

**Submission
No 21**

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

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

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1. The rule against double jeopardy and its exceptions

The rule against double jeopardy protects defendants against repeated prosecution. In so doing, the rule safeguards individual autonomy, and prevents prosecution being used by the state as an ‘instrument of oppression’. The rule also furthers efficiency and finality. The prosecution is motivated to present its best case first time around, the prospect of endless litigation is averted, and parties and society are given the opportunity to achieve closure: see, eg, *R v Carroll* (2002) 213 CLR 635 [22]. In precluding challenge of potentially mistaken acquittals, the rule against double jeopardy promotes these goals and interests at the expense of victims’ and society’s interest in accurate criminal law enforcement.

In several jurisdictions, the competing goals have recently been rebalanced; the double jeopardy rule has been subjected to narrow exceptions. The UK allowed applications to overturn tainted acquittals in 1996 (*Criminal Procedure and Investigations Act 1996 ss 54-57*) and a few years later enabled acquittals to be set aside on the basis of new and compelling evidence (*Criminal Justice Act 2003 Part 10, commencing 2005*). A number of Australian jurisdictions followed with their own ‘tainted acquittals’ and ‘fresh and

compelling evidence' exceptions, beginning with NSW: Part 8 Division 2 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA) commencing 2006. These exceptions give accurate law enforcement and the interests of victims an increased priority, relative to defendants' interests and broader concerns with individual autonomy, finality and efficiency.

It should be noted that, whatever the jurisprudential significance of double jeopardy reform, the practical impact has been slight. There appear to have been no 'tainted acquittal' applications in any jurisdictions. In the UK, a jurisdiction several times larger than Australia, there have only been a dozen or so applications to overturn acquittals on the basis of new and compelling evidence (James Wood, *Review of s 102 of CARA, 2015*, p 42 (Wood Review);). The Australian exceptions are narrower in certain respects than those of the UK, have been in place for a shorter period (eg, Wood Review, p 32), and there has been only one 'fresh and compelling evidence' application in Australia. It was rejected by the NSW Court of Criminal Appeal (NSWCCA): *AG(NSW) v XX* [2018] NSWCCA 198 ('XX', special leave refused [2019] HCATrans 52). This decision, regarding acquittals for the Bowraville murders of the early 1990s, has prompted the current Bill.

The small number of applications to overturn acquittals is unlikely to stem from the factual accuracy of acquittals. The criminal standard of proof demands a very high probability of guilt for conviction, a corollary of which is an expectation that many acquitted defendants are actually guilty: David Hamer 'The Expectation of Incorrect Acquittals and the "New and Compelling Evidence" Exception to Double Jeopardy' [2009] *Criminal Law Review* 63. The non-use of the exceptions may be attributed in large part to their narrowness. The restrictions extend beyond just the requirement for 'fresh and compelling evidence'. In NSW the exception is limited to 'life sentence offences': CARA s 100(1). No application could be made to set aside an acquittal for aggravated sexual assault on the basis of fresh DNA evidence as the offence is only punishable by a maximum of 20 years imprisonment: *Crimes Act 1900* (NSW) s 61J. Even if court finds that there is 'fresh and compelling evidence' in connection with a 'life sentence offence', the court may not set aside the acquittal because it is not 'in all the circumstances ... in the interests of justice for the order to be made': CARA ss 100(1)(b), 104.

Beyond the legal restrictions the lack of use of the double jeopardy exceptions may point to practical and cultural factors. The police and prosecution may lack the resources to maintain and pursue an interest in old cases. Further, there may be a strong cultural attachment to the traditional double jeopardy protection among criminal justice authorities.

A. The Bill

The Bill, if passed, would broaden the 'fresh and compelling evidence' exception in two respects. As stated in the explanatory note, it would, first, 'extend an exception to the rule against double jeopardy in relation to an acquitted person where previously inadmissible evidence becomes admissible'. Second, it would 'allow for a second

application for the retrial of an acquitted person to be made in exceptional circumstances'. These aspects are considered below in Parts 2 and 3 respectively.

If passed, the Bill would enable a further application to be made in XX. However, it is far from certain whether such an application would be successful. In any case, the Bill should be assessed on its merits more generally, not by reference to its application to XX.

2. Extending the exception to freshly admissible evidence

A. The incoherence of the current law

The issue which arose in XX was whether the 'fresh and compelling evidence' exception would cover evidence which had been adduced at the original trial, excluded as inadmissible, but then later became (potentially) freshly admissible due to a change in evidence law. In XX, the NSWCCA held that such evidence would not be considered 'fresh' under the Act. Following XX, the treatment of freshly admissible evidence is problematic. Putting to one side the broader policy arguments regarding the proposed extension (which are considered below), the current legislation as it currently operates is incoherent.

Section 102(2) currently requires that, for evidence to be "fresh":

- (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, the Court interpreted 'adduced' to mean 'tendered' or 'brought forward' rather than admitted: [225]. And so, if evidence was tendered at trial but held inadmissible, it cannot be considered 'fresh' regardless of whether a change in law later rendered it admissible.

In XX the Court adopted this interpretation notwithstanding s 102(4). It 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'. The Court held:

This section does not expand the definition of "fresh and compelling" evidence ... [T]he section does not state that evidence is "fresh" because it was inadmissible in the earlier proceedings and that now, because of some change in the rules of evidence, it had become admissible. Indeed, the use of the expression "merely because" is directly contrary to such a construction. (at [243])

The effect of s 102(4) is that, if evidence is fresh in the s 102(2) sense – that it, it was not adduced and not reasonably available – it will be viewed as fresh even if it would have been inadmissible at trial.

Sections 102(2) and 102(4) as interpreted by the Court in *XX*, are in tension. Suppose, in a historical murder prosecution, there is potential evidence of the defendant having committed similar violence against another victim. Consider the following alternative scenarios:

(a) The evidence of this other violence was not reasonably available because the victim did not come forward. The police and prosecution remain unaware of this evidence at the trial, but it most likely would be inadmissible anyway. The defendant is acquitted.

(b) Although not reasonably available (the victim did not come forward), the police go to extraordinary lengths in the investigation and manage to unearth him. The prosecution adduce the evidence as propensity evidence but it is rejected as inadmissible. The defendant is acquitted.

Now, due to a change in the law, the evidence may well be admissible and the prosecution seek to have the acquittal set aside under the 'fresh and compelling evidence exception'. Under *CARA* as interpreted in *XX* the evidence would be considered 'fresh' for scenario (a), but not scenario (b) because it had been adduced. (See also, Wood report #, p 60; *XX* [88].) This appears problematic. One of the arguments in favour of the rule against double jeopardy is that it discourages sloppy investigations and prosecutions by denying the prosecution the opportunity to correct them: Second Reading Speech, quoted in *XX* at [81]. However, as interpreted in *XX*, the double jeopardy exception penalises highly diligent investigations and prosecutions.

Consider these two further variations:

(c) The other victim comes forward but the prosecution elects not to adduce the evidence because they, correctly, consider it inadmissible. The defendant is acquitted.

(d) The other victim comes forward and the prosecution, while doubting its admissibility, adduce the evidence but it is held inadmissible. The defendant is acquitted.

Now, due to a change in the law, the evidence may well be admissible and the prosecution seek to have the acquittal set aside under the 'fresh and compelling evidence exception'. It seems that the evidence would be considered fresh in scenario (c) – surely it is reasonable not to adduce inadmissible evidence – but not in scenario (d). However, again, the rationale for the different treatment is difficult to understand. It appears inappropriate that the prosecution should be penalised simply for having tested admissibility at trial: *XX* at [185]. After all, – as the AG suggested in *XX*, some admissibility determinations may involve 'qualitative and discretionary judgments': at [215].

Finally, for completeness consider this scenario:

(e) The other victim comes forward, and the evidence is adduced. The evidence is wrongly held to be inadmissible. (Despite the then stringent exclusionary rule,

the attack on the other victim shares a number of peculiar similarities with the charged murder.)

Now, due to a change in the law, the admissibility of the evidence is clear and the prosecution seek to have the acquittal set aside under the 'fresh and compelling evidence exception'. However, under *CARA* s 102(2) the evidence would not be considered fresh. Perhaps this result is appropriate. It simply demonstrates the narrowness of the double jeopardy exception. Its purpose is not to remedy trial judge errors. Of course, since 1987, this situation can be addressed through the prosecution bringing an interlocutory appeal against the adverse admissibility ruling: *Criminal Appeal Act 1912* (NSW) s 5F.

B. Proposed change

The Amendment Bill would add s 102(2A) to extend the definition of 'fresh evidence'. It provides:

(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.

The Bill would also omit s 102(4), which would then be redundant. And, as discussed further below, s 102(2B) would be added to give this extended definition retrospective operation.

Before considering the impact of the proposed changes, it is worth questioning their precise 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.

Putting the wording issue to one side, s 102(2A) would improve the coherence of the double jeopardy exception. It would remove the inconsistencies in the treatment of the scenarios discussed above. The evidence would be considered 'fresh' in scenarios (a) and (b). The prosecution would not be penalised for the police having conducted an extraordinary investigation uncovering evidence that was not reasonably available. And

the evidence would be considered 'fresh' in scenarios (c) and (d). The prosecution would not be penalised simply for testing the admissibility of evidence.

This change, in effect, introduces a second way of establishing the freshness of evidence. The prosecution can argue that the evidence was not then reasonably available, *or* that it was not then admissible. The former argument would require the court to enquire as to the factual circumstances regarding the availability of the evidence. The latter argument would require the court to enquire as to its legal admissibility status. The defence, to block the application, may seek to establish that the evidence was *both* available and admissible at trial.

Note that under the proposed changes, the evidence would remain inadmissible in scenario (e). However, as discussed above, this may be appropriate. The double jeopardy exception is narrow, and not intended to remedy the problem of wrongly excluded prosecution evidence. Since 1987 this problem can be addressed through interlocutory prosecution appeal.

i. An alternative change

The change proposed in the Bill would remove inconsistency in the 'fresh' concept by extending it to all evidence that was inadmissible at trial but has since become admissible. The other way in which the inconsistency could be removed is by providing that, even if the evidence was then unavailable at trial, it cannot be considered 'fresh' if it would then have been inadmissible. With this change, the evidence would not be considered fresh in any of the scenarios (a) to (d). (The evidence would not be considered fresh in scenario (e) either. While admissible at trial, the evidence was reasonably available.)

If this change were to be adopted, the prosecution would need to establish that the evidence was not reasonably available at trial, but that if it had have been available it would have been admissible. The defence, in seeking to block the application, may do so either by demonstrating that the evidence was available at trial, or that it would have been inadmissible.

It seems that this change may pose questions which are overly hypothetical, particularly in the case of evidence flowing from recent technological developments. If the technology underpinning the evidence was not in existence at the time of the trial then the admissibility question will lack authority either way. This problem does not arise with the change proposed in the bill. The question as to whether the evidence would have been admissible need not arise if the evidence was not then in existence.

C. Broader policy considerations

The analysis above suggests that the ‘fresh and compelling evidence’ exception, as interpreted in *XX*, is incoherent. The proposed change brings coherency by expanding the scope of the double jeopardy exception. The greater coherence clearly brings formal benefits, but is the expansion desirable as a matter of policy? As noted above, greater coherence may also be achieved by narrowing the scope of the exception.

Opponents to the original creation of exceptions to the rule against double jeopardy exceptions will, no doubt, object to any extension of those exceptions. They would argue that defendant’s rights and the value of finality have been diminished enough. There should be no further shift in favour of the interests of victims and society in accurate law enforcement. They may point to the extensive changes brought by the *Evidence Act 1995* (NSW) and make claims about varieties of freshly admissible evidence and the number of applications the Bill may generate if passed. This floodgates concern will be discussed below.

The Wood Review (at p 63) identifies two more focused arguments against extending the ‘fresh and compelling evidence’ exception to freshly admissible evidence. The first, is the objection that ‘[a]llowing the prosecution to take advantage of changes in the law of evidence which expand the range of admissible evidence smacks of changing the rules after the game has already been played’. The second objection expresses concern that extending the double jeopardy exception to cover freshly admissible evidence may create an environment where, in the face of high profile unpopular acquittals, ‘[t]he law may be changed in order to secure a second trial’. These concerns, regarding fairness and strategic changes to evidence law, respectively, are discussed below.

i. Fairness and factual accuracy

Wood suggests that, allowing a retrial on the basis of freshly admissible evidence ‘smacks of changing the rules after the game has already been played’. One response to this is that the analogy is false; justice is not a game. ‘By definition, the opponents in a “fair game” are a priori both entitled to win.... Justice, however, again by definition, belongs to one side or another a priori, hence, independently of the outcome’: A Rapoport, *Fights, Games and Debates* (1960) 263. If a game is played according to the rules there is no basis for questioning the result. But a procedurally fair trial may reach the wrong result – it may acquit a guilty defendant or convict an innocent one. There may be very solid grounds for setting aside the result of a trial which are totally absent with games.

In *XX* the Court placed some emphasis on the fairness of the original trial in rejecting the AG’s application to set aside the acquittal.

As has been pointed out by the High Court on a number of occasions, an accused person is entitled to a trial “according to law” ... Such a trial is a trial based on evidence admissible according to law. There is no miscarriage of

justice by reason of the fact that, had inadmissible evidence been admitted, the result might have been different. (at [244])

This, however, only tells part of the story. Certainly, compliance with the rules and procedures governing the trial is important and is a chief factor going to whether there was a miscarriage of justice. However, the expression 'miscarriage of justice' may be used in different senses: *Rich v The Queen* (2014) 43 VR 558 [132]. It encompasses substantive truth as well as procedural regularity.

There is a clear line of authority on conviction appeals which recognises that a miscarriage of justice may be established by fresh evidence that throws doubt on the substantive accuracy of the original verdict: eg, *Ratten v The Queen* (1974) 131 CLR 510, 520 (Barwick CJ). And this extends to cases where the evidence may not have been admissible at trial. As the Victorian Court of Appeal recognised in *Rich* at [135], it is not a matter of

whether the trial was fair or unfair. It may be assumed that it was fair. The question is whether, on the material before the court of criminal appeal, including any new evidence, it appears that the applicant is innocent or that his guilt is in such doubt that he should not stand convicted. Logically, it follows that *the admissibility of any new evidence falls to be determined by the court according to the law of evidence as it stands when the matter is before the court.* (quoted in *Chidiac v The Queen* (No 2) [2016] NSWCCA 120 [136], my emphasis.)

Rich was a conviction appeal, and it is more important to correct a factually wrong conviction than it is to correct a factually incorrect acquittal. However, this is still clear authority that a verdict, the outcome of a fair trial, may be considered a miscarriage of justice on the basis of freshly admissible evidence.

ii. Rights and numbers

Opponents of the extension to freshly admissible evidence may make claims about how many applications it may generate. As explained further below, this kind of floodgates argument is without substance. As mentioned above, the practical impact of the double jeopardy has been very slight so far, and the Bill is very unlikely to change this.

But before substantiating this position it is worth considering the claim that any focus on the Bill's practical impact is misguided; it is all about principle. Paul Roberts argues, for example:

The unspoken implication – that double jeopardy reform cannot be anything to get hot under the collar about because it will not, in any event, affect many cases in practice – is immediately suspect. By this criterion, intermittent judicial torture or the odd execution should not bother us, either, so long as such exceptional remedies do not become routine. Yet, if something is unjust it remains unjust even if it only happens once; and, furthermore, penal law is *pro tanto* diminished to the extent that it authorises injustice, *even if that*

authorisation is never actually invoked. If it is justice to which we aspire – and not just public order, social hygiene, or the satisfaction of victims’ preferences etc – the numbers simply cannot be allowed to count in this crude fashion. (‘Justice for all? Two bad arguments (and several good suggestions) for resisting double jeopardy reform’ (2002) 6 *International Journal of Evidence and Proof* 197, 215, emphasis in original)

Roberts has a point, however, I think it may have fairly weak application to double jeopardy reform. There is no space here to get too caught up in the jurisprudence of human rights, however, there seems to be a reasonably clear distinction between torture and capital punishment, on the one hand, and exceptions to the double jeopardy protection on the other. Torture is prohibited by a jus cogens norm of international law. There is an absolute right not to be tortured. The prohibition on capital punishment does not apply as strongly or widely, but arguably it should. These rights should not be diminished due to countervailing considerations.

By contrast, the protection against double jeopardy and the extent to which it may be subject to exceptions, as mentioned above, appears to be a matter of balancing competing interests. And consideration of the numbers of cases appears relevant to this balancing exercise. How many defendants would actually face the prospect of having their acquittals set aside? How many mistaken acquittals may be corrected? There is a difference between the wholesale abolition of the protection against double jeopardy and the creation or extension of narrow exceptions for freshly available/admissible and compelling evidence in the most serious cases. Wholesale abolition would obviously be far more invasive, expensive, unsettling and difficult to justify than narrow well-targeted exceptions.

iii. The floodgates argument

As discussed above, the 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.

The Wood review provides half a dozen examples of types of evidence that may have become freshly admissible under the *Evidence Act 1995* (pp 64-66). But 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. Exclusionary rules generally have an epistemic rationale. They manifest a concern about the probative value of evidence relative to the risk that evidence would be misused. It is true that the *Evidence Act 1995* and evidence law more generally has opened up admissibility in recent decades, and that, to some extent, this reflects a view that evidence is more probative and/or less likely to be misused than

previously thought. But the changes have been incremental. 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.

Perhaps there may be some rare cases where a change in evidence law allows in compelling evidence which was inadmissible at trial. This situation may arise, for example, under the reforms to the hearsay rule in the *Evidence Act 1995*. For example, a fairly prompt report by a highly reliable eyewitness to a murder who is now unavailable may now be admissible under s 65 of the *Evidence Act 1995* whereas it may not have fitted any common law hearsay exceptions. If a rare case like this arose, there is a strong argument that it should be treated as 'fresh and compelling evidence' in an application to set aside the conviction. The development in evidence law may be analogised with a development in DNA technology. In the DNA case, the physical evidence was available at the original trial, as in the hearsay case. In both cases, the value inherent in the evidence is now capable of being realised through an evolution in knowledge, whether scientific in the case of DNA, or jurisprudential in the case of hearsay.

Wood seeks to add weight to the prospect of applications being made following evidence law changes with this suggestion:

The perception of finality would also be affected by an amendment of this type.

A person acquitted of a life sentence offence may forever remain attentive to any changes in evidence law that may impact upon his or her case. In this situation, victims may also find it difficult to heal and move on. (at 67)

This possibility would depend upon the qualities of the person in question and the circumstances of the individual case. It appears doubtful that many people would be well enough informed to understand the double jeopardy exceptions and the operation of evidence law. If they were, then they would probably appreciate that any change in evidence law would have to make *compelling* evidence freshly admissible. And, for reasons given, this scenario appears improbable.

iv. Strategic changes to evidence law

The Wood Review (at p 54-55) noted concerns that an extension of the double jeopardy exception to freshly admissible evidence could lead to a situation where the government would be pressured to make a strategic change to evidence law in order to enable retrial of an acquittal in a high profile case. The Wood Review 'accept[s] the legitimacy of stakeholders' concerns' (p 67). However, like the floodgates concern, these concerns are not well founded. As discussed in the previous section, it would not be enough that the change made evidence freshly admissible. The freshly admissible evidence would have to be compelling. Traditionally, evidence law has admitted compelling evidence.

A rare situation where potentially compelling evidence is currently subject to mandatory exclusion is confession evidence obtained through violence: *Evidence Act 1995* s 84. The reason that this principle potentially excludes highly probative evidence is that, unlike

most exclusions, this one has a moral rather than an epistemic basis. (Cf s 138 which creates a discretion to exclude illegally or improperly obtained evidence, but the trial judge must consider desirability of admitting it having regard to its probative value and importance, and the nature of the offence.) The mandatory exclusion of a violence-induced confession could result in an acquittal of doubtful accuracy. This could draw attention to the exclusion and pressure could be placed on the government to abolish or weaken it. However, in this situation pressure of this kind may well arise without regard to the double jeopardy exceptions. Any move to make such a change would be strongly opposed, including by reference to the jus cogens norm against torture (which includes the mandatory exclusion of torture-obtained evidence). The double jeopardy aspect would be a minor side issue.

The empirical plausibility of concerns about strategic law change and the floodgates can be tested by considering the English experience. On one view, freshly admissible evidence would count as ‘new evidence’ under the English double jeopardy exception. To constitute ‘new evidence’ the requirement appears to be merely that the evidence has not been “adduced” in the proceedings’. (And it is clear that, in the English context, ‘adduced’ means admitted in the previous trial.)¹ This was the position taken in *Baker* [2012] EWCA Crim 414 [9], where DNA evidence, wrongly excluded by the trial judge, was held to be new evidence for the purpose of the double jeopardy exception: see also Ian Dennis, ‘Quashing Acquittals Applying the New and Compelling Evidence Exception to Double Jeopardy’ [2014] *Criminal Law Review* 247, 254. This corresponds with scenario (e) discussed above. Under both current and proposed NSW law, this evidence would not be treated as ‘fresh evidence’.

An authority more on point, though inconclusive, is *Reilly* [2017] EWCA Crim 1333. In this case the prosecution relied upon propensity evidence – prior convictions – which had been excluded at trial, but may now be admissible due to the opening up of the admissibility of propensity evidence in the *Criminal Justice Act 2003*. The issue in *Reilly* is very similar to that raised in *XX* and addressed by the proposed Bill. The Court recognised

there might perhaps be a dispute as to whether or not those are “new” evidence for the purposes of section 78(2), in that those matters were known about at the time and indeed an application was made at the retrial for those convictions to be adduced as similar fact evidence. The trial judge had refused that application. (at [31])

However, the Court did not express a final view on the issue. (The prosecution in *Reilly* relied primarily on DNA evidence which was clearly new and compelling, and ultimately

¹ While, in this respect, England’s ‘new and compelling evidence’ exception is significantly broader than NSW’s ‘fresh and compelling evidence exception’, any ‘failure by an officer or by a prosecution to act with due diligence or expedition’ is expressly mentioned as a matter to be considered by the Court in determining whether the application should be granted in the ‘interests of justice’: *CJA s 79(2)(c)*.

the application was rejected as being contrary to the interests of justice as Reilly was very unwell, mentally and physically, close to death, and unfit to plead.)

While not resolving the issue it is significant that the Court did not reject the possibility that the prior convictions, if newly admissible, could count as new evidence. The Court noted (at [31]) that ‘although the evidence of those convictions had been *sought* to be adduced at the trial, they had not in fact been adduced in evidence before the jury’, and ‘any application made under the modern provisions contained in section 101(1)(d) of the *Criminal Justice Act 2003* to admit those convictions would nowadays most likely be viewed very differently from the way in which it was viewed under the law at the time in the 1980s’.

It is also highly significant for present purposes that, 12 years after the commencement of the ‘new and compelling evidence’ double jeopardy exception, the issue was apparently only being considered for the first time. It seems clear that the possibility of the ‘new and compelling evidence’ covering freshly admissible evidence has not opened the floodgates, even though changes in English evidence law are comparable to those in Australia: see, eg, JR Spencer’s *Evidence of Bad Character* (2006) and *Hearsay Evidence in Criminal Proceedings* (2008). It is also clear that this possibility has not led to strategic changes to evidence law so as to enable the challenging of high profile acquittals.

v. Retrospectivity

As noted above, the Bill, if passed into law, would have retrospective operation: s 102(2B). Retrospective laws raise legitimate concerns. Parliament does have the power to pass legislation with retrospective operation, but courts may demand a clear legislative statement that this is the intention: eg, *Maxwell v Murphy* (1957) 96 CLR 261, 267.

The concerns are gravest in the case of retrospective substantive criminal legislation. Clearly it is unjust to criminalise conduct retrospectively. If the conduct was lawful at the time it was engaged in, it is deeply problematic to later deem it to be criminal. However, even with laws extending criminal responsibility, concerns about retrospectivity may be mollified where the conduct was clearly immoral, such as war crimes (*Polyukhovich v Commonwealth* (1991) 172 CLR 501 [18]) and marital rape (Jill Hunter, ‘Rape Law, Past Wrongs and Legal Fictions’, in Roberts, Young and Dixon (eds), *The Integrity of Criminal Process* (2016) 327, 333).

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 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.

The line between procedural law and substantive law is not always easy to draw. Double jeopardy exceptions may lie on the border. On the one hand, if a person has committed murder and is acquitted, this is a serious injustice. Setting aside the acquittal so that the defendant can be convicted furthers justice: see eg, *Dunlop* [2007] 1 WLR 1657 [17], [45]. Despite this, there is authority that where a person has acquired a right not to be prosecuted, for example due to the expiration of a limitation period, this right cannot be removed except by express words: *Pinder* (1989) 155 LSJS 65; Pearce and Geddes, *Statutory Interpretation in Australia* (8th ed, 2014) 377.

The double jeopardy exceptions when originally introduced were expressly given retrospective operation: *CARA* s 99(3). In view of this, 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.

D. Further exceptional applications

The discussion above deals with the first aspect of the Bill – drawing freshly admissible evidence within the notion of fresh evidence. The second aspect of the Bill is that it would permit second applications in 'exceptional circumstances', including where the double jeopardy legislation has been subject to 'substantive legislative change': *CARA* ss 105(1AA), (1AB). Generally, only one application can be made under the 'fresh and compelling evidence' exception: s 105(1).

If the Bill is passed, this would permit a second application to be considered in XX. Indeed, the reform appears designed specifically to achieve this purpose. This may give rise to concerns. It might be argued that, for the legislature to design legislation to achieve a result in a particular case infringes the separation of powers. The legislature would be acting judicially, and the court would be acting as an instrument of the executive. But this argument claims too much. The legislation may well have been prompted by XX, but it is not unusual for individual cases to motivate law reform. The double jeopardy reforms in the UK were developed in response to the Stephen Lawrence case (W Macpherson, *The Stephen Lawrence Inquiry*, Cm 4262 (1999), Recommendation 38). In large part, the reforms were picked up in Australia in response to *R v Carroll* (2002) 213 CLR 635 (eg, Wood Review p 18). The present Bill, while prompted by an individual case, is expressed in general terms, and would present no difficulties under the *Kable* principle: *Kable v DPP (NSW)* (1996) 189 CLR 51.

The reactive nature of the present Bill may also elicit the old lawyer's saying, 'hard cases make bad law'. The fact that a new law is introduced in response to a perceived injustice in an individual case doesn't mean the new law will necessarily be bad. The aphorism's warning is that strenuous efforts to achieve the right result in an individual case may result in a poorly designed law. Care should be taken to ensure that the law provides justice beyond the individual case.

The Bowraville murders are a hard case. The grief experienced by the families of the murdered children has been 'compounded' over the subsequent decades by 'systemic flaws' in the criminal justice system: Standing Committee on Law and Justice, *The family response to the murders in Bowraville* (Report 55, Nov 2014) 119. Understandably, there is a strong desire to do whatever is necessary so that they may finally see children's murderer brought to justice. However, it must be ensured that the legislative steps that are taken will not lead to injustice in other cases.

Permitting a second application marks a further shift away from defendants' rights and finality and towards victims' rights and law enforcement. Is this appropriate? Given that XX is the first Australian application under the double jeopardy exceptions after more than a dozen years it seems possible that, beyond XX, a situation of 'exceptional circumstances' may never be repeated, or very rarely. The Bowraville families may be given the opportunity to see justice done without an impact on any defendants other than XX. Is it justifiable to subject XX, and possibly a small number of other defendants, to a further application? If he is guilty, this may not appear a particular problem, however, that is the question which a retrial would seek to answer.

It is worth noting that other double jeopardy exceptions permit repeated applications. A further application to set aside an acquittal may be made under the current law if the acquittal at the retrial was 'tainted': *CARA* s 105(1A). As mentioned above, the tainted acquittal exception appears to have not been employed yet in any jurisdiction. The double jeopardy exception for directed acquittals and questions of law in *CARA* s 107 also permits repeated applications. It has been used on successive occasions against a single defendant in respect of the same charges: *R v PL* [2009] NSWCCA 256; *R v PL* [2012] NSWCCA 31.