



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
-ADDENDUM-

INTRODUCTION

1. The below submissions are in addition to those provided to the Standing Committee on Monday, 5 August 2019 in response to questions on notice arising out of the New South Wales Bar Association's appearance before the Committee's hearing on 24 July 2019.
2. The Office of the Department of Public Prosecutions (**ODPP**) has yet to provide figures on its use of s 5F(3A) of the *Criminal Appeals Act 1912* (NSW) ("**CAA 1912**") to appeal against decisions or rulings on the admissibility of evidence that eliminate or substantially weaken the prosecution's case.
3. The Association has, therefore, produced in **Table A** (below) statistics on Crown appeals under s 5F(3A) CAA 1912 since the latter provision's introduction on 14 February 2004. **Table A** is based on an analysis of Court of Criminal Appeal cases publicly available on the New South Wales Case Law database and covers all authorities therein listed that relate to appeals by the ODPP and Commonwealth Director of Public Prosecutions ("**Cth DPP**") under s 5F(3A) of the CAA 1912.
4. The Association's research reveals that, in the fifteen years since the coming into force of s 5F(3A) of CAA 1912, there have been **57** prosecution appeals under that provision, 52 brought by the ODPP and 5 brought by the Cth DPP.
5. The Association also wishes to note that the "**Fresh Evidence**" section of the questions on notice was in order to supplement and clarify Ms Gabrielle Bashir SC's evidence before the Standing Committee on 24 July 2019 regarding how the term "fresh" is "understood in this State". Ms Bashir SC's testimony as to evidence being "not available" was a reference to the common law understanding of that phrase in the context of fresh evidence (also reflected in the legislation considered in *Attorney General (New South Wales) v XX* [2018] NSWCCA 198), namely evidence that is actually and/or constructively not available to an individual at the time of an original trial. This is explained further in the original response to questions on notice by reference to *Ratten v The Queen* (1974) 131 CLR 510. It may not have been clear that the term "not available" or "unavailable" when referring to "fresh" evidence includes constructively unavailable. That is, it refers to that which was actually not available or could not have been available with the exercise of due diligence. Ms Bashir SC also referred in her evidence to an investigation that was conducted with due diligence to illustrate that evidence can be unavailable despite a diligent investigation.

TABLE A ¹			
Year ²	Number of prosecution appeals	Cases	Evidential issue
2019	1	<i>R v Denton</i> [2019] NSWCCA 81 (16 April 2019)	exclusion of unfairly prejudicial photographic evidence (<i>Evidence Act 1995</i> (NSW), s 137)
2018	4	<i>Director of Public Prosecutions (NSW) v RDT</i> [2018] NSWCCA 293 (14 December 2018)	exclusion of tendency evidence
		<i>Director of Public Prosecutions v Martin (a pseudonym)</i> [2018] NSWCCA 207 (21 September 2018)	exclusion of tendency evidence
		<i>R v AC</i> [2018] NSWCCA 130 (27 June 2018)	exclusion of tendency evidence
		<i>R v Chase (a pseudonym)</i> [2018] NSWCCA 71 (18 April 2018)	exclusion of tendency and coincidence evidence
2017	2	<i>R v Moussa</i> [2017] NSWCCA 267 (17 November 2017)	exclusion of tendency evidence
		<i>R v SG</i> [2017] NSWCCA 202 (28 August 2017)	exclusion of evidence: assessment of relevance (<i>Evidence Act 1995</i> (NSW), s 55)
2016	4	<i>R (Cth) v Rapolti; R (Cth) v Russell; R (Cth) v Speedy Corporation Pty Limited</i> [2016] NSWCCA 264 (25 November 2016) (Cth)	exclusion of material seized pursuant to search warrants as improperly/illegally obtained evidence (<i>Evidence Act 1995</i> (NSW), s 138)
		<i>R v Tai</i> [2016] NSWCCA 207 (28 September 2016)	exclusion of hearsay evidence as unfairly prejudicial (<i>Evidence Act 1995</i> (NSW), s 135(a))
		<i>R v Matonwal & Amood</i> [2016] NSWCCA 174 (17 August 2016)	exclusion of tendency and coincidence evidence
		<i>R v GM</i> [2016] NSWCCA 78 (5 May 2016)	exclusion of tendency evidence
2015	6	<i>R v Gallagher; R v Burridge</i> [2015] NSWCCA 228 (26 August 2015)	exclusion of search of property as improperly/illegally obtained evidence (<i>Evidence Act 1995</i> (NSW), s 138)

¹ Table A covers appeals to the to the Court of Criminal Appeal brought by both the ODPP and Cth DPP under s 5F(3A) of the CAA 1912.

² The year of the decision in the “Cases” column.

		<u><i>R v DRF</i></u> [2015] NSWCCA 181 (7 July 2015)	exclusion of covertly recorded admissions (<i>Evidence Act 1995</i> (NSW), ss 138 & 139)
		<u><i>R v Seller; R v McCarthy</i></u> [2015] NSWCCA 76 (29 April 2015) (Cth)	the Court of Criminal Appeal clarified the scope of s 5F(3A) CAA 1912 (not applicable to orders prohibiting witness from giving evidence as not a decision or ruling on admissibility)
		<u><i>R v Ali</i></u> [2015] NSWCCA 72 (24 April 2015)	exclusion of DNA certificates as unfairly prejudicial evidence (<i>Evidence Act 1995</i> (NSW), s 137)
		<u><i>R v Edwards</i></u> [2015] NSWCCA 24 (20 March 2015)	exclusion of complainants' previous sexual activity (<i>Criminal Procedure 1986</i> (NSW), s 293(4)(a)); exclusion of tendency evidence
		<u><i>R v Knight</i></u> [2015] NSWCCA 34 (13 March 2015)	exclusion of tendency evidence
2014	2	<u><i>R v MM</i></u> [2014] NSWCCA 144 (30 July 2014)	exclusion of context evidence, tendency evidence and admissions
		<u><i>R v Norris</i></u> [2014] NSWCCA 76 (9 May 2014)	exclusion of expert evidence
2013	6	<u><i>R v TD</i></u> [2013] NSWCCA 337 (20 December 2013)	exclusion of unlawfully obtained undercover police operative's evidence (<i>Evidence Act 1995</i> (NSW), s 138)
		<u><i>R v Burton</i></u> [2013] NSWCCA 335 (20 December 2013)	exclusion of complainant's previous sexual activity (<i>Criminal Procedure 1986</i> (NSW), s 293(4)(a)); exclusion of admissions (<i>Evidence Act 1995</i> (NSW), ss 90 and 137)
		<u><i>R v Ryan</i></u> [2013] NSWCCA 316 (13 December 2013)	exclusion of admissions (<i>Evidence Act 1995</i> (NSW), ss 90 and 137); and, exclusion of tendency evidence
		<u><i>R v Cooney</i></u> [2013] NSWCCA 312 (2 December 2013)	exclusion of admissions (<i>Evidence Act 1995</i> (NSW), s 90)
		<u><i>R v MR</i></u> [2013] NSWCCA 236 (18 October 2013)	exclusion of coincidence evidence
		<u><i>R v XY</i></u> [2013] NSWCCA 121 (22 May 2013)	exclusion of admissions (<i>Evidence Act 1995</i> (NSW), ss 90 & 137)

2012	4	<u>R v RGC</u> [2012] NSWCCA 271 (14 December 2012)	exclusion of tendency/context evidence
		<u>Webb v R; R v Webb</u> [2012] NSWCCA 216 ³ (12 October 2012)	exclusion of the complainant's evidence (<i>Evidence Act 1995</i> (NSW), s 135 & s 137)
		<u>R v Gale; R v Duckworth</u> [2012] NSWCCA 174 (17 August 2012)	exclusion of coincidence evidence
		<u>R v MK</u> [2012] NSWCCA 110 (4 June 2012)	exclusion of expert (DNA) evidence (<i>Evidence Act 1995</i> (NSW), s 135(b), 135(c) & s 137)
2011	2	<u>R v Lane</u> [2011] NSWCCA 157 (14 July 2011)	limitation of use of evidence of lies as consciousness of guilt (<i>Evidence Act 1995</i> (NSW), s 136) ⁴
		<u>R v Zhi Qiang Han</u> [2011] NSWCCA 120 (27 May 2011)	exclusion of intercept evidence (<i>Telecommunications (Interception and Access) Act 1979</i> (Cth), s 74)
2010	7	<u>DPP (NSW) v JG</u> [2010] NSWCCA 222 (30 September 2010)	exclusion of interviews of child complainant; exclusion of complainant's post-hypnosis evidence (<i>Evidence Act 1995</i> (NSW), s 137)
		<u>Regina v PWD</u> [2010] NSWCCA 209 (17 September 2010)	exclusion of tendency evidence
		<u>Regina v XY</u> [2010] NSWCCA 181 (6 September 2010)	exclusion of evidence of hearsay (recent complaint) (<i>Evidence Act 1995</i> (NSW), s 66)
		<u>R v Jennings</u> [2010] NSWCCA 193 (2 September 2010)	exclusion of tendency and coincidence
		<u>R v Nguyen, John Viet; R v Nguyen, Anthony Si</u> [2010] NSWCCA 97 (7 May 2010) (Cth)	exclusion of evidence of intercepted calls (relevance assessment) (<i>Evidence Act 1995</i> (NSW), s 55)
		<u>R v McConalogue</u> [2010] NSWCCA 56 (7 April 2010) (Cth)	exclusion of relationship evidence as unfairly prejudicial (<i>Evidence Act 1995</i> (NSW), s 137)

³ The Crown was simultaneously the respondent to the defendant's appeal under s 5F(3)(b) of CAA 1912 against a refusal to order a permanent stay and the appellant under s 5F(3A) of CAA 1912.

⁴ It should be noted that, although the appeal was lodged under s 5F(3A), leave to amend the notice of appeal was granted to permit the appeal to be made under s 5F(2) on the basis that the ruling was did not concern the admissibility of evidence but the use of evidence once admitted.

		<u><i>R v Ceissman</i></u> [2010] NSWCCA 50 (22 March 2010)	exclusion of tendency and coincidence evidence
2009	2	<u><i>R v Ford</i></u> [2009] NSWCCA 306 (17 December 2009)	exclusion of tendency and coincidence evidence
		<u><i>R v C</i></u> [2009] NSWCCA 81 (31 March 2009)	exclusion of evidence concerning defective welding as irrelevant or (in the alternative) unfairly prejudicial (<i>Evidence Act 1995</i> (NSW), s 55 & 137)
2008	4	<u><i>R v Cittadini</i></u> [2008] NSWCCA 256 (5 November 2008)	exclusion of tendency evidence
		<u><i>R v Smith</i></u> [2008] NSWCCA 247 (30 October 2008)	exclusion of tendency evidence
		<u><i>Regina v Arvidson</i></u> [2008] NSWCCA 135 (20 June 2008)	exclusion of edited CCTV footage as unfairly prejudicial (<i>Evidence Act 1995</i> (NSW), s 137)
		<u><i>R v Mundine</i></u> [2008] NSWCCA 55 (18 March 2008)	exclusion of identification evidence as unfairly prejudicial (<i>Evidence Act 1995</i> (NSW), s 137)
2007	4	<u><i>R v GAC</i></u> [2007] NSWCCA 315 (21 November 2007)	exclusion of tendency evidence
		<u><i>R v Sood</i></u> [2007] NSWCCA 214 (19 July 2007) (Cth)	exclusion of documentary evidence as unfairly prejudicial (<i>Evidence Act 1995</i> (NSW), s 137)
		<u><i>R v SJRC</i></u> [2007] NSWCCA 142 (22 May 2007)	exclusion of the content of SMS messages as unfairly prejudicial (<i>Evidence Act 1995</i> (NSW), s 137)
		<u><i>R v Camilleri</i></u> [2007] NSWCCA 36 (20 February 2007)	exclusion of blood sample as improperly/unlawfully obtained evidence (<i>Evidence Act 1995</i> (NSW), s 138)
2006	3	<u><i>R v RAG</i></u> [2006] NSWCCA 343 (26 October 2006)	finding that a seven-year-old was incompetent to give unsworn evidence (<i>Evidence Act 1995</i> (NSW), 13(2)) ⁵

⁵ The Crown's appeal appears to have been found on an argument that the finding was appealable under either s 5F(2) or s 5F(3A) CAA 1912. The Court of Criminal Appeal found that jurisdiction to hear the appeal was founded upon the former rather than latter provision.

		<u>Regina v Ngatikaura</u> [2006] NSWCCA 161 (22 May 2006)		exclusion of tendency evidence
		<u>Regina v Linard Shamouil</u> [2006] NSWCCA 112 (12 April 2006)		exclusion of a photo-board identification as unfairly prejudicial evidence (<i>Evidence Act 1995</i> (NSW), s 137)
2005	1	<u>Regina v Milenkovic</u> [2005] NSWCCA 382 (27 September 2005)		exclusion of tendency and/or coincidence evidence.
2004	5	<u>Regina v Harker</u> [2004] NSWCCA 427 (2 December 2004)		exclusion of tendency evidence
		<u>Regina v MM</u> [2004] NSWCCA 364 (25 October 2004)		evidence of admissions inadmissible as improperly/unlawfully obtained evidence (<i>Evidence Act 1995</i> (NSW), s 138); and, exclusion of tendency evidence
		<u>Regina v Eld</u> [2004] NSWCCA 219 (16 July 2004)		Exclusion of (i) evidence of presence and (ii) an uncharged offence as evidence relationship as unfairly prejudicial evidence (<i>Evidence Act 1995</i> (NSW), s 137)
		<u>Regina v Lameri; Regina v Cohen</u> [2004] NSWCCA 217 (18 June 2004)		Exclusion of irrelevant or (in the alternative) unfairly prejudicial evidence (<i>Evidence Act 1995</i> (NSW), s55 & s137)
		<u>R v NKS</u> [2004] NSWCCA 144 (11 May 2004)		Exclusion of admissions of (i) sexual thoughts about the complainant (respondent's daughter) and (ii) sexual activity with the complainant as unfairly prejudicial (<i>Evidence Act 1995</i> (NSW), s 137)
Sub-total ODPP	52	Sub-total Cth DPP	5	
Total	57			