NEW SOUTH WALES
BAR ASSOCIATION

Legislative Council
Standing Committee on Law and Justice
Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019
Answers to Questions on Notice

INTRODUCTION

1. At the proceedings of the Standing Committee on Law and Justice ("**the Standing Committee**") on Wednesday, 24 July 2019:

   (i) the New South Wales Bar Association ("**the Association**") offered to provide the Standing Committee with an overview and analysis of the law in Scotland regarding retrials following acquittals;
   (ii) the Standing Committee requested that the Association provide additional information regarding the operation of the English double-jeopardy model contained within Pt 10 of the *Criminal Justice Act 2003* (UK) ("**CJA**"); and
   (iii) the Standing Committee requested information from the Association concerning the numbers of interlocutory appeals made by the Crown under s 5F of the *Criminal Appeals Act 1912* (NSW) ("**CAA 1912**").

2. To assist the Standing Committee in its consideration of the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 (NSW) ("**the Bill**"), the Association here provides:

   (i) in the section entitled "**Fresh Evidence**" below, submissions regarding the meaning of "fresh evidence" at common law and for the purposes of ss 100(1)(a) and 102(2) of the *Crimes (Appeal and Review) Act 2001* (NSW) ("**CARA**");
   (ii) in the section entitled "**The Scottish Position**" below, submissions regarding the operation of the *Double Jeopardy (Scotland) Act 2011* (Scot);
   (iii) at **Table 1**, a list of authorities the Association has been able to locate on Pt 10 of the CJA; and,
   (iv) at **Table 2**, an analysis of the numbers of interlocutory appeals made by the Crown between 2000/1 and 2017/18 generally under s 5F of CAA 1912.

   The Association obtained data recorded in **Table 2** from the Office of the Director of Public Prosecutions' (**ODPP's**) annual reports for the years 2000/1 to 2017/18. The ODPP's annual reports do not, however, specify whether prosecution appeals under s 5F of CAA 1912 related to decisions or rulings on the admissibility of evidence. The Association awaits a response from the ODPP as to whether the numbers of appeals under s 5F(3A) of CAA 1912 since the coming into force of that provision on 14 February 2004 are available. The Association shall provide the Standing Committee with statistics on the Crown's use of s 5F(3A), if possible, as soon as the ODPP's response is received.

3. The Association also wishes to draw the Standing Committee's attention to errata on page 6 of its letter of 26 June 2019. The paragraph references to the case of *Attorney General (New South Wales) v XX* [2018] NSWCCA 198 ("***XX***") ought to read "244" and "255" rather than "224" and "225", respectively. Ms Bashir SC referred to the correct paragraphs in her oral evidence.

FRESH EVIDENCE

4. When determining whether to permit a defendant's retrial for a prescribed offence under s 100 of CARA, the Court of Criminal Appeal must be satisfied, first, that "fresh and compelling" evidence is available to the Crown and, second, that it is in the interest of justice for a retrial to occur.

5. The term "fresh" appears in ss 100(1)(a) and 102(2) of CARA and was the subject of extensive judicial consideration in *XX*. As was noted by Bathurst CJ in *XX*, "*the distinction between "new" and "fresh" evidence is one that was well-established in this country at the time that Part 8 of CARA was enacted*". That distinction was delineated by the High Court in *Ratten v The Queen* (1974) 131 CLR 510 ("***Ratten***"), where Barwick CJ held (at 516) that "fresh" evidence was:

> *evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case*.

Significantly, the statutory definition of "fresh" in s 102(2) of CARA closely follows Barwick CJ's definition of the term at common law:

> [e]*vidence 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.*

In *XX*, Bathurst CJ concluded (at 231) that it was not "*inappropriate to take into account the concept of 'fresh evidence' at common law in determining the correct construction of s 102(2)* [of CARA]".

6. Evidence is seen as being constructively "available" if it could have been discovered or made available at the trial by the exercise of due diligence: *Ratten* at 517; *R v Abou-Chabake* (2004) 149 A Crim R 417 at 427 [63].

7. Chief Justice Barwick in *Ratten* contrasted the common-law definition of "fresh evidence" with the concept of "new" evidence, describing the latter (at 520) in the following terms:

> *To sum up, if the **new material,** whether or not it is fresh evidence, convinces the court upon its own view of that material that there has been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, the verdict will be quashed without more. But if the **new material** does not so convince the court, and the only basis put forward for a new trial is the production of **new material**, no miscarriage will be found if that new material is not fresh evidence. But if there is **fresh evidence** which in the court's view is properly capable of acceptance and likely to be accepted by a jury, and which is so cogent in the opinion of the court that, being believed, it is likely to produce a different verdict, a new trial will be ordered as a remedy for the miscarriage which has occurred because of the absence at the trial of the **fresh evidence**. (Emphasis added)*

8. In *Ratten*, "newness" was treated as distinct from "freshness", with "new" evidence defined according to its probative value and not by whether the evidence was actually unavailable, or could not have been made available despite the exercise of reasonable diligence, at the original trial. It was still subject to the tests of relevance, credibility and cogency. In *Wood v R* [2012] NSWCCA 21, McClellan CJ at CL (at [706]-[714]) summarised the difference and explained the distinction recognised in the criminal law. His Honour defined "new evidence" as evidence that was available and not adduced at the trial.

9. As was noted by Bathurst CJ in *XX*,[1] while elements of Barwick CJ's judgment in *Ratten* have subsequently been doubted,[2] his distinction between "fresh evidence" and "new evidence" has been accepted.[3]

THE SCOTTISH POSITION

10. "The UK position" is somewhat of a misnomer when used to describe the retrial regime ushered in by the CJA. Section 75 (1) of the CJA applies in terms to only England and Wales. The same definition of "new" evidence does not apply in Scotland. The *Double Jeopardy (Scotland) Act 2011* (Scot) ("**the Scottish Act**") governs exceptions to the rule against double jeopardy there.

11. The Scottish Act permits, in limited circumstances, retrial following acquittal where (i) an acquittal is tainted,[4] (ii) an admission was made or became known after acquittal,[5] or (iii) where 'new' evidence is available.[6] Under s 4(4) of the Scottish Act, "new" evidence cannot be evidence that was inadmissible at trial and has 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.

12. Applications for retrial on the basis of new evidence are made by the Lord Advocate (equivalent to both the Attorney-General and Director of Public Prosecutions) to the High Court of Justiciary (equivalent to the Court of Criminal Appeal). Such applications may only be made once.[7] The High Court of Justiciary will only permit a new-evidence retrial if the following conditions are satisfied:

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[1] At 229.

[2] See *Whitehorn v The Queen* (1983) 152 CLR 657 at 686-687; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 532-534; *Gallagher v The Queen* (1986) 160 CLR 392 at 409-410 ("***Gallagher***").

[3] See *Gallagher*, at 395 per Gibbs J; *Mickelberg v The Queen* (1989) 167 CLR 259, at 301, per Toohey and Gaudron JJ.

[4] Section 2 of the Scottish Act.

[5] Section 3 of the Scottish Act.

[6] Section 4 of the Scottish Act.

[7] Section 4(5) of the Scottish Act. As with the CJA and CARA, a retrial that itself resulted in acquittal would appear to constitute a separate acquittal from which a further retrial could be permitted if the new-/fresh-evidence requirements were met.

a. The application is based on evidence that was not available, and "could not with the exercise of due diligence have been made available", at the original trial.[8] The Scottish Act here approximates CARA and is in marked contrast with the English and Welsh system.[9]
b. The case against the acquitted person must additionally be "strengthened substantially" by such new evidence.[10]
c. The court must also be satisfied that it is "highly likely", given the new evidence and the evidence led at the original trial, that "a reasonable jury properly instructed would have convicted the person of the original offence".[11] The Scottish Act here contrasts with the CJA, which "does not require the court to second guess the impact of the evidence on a jury but instead asks whether 'it appears highly probative of the case against the acquitted person' [CJA, s 78(3)(c)]".[12]
d. The court must finally be satisfied that it is in the interest of justice to permit a retrial.[13] The Scottish Act – unlike the CJA and CARA – is silent as to the factors to be taken into account when determining whether retrial is in the interests of justice. The High Court of Justiciary in ***HM Advocate v Sinclair*** filled that void and noted the following as relevant considerations:

> *the fact of the acquittal, the effect any publicity attendant thereon might have on a subsequent trial, the importance of the rule against double jeopardy, the importance of finality, the stress which might be caused to an accused, to witnesses, to victims or their families, the seriousness of the crime(s), the nature and strengthening effect of the new evidence and the conduct of the Crown, both at the time of the original trial and since.*[14]

13. The exceptions to the double-jeopardy rule within the Scottish Act apply regardless of when an acquittal occurred.[15] However, as noted, the new evidence used to justify retrial cannot be evidence that was inadmissible at the original trial but, because of changes to evidential rules, has subsequently become admissible.[16]

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[8] Section 4(7)(b) of the Scottish Act.
[9] See CJA, s 79(2)(c).
[10] Section 4(7)(a) of the Scottish Act.
[11] Section 4(7)(c) of the Scottish Act.
[12] Leverick, F., "'Legal history' in the Making: HM Advocate v Sinclair and the Double Jeopardy (Scotland) Act 2011", (2015) 19 EdinLR , 403, 405.
[13] Section 4(7)(d) of the Scottish Act.
[14] [2014] HCJAC 131, [103] ("***Sinclair***").
[15] Section 14 of the Scottish Act. The Scottish Act, therefore, operates retrospectively like the CJA and CARA but unlike similar legislation in Ireland and New Zealand: *Criminal Procedure Act 2010* (Ir), s 8(1); *Criminal Procedure Act 2011* (NZ), s 154(6). The exceptions to the double-jeopardy rule in Queensland were originally non-retrospective (see *Criminal Code Act 1899* (Qld), s 678A(1), as inserted by *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld), s 4) but became retrospective in 2014 (see current *Criminal Code Act 1899* (Qld), s 678A(1), as amended by the *Criminal Law Amendment Act 2014* (Qld)).
[16] Section 4(4) of the Scottish Act.

14. If a retrial is permitted, "any available and competent" evidence may be adduced at the new trial, including evidence that was not led at the original trial or was inadmissible at the time of the original trial but is subsequently considered admissible at the time of the new trial.[17]

15. The Scottish Act is significant in that it was enacted six years after the CJA and after consideration of the CJA's operation by the Scottish Law Reform Commission.[18]

16. It should be noted that, while at the bill stage Scotland's new-evidence-retrial provisions were to apply only to a scheduled list of offences, the Scottish Act as enacted does not refer to a fixed list of prescribed offences.[19] The new-evidence-retrial provisions apply to acquittals following trial on indictment in the High Court of Justiciary and, as such, cover a wider range of offences than either the CJA or CARA. (The provisions for retrials based on tainted acquittal or confessions appear to apply effectively to all offences by covering matters originally tried on indictment – solemn proceedings, in the parlance of Scots law – or tried summarily.)[20]

17. However, the inclusion of "the seriousness of the crime(s)" as a factor to be taken into account when determining whether retrial on the basis of new evidence is in the interests of justice indicates that non-serious charges would likely not be considered fit to be retried in Scotland.[21]

18. An indication of the type of offences considered suitable for retrial can be gleaned from the Lord Advocate's three applications since the legislation came into force: *Sinclair*: the abduction, assault, rape, robbery and murder of two girls; *Coulter*: murder;[22] *HM Advocate v Auld*: murder.[23]

19. Finally, as was noted in *Coulter*, there is a cross-over between s 3 (evidence of admission) and s 4 (new evidence) of the Scottish Act:

> *Section 3(1), which relates only to post acquittal evidence of admissions, can be utilised in respect of any acquittal in summary or solemn proceedings. Section 4(1), which relates to new evidence,*

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[17] *Ibid.*, [104].

[18] See the Scottish Law Reform Commission's (**SLRC's**) *Report on Double Jeopardy* (Scot Law Com N° 218), 2009 (see in particular [5.16] to [5.20]). The SLRC additionally noted the reforms in Australia (*ibid.*, [4.4]).

[19] Section 4(3)(a) of the Double Jeopardy (Scotland) Bill (Scot) ("**the Scottish Bill**") as introduced by Kenny MacAskill MSP on 7 October 2010 required that retrial on the basis of new evidence could only be ordered if the original offence was listed in sch 1 to the Scottish Bill, which could be modified by order of the Scottish Ministers in accordance with s 4(7) of the Scottish Bill. Schedule 1 prescribed the following 23 grave offences for the purposes of s 4(3)(a) of the Scottish Bill: murder; culpable homicide; genocide; a crime against humanity; a war crime; rape; clandestine injury to women; abduction of a woman with intent to rape; assault with intent to rape or ravish; indecent assault; lewd, indecent or libidinous practice of behavior; sodomy; rape; sexual assault by penetration; sexual assault; sexual coercion; rape of a young child; sexual assault on a young child by penetration; sexual assault on a young child; causing a child to participate in a sexual activity; incest; sexual intercourse with a stepchild; and unlawful sexual intercourse with a girl under 13.

[20] See s 2(1) and 3(1) of the Scottish Act.

[21] *Sinclair*, at [103].

[22] 2017 JC 115.

[23] [2016] HCJAC 18.

> *may be employed only where the acquittal has been in the High Court. This does not mean that an admission cannot also be new evidence for the purposes of sec 4(1). In a High Court case, where an admission is relied upon, it is the combination of admission and other new evidence which should be considered when applying the tests of strengthening substantially the case against the respondent ('case' meaning the evidence led at the original trial of that respondent) and of there having been a high likelihood of conviction as a result of the new and old evidence.*[24]

There is no express statutory prohibition on previously inadmissible admissions being relied upon when an application is founded on s 3 of the Scottish Act. The admissions must, however, either have been made post-acquittal or, if made before acquittal, only become known after the acquittal for retrial to be ordered under that section.[25] The possibility of retrial based on a previously inadmissible but known confession would not, therefore, arise under the Scottish Act.

[24]At [37].
[25] Section 3(1) of the Scottish Act.

TABLE 1

1. *R v Dunlop* [2007] 1 WLR 1657
2. *R v Miell* [2008] 1 WLR 627
3. *R v Andrews* [2009] 1 WLR 1947
4. *R v Celaire (Mario)* [2009] EWCA Crim 633
5. *R v B(J)* [2009] EWCA Crim 1036
6. *R v G (G)* [2009] EWCA Crim 1207
7. *R v Weston (Mark)* [2010] EWCA Crim 1576
8. *R. v Whittle* [2010] EWCA Crim 2934
9. *R v Dobson (Gary)* [2011] 1 WLR 3230
10. *R v McGuire (C)* [2011] EWCA Crim 3188
11. *R v D* [2012] EWCA Crim 2370
12. *R v B* [2013] 1 WLR 320
13 *R v Khatkar* [2013] EWCA Crim 1820
14. *R v Henry (Duwayne)* [2015] 2 Cr App R 1
15. *R v MH* [2015] EWCA Crim 585
16. *R v Reilly (Patrick Joseph)* [2018] 1 Cr App R 17
17. *R v Bishop* [2019] 1 Cr App R 31

TABLE 2			
Year	**Number of Crown appeals under s 5F of the *Criminal Appeals Act 1912* (NSW)**	**As a percentage of Court of Criminal Appeal matters initiated by the Crown[i]**	
2017/18	8[ii]	24%	
2016/17	5[iii]	10%	
2015/16	29[iv]	62%	
2014/15	No clear figures[v]	-	
2013/14	No clear figures[vi]	-	
2012/13	No clear figures[vii]	-	
2011/12	19[viii]	29%	
2010/11	17[ix]	22%	
2009/10	15[x]	24%	
2008/9	15[xi]	16%	
2007/8	16[xii]	18%	
2006/7	20[xiii]	21%	
2005/6	25[xiv]	24%	
2004/5	20[xv]	18%	
2003/4	25[xvi]	20%	
2002/3	35[xvii]	29%	
2001/2	14[xviii]	15%	
2000/1	27[xix]	30%	
Total (2000/1 to 2017/18)	**290**	**Average percentage[xx]**	**24%**

[i] In the annual reports (2000/1 to 2017/18) of the ODPP, statistics on Crown appeals to the Court of Criminal Appeals variously cover appeals under s 5F of the Criminal Appeals Act 1912 (NSW) ("**CAA 1912**"), s 5D of CAA 1912 and s 107 of the CARA (appeals against directed verdicts) along with case-stated applications from the District Court under s 5B of the CAA 1912. The percentages listed above are based on each year's ODPP figures for Crown appeals as stated in each year's annual reports.

[ii] ODPP, Annual Report 2017/18, p 72.

[iii] ODPP, Annual Report 2016/17, p 60.

[iv] ODPP, Annual Report 2015/16, p 49.

[v] For this year, under the category "Appeals Finalised in CCA", 20 appeals are listed under the subcategory "Other Appeals", while 49 appeals are listed under the subcategory "Crown Inadequacy Appeals". It is not possible to discern which of the 20 "Other Appeals" related to appeals under s 5F of the CAA 1912 and which related to appeals under s 107 of CARA (appeals against directed verdicts) or to case-stated applications from the District Court under s 5B of the CAA 1912: see ODPP, Annual Report 2014/15, p 48.

[vi] For this year, under the category "Appeals Finalised in CCA", no clear numbers of appeals are listed under either the subcategory "Other Appeals" or "Crown Inadequacy Appeals". It is not possible to discern how many appeals under s 5F of the CAA 1912 were finalised in 2013/14: see ODPP, Annual Report 2013/14, p 22.

[vii] For this year, under the category "Appeals Finalised in CCA", no clear numbers of appeals are listed under either the subcategory "Other Appeals" or "Crown Inadequacy Appeals". It is not possible to discern how many appeals under s 5F of the CAA 1912 were finalised in 2012/13: see ODPP, Annual Report 2012/13, p 32.

[viii] ODPP, Annual Report 2011/12, p 34.

[ix] ODPP, Annual Report 2010/11, p 35.

[x] ODPP, Annual Report 2009/10, p 38.

[xi] ODPP, Annual Report 2008/09, p 36.

[xii] ODPP, Annual Report 2007/08, p 44.

[xiii] ODPP, Annual Report 2006/07, p 43.

[xiv] ODPP, Annual Report 2005/06, p 46.

[xv] ODPP, Annual Report 2004/05, p 46.

[xvi] ODPP, Annual Report 2003/04, p 44.

[xvii] ODPP, Annual Report 2002/03, p 42.

[xviii] ODPP, Annual Report 2001/02, p 41.

[xix] ODPP, Annual Report 2000/01, p 40.

[xx] Average based on those years for which clear figures are available.