the common law world as evidence, which may lead to the reopening of an acquittal verdict, but rather the device of a later change in [the] law of admissibility of evidence, which can then be retrospectively applied to the same evidence not admissible at the earlier trial to achieve a different and, it might be thought, more socially acceptable result.
>
> It represents a fundamental and unwarranted departure from the established legal principles against, in combination retrospectivity of criminality and ex post facto criminal law—changing the rules to change an earlier result.[232]

3.61 The Bar Association proposed that this aspect of the Bill would bring about 'a complete erosion of fair trial principles and the efficient administration of trials',[233] asserting:

> What is proposed by the Bill is that an accused person would no longer have to simply meet the case as notified to him or her in advance of trial, adduced in accordance with the rules of evidence and procedure as they stood in the trial and make his or her defence accordingly. There would be no security of acquittal in those circumstances. A change in the law of evidence *after* his or her trial which may be prescribed to "fit the facts after they had become known" would render the acquittal open to review on application of the prosecution following the accused having met the case against him or her and being acquitted at trial. The repercussions for another fundamental right, namely the right to silence, in such instances are patent.[234]

3.62 Ms Bashir SC put it in the following terms:

231 Submission 24, Legal Aid NSW, p 7.

232 Evidence, Mr McGrath SC, 24 July 2019, p 20; see also Submission 2, Office of the Director of Public Prosecutions, pp 2-3.

233 Submission 1, NSW Bar Association, p 5.

234 Submission 1, NSW Bar Association, p 5.

> The 2019 bill allows for a trial to be run on one basis according to the law as it stands at the time of trial and then seeks to impugn the verdict that was rendered in accordance with law on the basis that the law that has been passed subsequently to the verdict should now be applied to the facts. The inadmissibility of the evidence in accordance with law at the time of the trial becomes the reason for the retrial under the bill. That, in our submission, is the end of fair trial as we know it.[235]

3.63 Ms Bashir SC cited the judgements of Gaudron J and McHugh J in the matter of *Polyukhovich v The Commonwealth* to highlight the principles against retrospectivity in criminal law,[236] further arguing that retrospective application of the law to individuals acquitted prior to the introduction of Part 8 of the CARA breaches human rights principles:

> In our submission, retrospective application to persons acquitted prior to the introduction of part 8 of the Act breaches article 14 (7) of the International Covenant on Civil and Political Rights [ICCPR] … If I could explain this way; where double jeopardy exceptions existed at the time of the acquittal, an accused person is arguably never finally acquitted in accordance with law. But going back to what we have said before, if there was no such provision at the time of the acquittal, they have been acquitted in accordance with law. So to then give retrospective application breaches, in our submission, that article of the ICCPR. There was a final acquittal in accordance with law for those matters predating the double jeopardy exceptions.[237]

3.64 Ms Michalko of the Department of Communities and Justice explained to the committee that for some stakeholders, the concerns about retrospectivity were also relevant to the way that defence counsel run their case:

> [O]ne of the concerns in respect of retrospectivity being attached to a change in admissibility of the law is that a person may not know the case that they have to meet at the time that they are being tried because they will have to meet an ever evolving case based on ever evolving evidence law. So they may well lead evidence or make arguments or take a particular approach based on their understanding and their knowledge of the admissibility of the evidence at the time … And that will then change by virtue of the fact that a law is made that changes the way that that evidence would be admissible. So in the future they are exposed to a future prosecution that they never would have anticipated or addressed in the way that they dealt with their case in the first place.[238]

3.65 Mr McHugh SC of the Bar Association provided an example to illustrate the practical implications of this aspect of the Bill:

> There are some real difficulties. I just finished a trial where I was defending for a life imprisonment. We knocked out some coincidence evidence. There is a question of whether I would call the accused in that case. If this legislation goes through, as a tactical decision—I prosecute a lot, I should say, but I am defending in this case—do I call the accused? Because he may give evidence in that case. Five years later, the law of evidence changes, that coincidence evidence would have gone in. Now he is on record, so his

235 Evidence, Ms Bashir SC, 24 July 2019, p 29.

236 Evidence, Ms Bashir SC, 24 July 2019, p 30, citing *Polyukhovich v The Commonwealth* [1991] 172 CLR 501.

237 Evidence, Ms Bashir SC , 24 July 2019, p 30; see also Submission 1, NSW Bar Association, p 3.

238 Evidence, Ms Michalko, 24 July 2019, p 18.

> right to silence is gone. Those sorts of concerns are—I should not use the expression Pandora's box. We just do not know where this is going to go.[239]

Arguments for retrospective laws

3.66 Professor Hamer acknowledged that the Bill is retrospective and that, '[r]etrospective laws raise legitimate concerns',[240] but he responded to these concerns in detail. First, he observed that the 2006 double jeopardy exceptions were expressly given retrospective operation, and in view of this, he proposed that 'it seems appropriate that changes to the double jeopardy exceptions are also given retrospective operation. Whether or not the Bill is justified doesn't turn upon its retrospective operation'.[241]

3.67 Professor Hamer advised the committee that Parliament's legitimacy in making retrospective legislation has been tested and upheld by the High Court. Here he also referred to the *Polyukhovich* case, which concerned the Commonwealth Parliament's retrospective creation of new war crimes offences to capture conduct that, at the time it was engaged in, was not legislated as a war crime. Observing that retrospective law is perhaps not so problematic with regard to such crimes because the actions involve patently criminal acts such as murder and genocide, Professor Hamer acknowledged that in other circumstances, criminalising conduct after the fact would pose significant problems for the rule of law. However he drew a distinction between retrospective changes to criminal law and those to procedural law, arguing that the latter are quite legitimate:

> But, generally speaking, if there is a change made to the substantive criminal law, such that conduct when it was engaged in was entirely legal and it is only later that Parliament decides, "Well, actually, we would like to criminalise that conduct." that obviously poses serious rule of law problems because at the time the conduct was engaged in the defendant would have had no way of knowing that that conduct was criminal.
>
> But if we are talking about procedural changes such that there is no change to the substantive law and at the time the conduct was engaged in it was criminal conduct but subsequently there is a change to, for example, the rules of evidence such that by the time the trial occurs, then more evidence is admissible than might have been at an earlier stage and more evidence is admissible than at the time the criminal conduct was engaged in. In those circumstances, the defendant really is not in a position to object and say, "Well, I want to be tried under the old law when this evidence was not admissible."[242]

3.68 Professor Hamer further explained that in procedural law defendants do not generally have a vested right in respect of process:

> Concerns about the injustice of retrospectivity are far weaker for procedural laws. The presumption against retrospective operation does not generally apply to procedural statutes: eg, *Maxwell v Murphy* (1957) 96 CLR 261, 267. A defendant will be tried

239 Evidence, Mr McHugh SC, 24 July 2019, p 37.

240 Submission 21, Professor Hamer, p 12.

241 Submission 21, Professor Hamer, p 13.

242 Evidence, Professor Hamer, 24 July 2019, p 39; see also Submission 21, Professor Hamer, pp 12-13.

> according to the evidence law applicable at the date of trial, not the date of the charged offence. Defendants don't have a vested right to be tried in any particular way.[243]

3.69 Acknowledging that the line between procedural law and substantive law is not always easily drawn, he proposed that double jeopardy exceptions may lie on the border between the two.[244]

3.70 Professor Hamer also responded to the concern that if an acquittal was set aside and sometime later the defendant was retried, there could be difficulty ensuring a fair trial because the evidence law has changed and the defendant may be facing quite a different case from that which they faced initially. He pointed out that this could simply be dealt with via the interests of justice considerations in section 104 of the CARA:

> If the concern about the fair trial is insurmountable, then under the double jeopardy exception the Court of Criminal Appeal could reject the application on the basis that it is not possible to hold a fair trial. That is expressly mentioned as one of the considerations going to the interest of justice. If that really does pose a problem, that could be handled in that way.[245]

3.71 Like Professor Hamer, Mr Longman of Jumbunna acknowledged concerns about retrospectivity but argued that, 'The real evil that the law of retrospectivity is aimed at is making conduct criminal at some time in the future, when it was not criminal at the time. There is a distinction drawn in the jurisprudence between those kinds of laws and the kinds of laws that change procedure'.[246]

3.72 Mr Longman told the committee, '*Polyukhovich* makes it clear that the Parliament has the capacity to make [retrospective] laws, it just has to make them explicit.'[247] He further agreed that there is longstanding High Court authority indicating that procedural and evidential changes to the law operate retrospectively, as in *Maxwell v Murphy*, as well as *Rodway v R*. He reasoned:

> When one looks at the way in which the criminal legal system works, we see this every day. If you are tried today for an historical offence then the substantive offence—the law about intent and the law about the actus reus is the law from the time of the offence. But you are tried under the procedure and evidence law of today. A distinction arises in the jurisprudence.[248]

3.73 Mr Longman further contended that the proposed changes to section 102 (either the Bill's or Jumbunna's) do not retrospectively change the substantive law, pointing out:

> The law on murder today is no different to the law on murder in 1991, in 1990. It simply says that today you face the evidence that we have as a society, and as a legal profession we have come to an awareness it is more probative than we initially thought, or is more reliable than we initially thought. Evidence law is, in one view, the evolution of what a

243 Submission 21, Professor Hamer, 24 July 2019, p 12.

244 Submission 21, Professor Hamer, 24 July 2019, p 13.

245 Evidence, Professor Hamer, 24 July 2019, p 40.

246 Evidence, Mr Longman, 24 July 2019, p 4.

247 Evidence, Mr Longman, 24 July 2019, p 4.

248 Evidence, Mr Longman, 24 July 2019, p 4.

> community decides is reliable or not. It is what we decide a jury should be able to rely upon to determine guilt or innocence.[249]

3.74 While acknowledging that there is some complexity to this issue, Mr Longman asserted that retrospectivity argument does not hold with regard to double jeopardy exceptions:

> The argument that is being put is that you should not expand double jeopardy exceptions. But when we are talking about this terrain there is no prohibition against reopening these offences. They already exist under section 107 [which deals with directed jury acquittals and acquittals in judge alone trials] and they exist currently under the fresh evidence exception. The idea that we are creating a law that is retrospective in some manner that is not already contained within the existing exceptions is, in my view, not accurate.[250]

3.75 Thus Jumbunna observed, 'In this case, the retrospective operation of the amending Bill, or the alteration of the word 'adduced' to 'admitted', doesn't serve to criminalise conduct retrospectively. The crimes the subject of the initial acquittal would, by necessity, be the same crimes sought to be retried and the substantive criminal law applicable at the time of the acquittal would still apply on any retrial.'[251]

3.76 With regard to the tactical issue, Mr Longman noted that strategic decision making is an inherent part of the defence role and cautioned not to overestimate the impact of the proposed amendments on those decisions:

> [E]very day defence counsel and solicitors have to work with whatever the current framework is in the way that they run cases. The tactical decisions are never easy. This is not going to introduce a level of complexity that suddenly changes the nature of running a criminal trial. It is also, I would think, one of those things that the courts would be capable of taking account of, both in the context of this kind of application but also in other applications. For example, if you are arguing an appeal against conviction on the basis that you have incompetent counsel. These kind of judgements are the kind of judgements courts make all the time.[252]

3.77 Similarly, Distinguished Professor Behrendt disagreed that a change in the law would actually affect the defence's decisions about how to run a trial in the context of the many tactical decisions that they make, first emphasising that the cases to be brought under the legislation would actually be extremely rare (as discussed in the previous chapter):

> [O]bviously there has been a lot of evidence put before you about the fact that this is not going to open the floodgates, so this is not going to fundamentally alter the day to-day running of most legal matters. These are provisions that will come into play in extraordinarily exceptional circumstances. We did reflect on whether that would impact on how we would prepare cases and we could not think that it would every day. It is not the sort of thing that would be front of mind. As Mr Longman says, there are so many other complex issues to think about in terms of strategy when you run a criminal

249 Evidence, Mr Longman, 24 July 2019, p 4.

250 Evidence, Mr Longman, 24 July 2019, p 4; Submission 25, Jumbunna Institute for Indigenous Education and Research, p 18.

251 Submission 25, Jumbunna Institute for Indigenous Education and Research, p 18.

252 Evidence, Mr Longman, 24 July 2019, p 57.

> case, it is hard to agree with the proposition that this would fundamentally change how you approach that.[253]

3.78 Notably, Ms Rigg SC of the Public Defenders commented that she was not overly concerned with the retrospectivity issue arising from the proposed amendments:

> Similarly, the Polyukhovich issue has been raised in a number of the submissions, and I accept that there is a difference between retrospective change of substantive law, on the one hand, and procedural on the other. Neither is great but retrospective change in relation to substantive law is significantly worse.[254]

Symmetry

3.79 A further debate among inquiry participants focused on whether the Bill's extension of the ability to seek a retrial for those *acquitted* of a serious offence should also apply to those who had been *convicted*. As noted previously in the report, the Bill's amendments to section 102 would enable evidence to be considered fresh for the purposes of an appeal if, as a result of a substantive change in evidence law since the acquittal, the evidence would now be admissible if the person were to be retried.

Applying proposed changes to convictions

3.80 The Bar Association argued that the policy rationale for changes proposed to the definition of 'fresh' in section 102 could apply equally to those acquitted or convicted of a serious crime,[255] with Ms Bashir SC proposing:

> [W]hat policy considerations that apply for acquitted persons must surely apply for convicted persons, people who are sitting in custody convicted of the most serious crimes but there is a change in law that now says that that evidence should never have been admitted in their trial … If you are going to apply it for people who are acquitted, then surely the policy reasons behind it, that is to remedy a miscarriage of justice, would apply to someone who is sitting locked up in custody convicted of a very serious offence where the law has changed such that a whole bundle of the evidence, for example, that was admitted in their trial, is now seen in the eyes of the law to be inadmissible.[256]

3.81 The Public Defenders and Legal Aid were similarly concerned that the Bill does not provide for 'convicted people to have any entitlement to have a conviction that might be unjust reviewed in similar circumstances'.[257] Ms Rigg SC emphasised that the policy concerns 'about the actual justice or truth of the individual result really apply even more resoundingly to someone who has been convicted of a serious crime, for all the traditional reasons in an accusatorial system, than they do for someone who has been acquitted'.[258] Thus, she told the committee:

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253 Evidence, Distinguished Professor Behrendt, 24 July 2019, p 57.

254 Evidence, Ms Rigg SC, 24 July 2019, p 51.

255 Evidence, Mr McHugh SC, 24 July 2019, p 37; Submission 1, NSW Bar Association, p 2.

256 Evidence, Ms Bashir SC, 24 July 2019, p 37.

257 Evidence, Ms Rigg SC, 24 July 2019, p 50.

258 Evidence, Ms Rigg SC , 24 July 2019, p 50.

> [M]y submission is that if there is going to be change to introduce that capacity it should, of course, first be allowed to review questionable convictions. No-one has suggested such a thing occur in relation to questionable conviction.[259]

3.82 Ms Rigg SC referred to the *Suteski* case determined by the NSW Court of Criminal Appeal and the High Court, to illustrate the price paid by a convicted person not able to appeal against their conviction following a change in evidentiary law. Ms Suteski remains in gaol as appeal rights in respect of convictions on legal grounds require error, and there was no error in the application of the law at the time:[260]

> The Suteski case is the example that I have put forward in my written submissions. A person who was serving a 22-year sentence for murder in circumstances where the operation of section 65 (2D) of the Evidence Act, as it then stood at the time of her trial, allowed evidence from a co-accused, who would not give evidence—so it was hearsay evidence of the co-accused's account out of court—to be put in front of the jury to convict her. It was really incriminatory evidence. On the law as it stood at the time, the Court of Criminal Appeal said that there was not an error in the trial judge's decision. The High Court refused special leave.
>
> She has no entitlement to say, "Well, the law has changed." The law has recognised, as the Law Reform Commission did in specifically looking at her case, that that law at that time was too permissive in terms of allowing hearsay evidence. She does not have the chance to go and ask for her conviction to be reviewed because there is a compelling case that had that evidence not gone before the jury she would have been acquitted.[261]

3.83 Mr McGrath SC put his concern in terms of the Bill creating a two-tiered appeal system, posing that this raises fundamental questions about the values of our legal system:

> The DPP has concerns that the bill establishes a two-tiered appeal system for trials of offences carrying potential life sentences. A person convicted on evidence admissible at their trial, or convicted after evidence was rejected at their trial, will not get to appeal their conviction on the basis of awaited change to the law of the admissibility of evidence, which will have led to a different evidentiary ruling in their trial, and possibly an acquittal, but a person acquitted in these circumstances will remain at risk of their acquittal being appealed until they die. It is worth perhaps stepping back and asking, "What does our legal system value more, or what does it seek to avoid more?"—wrongful acquittals of those said to be guilty or wrongful convictions and imprisonments of those people who are innocent of these serious offences?[262]

Distinguishing conviction and acquittal appeals

3.84 Professor Hamer responded to these concerns by affirming the importance of conviction appeals within our adversarial justice system, while also noting that the two types of appeals are not easily compared:

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259 Evidence, Ms Rigg SC , 24 July 2019, p 50.

260 Submission 23, The Public Defenders, p 5, citing *R v Suteski* [2002] NSWCCA 509; 56 NSWLR 182; 127 A Crim R 371; *Suteski v R* [2003] HCA Trans 493.

261 Evidence, Ms Rigg SC, 24 July 2019, p 54; see also Submission 23, The Public Defenders, p 5.

262 Evidence, Mr McGrath SC, 24 July 2019, p 21.

> Actually, it is difficult to compare defence and prosecution appeals. Generally, across criminal procedure including appeals, there is an asymmetry which strongly favours the defence. This is appropriate, given that the prosecution, a state actor, has far greater resources while the defendant has far more at stake. If there are two tiers, the convicted defendant is on the higher tier. The defendant generally has greater appeal rights than the prosecution.[263]

3.85 Professor Hamer advised the committee that where there has been a wrongful conviction on inadmissible evidence, he considered it entirely appropriate that a convicted offender be able to avail themselves of the mechanism proposed in the Bill:

> I think the ultimate question is, particularly if you are talking about convicted defendants, what were the true facts? If the change in evidence law is such that now there is clearly admissible evidence that suggests that that conviction is a wrongful conviction, I wouldn't have any problem at all with that evidence being considered. I think that would be quite appropriate.[264]

3.86 Professor Hamer gave the example of the Victorian case, *Baker*, in which the defendant was convicted of murder. A third-party confession followed, with another person saying it was not Baker, but them self that committed the murder. Under the common law, which applied at the time, the third party confession was hearsay evidence and was excluded so the defendant was not able to rely upon it to prove his innocence. The matter went to the High Court, with the defendant arguing that the common law governing hearsay should be changed so that third party confessions were admissible. The High Court rejected that as a matter of common law, and in the meantime Victoria adopted the Uniform Evidence Law, which includes a very broad exception for hearsay that is now able to be relied upon by the defendant. Baker has recently been released from prison and is arguing his innocence; the third party is still saying, "Yes, it wasn't the defendant; it was me." Professor Hamer concluded, 'I think it would be appropriate to allow the defendant to have the conviction set aside and for there to be a retrial with that evidence now admitted under the new *Evidence Act* provisions. I don't have a problem with that.'[265]

3.87 Professor Hamer further advised that South Australia and Tasmania have recently introduced an appeal provision based on double jeopardy exceptions whereby a convicted defendant may apply for an exceptional subsequent appeal on the basis that there is fresh and compelling evidence of innocence. Noting that there is a bill before the West Australian Parliament for the same provision, Professor Hamer commented, 'I think that's quite a good innovation which it would be worth New South Wales considering that as well.'[266]

3.88 Jumbunna representatives' response to the suggestion that the Bill creates asymmetrical appeal rights to the disadvantage of the accused was that there are asymmetrical rights of appeal for the Crown and the accused throughout all levels of the criminal justice system, which have developed over time in response to the common law and the legislative process.[267]

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263 Submission 21a, Professor Hamer, p 1.

264 Evidence, Professor Hamer, 24 July 2019, p 40.

265 Evidence, Professor Hamer, 24 July 2019, p 40, citing *Baker* [2012] EWCA Crim 414.

266 Evidence, Professor Hamer, 24 July 2019, p 40.

267 Evidence, Mr Longman, 24 July 2019, p 56.

Pressure on legislatures to change evidence law in response to unpopular acquittals

3.89 Related to the retrospectivity issue was the suggestion from a number of stakeholders that if passed, the Bill may encourage pressure on the legislature to amend the rules of evidence following evidentiary rulings that are unfavourable to the prosecution case.

3.90 The concern that allowing for a retrial on the basis of a change in evidence law could result in the Parliament acting to retrospectively change the law of evidence was raised in the Wood review. The Hon James Wood AO QC observed that, 'The key argument against the option [to extend 'fresh' evidence in s 102 to expressly extend to evidence that was previously admissible but made admissible due to a change in evidence law] is that it would open the possibility for a change in admissibility/evidence law to be brought about 'to address a specific case, most notably one where there was a degree of publicity and an unpopular acquittal' in order to secure a second trial.[268]

3.91 The Public Defenders, Legal Aid and the Law Society of New South Wales all highlighted this as a concern, with Ms Rigg SC noting the media's propensity to comment on the court outcomes of very serious crimes.[269]

3.92 The Public Defenders submission also noted a related issue, that the Bill might potentially have a deterrent effect on legislative change such as in the case of the Attorney General's proposed amendments to the *Evidence Act* in respect of child sex offences documented in the previous chapter. They argued that, 'The merits of any Bill should be debated and acted upon with a view to moving forward, not needing to be mindful of how many old acquittals are likely to have to be re-opened and litigated as a result of the legislative change'.[270]

3.93 Professor Hamer disagreed with this view, suggesting that it was not plausible and that it appears misdirected. In respect of the latter point he proposed:

> The objection is that the *current* Bill is problematic not in and of itself but just because it may lead to further problematic changes to the law down the track. But assuming that the current Bill is otherwise sound, then the solution would be to prevent the further legislation, not the current Bill.[271]

3.94 Professor Hamer reported that the perceived danger that the Bill may lead to pressure on the legislature to change evidence law in response to unpopular acquittals has not been borne out in the 12 years of the United Kingdom's experience.[272]

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268 *Wood review report* pp 62-63; see also p 54-55; see also submission 21, Professor Hamer, p 10.

269 Submission 24, Legal Aid NSW, p 10; Submission 23, The Public Defenders, pp 8-9; see also Ms Rigg SC, 24 July 2019, p 46; Submission 3, Law Society of New South Wales, p 2.

270 Submission 23, The Public Defenders, p 9.

271 Submission 21a, Professor Hamer, p 7.

272 Submission 21, Professor Hamer, p 12.

Uniformity with other jurisdictions

3.95 On a different matter, the ODPP raised a concern that by amending its double jeopardy law in the significant manner envisaged by the Bill (and Jumbunna's model), New South Wales would reduce consistency with other Australian jurisdictions:

> The NSW provision is consistent with the Council of Australian Governments Model and provisions that are now operative in the other States. As a general proposition the ODPP supports consistency of laws between the States. This proposal would bring NSW out of step with other Australian jurisdictions.[273]

3.96 Professor Hamer acknowledged that changing the law in New South Wales would erode uniformity but went on to indicate that differences between jurisdictions are fairly common in criminal law, including in respect of double jeopardy:

> It would be a negative step in terms of uniformity across the jurisdictions, obviously, but when it comes to the criminal law there is quite a lot of difference between the different jurisdictions anyway and that does extend to the double jeopardy exception. In New South Wales, the fresh and compelling evidence exception only applies to life sentence offences; in other jurisdictions it applies to serious offences or very serious offences and so on. There is already that difference. WA is already quite different in the way in which it operates. The ACT is quite different in the way in which it defines fresh evidence. I think the ACT expressly prevents evidence that was inadmissible at the time of trial from being considered fresh evidence. WA might go the other way. WA provisions are kind of hard to interpret.[274]

3.97 Similarly, Jumbunna acknowledged that its proposed amendment (and the Bill) would degrade uniformity, but expressed doubt that this really matters when no other jurisdictions have actually contemplated the meaning of fresh:

> Whilst such a change would put the New South Wales legislation at odds with the language in other Australian jurisdictions, it is not clear to what extent it would practically create inconsistency given that we have been unable to identify any cases in other Australian jurisdictions that have considered the meaning of 'fresh' within the context of appeals against acquittal.[275]

3.98 In the same vein, Professor Hamer proposed that this could be an opportunity for innovation and perhaps leadership on New South Wales' part:

> Also I do not think there is such a great concern about the jurisdictions all being the same since this legislation almost never gets used, so the whole thing is very hypothetical. While in some areas there is a lot to be said for uniformity across the jurisdictions in a Federal system, there is also something to be said for different jurisdictions trying out different approaches to difficult questions and seeing which one works best. If New South Wales adopts this amendment and it works well, then that is a nice experiment that the Federal system has tried out and other jurisdictions may be able to benefit from it.[276]

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273 Submission 2, Office of the Director of Public Prosecutions, p 1.

274 Evidence, Professor Hamer, 24 July 2019, p 42.

275 Submission 25, Jumbunna Institute for Indigenous Education and Research, pp 16-17.

276 Evidence, Professor Hamer, 24 July 2019, p 42.

Systemic improvements to the justice system

3.99 Beyond the legal examination of the Bill that was the focus of this inquiry, within the context of the Bowraville cases, a number of inquiry participants addressed the importance of systemic improvements to the justice system, in respect of policing, prosecution and the courts. These issues were a significant focus of the committee's 2014 inquiry and report, recognising that both the initial police investigation and also the process in respect of the trials for the murder of Clinton Speedy-Duroux and Evelyn Greenup contributed to the inability of all three Bowraville families to achieve justice to date.

3.100 Professor Luke McNamara and Mr Brian Whelan of the Centre for Crime, Law and Justice at the University of New South Wales, advocated improvements to the criminal justice system instead of double jeopardy law reform, recommending that, 'criminal justice reforms continue to focus on reductions in the rate of violence against Aboriginal and Torres Strait Islander people and improving criminal justice agency responses when it does occur'.[277]

3.101 These authors acknowledged the work of the NSW Police Force in recent decades:

> Since the early 1990s there has been a proliferation of strategies and policies designed to reduce over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system and to improve criminal justice agency responses. We recognise the good work undertaken by police officers on a daily basis, often in difficult and dangerous circumstances, and also recognise that NSW police have undertaken significant reforms to culture, policy and practice to improve relationships with Aboriginal and Torres Strait Islander communities.[278]

3.102 However, Professor McNamara and Mr Whelan went on to emphasise that there is still much work to be done, referring to the 'under-criminalisation' of violence towards Indigenous people, and pointing to some of the well recognised features of the Bowraville families' experience:

> Notwithstanding those measures, many Aboriginal and Torres Strait Islander people continue to report having negative policing experiences, and holding negative attitudes about the criminal justice system. It is clear that those perceptions have strong historical antecedents and that there is evidence that the criminal punishment is applied disproportionately against Aboriginal and Torres Strait Islander people. What is less commonly appreciated is that many Indigenous communities also suffer from 'under-criminalisation'. A 2010 Australian Institute of Criminology (AIC) study suggested up to 90% of violence against Aboriginal and Torres Strait Islander women goes unreported to police. The reasons are complex, and include under-policing, and a history of conflict between police and Indigenous communities.[279]

3.103 Professor McNamara and Mr Whelan then observed that this problem is often compounded by subsequent inadequacies in both the investigation and prosecution of crimes against Aboriginal and Torres Strait Islander people, referring to the case of the violent death of Indigenous woman Lynette Daley as an example. It is noted here that Ms Daley died in 2011, with convictions obtained in September 2017, after the DPP twice declined to prosecute her death on the basis

277 Submission 5, Professor Luke McNamara and Mr Brian Whelan, p 3.

278 Submission 5, Professor Luke McNamara and Mr Brian Whelan, p 2.

279 Submission 5, Professor Luke McNamara and Mr Brian Whelan, p 3, citing *R v Attwater; R v Maris* [2017] NSWSC 1710.

of insufficient evidence. Following a *Four Corners* investigation, the DPP's decision was reviewed and the case then prosecuted:[280]

> Such failures to exercise reasonable standards of diligence in investigation and prosecution after the sexual assault and death of an Aboriginal woman were made apparent in the recent case of *R v Attwater and Maris*, where evidentiary and prosecutorial issues resulted in delayed justice for the victim's family.[281]

3.104 Noting that poor police relations with Aboriginal communities may undermine investigations and subsequent prosecutions, Professor McNamara and Mr Whelan referred to the 2018 recommendations of the Australian Law Reform Commission inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples:

> In 2018, the Australian Law Reform Commission recommended that police practices and procedures be reviewed by governments so that the law is applied equally and without discrimination with respect to Aboriginal and Torres Strait Islander communities, offenders and victims. The ALRC also recommended that police complaints handling mechanisms be reviewed, particularly addressing the perception by Aboriginal and Torres Strait Islander people that their complaints are not taken seriously.[282]

3.105 Acting Assistant Commissioner Smith of the NSW Police Force acknowledged to the committee the deficits in the initial Bowraville investigation and the lessons that the Police have learned and applied to the training of all investigators:

> In 1996, when the matter was reinvestigated diligently by the investigators of Strike Force ANCUD, suddenly we had evidence that we had not contemplated—the serial nature and the segregated community. We needed to look at the way we collected evidence from vulnerable people. The outcomes from that are now taught to every investigator in New South Wales. Every police officer coming into the force gets cultural awareness training so that we can understand how best to collect that evidence.[283]

3.106 He went on to emphasise how much the Police has learned from the case, noting again that the Police Commissioner supports amendment to the CARA with a view to allowing the Bowraville case to be retried:

> We changed everything. We changed the way we train our people. The Commissioner has a Police Aboriginal Strategic Advisory Council [PASAC] panel. Every local area commander, police district commander and police area commander has an Aboriginal advisory committee. We have an Aboriginal strategic direction. I have been a

---

280 ABC News, 'Lynette Daley death: Adrian Attwater and Paul Maris jailed for brutal attack', 8 December 2017, https://www.abc.net.au/news/2017-12-08/lynette-daley-justice-with-attwater-and-maris-sentenced-to-jail/9239312.

281 Submission 5, Professor Luke McNamara and Mr Brian Whelan, p 3, citing *R v Attwater; R v Maris* [2017] NSWSC 1710.

282 Australian Law Reform Commission, *Pathways to justice – Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples*, ALRC Report No. 133 (2018), 14.5, cited in Submission 5, Professor McNamara and Mr Whelan, p 3.

283 Evidence, Acting Assistant Commissioner Smith, 24 July 2019, p 15.

> commander at Dubbo. I know the specifics of how communities can find themselves segregated.
>
> The police is a learning machine. We learn with the community and we are adjusted quite regularly by government when we do not learn …[284]

3.107 Ms Kathrina Lo, Deputy Secretary, Law Reform and Legal Services Division, Department of Communities and Justice, attested to systemic and cultural changes in the way that government works with Aboriginal communities, noting that cultural awareness training and cultural competency training – the higher bar – have been important in the changes taking place in the justice system. In addition, the OCHRE Plan to improve education and employment outcomes for Aboriginal people in New South Wales has been an important driver of change.[285] The department advised the committee, however, that the Office of the Sheriff does not provide cultural awareness training to jurors and are unaware of any other Australian jurisdiction that does so.[286]

3.108 At the committee's request the Judicial Commission of New South Wales provided information on its initiatives since 2014 to improve cultural sensitivity towards Indigenous people within the court system. The Commission's initiatives include:

- the *Criminal Trial Courts* bench book which contains information concerning the cultural and linguistic factors of which judicial officers should be aware with respect to particular witnesses
- the *Equality Before the Law* bench book which contains extensive information concerning Aboriginal people and provides guidance on the approach to be taken with respect to different parts of the justice process
- an ongoing Aboriginal Cultural Awareness education program for judicial officers which is aimed at increasing understanding about contemporary Indigenous social and cultural issues and their effects on Aboriginal people in the criminal justice system
- the Ngara Yura Program which facilitates judicial visits to Aboriginal communities around the State and provides Indigenous people with opportunities to learn about the judicial process
- ongoing joint seminars with the Law Society and the Bar Association.[287]

3.109 The Judicial Commission also told the committee about the Public Defenders' initiative, the Bar Book Project, which aims to provide guidance to the legal profession regarding the appropriate way to present evidence of cultural disadvantage in a variety of contexts including as it relates to Aboriginal people who are protagonists in the justice system. This will be published in late 2019.[288]

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284 Evidence, Acting Assistant Commissioner Smith, 24 July 2019, p 16.

285 Evidence, Ms Kathrina Lo, Deputy Secretary, Law Reform and Legal Services Division, Department of Communities and Justice, 24 July 2019, p 15; Answers to questions on notice, Department of Communities and Justice, received 6 August 2019, p 4.

286 Answers to questions on notice, Department of Communities and Justice, p 5.

287 Correspondence from Mr Ernest Schmatt AM PSM, Chief Executive, Judicial Commission of New South Wales, to Committee, received 9 August 2019, pp 1-2.

288 Correspondence from Mr Schmatt, p 2.

3.110 The committee also asked representatives of Jumbunna to comment on the implementation of our 2014 recommendations focused on systemic improvements to the justice system. Jumbunna commented that:

- The 2014 update to the *Equality Before the Law* bench book's section on Aboriginal 'was substantial and provides much better guidance now on cultural safety issues'.
- The Law Council of Australia has recognised the issue of unconscious bias in the context of the Australian legal profession and has developed training for Australian solicitors, although it is neither free of charge nor mandatory.
- Jumbunna has produced updated cultural safety training for the NSW Police using Bowraville as a case study.[289]

3.111 In respect of the committee's 2014 recommendation that the (then) Department of Justice consider and report on the merit of requiring lawyers who practice primarily in criminal law, as well as judicial officers and court officers, to undergo Aboriginal cultural awareness training, Jumbunna commented that training is voluntary for most relevant lawyers and judicial officers, but should be mandatory for lawyers at the major government legal agencies providing family and criminal law advice.

3.112 Jumbunna was concerned that a view has been taken that training is only necessary for those practitioners who practice in criminal or family law (including child protection). It said:

> In our view this is unfortunate, and represents a fixation of the profession on its role as service providers rather than a larger role as contributors to dialogues of justice in Australia. An obvious example is the raft of constitutional lawyers who are now asked about questions of treaty, sovereignty and the Uluru Statement of the Heart, none of whom would have any obligation to undergo such training.
>
> One recommendation made by Jumbunna during these consultations was that the NSW Government, as the single largest employer of practitioners in NSW should make such training a pre-requisite for employment, which would ensure take-up of such training by the academy.
>
> We are not aware whether the Government adopted this recommendation.[290]

3.113 In respect of the committee's 2014 recommendation that the NSW Government liaise with the Legal Profession Admission Board, the NSW Bar Association and all accredited universities offering legal training in New South Wales to request that Aboriginal cultural awareness training be included as a compulsory element in their legal training and accreditation, Jumbunna told the committee that 'the Legal Services Council [has] determined such training should not be mandatory'. Jumbunna was aware, however, that law faculties are adopting such training, with 11 out of 14 providers intending to have a relevant graduate attribute, as of 2016.

3.114 Jumbunna also advised that it has provided cultural competency training at the request of the Aboriginal Legal Service on two occasions, again built around the Bowraville case study, and is in discussions with stakeholders about developing further training on unconscious bias.

[289] Answers to questions on notice, Jumbunna Institute for Indigenous Education and Research, received 5 August 2019, p 6.

[290] Answers to questions on notice, Jumbunna Institute for Indigenous Education and Research, p 7.

Jumbunna noted that neither the Department of Communities and Justice nor the DPP had approached it to provide such training, although though it understood that the Crown Solicitors Office had received training from Dr Diana Eades, 'who is eminently qualified in this area'.[291]

3.115 Jumbunna further indicated that through its work with the Bowraville community and other communities across Australia in coronial work and cases of unsolved murders, it had identified 'a significant need to support First Nation families and communities in navigating the Australian legal system'.[292] It suggested that, ultimately what is required is a 'culturally safe and holistic support service' that is capable of:

- advocating for the interests of victims and communities within the legal and political arenas
- providing culturally appropriate support to victims to ensure their voice is heard among stakeholders
- providing culturally appropriate support to assist communities to heal and grieve together.

3.116 As a first step Jumbunna recommended that it be funded by government to organise and facilitate an event to bring together First Nation representatives touched by violent death.[293]

Committee comment

3.117 While the committee has concluded that there is insufficient support for the Bill as drafted to proceed, should the NSW Government or any other party wish to prepare another bill to address the double jeopardy law in New South Wales, this inquiry has identified a number of matters to be carefully considered. The perspectives of a range of legal stakeholders in respect of each of these matters have been documented in this chapter, as a resource to assist that task.

3.118 In the course of reviewing the Bill referred to this committee an alternative reform was proposed to achieve the same stated goals as the Bill, but through an alternative form of wording. This proposal, which has the support of the NSW Police Force amongst others, was brought by Jumbunna.

3.119 While there was a great deal of evidence from the overwhelming majority of the legal fraternity that any change to the laws of double jeopardy would cause a significant erosion to the principle of finality, this position was contested by the evidence of both Professor Hamer and Jumbunna and the submissions from the Bowraville families. It is true that any opening of the exception to double jeopardy would provide a further avenue to review an acquittal and this would have the effect of reducing finality in a very limited number of cases.

3.120 In this regard the committee notes the large number of hurdles that would remain in the system even if Jumbunna's proposed reforms were implemented. They include:

- the Attorney General or the Director of Public Prosecutions would need to agree to seek an application for a retrial

291 Answers to questions on notice, Jumbunna Institute for Indigenous Education and Research, p 7.

292 Answers to questions on notice, Jumbunna Institute for Indigenous Education and Research, p 7.

293 Answers to questions on notice, Jumbunna Institute for Indigenous Education and Research, p 7-8.

- the Court of Criminal Appeal would need to be satisfied that the evidence on which the application is based is not only fresh (under a revised definition) but also compelling
- the Court of Criminal Appeal would also need to be satisfied that in all the circumstances it is in the interests of justice for the order to be made.

3.121 We are not persuaded that the changes proposed by Jumbunna would lead to a flood of applications. As numerous submissions pointed out, the 2006 reforms to the law on double jeopardy have not been successfully used on a single occasion. Indeed the Bowraville case of XX remains the only time that they have been considered by the NSW Court of Criminal Appeal.

3.122 The United Kingdom experience has demonstrated that these changes have not produced a flood of cases. Despite the UK provisions applying to a significantly broader class of offences, having less checks and balances, a broader definition of what evidence can found an application and applying to a significantly larger population, there have been less than 20 applications made.

3.123 Given the above, the committee believes it is appropriate for the NSW Government to consider the alternative reform model proposed by Jumbunna. This will necessarily include consideration of its impact beyond the Bowraville case, and will need to address the merits of broadening the exception to double jeopardy, against considerations such as finality and certainty.

Recommendation 2

That the NSW Government consider the alternative reform model proposed by the Jumbunna Institute of Indigenous Education and Research.

Appendix 1 Submissions

No.	Author
1	The New South Wales Bar Association
2	Office of the Director of Public Prosecutions
3	The Law Society of New South Wales
4	Mr Michael Smee
5	Professor Luke McNamara and Mr Brian Whelan, Centre for Crime, Law and Justice, Faculty of Law, University of New South Wales
6	Ms Jen Costello
7	Name suppressed
8	Name suppressed
9	Ms Lorraine Osborne
10	Name suppressed
11	Name suppressed
12	Mr Robert Stewart
13	Mrs Michelle Hanson
14	NSW Government
15	Ms Mavis Jean Symonds
16	Mr Stefan Moore
17	Name suppressed
18	Name suppressed
19	Name suppressed
20	Name suppressed
21	Professor David Hamer, Sydney Law School, University of Sydney
21a	Professor David Hamer, Sydney Law School, University of Sydney
22	Leonie Duroux, Allen Kirk, Elijah Duroux, Marbuck Duroux, Tnikka Butler & Name suppressed
23	The Public Defenders
24	Legal Aid NSW
25	Jumbunna Institute for Indigenous Education and Research
25a	Jumbunna Institute for Indigenous Education and Research
26	Ms Michelle Jarrett

No.	Author
27	Mr Barry Toohey
28	Mr Thomas Duroux
29	Ms Penny Stadhams

Appendix 2 Witnesses

Date	Name	Position and Organisation
Wednesday 24 July 2019 **Macquarie Room** **Parliament House,** **Sydney**	Distinguished Professor Larissa Behrendt	Professor of Law Jumbunna Institute for Indigenous Education and Research University of Technology Sydney
	Mr Craig Longman	Head, Legal Strategies and Senior Researcher Jumbunna Institute for Indigenous Education and Research University of Technology Sydney
	Ms Kathrina Lo,	Deputy Secretary Law Reform and Legal Services Division Department of Communities and Justice
	Ms Larisa Michalko	Director, Criminal Law Specialist, Law Reform and Legal Services Division Department of Communities and Justice
	Mr Mark Follett	Director, Law Enforcement and Crime Team, Law Reform and Legal Services Division Department of Communities and Justice
	Acting Assistant Commissioner Stuart Smith	Commander, State Crime Command NSW Police Force
	Mr Peter McGrath SC	Acting Director of Public Prosecutions
	Ms Johanna Pheils	Deputy Solicitor for Public Prosecutions (Legal) Office of the Director of Public Prosecutions
	Ms Gabrielle Bashir SC	Junior Vice President and Co-Chair, Criminal Law Committee NSW Bar Association
	Mr Michael McHugh SC	Senior Vice President NSW Bar Association
	Professor David Hamer	Sydney Law School University of Sydney
	Ms Belinda Rigg SC	Senior Public Defender for NSW The Public Defenders and Legal Aid NSW

Appendix 3 Minutes

Minutes no. 1

Thursday 30 May 2019
Standing Committee on Law and Justice
Members' Lounge, Parliament House, Sydney, 1.31 pm

1. Members present

Mr Blair, *Chair*
Mr Donnelly, *Deputy Chair*
Mr D'Adam
Mr Fang
Mr Khan
Mr Roberts
Mr Shoebridge
Mrs Ward

2. Tabling of resolution establishing the committee

Chair to table the resolution of the House establishing the committee, which reads as follows:

Appointment

1. Three standing committees are appointed as follows:
   (a) Law and Justice Committee,
   (b) Social Issues Committee, and
   (c) State Development Committee.

Law and Justice Committee

2. The committee may inquire into and report on:
   (a) legal and constitutional issues in New South Wales, including law reform, parliamentary matters, criminal law, administrative law and the justice system, and
   (b) matters concerned with industrial relations and fair trading.

3. For the purposes of section 27 of the State Insurance and Care Governance Act 2015, the committee is the designated Legislative Council committee to supervise the operation of the insurance and compensation schemes established under New South Wales workers' compensation and motor accidents legislation:
   (a) the Workers' Compensation Scheme,
   (b) the Workers' Compensation (Dust Diseases) Scheme,
   (c) the Motor Accidents Scheme, and
   (d) the Motor Accidents (Lifetime Care and Support) Scheme.
4. In exercising the supervisory function outlined in paragraph 3, the committee:
   (a) does not have the authority to investigate a particular compensation claim, and
   (b) must report to the House in relation to the operation of each of the schemes at least every two years every Parliament.

……

Referral of inquiries

7. A committee:

   (a) is to inquire into and report on any matter relevant to the functions of the committee which is referred to the committee by resolution of the House,

   (b) may inquire into and report on any matter relevant to the functions of the committee which is referred by a Minister of the Crown, and

   (c) may inquire into and report on any annual report or petition relevant to the functions of the committee which has been laid upon the Table of the Legislative Council.

8. Whenever a committee resolves to inquire into a matter, under paragraph 7(b) or 7(c), the terms of reference or the resolution is to be reported to the House on the next sitting day.

Powers

9. The committee has power to make visits of inspection within New South Wales and, with the approval of the President, elsewhere in Australia and outside Australia.

Membership

10. Each committee is to consist of eight members, comprising:

    (a) four government members,

    (b) two opposition members, and

    (c) two crossbench members.

Chair and Deputy Chair

11. (a) The Leader of the Government is to nominate in writing to the Clerk of the House the Chair of each committee.
    (b) The Leader of the Opposition is to nominate in writing to the Clerk of the House the Deputy Chair of each committee.

Quorum

12. The quorum of a committee is three members, of whom two must be government members and one a non-government member.

Sub-committees

13. A committee has the power to appoint sub-committees.

Conduct of committee proceedings

14. Unless the committee decides otherwise:

    (a) submissions to inquiries are to be published, subject to the Committee Clerk checking for confidentiality and adverse mention and, where those issues arise, bringing them to the attention of the committee for consideration,

    (b) attachments to submissions are to remain confidential,

    (c) the Chair's proposed witness list is to be circulated to provide members with an opportunity to amend the list, with the witness list agreed to by email, unless a member requests the Chair to convene a meeting to resolve any disagreement,

    (d) transcripts of evidence taken at public hearings are to be published,

(e) supplementary questions are to be lodged with the Committee Clerk within two days, excluding Saturday and Sunday, following the receipt of the hearing transcript, with witnesses requested to return answers to questions on notice and supplementary questions within 21 calendar days of the date on which questions are forwarded to the witness, and

(f) answers to questions on notice and supplementary questions are to be published, subject to the Committee Clerk checking for confidentiality and adverse mention and, where those issues arise, bringing them to the attention of the committee for consideration.

3. Committee Chair and Deputy Chair

The committee noted that the following members were nominated by the Leader of the Government and the Leader of the Opposition as Chair and Deputy Chair of the Standing Committee on Law and Justice:

- Mr Blair (Chair)
- Mr Donnelly (Deputy Chair).

4. Conduct of committee proceedings – Media

Resolved, on the motion of Mr Shoebridge: That unless the committee decides otherwise, the following procedures are to apply for the life of the committee:

- the committee authorise the filming, broadcasting, webcasting and still photography of its public proceedings, in accordance with the resolution of the Legislative Council of 18 October 2007
- the committee webcast its public proceedings via the Parliament's website, where technically possible
- committee members use social media and electronic devices during committee proceedings unobtrusively, to avoid distraction to other committee members and witnesses
- media statements on behalf of the committee be made only by the Chair.

5. Correspondence

Received:

- 6 February 2019 – Email from an employee of Ausgrid, to committee, in relation to parking fines to electrical network provider vehicles when undertaking maintenance of the electrical network
- 4 February 2019 – Email from a practicing advocate at Nashik Maharashtra, to committee, in relation to the Conciliation Act 1996
- 20 February 2019 – Letter from an individual to the Law and Justice Committee, seeking an investigation of the Executive Director and Registrar of the Supreme Court and the Attorney General .

Sent:

- 26 February 2019 – Letter from Mr David Blunt, Clerk of the Parliaments, to the Hon Don Harwin MLC, Leader of the Government in the Legislative Council, requesting a government response to the report of the 2018 review of the Dust Diseases Scheme
- 26 February 2019 – Letter from Mr David Blunt, Clerk of the Parliaments, to the Hon Don Harwin MLC, Leader of the Government in the Legislative Council, requesting a government response to the report of the 2018 review of the Lifetime Care and Support Scheme
- 1 March 2019 – Letter from Clerk Assistant – Committees responding to the individual who wrote to the Law and Justice Committee, seeking an investigation of the Executive Director and Registrar of the Supreme Court and the Attorney General.

Resolved, on the motion of Mr Shoebridge: That the following correspondence be kept confidential, as per the recommendation of the secretariat, as it contains identifying and/or sensitive information:

- 20 February 2019 – Letter from an individual to the Law and Justice Committee, seeking an investigation of the Executive Director and Registrar of the Supreme Court and the Attorney General
- 1 March 2019 – Letter from Clerk Assistant – Committees responding to the individual who wrote to the Law and Justice Committee, seeking an investigation of the Executive Director and Registrar of the Supreme Court and the Attorney General.

6. Legacy report of 56th Parliament

The committee noted the Legacy Report detailing the committee's work in the previous Parliament.

7. Oversight reviews and timeframes

The committee discussed timeframes for the next reviews of statutory schemes, specifically considering Recommendation 2 of its 2018 Review of the Dust Diseases scheme:

> That the Standing Committee on Law and Justice's next review of the Workers Compensation (Dust Diseases) Scheme focus on silica dust and silicosis, particularly in the manufactured stone industry.

Resolved, on the motion of Ms Ward: That the committee's next review of the Workers Compensation (Dust Diseases) Scheme focus on silica dust and silicosis, particularly in the manufactured stone industry, and open for submissions at the beginning of July 2019.

Resolved, on the motion of Ms Ward: That the committee write to icare, ccing the Hon Victor Dominello MP, Minister for Customer Service, seeking an update on the establishment of a dust diseases register, acknowledging that the committee has not yet received the government response to the report on the 2018 review of the dust diseases scheme, and advising that it will commence its call for submissions for the 2019 review of the dust diseases scheme in early July.

8. Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

8.1 Terms of reference

The Committee noted the terms of reference for the inquiry as referred by the House to inquire and report into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019.

8.2 Proposed timeline

Resolved, on the motion, of Mr Shoebridge: That the committee adopt the following timeline for the inquiry:

- submission closing date of 30 June 2019
- the Chair liaise with committee members regarding the timing and location of hearings
- table report by end August.

The committee discussed the need to carefully manage stakeholder expectations about the purpose and scope of the inquiry.

The committee noted that the secretariat will liaise with the chair to develop then circulate for comment proposed wording to be included in the call for submissions and on the inquiry website.

8.3 Advertising

The committee noted that the inquiry would be advertised via social media, stakeholder letters and a media release distributed to all media outlets in New South Wales.

8.4 Stakeholders

The Chair tabled a proposed stakeholder list. The Committee noted that the secretariat will circulate a revised list, with members to provide any further additions early next week.

9. Publication of minutes of the first meeting

Resolved, on the motion of Mr Fang: That the committee publish the minutes of the first meeting on the committee's webpage, subject to the draft minutes being circulated to members for agreement.

10. Other business

Resolved, on the motion of Mr Shoebridge: That the secretariat provide to the committee proposed timeframes for the workers compensation, motor accidents and lifetime care and support reviews.

11. Adjournment
The committee adjourned at 1.56 pm, *sine die*.

Merrin Thompson
Committee Clerk

Minutes no. 2

Wednesday 5 June 2019
Standing Committee on Law and Justice
Macquarie Room, Parliament House, Sydney, 10.01 am

1. Members present
Mr Blair, *Chair*
Mr Donnelly, *Deputy Chair*
Mr D'Adam
Mr Fang
Mr Khan
Mr Roberts
Mr Shoebridge
Mrs Ward

2. Draft minutes
The committee noted that draft minutes no. 1 were confirmed via email on 4 June 2019, as per a previous resolution of the committee.

3. Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

3.1 Wording to be included in the call for submissions and on the inquiry website
The committee noted that on 6 June 2019 it adopted via email wording developed by the secretariat in liaison with the Chair for inclusion in the call for submissions and on the inquiry website, as per a resolution on 30 May 2019.

3.2 Informal private briefing with family members in Bowraville
Resolved, on the motion of Mrs Ward: That:

- The committee conduct an informal private briefing (with catering) in Bowraville with two to three representatives of each family group, where no formal evidence is taken, for up to 2 hours, for the purpose of explaining the legal focus of the inquiry
- The meeting take place at the Pioneer Community Hall in Bowraville, subject to availability
- The visit to Bowraville take place on 17, 24, or 26 June 2018, with the date to be determined following consultation with the committee
- A representative of the Aboriginal Heath Clinic and/or Jumbunna Institute for Indigenous Education and Research be invited to support attendees.

3.3 Resources
Resolved, on the motion of Mr Shoebridge: That the secretariat:
(a) Prepare a short briefing paper addressing:
    - the legal background to the bill, including double jeopardy law in New South Wales and Australia
    - timeline and outcome of court decisions
    - any known cases other than Bowraville
    - UK model for double jeopardy law
    - publication documenting relevant UK cases

(b) Distribute cultural awareness resources to assist communication with Aboriginal people.

3.4 Public hearing

Resolved, on the motion of Mr Khan: That the committee hold a public hearing on 9 or 10 July 2019, subject to the availability of members.

4. Oversight reviews

The committee noted that:

- both the 2018 Review of the Workers Compensation Scheme and 2018 Review of the Compulsory Third Party Scheme reports were tabled on 12 February 2019 and the government responses are due 12 August 2019
- both the 2018 Review of the Lifetime Care and Support Scheme and 2018 Review of the Dust Diseases Scheme reports were tabled on 26 February 2019 and the government responses are due on 26 August 2019.

Having previously resolved to commence the 2019 review of the Dust Diseases Scheme in July 2019, the committee discussed its approach to and timeframes for the next round of other oversight reviews.

Resolved, on the motion of Mr Shoebridge: That the following be adopted for the next oversight reviews:

2019 Review of the Dust Diseases Scheme	• Submissions open early July 2019 and close 12 August 2019 • 1-2 hearings days early September 2019 • table by early December 2019
2020 Review of the Lifetime Care and Support Scheme and Compulsory Third Party Scheme, in one combined report	Commence January 2020
2020 Review of the Workers Compensation Scheme	Commence June 2020

5. Other business

Resolved, on the motion of Mr Shoebridge: That the committee request that the government response to the 2018 review of the Dust Diseases Scheme be provided early, in light of its timeframe for the 2019 review of the scheme.

6. Adjournment

The committee adjourned at 10.30 am, *sine die.*

Merrin Thompson
Committee Clerk

Minutes no. 3

Wednesday 19 June 2019
Standing Committee on Law and Justice
McKell Room, Parliament House, Sydney, 10.32 am

1. Members present

Mr Blair, *Chair*
Mr Donnelly, *Deputy Chair*
Mr D'Adam
Mr Fang
Mr Khan
Mr Roberts
Mr Shoebridge
Mrs Ward

2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 2 be confirmed.

3. Correspondence

Received:

- 17 June 2019 – Email from Assistant Commissioner Mick Willing, Commander, Terrorism and Special Tactics, NSW Police Force, advising that Detective Chief Inspector Gary Jubelin will be allowed to attend the meeting with family representatives in Bowraville on 24 June 2019.

Sent:

- 12 June 2019 – Letter from the Chair to Assistant Commissioner Mick Willing, NSW Police Force, requesting the attendance of Detective Chief Inspector Gary Jubelin as a support person at the informal private meeting with family representatives in Bowraville on 24 June 2019, on the request of the families
- 13 June 2019 – Email exchange between secretariat and Mr Mark Follett, Director, Crime Policy, Policy and Reform Branch, Department of Justice, granting extension for the NSW Government submission to the double jeopardy inquiry until 8 July 2019
- 17 June 2019 – Email from secretariat to Assistant Commissioner Mick Willing, Commander, Terrorism and Special Tactics, NSW Police Force, conveying the committee's thanks for allowing Detective Chief Inspector Gary Jubelin to attend the meeting with family representatives in Bowraville on 24 June 2019.

The Committee noted that in the last Parliament and since, it has received several items of correspondence from a member of the public making allegations about the conduct of the Attorney General.

Resolved, on the motion of Mr Shoebridge: That unless a new issue arises, all correspondence received from the member of the public known to the committee remain confidential with no action taken.

4. Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

4.1 Informal private briefing with family representatives in Bowraville

The committee noted that the visit to Bowraville to meet with family representatives is confirmed for Monday 24 June 2019. The Chair briefed the committee on the attendance of Detective Chief Inspector Gary Jubelin. The committee further noted the draft itinerary for the day.

The committee discussed that the purpose of the inquiry is not to revisit the matters canvassed in the committee's 2014 inquiry into the family response to the murders in Bowraville, but is limited to examining the legal implications of the proposed amendments in the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019.

Resolved, on the motion of Mr Donnelly: That the secretariat liaise with the Chair to develop then circulate wording advising participants on the purpose of the informal private briefing and the focus of the inquiry, prior to the visit.

Resolved, on the motion of Mr Donnelly: That the secretariat prepare a short report that captures the key messages from families expressed at the informal private meeting, to be considered by the committee, then checked by Jumbunna Institute for Indigenous Education and Research, then published on the inquiry website.

4.2 Public hearing

The committee noted that the hearing date has been confirmed for Wednesday 24 July 2019.

4.3 Submissions to the Wood review of Section 102 of the *Crimes (Appeal and Review) Act 2001*

Resolved, on the motion of Mrs Ward: That the secretariat ascertain the publication status of submissions to the Wood review of Section 102 of the *Crimes (Appeal and Review) Act 2001* and report back to the committee for its consideration.

5. Inquiry into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019

5.1 Terms of reference

The committee noted the terms of reference for the inquiry as referred by the House, to inquire and report into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019.

5.2 Proposed timeline and activities

Resolved, on the motion of Mr Shoebridge: That the committee adopt the following timeline for the inquiry:

- Submission closing date of 31 July 2019
- One hearing day and one reserve day in August, potentially on 5, 9, 19 or 23 August, to be canvassed by the secretariat.
- Table report by end October.

Advertising

The committee noted that the inquiry would be advertised via social media, stakeholder letters and a media release distributed to all media outlets in New South Wales.

Stakeholders

Resolved, on the motion of Mr Shoebridge: That the secretariat email members with a list of stakeholders to be invited to make written submissions, and that members have two days from the email being circulated to amend the list or nominate additional stakeholders.

6. Adjournment

The committee adjourned at 10.57 am until 7.15 am Monday 24 June 2019 at Sydney Airport (visit to Bowraville).

Merrin Thompson
Committee Clerk

Minutes no. 4

Monday 24 June 2019
Standing Committee on Law and Justice
Pioneer Community Centre, Bowraville at 10.45 am

1. Members

Mr Blair, *Chair*
Mr Donnelly, *Deputy Chair*
Mr D'Adam
Mr Khan
Mr Roberts
Mr Shoebridge
Mrs Ward

2. Apologies

Mr Fang

3. Correspondence

Received:

- 21 June 2019 – Email exchange between secretariat and Assistant Commissioner Mick Willing, Counter Terrorism and Special Tactics Command, NSW Police Force, regarding the attendance of Detective Chief Inspector Gary Jubelin as support person at the meeting with family representatives in Bowraville on 24 June 2019.

4. Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

4.1 Private briefing and tour of key sites in Bowraville

The committee received a private briefing from Detective Chief Inspector Gary Jubelin, NSW Police Force, with Detective Sergeant Gerry Bowden and Ms Bianca Comina, NSW Police Force, also present.

Resolved, on the motion of Mr Donnelly: That Detective Chief Inspector Jubelin, Detective Sergeant Bowden and Ms Comina accompany the committee on a tour of key sites in Bowraville.

4.2 Informal private briefing with family representatives

The committee held an informal private briefing with family representatives of Clinton Speedy-Duroux, Evelyn Greenup and Colleen Walker-Craig, in order to explain the inquiry purpose and process. The attendees were:

Family members

- Billy Greenup
- Clarice Greenup
- Natasha Greenup
- Rebecca Stadhams
- Robert Dunn
- Michelle Jarret
- Craig Jarrett
- Penny Stadhams
- Thomas Duroux
- Margie Buchanan
- Paula Craig
- Muriel Craig Junior

- Colleen Kelly
- Alison Stanbrook
- Gavin Stanbrook

Support persons

- Detective Chief Inspector Gary Jubelin, NSW Police Force
- Mr Craig Longman, Senior Researcher and Head of Legal Strategies, Jumbunna Institute for Indigenous Education and Research
- Associate Professor Pauline Clague, Jumbunna Institute for Indigenous Education and Research
- Ms Alison Whittaker, Research Fellow, Jumbunna Institute for Indigenous Education and Research

Others

- Detective Sergeant Gerry Bowden, NSW Police Force
- Ms Bianca Comina NSW Police Force
- Barry Toohey.

5. Draft minutes

Resolved, on the motion of Mrs Ward: That draft minutes no. 3 be confirmed.

6. Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

6.1 Review of section 102 of the *Crimes (Appeal and Review) Act 2001* conducted by Hon James Wood AO QC

The committee noted that submissions to the Wood review of Section 102 of the *Crimes (Appeal and Review) Act 2001* are not publicly available online.

Resolved, on the motion of Mrs Ward: That the committee write to the District Court and Supreme Court inviting them to provide a copy of their respective submissions to the Wood review and any additional comments they wish to make in relation the committee's inquiry.

7. 2019 Review of the Dust Diseases Scheme

7.1 Terms of reference

Resolved, on the motion of Mr Shoebridge: That the 2019 Review of the Dust Diseases Scheme focus on the response to silicosis in the manufactured stone industry in New South Wales.

Resolved, on the motion of Mr Khan: That the Chair write to Minister Dominello, further to previous correspondence, to advise that the committee has now resolved that the focus of the 2019 review of the dust diseases scheme be on the response to silicosis in the manufactured stone industry in New South Wales.

8. Inquiry into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019

The committee discussed access to the report and evidence from Operation Acacia and other related documents.

Resolved, on the motion of Mr Khan: That the Chair write to ICAC to request a copy of:

- the Operation Acacia report
- ***
- transcripts of public hearings in Operation Acacia
- a list of exhibits in Operation Acacia
- minutes/other obtainable documents related to the Jerry Plains community meeting of 28 July 2009, referenced in the Operation Acacia report.

Consideration of whether the secretariat should prepare a briefing paper was deferred until the next meeting.

9. Adjournment

The committee adjourned at 3.20 pm until Wednesday 24 July 2019 (public hearing for inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019).

Merrin Thompson
Committee Clerk

Minutes no. 5

Wednesday 24 July 2019
Standing Committee on Law and Justice
Macquarie Room, Parliament House, Sydney at 8.55 am

1. Members

Mr Blair, *Chair*
Mr Donnelly, *Deputy Chair*
Mr D'Adam
Mr Fang
Mr Roberts
Mr Shoebridge
Mrs Ward (until approximately 12.30 pm)

2. Apologies

Mr Khan

3. Previous minutes

Resolved on the motion of Mr Donnelly: That draft minutes no. 4 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 28 June 2019 – Letter from the Hon John Ajaka MLC, President and Procedure Committee Chair, to Chair, regarding an inquiry into the broadcast of proceedings resolution
- 1 July 2019 – Letter from Mr Stephen Rushton SC, Acting Chief Commissioner, Independent Commission Against Corruption, to Chair, responding to the committee's request for documents related to the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019
- 3 July 2019 – Letter from Hon Lynda Voltz MP – correspondence sent on behalf of Ms Lillian Ikoro regarding a motor vehicle accident in Parramatta
- 4 July 2019 – Letter from Justice D Price AM, President, The Dust Diseases Tribunal of New South Wales – notifying the committee that the Tribunal does not wish to make a submission to the dust diseases review
- 5 July 2019 – Letter from the Hon Dominic Perrottet MP, Treasurer, to the Clerk of the Parliaments, enclosing the NSW Government response to the 2018 review of the Dust Diseases scheme and 2018 review of the Lifetime Care and Support Scheme
- 9 July 2019 – Letter from Hon TF Bathurst SC, Chief Justice of New South Wales, indicating that he will not be providing input into the inquiry into the Crimes (Appeal and Review) Amendment (Double

Jeopardy) Bill 2019, and attaching a letter to Hon James Wood AO QC's review of Section 102 of the *Crimes (Appeal and Review) Act 2001 (NSW)*

- 11 July 2019 – Email from Mr Craig Longman, Head of Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, regarding the report on key messages from the committee's meeting with family members in Bowraville on 24 June 2019
- 16 July 2019 – Letter from Mr Stephen Rushton SC, Acting Chief Commissioner, Independent Commission Against Corruption, to Chair, relating to the status of Operation Acacia documents provided to the committee
- 18 July 2019 – Letter from Justice D Price AM, Chief Judge of the District Court of NSW, to Chair, regarding the inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019, and attaching a letter to Hon James Wood AO QC's review of Section 102 of the *Crimes (Appeal and Review) Act 2001 (NSW).*

Resolved on the motion of Mrs Ward: That the letter from Mr Stephen Rushton SC, Acting Chief Commissioner, Independent Commission Against Corruption, to Chair, relating to the status of Operation Acacia documents provided to the committee, dated 16 July 2019, be kept confidential at this stage.

Resolved on the motion of Mr Donnelly:

- That the letter from Justice D Price AM, Chief Judge of the District Court of NSW, to Chair, regarding the inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019, and attaching a letter to Hon James Wood AO QC's review of Section 102 of the Crimes (Appeal and Review) Act 2001 (NSW), be kept confidential
- That the secretariat inform the Attorney General's Office of having received the letter from Judge Price AM regarding the inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019, and its status as confidential.

Sent:

- 7 June 2019 – Letter from Chair to the Hon Don Harwin MLC, Leader of the Government in the Legislative Council, requesting an earlier response to the committee's recommendations in the 2018 review of the Dust Diseases scheme
- 7 June 2019 – Letter from Chair to Mr John Nagle, CEO and Managing Director, icare, requesting an update on the establishment of a dust diseases register
- 27 June 2019 – Letter from Chair to Acting Chief Commissioner, Independent Commission Against Corruption, requesting documents related to Operation Acacia for the inquiry into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019
- 27 June 2019 – Letter from Chair to the Honourable Justice D M Price AM, District Court of NSW, relating to the inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019
- 27 June 2019 – Letter from Chair to the Chief Justice of the Supreme Court of NSW, relating to the inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019
- 27 June 2019 – Letter from Chair to the Hon Victor Dominello MP, Minister for Customer Service, regarding the focus of the 2019 review of the dust diseases scheme being on the response to silicosis in the manufactured stone industry
- 2 July 2019 – Letter from Chair to Assistant Commissioner Mick Willing, NSW Police Force, thanking him for facilitating attendance of Detective Chief Inspector Gary Jubelin and others at the meeting in Bowraville on 24 June 2019
- 2 July 2019 – Letter from Chair to Mr Gavin Stanbrook, thanking him and family members for attending the meeting in Bowraville on 24 June 2019
- 2 July 2019 – Letter from Chair to Mr Thomas Duroux, thanking him and family members for attending the meeting in Bowraville on 24 June 2019
- 2 July 2019 – Letter from Chair to Ms Michelle Jarrett, thanking her and family members for attending the meeting in Bowraville on 24 June 2019.

The committee noted its resolution adopted on 19 June 2019: That unless a new issue arises, all correspondence received from a member of the public known to the committee remain confidential with no action taken.

5. Inquiry into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019

5.1 Public submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 3, 6, 7, 10 and 11.

5.2 Partially confidential submissions

The following submissions were partially published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 4 and 5.

Resolved, on the motion of Mr Shoebridge: That the committee keep the following information confidential, as per the request of the author: names and/or identifying and sensitive information in submission nos. 4 and 5.

Resolved, on the motion of Mr Shoebridge:

- That the committee authorise the publication of submission nos. 2, 8 and 9, with the exception of identifying and/or sensitive information which are to remain confidential, as per the recommendation of the secretariat.
- That the committee authorise the publication of submission no. 1, with the exception of sensitive information which is to remain confidential, as per the request of the author.

5.3 ICAC documents related to Operation Acacia

The committee noted that ICAC has provided documents related to Operation Acacia and provided some clarification as to the status of those documents in their recent letter.

Resolved, on the motion of Mr Fang: That:

- all of the documents received from ICAC relating to Operation Acacia be kept confidential
- the Chair write to the Office of the Director of Public Prosecutions to clarify whether it has any concerns about potential publication of documents related to Operation Acacia, and that this letter be kept confidential.

5.4 Hearing date

The committee noted that the hearing will take place on 9 August.

6. 2019 Review of the Dust Diseases Scheme

6.1 Submissions

The committee noted that submissions opened at the beginning of July and close on 12 August 2019.

6.2 Hearing dates

The committee noted that two hearing dates, 16 and 20 September 2019, were confirmed via email.

6.3 Pre-hearing questions for SIRA and icare

Resolved, on the motion of Mr Shoebridge: That as with previous reviews, the committee request the State Insurance Regulatory Authority and icare respond in writing to pre-hearing questions before the hearing date.

7. Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

7.1 Public submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-6, 9, 12-16, 21, 23, 24 and 25.

7.2 Partially confidential submissions

The following submissions were partially published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 7, 8, 10, 11, 17, 18, 20 and 22.

Resolved, on the motion of Mr Shoebridge: That the committee keep the following information confidential, as per the request of the author: names and/or identifying and sensitive information in submissions nos. 7, 8, 10, 11, 17, 18, 20 and 22.

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of submission no. 19, with the exception of identifying and/or sensitive information which is to remain confidential, as per the request of the author.

7.3 Answers to questions on notice

The committee noted that as the inquiry report is to be tabled on 30 August 2019, the due date for answers to questions on notice needs to be much shorter than the standard 21 days.

Resolved, on the motion of Mr D'Adam: That witnesses be requested to return answers to questions on notice and supplementary questions within seven days of the date on which the questions are forwarded to the witness.

7.4 Public hearing

The committee noted that it resolved via email:

- to accept the Chair's proposed list of witnesses
- that representatives of the Jumbunna Institute for Indigenous Education and Research be invited to give evidence at both the start and end of the hearing day.

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witnesses were sworn and examined:

- Distinguished Professor Larissa Behrendt, Professor of Law, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney
- Mr Craig Longman, Head, Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Kathrina Lo, Deputy Secretary, Law Reform and Legal Services Division, Department of Justice
- Ms Larisa Michalko, Director, Criminal Law Specialist, Law Reform and Legal Services Division, Department of Justice
- Mr Mark Follett, Director, Law Enforcement and Crime Team, Law Reform and Legal Services Division, Department of Justice
- Acting Assistant Commissioner Stuart Smith, Commander, State Crime Command, NSW Police Force.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Peter McGrath SC, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions
- Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal), Office of the Director of Public Prosecutions.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Gabrielle Bashir SC, Junior Vice President and Co-Chair, Criminal Law Committee, NSW Bar Association
- Mr Michael McHugh SC, Senior Vice President, NSW Bar Association.

The evidence concluded and the witnesses withdrew.

Mrs Ward left the meeting.

The following witness was sworn and examined:
- Professor David Hamer, Sydney Law School, University of Sydney.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:
- Ms Belinda Rigg SC, Senior Public Defender, The Public Defenders and Legal Aid NSW.

The evidence concluded and the witness withdrew.

The following witnesses were re-examined on their former oaths:
- Distinguished Professor Larissa Behrendt, Professor of Law, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney
- Mr Craig Longman, Head, Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney.

The Chair made a closing statement about the conduct of the hearing, in which he noted the uniqueness and complexity of the issues being examined in the inquiry. In keeping with the committee's role to examine in detail the implications of the bill, the Chair noted that the committee challenged all witnesses on their own views and those of other stakeholders, and that no line of questioning from any member should be taken to indicate the conclusions of the committee.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.07 pm.

The media and the public withdrew.

7.5 Report of key messages from family members at the meeting in Bowraville, 24 June 2019
The committee noted that it resolved via email to publish the report on key messages from family members at the meeting in Bowraville on 24 June 2019.

7.6 Approach to draft report
The committee discussed its approach to the inquiry report.

Resolved, on the motion of Mr Fang: That the secretariat make a confidential audio recording of the discussion, for the purposes of preparing the inquiry report.

Resolved, on the motion of Mr Roberts: That when forwarding questions on notice to Acting Assistant Commissioner Smith, NSW Police Force, the secretariat request that he confirm that the 470 unsolved cases referred to in his evidence are all homicide cases, and provide information on the numbers of serious child sexual assault and other life sentence cases where a conviction has not been obtained.

Resolved, on the motion of Mr Donnelly: That the Chair write to the Judicial Commission of NSW to seek information on recent updates to its Bench Books and other initiatives to improve cultural sensitivity to Indigenous people within the court system.

7.7 Public submission
Resolved, on the motion of Mr Donnelly: That the committee authorise the publication of submission no. 27.

7.8 Partially confidential submissions

Resolved, on the motion of Mr Donnelly: That the committee authorise the publication of submission nos. 26, 28 and 29, with the exception of identifying and/or sensitive information which is to remain confidential, as per the recommendation of the secretariat.

8. Adjournment

The committee adjourned at 4.58 pm until 9 August 2019 (public hearing for the inquiry into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019.

Merrin Thompson
Committee Clerk

Minutes no. 6

Thursday 8 August 2019
Standing Committee on Law and Justice
Room 1254, Parliament House, Sydney at 2.00 pm

1. Members

Mr Blair, *Chair*
Mr Donnelly, *Deputy Chair*
Mr D'Adam
Mr Fang
Mr Khan
Mr Roberts
Mr Shoebridge
Mrs Ward

2. Inquiry into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019

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3. Adjournment

The committee adjourned at. 2.15 pm until 9 August 2019 (public hearing for the inquiry into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019.

Tina Higgins
Committee Clerk

Minutes no. 7

Friday 9 August 2019
Standing Committee on Law and Justice
Preston-Stanley Room, Parliament House, Sydney at 9.50 am

1. Members

Mr Blair, *Chair*
Mr Donnelly, *Deputy Chair*
Mr D'Adam
Mr Fang
Mr Farlow (substituting for Mrs Ward)
Mr Khan
Mr Roberts
Mr Shoebridge

2. Apologies

Mrs Ward

3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 5 and 6 be confirmed.

4. Correspondence

The committee noted the following correspondence:

Received:

- 31 July 2019 – Letter from the Hon Natasha Maclaren-Jones MLC, Government Whip, to Chair, advising that the Hon Scott Farlow MLC will be substituting for the Hon Natalie Ward MLC at the meeting on 9 August 2019
- 31 July 2019 - Email from Mr Adam Raskall, Head of Engagement, icare, to secretariat, inviting the committee to visit the new medical centre that provides testing for silicosis
- 30 July 2019 – Letter from Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, to Chair, offering to provide a briefing to the committee on its regulatory role
- 1 August 2019 – Letter from Mr Peter McGrath SC, Acting Director of the Office of Public Prosecutions, to the Chair, regarding the potential publication of material that may be adverse to any accused persons in trials arising from Operations Acacia and Jasper
- ***
- 1 August 2019 – Email from Mr Andrew Poole to the secretariat, declining the committee's invitation to appear as a witness at the hearing on 9 August 2019
- 1 August 2019 – Email from Mr Craig Ransley to the secretariat, declining the committee's invitation to appear as a witness at the hearing on 9 August 2019
- 3 August 2019 – Email from Dr Barry Gordon, NuCoal shareholder, declining the committee's invitation to appear as a witness at the hearing on 9 August 2019
- 5 August 2019 – Email from the Hon Mark Buttigieg MLC, Opposition Whip, to secretariat, advising that the Hon Daniel Mookhey will be a participating member on the committee's 2019 review of the dust diseases scheme for the duration of the inquiry
- 6 August 2019 – Email from Mr Rod Doyle, NuCoal shareholder, advising that his wife Pauline declines the invitation to appear as a witness at the hearing on 9 August 2019
- 6 August 2019 – Letter from Mr Tim Reardon, Secretary, Department of Premier and Cabinet, to the Chair, declining the committee's invitation to appear as a witness at the hearing on 9 August 2019, and attaching graphs on NuCoal's share prices
- ***

Resolved, on the motion of Mr Khan: That the letter from Mr Peter McGrath SC, Acting Director of the Office of Public Prosecutions, to the Chair, regarding the potential publication of material that may be adverse to any accused persons in trials arising from Operations Acacia and Jasper, be kept confidential.

Sent:

- ***
- 1 August 2019 – Letter from Chair to Mr Craig Ransley, regarding an invitation to give evidence at the hearing
- 1 August 2019 – Letter from Chair to Mr Andrew Poole, regarding an invitation to give evidence at the hearing
- ***
- 1 August 2019 – Letter from Chair to Mr Stephen Rushton SC, Acting Chief Commissioner, Independent Commission Against Corruption, regarding an invitation to give evidence at the hearing
- 1 August 2019 – Letter from Chair to Mr Tim Reardon, Secretary, Department of Premier and Cabinet, regarding an invitation to give evidence at the hearing
- 1 August 2019 – Letter from Chair to Mr Jim Betts, Secretary, Department of Planning, Industry and Environment, regarding an invitation to give evidence at the hearing
- 30 July 2019 - Letter from Chair to Mr Ernest Schmatt AO PSM, Chief Executive, Judicial Commission of NSW, seeking information on the Commission's initiatives to improve cultural sensitivity towards Indigenous people
- Letter from secretariat to Mr Peter McGrath SC, Acting Director of Public Prosecutions, seeking publication status of documents provided by ICAC in relation to Operation Acacia.

5. 2019 Review of the Dust Diseases Scheme

5.1 Provision of documents to participating member

Resolved, on the motion of Mr Donnelly: That the Hon Daniel Mookhey MLC, who has advised the committee that he intends to participate for the duration of the inquiry into 2019 Review of the Dust Diseases Scheme, be provided with copies of inquiry related documents.

5.2 Invitation to visit new silicosis testing centre

Resolved, on the motion of Mr Fang: That the committee visit icare's new silicosis testing centre in Sydney, on a date to be canvassed by the secretariat.

6. Oversight reviews and role of SIRA

Resolved, on the motion of Mr Fang: That the committee have an informal briefing with SIRA about its regulatory role and the independent review of the nominal insurer currently being undertaken, on a date to be canvassed by the secretariat.

7. Inquiry into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019

7.1 Public submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 13, 16-21 and 25.

7.2 Partially confidential submissions

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of:

- submission nos. 9a and 14, with the exception of identifying and/or sensitive information which are to remain confidential, as per the recommendation of the secretariat
- submission nos. 15 and 22, with the exception of identifying and/or sensitive information which are to remain confidential, as per the request of the author or identified by the secretariat.

- submission no. 12, with the exception of the section with potential adverse mention, as recommended by the secretariat.

7.3 Confidential submissions
Resolved, on the motion of Mr Fang: That the committee keep
- submission no. 23 confidential, as per the request of the author.
- submission nos. 19 and 24 confidential, as per the recommendation of the secretariat.

7.4 Attachments to submissions
The committee noted that various attachments had been distributed.

7.5 ICAC documents related to Operation Acacia
Resolved, on the motion of Mr Khan: That the committee keep confidential all material provided by the Independent Commission Against Corruption.

***

7.6 Approach to questioning
In light of the correspondence received from the Office of the Director of Public Prosecutions, the Chair discussed the committee's approach to questioning witnesses.

7.7 Briefing paper
Resolved, on the motion of Mr Shoebridge: That the committee keep the briefing paper confidential, as per the recommendation of the secretariat, as it contains sensitive information.

8. Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

8.1 Public submissions
The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 21a and 25a.

8.2 Answers to questions on notice and supplementary questions
The following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:
- Department of Justice, received 5 August 2019
- Jumbunna Institute for Indigenous Education and Research, received 5 August 2019
- Professor David Hamer, received 5 August 2019
- NSW Bar Association, received 5 August 2019
- Office of Public Prosecutions, received 7 August 2019
- NSW Police Force, received 6 August 2019.

Resolved, on the motion of Mr Shoebridge: That the secretariat request further clarification in relation to the data provided by the Office of Public Prosecutions.

8.3 Correspondence from Judge Price
Resolved, on the motion of Mr Shoebridge: That the correspondence from Judge Price be kept confidential and not provided to the Attorney General.

8.4 Approach to draft report
The committee discussed its approach to the double jeopardy bill inquiry report.

9. Inquiry into the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019

9.1 Public hearing
Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witnesses were sworn and examined:

- Mr Gordon Galt, Chairman, NuCoal Resources
- Mr Michael Davies, Non-Executive Director, NuCoal Resources
- Mr Glen Lewis, Non-Executive Director, NuCoal Resources.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Darrell Lantry, shareholder
- Mrs Michelle Lantry, shareholder
- Mr Rodney Doyle, shareholder.

The evidence concluded and the witnesses withdrew.

The media and the public withdrew.

Resolved, on the motion of Mr Shoebridge: That the committee accept and publish the following document tendered during the public hearing:

- RBS Morgans Report – NuCoal – 12 May 2012.

9.2 Further activity

The committee discussed meeting in the future to consider further activity related to this inquiry.

Resolved, on the motion of Mr Roberts: That the Chair write to the Department of Foreign Affairs and Trade to request copies of recent correspondence provided to them from the US Trade Representative Ambassador Robert Lighthizer in relation to this matter.

10. Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

10.1 Informing Bowraville family members of report tabling

Resolved, on the motion of Mr Fang: That the Bowraville family members and representatives from Jumbunna be invited to meet with the committee the day the report is tabled.

11. Next meeting

Monday 16 September 2019 (2019 Review of the Dust Diseases Scheme public hearing)

Tina Higgins
Committee Clerk

Draft minutes no. 8

Wednesday 28 August 2019
Standing Committee on Law and Justice
McKell Room, Parliament House, Sydney, 9.05 am

1. Members present

Mr Blair, *Chair*
Mr Donnelly, *Deputy Chair*
Mr D'Adam *(from 9.15 am)*
Mr Fang
Mr Roberts
Mr Shoebridge
Mrs Ward

2. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 7 be confirmed.

3. Correspondence

The committee noted the following item of correspondence:

Received:

- 31 July 2019 – Letter from individual to Chair, regarding the 2019 review of the dust diseases scheme
- 20 August 2019 – Email from Mr Steven Dyokas, Deputy Economic Counselor, US Embassy Canberra, to Chair, regarding US investor concerns related to the cancellation of exploration licence 7270, attaching letter from Karl Ehlers, Assistant US Trade Representative for Southeast Asia and the Pacific, Executive Office of the President, Office of the United States Trade Representative to Greg Wilcock, Department of Foreign Affairs and Trade
- 9 August 2019 – Letter from Mr Ernest Schmatt AO PSM, Chief Executive, Judicial Commission of New South Wales, to Chair, responding to committee's request for information on the Commission's initiatives to improve cultural sensitivity towards Indigenous people.

Sent:

- 19 August 2019 – Letter from the Chair to Ms Patricia Holmes, Assistant Secretary, Department of Foreign Affairs and Trade, regarding representations made by the US Trade Representative Ambassador relevant to the cancellation of exploration licence 7270
- ***

The Committee noted that it previously resolved via email that the Letter from Mr Ernest Schmatt AO PSM, Judicial Commission, to the Chair, received 9 August 2019, be published.

4. 2019 Review of the Dust Diseases Scheme

4.1 Public submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 2-10.

4.2 Confidential submission

Resolved on the motion of Mr Fang: That the committee keep submission no. 1 confidential, as per the request of the author.

4.3 Visit to icare's silicosis testing centre

Resolved on the motion of Ms Ward: That the committee visit icare's new silicosis testing centre on 16 September 2019.

5. Oversight role

5.1 Informal briefing

Resolved, on the motion of Mr Shoebridge: That the committee defer consideration of icare's invitation to provide an informal briefing on its role until after the budget estimates hearings.

6. Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

6.1 Answers to questions on notice

The following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Office of the Director of Public Prosecutions, received 12 August 2019
- Additional information, NSW Police Force, received 13 August 2019
- Addendum, NSW Bar Association, received 14 August 2019.

6.2 Consideration of Chair's draft report

The Chair submitted his draft report entitled *'Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019*' which, having been previously circulated, was taken as being read.

Mr D'Adam joined the meeting.

Resolved, on the motion of Mr Shoebridge:

- that paragraph 1.33 be amended by inserting 'from those primarily legal stakeholders that he consulted with', after 'strong opposition'.
- that the following new paragraph be inserted after the quote following paragraph 1.33:

'This review is timely given the recent legal proceedings.'

Resolved, on the motion of Mr Shoebridge: That the heading above paragraph 2.13 be amended by omitting 'The legal fraternity's perspective' and inserting instead 'Concerns about the Bill from legal agencies and organisations'.

Mr Shoebridge moved: That paragraph 2.13 be amended by omitting the first sentence:

'Members of the legal fraternity were of one voice in their opposition to the Bill.'

Question put.

The committee divided.

Ayes: Mr Shoebridge.

Noes: Mr Blair, Mr Donnelly, Mr D'Adam, Mr Fang, Mr Khan, Mr Roberts, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That the first sentence in paragraph 2.13 be amended by inserting at the start, 'The overwhelming majority of'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.13 be amended by inserting 'Jumbunna and Professor David Hamer supported the direction of the reform.' after 'unchanged'.

Mr Shoebridge moved: That the heading above paragraph 2.83 and the first sentence in 2.83 be amended by omitting 'Other hurdles' and inserting instead 'checks and balances'.

Question put and negatived.

Resolved, on the motion of Mr Shoebridge: That the final sentence in paragraph 2.100 be omitted:

'While the legal fraternity were of one voice in opposing the Bill on the most fundamental of principles, even those participants who supported the objectives of the Bill and the principles underpinning it had concerns about its detail.'

And the following sentence inserted instead:

'While there was opposition to the Bill among many in the legal community, there were also those who supported the objectives and principles in it, but had alternative proposals for the detail of how these might be achieved.'

Resolved, on the motion of Mr Shoebridge: That the last sentence in paragraph 2.102 be amended by omitting '— and we are disappointed that we have not been able to find a resolution for them' after 'fighting spirit' and inserting instead ', despite all the challenges.'

Mr Shoebridge moved: That the second sentence of paragraph 2.106 be amended by omitting 'widespread' after 'there was'.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.106 be amended by inserting at the end:

'Indeed the initial 2006 reforms in New South Wales were supported in the Parliament, based in some significant part, on the Bowraville cases. This is a matter to be considered in responding to the Bill and other potential law reforms, but it is not determinative of the matter.'

Mr Shoebridge moved: That the first sentence of paragraph 2.107 be amended by omitting 'This dilemma could potentially be overcome if', and inserting instead 'We also note the evidence to the committee that'.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That the last sentence in paragraph 2.108 be amended by omitting 'highly' before 'probable that this group exists'.

Resolved, on the motion of Mr Shoebridge: That a new paragraph be inserted after paragraph 2.109:

'On balance, while the committee does not believe the Bill as drafted should proceed, we will consider the potential other options later in this report.'

Resolved, on the motion of Mr Shoebridge: That the heading above paragraph 3.42 be amended by omitting 'Other legal perspectives' and inserting instead 'Alternative approaches to finality'.

Resolved, on the motion of Mr Shoebridge: That the first sentence in paragraph 3.42 be amended by omitting 'legal fraternity's concerns' after 'responded to' and inserting instead 'concerns from the legal fraternity'.

Resolved, on the motion of Mr Shoebridge: That the heading above paragraph 3.59 be amended by omitting 'The legal fraternity's perspectives' and inserting instead 'Concerns about retrospectivity'.

Resolved, on the motion of Mr Shoebridge: That the heading above paragraph 3.66 be amended by omitting 'Other legal perspectives' and inserting instead 'Arguments for retrospective laws'.

Resolved, on the motion of Mr Shoebridge: That the heading above paragraph 3.80 be amended by omitting 'The legal fraternity's perspectives' and inserting instead 'Applying proposed changes to convictions'.

Resolved, on the motion of Mr Shoebridge: That the heading above paragraph 3.84 be amended by omitting 'Other legal perspectives' and inserting instead 'Distinguishing conviction and acquittal appeals'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.117:

'In the course of reviewing the Bill referred to this committee an alternative reform was proposed to achieve the same stated goals as the Bill, but through an alternative form of wording. This proposal, which has the support of the NSW Police Force amongst others, was brought by Jumbunna.'

Mr Shoebridge moved: That the following new paragraphs be inserted after the new paragraph following 3.117:

While there was a great deal of evidence from certain stakeholders that any change to the laws of double jeopardy would cause a significant erosion to the principle of finality, this position was contested by

evidence of both Professor Hamer and Jumbunna and the submissions from the Bowraville families. It is true that any opening of the exception to double jeopardy would provide a further avenue to review an acquittal and this would have the effect of reducing finality in a very limited number of cases.

In this regard the committee notes the large number of checks and balances that would remain in the system even if Jumbunna's proposed reforms were implemented. They include:

- [list all the elements in the CARA including the consent of the Attorney General or DPP, the interests of justice, compelling and fresh etc.]

We also note that the question of finality is only one of a number of, sometimes competing, values or principles in the criminal justice system. Other principles that must be considered include the need to provide justice, not just to alleged perpetrators of crimes, but also to victims and survivors of crimes, the ability to correct errors, as well as the need to maintain community confidence in the system.

These considerations can, on occasion, compete with the principle of finality. Indeed they have lead in the past to significant legal reforms that have eroded the principle of finality through an array of appeal and review provisions in the criminal justice system, none of which have brought the system into disrepute.'

Mr D'Adam moved: That the motion of Mr Shoebridge be amended by omitting the last two paragraphs.

The committee divided.

Ayes: Mr Blair, Mr Donnelly, Mr D'Adam, Mr Fang, Mr Khan, Mrs Ward.

Noes: Mr Shoebridge, Mr Roberts.

Question resolved in the affirmative.

Mr Khan moved: That the motion of Mr Shoebridge be amended by:

- omitting from the first sentence of the first paragraph 'certain stakeholders' after 'a great deal of evidence from' and inserting instead 'the overwhelming majority of the legal fraternity'
- omitting from the first sentence of the second paragraph 'checks and balances' after 'a large number of' and inserting instead 'hurdles'.

The committee divided.

Ayes: Mr Blair, Mr Donnelly, Mr D'Adam, Mr Fang, Mr Khan, Mr Roberts, Mrs Ward.

Noes: Mr Shoebridge.

Question resolved in the affirmative.

Original question, as amended, put and passed.

Mr Shoebridge moved: That the following new paragraphs be inserted after the new paragraphs following paragraph 3.117:

'We are not persuaded by the evidence of opponents to reform that the changes proposed by Jumbunna would lead to a flood of applications, nor would they significantly alter the fundamentals of the criminal justice system. The proposed reforms are modest, considered and carefully drafted. As numerous submissions pointed out, the 2006 reforms to the law on double jeopardy have not been successfully used on a single occasion. Indeed the Bowraville case of XX remains the only time that they have been considered by the NSW Court of Criminal Appeal.

We are strengthened in our conclusion that the changes would not open floodgates by the experience in the United Kingdom. Despite the UK provisions applying to a significantly broader class of offences, having less checks and balances, a broader definition of what evidence can found an application and applying to a significantly larger population, there have been less than 20 applications made. Further, no witness was able to identify a case that had produced a result that could be cogently criticised as being unjust or inappropriate.'

Mr Khan moved: That the motion of Mr Shoebridge be amended by:

- omitting from the first sentence of the first paragraph 'by the evidence of opponents to reform' after 'persuaded'
- omitting from the first paragraph 'nor would they significantly alter the fundamentals of the criminal justice system. The proposed reforms are modest, considered and carefully drafted.'
- omitting the first sentence of the second paragraph 'We are strengthened in our conclusion that the changes would not open floodgates by the experience in the United Kingdom.' And inserting instead 'The United Kingdom has demonstrated that these changes have not produced a flood of cases.'
- Omitting the final sentence of the second paragraph 'Further, no witness was able to identify a case that had produced a result that could be cogently criticised as being unjust or inappropriate.'

The committee divided.

Ayes: Mr Blair, Mr Donnelly, Mr D'Adam, Mr Fang, Mr Khan, Mr Roberts, Mrs Ward.

Noes: Mr Shoebridge.

Question resolved in the affirmative.

Original question, as amended, put and passed.

Mr Shoebridge moved: That the following new paragraph be inserted after the new paragraphs following paragraph 3.117:

> 'Given the above, the committee believes it is appropriate for the NSW Government to consider the alternative reform model proposed by Jumbunna. This will necessarily include consideration of its impact beyond the Bowraville case, and will need to address the merits of broadening the exception to double jeopardy, against considerations such as finality and certainty. While any consideration must extend beyond the Bowraville case, given the effluxion of time in the Bowraville matter, and that community's legitimate demand for a prompt response from both the NSW Parliament and the NSW Government, we would urge the Government to respond to this matter with a sense of urgency. If possible, we would be seeking that considered response be delivered in less than the six months usually provided for a Government response to a Committee report.'

Mr Khan moved: That the motion of Mr Shoebridge be amended by omitting all words after 'finality and certainty.'

The committee divided.

Ayes: Mr Blair, Mr Donnelly, Mr D'Adam, Mr Fang, Mr Khan, Mr Roberts, Mrs Ward.

Noes: Mr Shoebridge.

Question resolved in the affirmative.

Original question, as amended, put and passed.

Mr Shoebridge moved: That a new recommendation be inserted following the new paragraphs after 3.117:

> 'That the NSW Government consider the alternative reform model proposed by the Jumbunna Institute of Indigenous Education and Research and provide any potential legislative response as soon as practically possible.'

Mr Khan moved: That the motion of Mr Shoebridge be amended by omitting 'and provide any potential legislative response as soon as practically possible'.

The committee divided.

Ayes: Mr Blair, Mr Donnelly, Mr D'Adam, Mr Fang, Mr Khan, Mr Roberts, Mrs Ward.

Noes: Mr Shoebridge.

Question resolved in the affirmative.

Original question, as amended, put and passed.

Mr Roberts moved: That:

a) The draft report as amended be the report of the committee and that the committee present the report to the House;

b) The transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;

c) Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;

d) Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;

e) The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

f) The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;

g) Dissenting statements be provided to the secretariat by 10.00 am Thursday 29 August 2019;

h) That the report be tabled on Friday 30 August 2019.

6.3 Meeting with Bowraville families on 30 August 2019

Mr Shoebridge moved: That representatives of Jumbunna Institute for Indigenous Education and Research, Mr Gary Jubelin and a representative of the Attorney General be invited to attend the committee's meeting with Bowraville families after the report is tabled on 30 August 2019.

7. Adjournment

The committee adjourned at 10.30 am until 1.00 pm Friday 30 August 2019 (meeting with Bowraville families).

Merrin Thompson
Committee Clerk

Appendix 4 Part 8, Division 2, *Crimes (Appeal and Review) Act 2001 (NSW)*

Crimes (Appeal and Review) Act 2001 No 120

Current version for 28 November 2018 to date (accessed 29 August 2019 at 10:38)

Part 8 > Division 2

Division 2 Retrial after acquittal for very serious offence

99 Application of Division

(1) This Division applies where:

(a) a person has been acquitted of an offence, and

(b) according to the rules of law relating to double jeopardy (including rules based on abuse of process), the person is thereby precluded or may thereby be precluded from being retried for the same offence, or from being tried for some other offence, in proceedings in this State.

Note. Under section 100 a person to whom this Division applies can only be retried for a life sentence offence (in the case of fresh or compelling evidence). Under section 101 a person to whom this Division applies can only be retried for a 15 years or more sentence offence (in the case of a tainted acquittal).

(2) This section extends to a person acquitted in proceedings outside this State of an offence under the law of the place where the proceedings were held. However, this section does not so extend if the law of that place does not permit that person to be retried and the application of this Division to such a retrial is inconsistent with the Commonwealth Constitution or a law of the Commonwealth.

(3) This section extends to a person acquitted before the commencement of this Division.

100 Court of Criminal Appeal may order retrial—fresh and compelling evidence

(1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence if satisfied that:

(a) there is fresh and compelling evidence against the acquitted person in relation to the offence, and

(b) in all the circumstances it is in the interests of justice for the order to be made.

(2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).

(3) The Court of Criminal Appeal may order a person to be retried for a life sentence offence under this section even if the person had been charged with and acquitted of manslaughter or other lesser offence.

(4) The Court of Criminal Appeal cannot order a person to be retried for a life sentence offence under this section where the person had been charged with and acquitted of the life sentence offence but had been convicted instead of manslaughter or other lesser offence.

101 Court of Criminal Appeal may order retrial—tainted acquittals

(1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a 15 years or more sentence offence if satisfied that:

(a) the acquittal is a tainted acquittal, and

(b) in all the circumstances it is in the interests of justice for the order to be made.

(2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).

(3) The Court of Criminal Appeal may order a person to be retried for a 15 years or more sentence offence under this section even if the person had been charged with and acquitted of a lesser offence.

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.

103 Tainted acquittals—meaning

(1) This section applies for the purpose of determining under this Division whether the acquittal of an accused person is a tainted acquittal.

(2) An acquittal is ***tainted*** if:

(a) the accused person or another person has been convicted (in this State or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted, and

(b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

(3) An acquittal is not a tainted acquittal if the conviction for the administration of justice offence is subject to appeal as of right.

(4) If the conviction for the administration of justice offence is, on appeal, quashed after the Court of Criminal Appeal has ordered the acquitted person to be retried under this Division because of the conviction, the person may apply to the Court to set aside the order and:

(a) to restore the acquittal that was quashed, or

(b) to restore the acquittal as a bar to the person being retried for the offence,

as the case requires.

104 Interests of justice—matters for consideration

(1) This section applies for the purpose of determining under this Division whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.

(2) It is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances.

(3) The Court is to have regard in particular to:

(a) the length of time since the acquitted person allegedly committed the offence, and

(b) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for the retrial of the acquitted person.

105 Application for retrial—procedure

(1) Not more than one application for the retrial of an acquitted person may be made under this Division in relation to an acquittal.

(1A) An application may be made for a further retrial of a person acquitted in a retrial under this Part but only if it is made on the basis that the acquittal at the retrial was tainted.

(2) An application for the retrial of an acquitted person cannot be made under this Division unless the person has been charged with the offence for which a retrial is sought or a warrant has been issued for the person's arrest in connection with such an offence.

Note. Section 109 requires the Director of Public Prosecutions' approval for the arrest of the accused or for the issue of a warrant for his or her arrest.

(3) The application is to be made not later than 28 days after the person is so charged with that offence or the warrant is so issued for the person's arrest. The Court of Criminal Appeal may extend that period for good cause.

(4) The Court of Criminal Appeal must consider the application at a hearing.

(5) The person to whom the application relates is entitled to be present and heard at the hearing (whether or not the person is in custody). However, the application can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.

(6) The powers of the Court of Criminal Appeal under section 12 of the *Criminal Appeal Act 1912* may be exercised in connection with the hearing of the application.

(7) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned should be tried on the same indictment.

(8) If the Court of Criminal Appeal determines in proceedings on an application under this Division that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.

106 Retrial

(1) An indictment for the retrial of a person that has been ordered under this Division cannot, without the leave of the Court of Criminal Appeal, be presented after the end of the period of 2 months after the order was made.

(2) The Court must not give leave unless it is satisfied that:

(a) the prosecutor has acted with reasonable expedition, and

(b) there is good and sufficient cause for the retrial despite the lapse of time since the order was made.

(3) If, after the end of the period of 2 months after an order for the retrial of an accused person was made under this Division, an indictment for the retrial of the person has not been presented or has been withdrawn or quashed, the person may apply to the Court of Criminal Appeal to set aside the order for the retrial and:

(a) to restore the acquittal that was quashed, or

(b) to restore the acquittal as a bar to the person being tried for the offence,

as the case requires.

(4) If the order is set aside, a further application cannot be made under this Division for the retrial of the accused person in respect of the offence concerned.

(5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person or, as the case requires, that it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

Appendix 5 The Bill's proposed amendments to the *Crimes (Appeal and Review) Act 2001* (NSW)

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.

(2A) Evidence is also fresh if:

(a) it was inadmissible in the proceedings in which the person was acquitted, and

(b) as a result of a substantive legislative change in the law of evidence since the acquittal, it would now be admissible if the acquitted person were to be retried.

(2B) Subsection 2A extends to a person acquitted before the commencement of that subsection.

(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.~~

…

105 Application for retrial—procedure

(1) Not more than one application for the retrial of an acquitted person may be made under this Division in relation to an acquittal.

(1AA) Despite subsection (1), the Court of Criminal Appeal may allow a second application for the retrial of an acquitted person to be made under this Division in relation to an acquittal if the Court is satisfied that exceptional circumstances apply.

(1AB) For the purposes of subsection (1AA), exceptional circumstances are taken to include any substantive legislative change to this Division made since the previous application.

(1A) An application may be made for a further retrial of a person acquitted in a retrial under this Part but only if it is made on the basis that the acquittal at the retrial was tainted.

(2) An application for the retrial of an acquitted person cannot be made under this Division unless the person has been charged with the offence for which a retrial is sought or a warrant has been issued for the person's arrest in connection with such an offence.

Note. Section 109 requires the Director of Public Prosecutions' approval for the arrest of the accused or for the issue of a warrant for his or her arrest.

(3) The application is to be made not later than 28 days after the person is so charged with that offence or the warrant is so issued for the person's arrest. The Court of Criminal Appeal may extend that period for good cause.

(4) The Court of Criminal Appeal must consider the application at a hearing.

(5) The person to whom the application relates is entitled to be present and heard at the hearing (whether or not the person is in custody). However, the application can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.

(6) The powers of the Court of Criminal Appeal under section 12 of the *Criminal Appeal Act 1912* may be exercised in connection with the hearing of the application.

(7) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned should be tried on the same indictment.

(8) If the Court of Criminal Appeal determines in proceedings on an application under this Division that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.