Submission
No 2

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

Organisation: Office of the Director of Public Prosecutions

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

Submission to the Standing Committee on Law and Justice by the Office of the Director of Public Prosecutions (ODPP)

Thank you for the opportunity to make submissions on the proposed amendments to section 102 of the *Crimes (Appeal and Review) Act* 2001 (*CARA*).

In my view the current section strikes an appropriate balance between the principles of finality and the discovery of fresh evidence that would materially impact on the outcome of criminal proceedings.

The NSW provision is consistent with the Council of Australian Government Model[1] 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.

In 2015 Justice Wood was commissioned by the NSW Government to review section 102 in response to the *Crimes Appeal and Review Amendment (Double Jeopardy) Bill* 2015. That Bill proposed similar amendments to s102 of CARA. The ODPP did not support those amendments and my position is substantially the same in respect of the 2019 amending Bill.

Section 102 is currently carefully framed to provide for the fresh evidence to be something more than evidence that was not led or admitted at the first trial. The Honourable Frank Vincent in a lecture in 2003 made this point concerning double jeopardy and the temptation to change the result of a particular case:

> "As you will appreciate it is not my purpose tonight to discuss the double jeopardy rules, although my very tentatively held view is that there are some respects in which they may need to be reconsidered, but to emphasize the complex nature of the relationships between our basic rights and the criminal law and, of course, the need for careful consideration of the effect upon those relationships of making superficially attractive changes in the law designed to deal with perceived problems in particular cases. It must not be overlooked that alterations of the system to achieve what is presumed to be justice in a specific type of situation may occasion serious injustice to others."[2]

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[1] Double Jeopardy Law Reform – Model Agreed by COAG – April 2007

[2] Honourable Frank Vincent, Supreme Court of Victoria, Court of Appeal "Sir Leo Cussen Lecture" 16 October 2003

Double Jeopardy and the Finality Principle

The principle of double jeopardy encapsulates four fundamental principles in the criminal law. The judgment of Gleeson CJ and Hayne J in the decision in the *Queen v Carroll*[3] lists these principles as:

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[4];
3) without safeguards the power to prosecute could readily be used by the executive as an instrument of oppression[5]; and
4) Finality is an important aspect of any system of justice.[6]

Their Honours cited Lord Wilberforce[7]:

> "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"

The joint judgment then goes on to say that these tenets are balanced against the "very root" of the criminal law system, namely "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."[8]

There was considerable controversy[9] and debate surrounding the changes to the "double jeopardy" rule in NSW in 2003 and a number of stakeholders remain opposed to the amendments[10]. The changes proposed[11] by the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019* represent a departure from the current provision and would provide the foundation to greatly broaden the number of trials

[3] *The Queen v Carroll* [2002] HCA 55
[4] *Carroll*, judgment Gleeson CJ Hayne J Para 21
[5] Par 22
[6] Par 22
[7] *The Ampthill Peerage* [1977] AC 547 at 569
[8] Par 23
[9] See for instance Andrew Haesler paper on Public Defenders website,
[10] Review of Part 8 of the Crimes (Appeal and Review) Act 2001 by the Department of Attorney General and Justice in 2012 at p12 notes half the submissions received voiced in principle objection to the erosion of the rule against double jeopardy.
[11] In the Crimes (Appeal and review) Amendment (Double Jeopardy) Bill 2015 and as discussed in the Legislative Council Standing Committee on Law and Justice Report 55 November 2014

eligible for consideration as they would allow re-litigation of decisions in trials following a "substantive legislative change in the law of evidence".

Ex post facto criminal law – a retrial after a change in the law

The changes proposed also raise a complex consideration touching on the issue of retrospectivity in criminal law.

Article 15 of the International Covenant on Civil and Political Rights prohibits the retrospective creation of a criminal offence or increase in penalty. The Article does not address the question of changes to the laws of evidence.

The High Court in *Polyukhovich v The Commonwealth* [1991] HCA 32, considered the question of retrospective criminal laws in terms of the *War Crimes Amendment Act 1988* (Cth). The judgments of Gaudron and McHugh JJ touch on the legal principles against ex post facto criminal law, in the context of changes to the law of evidence:

Gaudron J at 36:

> "Equally, it would be a travesty of the judicial process if, in proceedings to determine whether a person had committed an act proscribed by and punishable by law, the law proscribing and providing for punishment of that **act *were a law invented to fit the facts after they had become known.*** In that situation, the proceedings would not be directed to ascertaining guilt or innocence (which is the function of criminal proceedings and the exclusive function of the courts), but to ascertaining whether the Parliament had perfected its intention of declaring the act in question an act against the criminal law. That is what is involved if a criminal law is allowed to take effect from some time prior to its enactment." (Emphasis added)

McHugh J at [37] to [40] quotes United States Supreme Court authority that law ex post facto is prohibited if it "mollifies the rigor of the criminal law" and stated at [38];

> In a context where the express prohibition of "ex post facto laws" was seen as merely declaratory of an aspect of the doctrine of separation of powers, it was a natural step to confine the scope of that phrase to its traditional meaning of ex post facto laws dealing with criminal offences. **That step was taken in Calder v. Bull[12] where it was laid down that the reference to ex post facto laws in Art.I should be construed in a technical sense and confined to criminal laws which "create or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction"** (see per Chase J. at pp 390-391; Watson v. Mercer (1834) 33 US 88, at pp 109-110).

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[12] *Calder v Bull* (1798) 3 US 386, Chase J.

Accordingly, I understand the proposition to establish that a subsequent legislative change to the law of evidence to render evidence admissible offends the legal principles against ex post facto criminal law, particularly so where the change is brought about in respect to or for the purposes of a particular case.

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

The only available authority that involves judicial consideration of the current double jeopardy provisions is the case of *Attorney General for New South Wales v XX* [2018] NSWCCA 198, the decision which has prompted the Bill under discussion. In that case, the court was asked to consider three areas of evidence said to be 'fresh and compelling' to enliven the discretion to order a retrial, per s100 and s101 of *CARA*. Those discrete areas of evidence were the 'Walker Evidence', the 'Informer evidence' and 'Lies evidencing consciousness of guilt', see paragraph [36] – [69]. Relevant to this submission is the Attorney's position that the admissibility of the 'Walker evidence' as coincidence evidence within 'the evolving legislative framework' could now constitute evidence that was not able to be 'adduced' and, as such, was now 'fresh'.

The thrust of that submission was that the enactment of the *Evidence Act 1995 (NSW)* created a new statutory framework by which the evidence said to make up the 'Walker evidence' could now be admitted in the other trials, that statutory provision being coincidence reasoning per s98 *Evidence Act 1995.* When the matter was previously before the court for trial, the admissibility of evidence for that purpose was governed by the common law.

The present s102(2)(a) defines "fresh" as;

> *(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.*

The decision of the court focused on two legal questions. The first was how the court determines in a single hearing more than one application to set aside multiple acquittals. The second legal question was the legislative construction of the words 'adduced' and 'fresh' for the purpose of s102.

The court also considered the operation of s105 of *CARA* in particular s105(7), in conjunction with s100 and s102 of the Act. It was the argument of the Attorney that s105(7) should be applied in a compendious way when considering the evidence it relied on as being 'fresh and compelling'. The respondent argued that each application should be argued separately and that the 'Walker evidence' should be considered in relation to it being 'fresh and compelling' on one of the murders at a time, and further that the evidence of the Speedy and Greenup trials could not be considered together because they were not 'fresh and compelling in relation to each other' [62].

Ultimately, the court found that the operation of s105(7) with s100 and s102 is such that the question of whether evidence is 'fresh' for the purpose of the section should

be considered separately with respect to each acquittal: paragraph [169] to [172]; further, it is only when the court determines that the evidence is 'fresh' in relation to one or more acquittals separately, that s105(7) applies; and, importantly, that evidence cannot become 'fresh' by operation of a new use, such as by way of tendency or coincidence evidence.

UK Position

I note that the English provision uses the word "new" as opposed to "fresh" in the equivalent provision. Although these words may be used interchangeably there is a technical legal distinction. "Fresh" evidence refers to evidence that could not have been used in the earlier trial while "new" includes evidence that was available but not adduced in the original trial. However, evidence that was available but was not used due to an erroneous ruling can constitute "new" evidence, per *R v B* [2012] EWCA Crim 414.

The application of Part 10 of the *Criminal Justice Act 2003* (UK) can be assessed by an analysis of a selection of decisions concerning applications for retrial after acquittal. In consideration of whether evidence was 'new and compelling' the case of *R v A* [2008] EWCA Crim 2908 determined that the question should be considered by addressing whether the evidence is, in fact, new and compelling **and** highly probative of the alleged offending. It is not sufficient that the form, type or nature of the evidence is said to make it 'new and compelling' for the purpose of the section.

While the English authorities make clear that the 'new and compelling' evidence need not be irrefutable, and does not need to reach the threshold of proving absolute guilt, per *R v Dobson* [2011] EWCA 1255, it is not enough that the evidence be of the sort that simply raises a case to answer. The evidence needs to be compelling and new and of a kind which cannot be realistically disputed to justify the quashing of an acquittal: *R v G(G) and B(S)* [2009] EWCA Crim 1207.

The factors said to make out the 'in the interests of justice' test in s79(2) *Criminal Justice Act 2003* (UK) were considered in both the cases of *R v Dobson* and *R v A.* In *Dobson* the court said that the factors set out in s79(2) were not exhaustive and that a court considering any application should consider all the available circumstances when determining whether or not it is in the interests of justice that the acquittal be quashed and a retrial ordered.

The English provisions do not provide for evidence becoming admissible because of a change in the law. I note the United Kingdom Law Commission in its review conducted between 1999 and 2001[13] asked as part of the consultation process whether: "for the purposes of the new exception that evidence should count as new evidence if, having been inadmissible at the first trial, it becomes admissible through a change in the law?"[14] The final report states that none of the respondents to the review supported this proposal.

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[13] UL Law Commission report "Double Jeopardy and Prosecution Appeals" March 2001
[14] CP 156 UL Law Commission 2001

Proposed amendment section 102 (2A)

"Substantive legislative change in the law of evidence"

The proposed section 102 (2A) provides that

> *"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."*

The current s102 (4) which provides

> *"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"*

is to be omitted.

Section 102 (2A) operates to deem evidence that is now available through a substantive change to the law of evidence to be "fresh" for the purposes of s102 (1). The evidence therefore is still subject to the other limb in s102(3) requiring the evidence to compelling.

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.

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.

Other substantial changes to legislation that impacts 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.

For instance, evidence which was previously held to be illegally obtained could subsequently be deemed to have become lawfully obtained under subsequent amendment to the law of evidence, and therefore now be potentially admissible.

It could also be possible that changes to an offence whereby proof is facilitated by the inclusion of a deeming provision, or a change in onus or standard of proof or the inclusion of a list of factors to be taken into account by the court would also be considered to be a substantive change to the law of evidence.

These amendments would mean that there will be an additional consideration for the Legislature in introducing all new legislative amendments, as to whether the change is caught by this provision, and whether the change needs to expressly exclude double jeopardy. This will create an unnecessary consideration when otherwise important or uncontroversial legislative changes are required. Therefore, the effect of the proposed double jeopardy changes could be more wide- ranging than currently contemplated by the proposed Bill.

In my submission there is a real possibility that this amendment will unfairly impact a significant number of completed cases. More worrying is the level of uncertainty it would bring to the principal of finality on future proceedings. This concern is amplified in the scenario where a case results in an acquittal and there is a call, based on the facts of that case, to change an evidentiary law. A change in the law of evidence, unless the change is expressly made not be retrospective, will enliven the provision and subject the acquitted person to a re-trial. This scenario is tantamount to the executive using prosecution as “an instrument of oppression”.[15] Section 105(1AA) and (1AB) exemplify this point, as the provisions are clearly aimed at addressing a particular case.

I also note that the over representation of indigenous persons in the criminal justice system means that proportionally this population is more likely to be impacted by this change.

Conclusion

The ODPP does not support this Bill.

Office of the Director of Public Prosecutions

28 June 2019

[15] *The Queen v Carroll* [2002] HCA 55 par 22.