

INQUIRY INTO THE CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2019

RESPONSES TO QUESTIONS ON NOTICE

Department of Communities and Justice

QUESTION 1:

Mr DAVID SHOEBRIDGE: There is no final discretion in the UK if the court concludes that the evidence is new and meets the interests of justice and is compelling. Is that right? If those statutory tests are met, then a retrial has to be ordered in the UK, whereas in New South Wales if those statutory tests are met there is still an overriding discretion in the court.

The CHAIR: You can take it on notice.

Ms MICHALKO: Yes, I will.

ANSWER 1:

The relevant provision under the *Crimes (Appeal and Review) Act 2001* (NSW) is as follows:

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.*

...

[emphasis added]

The relevant provision under the *Criminal Justice Act 2003* (UK) is as follows:

77 Determination by Court of Appeal

- (1) *On an application under section 76(1), the Court of Appeal—*
- a. *if satisfied that the requirements of sections 78 and 79 are met, **must** make the order applied for;*
 - b. *otherwise, **must** dismiss the application.*
- (2) *Subsections (3) and (4) apply to an application under section 76(2).*
- (3) *Where the Court of Appeal determines that the acquittal is a bar to the person being tried for the qualifying offence, the court—*
- a. *if satisfied that the requirements of sections 78 and 79 are met, must make the order applied for;*
 - b. *otherwise, must make a declaration to the effect that the acquittal is a bar to the person being tried for the offence.*
- (4) *Where the Court of Appeal determines that the acquittal is not a bar to the person being tried for the qualifying offence, it must make a declaration to that effect.*

[emphasis added]

Relevantly, sections 78 and 79 of the *Criminal Justice Act 2003* (UK) relate to the test for new and compelling evidence (section 78) and the interests of justice test (section 79).

QUESTION 2:

Mr DAVID SHOEBRIDGE: Are you aware of a single incidence under any of the other State laws where a case has been brought?

Mr FOLLETT: Our understanding is that there was a case in Queensland in 2018. We are not able to find a judgement on that.

Mr DAVID SHOEBRIDGE: Could you take that on notice?

ANSWER 2:

A person (referred to as 'Mr A') was arrested on a charge of murder in relation to an offence that allegedly occurred in Queensland in the 1980s. Mr A had previously been tried for, and acquitted of, that murder in the 1980s.

A judgment of the Queensland Supreme Court (see below) notes that an application for Mr A's re-trial for murder has been made to the Court of Appeal under Chapter 68 ('Exceptions to double jeopardy rules') of the *Criminal Code 1899* (QLD) ('QLD Criminal Code').

Subsection 678K(1) of the QLD Criminal Code states the following:

A person must not publish any matter for the purpose of identifying or having the effect of identifying an acquitted person who is being retried under this chapter or who is the subject of—

- (a) a police investigation, or an application for a police investigation, mentioned in section 678I; or*
- (b) an application for a retrial, or an order for retrial, under this chapter [Chapter 68].*

Mr A applied for bail. Bail was granted, subject to conditions.¹

On 7 August 2018, the Queensland Supreme Court ordered:

1. The orders made under section 12 of the *Bail Act 1980* (Qld) on 3 August 2018 are dissolved and it is ordered that there be no reporting of the details of the bail application that would identify or have the effect of identifying the person the subject of the bail application until the earlier of:
 - (a) There is no longer any step that could be taken which would lead to the person the subject of the bail application being retried under Chapter 68 of the *Criminal Code* (Qld);
 - (b) If the person the subject of the bail application is retried under Chapter 68 of the *Criminal Code* (Qld) – the trial ends;
 - (c) The Court of Appeal or the court before which the person is being retried makes an order authorising publication of matters identifying or having the

¹ *Re A* [2018] QSC 184, per Davis J, at [5]. Judgement available at: <https://www.queenslandjudgments.com.au/case-download/id/311682>.

effect of identifying the person the subject of the bail application (to the extent of the matter so authorised).²

The Queensland Department of Justice and Attorney-General has advised that no further information can be provided on this matter at this time.

² *Re A* [2018] QSC 184, per Davis J, at [56].

QUESTION 3:

Ms LO: OCHRE is the Government's approach to working with Aboriginal communities.

The CHAIR: It is an acronym?

Ms LO: I will take that on notice so that I get the acronym correct.

ANSWER 3:

OCHRE is not an acronym. The OCHRE Plan is a plan to improve education and employment outcomes for Aboriginal people in NSW and to enhance service accountability to support those goals. It was developed by the Ministerial Taskforce on Aboriginal Affairs and was released in April 2013. The OCHRE Plan is accessible here:

https://www.aboriginalaffairs.nsw.gov.au/pdfs/OCHRE/AA_OCHRE_final.pdf.

QUESTION 4:

The CHAIR: What about courts and juries? We have talked about systematic cultural awareness training within the police and within the Department of Justice. Can you comment on the courts and any improvements to the system? What about juries? Are there any instructions or is there any advice or assistance provided for cultural awareness for jurors, for example?

Ms LO: We might take that question on notice and ask the Sheriff of New South Wales what is done in relation to juries. I am certainly aware that the Judicial Commission supports judicial officers with regard to cultural awareness training. On the court administration side of things there are identified Aboriginal positions within courts; they are on the ground.

ANSWER 4:

The Department of Communities and Justice has consulted with the Judicial Commission of New South Wales and has been advised that the Standing Committee has approached the Judicial Commission directly to seek information about training and support provided to judicial officers. We understand that the Judicial Commission will provide information separately about these issues, including any relevant jury directions.

In relation to the Office of the Sheriff specifically, the Office of the Sheriff has advised that they do not provide any cultural awareness training to jurors and are unaware of any other jurisdiction in Australia that provides such training.

As part of a jury induction procedure, NSW do remind empanelled jurors that during the term of their jury service they need to be respectful of the differences within their jury cohort, specifically including cultural differences. This reminder is founded in asking jurors to be generally respectful to each other in a workplace setting and not related to the trial itself.

QUESTION 5:

The Hon. GREG DONNELLY: This is probably best directed to Ms Michalko. Beyond the UK and New Zealand jurisdictions, which are referred to in the Government's submission, and indeed other submissions, are there any other jurisdictions around the world perhaps worth us looking at, or being able to draw from their experiences that you would like to draw to our attention?

The CHAIR: You can take it on notice.

The Hon. GREG DONNELLY: Yes. I am not putting you on the spot.

Ms MICHALKO: There are not any that I would immediately draw your attention to, no. Though I suppose it is relevant to look at any common law jurisdiction that has equivalent provisions, if that is something that the Committee is interested in.

The Hon. GREG DONNELLY: It is just that they are the two that keep coming up in other submissions but none other. For example, Canada. I have not seen any—and I stand to be corrected—for Canada. If you could take it on notice.

Mr FOLLETT: Some jurisdictions do not allow for a retrial under any circumstance. We will take it on notice, but the approach is varied around the world.

ANSWER 5:

According to the publicly available information that could be located, the Canadian Charter of Rights and Freedoms³ prohibits a retrial after an accused person has been “finally” found guilty and punished for an offence or acquitted of an offence. An accused person who is acquitted by a judgment containing no error is “finally acquitted” within the meaning of section 11(h) of the Charter⁴.

The Attorney General or counsel instructed by him may appeal to the court of appeal against, relevantly, a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone.⁵ In addition to satisfying the court of appeal that a pure error of law led to the wrong outcome, the Crown must also show that “the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at

³ Canadian Charter of Rights and Freedoms, Article 11 [“Proceedings in criminal and penal matters: Any person charged with an offence has the right ... (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.”]. Accessible at: <https://laws-lois.justice.gc.ca/eng/const/page-15.html>.

⁴ Department of Justice, Canada. Charterpedia - Section 11(h) – protection against double jeopardy. Accessible at: <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/check/art11h.html>

⁵ Section 676(1)(a) of the *Criminal Code*, RSC 1985, c. C-46, cited in the Public Prosecution Service of Canada Deskbook. Accessible at: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch15.html>

hand, to have had a material bearing on the acquittal.”⁶ Where the dual thresholds for a Crown appeal against acquittal are met – (1) error of law and (2) that in the concrete reality of the case materially contributed to the acquittal – the Crown will consider whether the public interest is best served by appealing the acquittal.⁷

If the Court allows an appeal against an acquittal, it may order a new trial or, except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.⁸

Information on how the principle of double jeopardy applies in some other international jurisdictions is provided in the *Review of section 102 of the Crimes (Appeal and Review) Act 2001 (NSW) – To clarify the definition of “adduced”* completed by the Hon James Wood AO QC in 2015 (**Wood Review**).⁹

⁶ *R v Graveline*, 2006 SCC 16, [2006] 1 SCR 609 per Fish J at para 14, cited at Part 3.15 of the Public Prosecution Service of Canada Deskbook. Accessible at: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch15.html>

⁷ Part 3.15 of the Public Prosecution Service of Canada Deskbook, at [2.3]. Accessible at: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch15.html>

⁸ Section 686(4) of the *Criminal Code*, RSC 1985, c. C-46.

⁹ The Hon James Wood AO QC, *Review of section 102 of the Crimes (Appeal and Review) Act 2001 (NSW) – To clarify the definition of “adduced”*, 2015 (**Wood Review**). Accessible at: <https://www.justice.nsw.gov.au/justicepolicy/Documents/review-section-102-crimes-act-wood-september-2015.pdf>

QUESTION 6:

Mr DAVID SHOEBRIDGE: Fundamentally it is the same principle of finality.

Ms MICHALKO: It does but the thing that I would note about that section, section 107 (8) provides that that section does not apply to a person who is acquitted before the commencement of that section. So although I understand in the typical way that we talk about retrospectivity, well of course it has to apply to an acquittal that has already happened, it does not apply to a person who is acquitted before that section commenced. That is different to the legislation that we are talking about.

The CHAIR: When did that come in?

Ms MICHALKO: I do not know when section 107 came in. I take it on notice if you like.

The CHAIR: Please.

ANSWER 6:

Section 107 was inserted in 2006 by way of the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW), and commenced on 15 December 2006. Subject to a minor amendment to replace a reference in subsection (6) to the *Bail Act 1978* with the *Bail Act 2013* in 2014, the provision has been unchanged since its commencement.