Submission No 14

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

Organisation: NSW Government

Date Received: 9 July 2019

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Doc# A769757

The Hon Niall Blair MLC
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Dear Mr ~~Blair~~ Niall

NSW Government submission to inquiry into Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

I write to provide the NSW Government submission to the Legislative Council Standing Committee on Law and Justice's inquiry into the legal implications of the amendments proposed in the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 (the Bill). I appreciate the Committee's willingness to accept a late submission on this important matter.

The Government is pleased to make this submission, which, in short, seeks to provide the Standing Committing with some background summarising:

- the principle of double jeopardy and its policy rationale;
- the history of the development of the relevant NSW provisions; and
- reforms adopted in other Australian and overseas jurisdictions.

I hope that the submission will be of assistance to the Committee.

Yours sincerely

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NSW Government submission

Standing Committee on Law and Justice Inquiry into

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

1. Introduction

The NSW Government welcomes the opportunity to make a submission for consideration by the Legislative Council Standing Committee on Law and Justice (the **Committee**) as part of its inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 (the **2019 Amendment Bill**).

To help inform the Committee's deliberations on the legal implications of the proposed amendments in the 2019 Amendment Bill, this submission seeks to provide the Committee with background information on:

- legislative reforms in relation to double jeopardy in Australia and other common law countries;
- the development and application of the relevant provisions of the *Crimes (Appeal and Review) Act 2001* (the **CARA**) that the 2019 Bill proposes to amend (at **Annex A**); and
- recent case law that has examined the scope and application of the relevant provisions of the CARA.

2. Contextualising the 2019 Amendment Bill

Some background is necessary to help contextualise the 2019 Amendment Bill.

The Government notes that the Committee's task, as set out in its terms of reference, is to inquire into, examine the legal implications of and report on the 2019 Amendment Bill without canvassing issues covered in the Committee's 2014 inquiry into the family response to the murders in Bowraville; however, some discussion of the tragic events that were the catalyst to the Bill's development is warranted to allow its potential scope and application to be appreciated.

2.1 Bowraville murders

As indicated in Mr Shoebridge's second reading speech, the 2019 Amendment Bill was developed and introduced against the backdrop of a devastating incident that has deeply affected the Bowraville, and broader NSW, community. The lasting grief and loss experienced by the families of Colleen Walker-Craig, Clinton Speedy-Duroux, and Evelyn Greenup, and the Bowraville community, has been profound. The Government is deeply sorry for their pain and suffering.

Between September 1990 and February 1991, 16 year old Colleen Walker-Craig, 16 year old Clinton Speedy-Duroux, and 4 year old Evelyn Greenup disappeared from the town of Bowraville on the NSW north coast. Clinton's remains were discovered on 18 February 1991, and a person known as '**XX**' was charged with Clinton's murder on 8 April 1991. On 27 April 1991, Evelyn's remains were discovered. XX was charged with Evelyn's murder on 16

October 1991. Colleen's remains were never discovered; however, items of her clothing were subsequently located in the Nambucca River. On 30 November 1991, an inquest was held into the disappearance of Colleen, which was adjourned after one day and an "open" finding was made by the Coroner. On 29 September 1993, the inquest was re-opened for new evidence. The matter was then adjourned until 2 November 1994, when the Coroner found that there was insufficient evidence to pronounce Colleen deceased.

In 1993, the NSW Director of Public Prosecutions (**DPP**) sought to prosecute XX in a joint trial for the murders of Clinton and Evelyn, relying on similar fact evidence to prove that both crimes were committed by the same person. The accused sought an order that the counts in relation to Clinton and Evelyn be tried separately on the basis that: evidence of either offence was not admissible in respect of the other offence; the accused would be seriously and unfairly prejudiced by a joint trial; and similar fact evidence was only admissible if, when viewed independently and together with the remaining evidence, it was strongly probative of the offence charged. The application was determined prior to the introduction of the *Evidence Act 1995* (NSW). On 25 August 1993, an order was made that the counts in relation to Clinton and Evelyn would be tried separately.

On 18 February 1994, XX was acquitted of the murder of Clinton. On 4 March 1994, *a nolle prosequi*, being a formal notice that a prosecutor will not proceed with a charge, was entered in relation to the charge of murder that related to Evelyn.

On 6 January 1997, the Commissioner of Police established a Strike Force to reinvestigate the deaths of Clinton and Evelyn, and the disappearance of Colleen.

A coronial inquest was into Evelyn's death and the suspected death of Colleen was held in 2004. On 10 September 2004, the Coroner concluded that Evelyn died on or about 4 October 1990 in Bowraville and was satisfied that there was evidence capable of satisfying a reasonable jury properly instructed that she was murdered and, further, that there was a reasonable prospect that the jury would convict a known person of her murder. The inquest in relation to Evelyn was terminated. The Coroner also found that Colleen died on or about 13 September 1990 near Bowraville as a result of homicide, but was not satisfied that there was sufficient evidence to satisfy a jury that a known person was responsible. No charges have been laid with respect to Colleen's murder.

Following the 2004 inquest, an ex officio indictment was filed against XX for the murder of Evelyn and, in February 2005, he was indicted to stand trial. XX was acquitted of Evelyn's murder by a jury on 3 March 2006.

2.3 Double jeopardy rule

The double jeopardy rule is a long-established principle of law that prevents a person who has been acquitted or convicted of a criminal charge being tried again on the same (or very similar) charges and on the same facts. The rule, which dates back at least 800 years, is recognised in the laws of various common law and civil law countries, as well as in international instruments. For example, Article 14(7) of the United Nations International Covenant on Civil and Political Rights provides that:

> No one shall be liable to be tried or punished again for an offence for which he has already finally been convicted or acquitted in accordance with the law and penal procedure of each country.[1]

The UN Human Rights Committee has stated, however, that Article 14(7):

> "does not prohibit the resumption of a criminal trial justified by exceptional circumstances, **such as the discovery of evidence which was not available or known at the time of the acquittal**."[2]
>
> [emphasis added]

The justification for the rule can generally be summarised as follows:

- the power and resources of the State as prosecutor are much greater than those of the accused;
- the consequences of conviction are very serious;
- the power to prosecute could be used by the executive as an instrument of oppression; and
- finality and legal certainty are important aspects of any system of justice.[3]

The provisions of the CARA that the 2019 Amendment Bill seek to amend allow for a very limited exception to the principle of double jeopardy. This is discussed further below.

2.3 Amendment to evidence law

In 1995, NSW enacted the *Evidence Act 1995* (NSW), adopting the Uniform Evidence Law in NSW. Relevantly, the Evidence Act introduced rules with respect to the admissibility of tendency and coincidence evidence that replaced the common law rules applicable to propensity and similar fact evidence. Critically, section 101(2) of the Evidence Act provides that tendency and/or coincidence evidence about a defendant adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. This test is generally considered to be more permissive than the common law test for the admissibility of similar fact evidence.[4]

3. Catalyst cases: United Kingdom, New Zealand and Australia

In the late 1990s and early 2000s, a series of high profile cases were decided in several common law countries that called the double jeopardy principle into question, discussed in brief below.

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[1] United Nations International Covenant on Civil and Political Rights, 1966, Art. 14(7).
[2] United Nations Human Rights Committee, *General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, July 2007 (CCPR/C/GC/32), para 56. Accessible at: http://hrlibrary.umn.edu/hrcommittee/gencom32.pdf.
[3] *R v Carroll* [2002] HCA 55. See for example, paras. 22-23, 25, 48 per Gleeson CJ and Hayne J; para 86, per Gaudron and Gummow JJ.
[4] 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. At para 1.13.

3.1 United Kingdom - Murder of Stephen Lawrence

On 22 April 1993, an 18 year old black Englishman, Stephen Lawrence, was murdered in a racially motivated attack by a gang of white youths in south London. After initial investigations, five suspects were arrested. Two suspects were initially charged with murder, but their prosecution was discontinued as a result of issues of reliability in relation to identification evidence.

Mr Lawrence's family initiated a private prosecution of the five suspects. Committal proceedings against four of the suspects took place; at the end of the committal, the prosecution did not seek the committal of one of the suspects. The committing Magistrate discharged another suspect. In April 1996, the remaining three suspects were tried for murder before a jury. Following the judge's ruling that purported identification evidence was not admissible, there was insufficient further evidence to justify the continuation of the prosecution. No further evidence was offered, and the jury was directed to acquit the defendants (i.e. enter "not guilty" verdicts in relation to the defendants). The rule against double jeopardy represented a barrier against any further prosecution of the three suspects who had been acquitted.

3.2 New Zealand - R v Moore

In May 1992, Kevin Moore and two other members of a New Plymouth gang were tried for the murder of a rival gang member. A defence witness gave alibi evidence in favour of Moore and his co-accused that may have led to their acquittal.

In August 1999, Moore was convicted of conspiracy to pervert the course of justice in relation to that alibi evidence. He received the maximum term of imprisonment for that offence (seven years). In his remarks, the sentencing judge stated:

> The law does not permit you to be retried for the murder you committed as you were acquitted of it because of your conspiracy. You escape the sentence of life imprisonment that should be the minimum you receive. Instead you receive a much lesser sentence… The maximum sentence of seven years imprisonment is itself a very lenient sentence in your case when by your conspiracy you have literally got away with murder and avoided life imprisonment. To impose any lesser sentence would further benefit you in respect of the crime of conspiracy committed by you.[5]

Moore appealed his sentence, in part on the basis that his conviction amounted to a breach of the double jeopardy principle, and that the sentence was, in any event, excessive. The Court of Appeal dismissed the appeal stating, "[t]his offending falls squarely within the band or bracket comprising the worst class of cases under this section and therefore qualifies for the maximum term."[6]

3.3 Australia - *R v Carroll*

In 2002, the High Court handed down its decision in the case of *R v Carroll* (***Carroll***).[7] As relevant, Raymond Carroll was acquitted of murder in 1985. By 1999, police had received substantial further evidence to indicate that Carroll had perjured himself at trial with respect to his whereabouts at the time of the murder, and had made admissions of guilt since his

[5] *R v Moore* (17 September 1999) unreported, High Court, Palmerston North Registry, T31/99, 3–5, Doogue J.
[6] *R v Moore* (23 November 1999), unreported, Court of Appeal, CA399/99.
[7] *R v Carroll* [2002] HCA 55.

earlier acquittal. Carroll was charged with perjury, and convicted in November 2000. Carroll appealed.

On appeal, the Queensland Court of Criminal Appeal held that the perjury trial was, in effect, a re-trial of the murder offence of which he was acquitted.[8] The Crown appealed to the High Court.

The High Court unanimously held that the Crown's attempt to prosecute an acquitted person for perjury on substantially the same facts as the initial trial for murder was an abuse of process. Even though Carroll was not tried for the same offence twice, the High Court considered that the prosecution for perjury effectively sought to undermine the earlier acquittal for murder.

4. Inquiries and reform: United Kingdom and New Zealand

4.1 United Kingdom

Following the murder of Mr Lawrence and the unsuccessful prosecution of the five suspects, the UK Government established the *Stephen Lawrence Inquiry*. In 1999, the Inquiry report was issued;[9] Recommendation 38 was:

> That consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented.

In 2001, the UK Law Commission was tasked with reviewing whether the double jeopardy principle as applied in the UK should be reformed, as suggested in Recommendation 38. In its Report,[10] the UK Law Commission recommended (as relevant) that:

> [T]he Court of Appeal should have power to set aside an acquittal for murder only, thus permitting a retrial, **where there is compelling new evidence of guilt and the court is satisfied that it is in the interests of justice** to quash the acquittal; and that that power should apply equally to acquittals which have already taken place before the law is changed.
>
> [emphasis added]

It further considered that the exception should apply:

> [Only] **where new evidence is discovered after an acquittal**… [it] **should not be possible** to apply for a retrial on the basis of evidence which was in the possession of the prosecution at the time of the acquittal **but could not be adduced because it was inadmissible, even if it would now be admissible because of a change in the law.**[11]
>
> [emphasis added]

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[8] *R v Carroll* [2001] QCA 394.

[9] Sir William MacPherson, *The Stephen Lawrence Inquiry*, 1999. Accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf.

[10] The Law Commission, *Double Jeopardy and Prosecution Appeals – Report on two references under section 3(1)(e) of the* Law Commission Act 1965, 2001 (**UK Law Commission Report**). Accessible at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc267_Double_Jeopardy_Report.pdf.

[11] UK Law Commission Report, Part VIII. See also, *Attorney General for NSW v XX* [2018] NSWCCA 198, at para. 77.

In 2002, the Blair Government issued its *Justice for All* policy statement, which set out the Government's commitment to reform the double jeopardy principle in the UK. While noting the principle's importance, it proposed to create limited exceptions on the basis that there are certain cases in which "re-trial would be justified if there were compelling fresh evidence giving a clear indication of guilt." It suggested that the reform would:

- apply only where "**fresh evidence emerge[s] that could not reasonably have been available** for the first trial and strongly suggests that a previously acquitted defendant was in fact guilty…" [emphasis added];
- empower the Court of Appeal to quash an acquittal where "there is compelling new evidence of guilt"; and
- allow for one retrial only.[12]

The UK Government subsequently introduced the Criminal Justice Bill 2002 (**2002 UK Bill**) to implement that reform commitment. Clause 65(1) of the 2002 UK Bill provided that, for an application to be made (and ordered), there must be "**new and compelling** evidence that the acquitted person is guilty of the qualifying offence" [emphasis added]. Clause 65(2) defined 'new' evidence as evidence that "**was not available or known** to an officer or prosecutor at or before the time of the acquittal" [emphasis added].

Under the *Criminal Justice Act 2003* (UK) (**2003 UK Act**) as passed (at **Annex B**), the Court of Appeal must, on the application of a prosecutor, order the retrial of a person acquitted in earlier proceedings if satisfied that there is 'new and compelling' evidence against the acquitted person, and that to do so would be in the interests of justice.[13] Evidence is:

- 'new' if it "**was not adduced** in the proceedings in which the person was acquitted" [emphasis added] and

- 'compelling' if it is reliable, substantial and, in the context of outstanding issues, appears highly probative of the case against the acquitted person.

In determining whether a retrial is in the interests of justice, the Court is to have regard to:

- whether existing circumstances make a fair trial unlikely;
- the length of time since the qualifying offence was allegedly committed;
- whether it is likely that "the new evidence **would have been adduced** in the earlier proceedings against the acquitted person **but for a failure by an officer or by a prosecutor to act with due diligence or expedition**" [emphasis added]; and
- whether, since the original proceedings, any officer or prosecutor has failed to act with due diligence or expedition.

The definition of 'new' in the 2003 UK Act provides a lower threshold than the definition proposed in the 2002 UK Bill. The meaning of 'new' in the context of the 2003 UK Act was

[12] Great Britain Home Office, *Justice for All – A White Paper on the Criminal Justice System*, CM 5563, 2002, para 4.64, as quoted in Model Criminal Code Officers Committee, *Model Criminal Code Discussion Paper Chapter 2 – Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, 2003, Attorney General's Department, p47 (**MCCOC Discussion Paper**). Accessible at: https://www.ag.gov.au/Publications/Documents/Double%20jeopardy%20reform%20proposals%20March%202004/Discussion%20paper%20Double%20Jeopardy.pdf

[13] *Criminal Justice Act 2003* (UK), ss76-79.

considered in *R v B* [2012] EWCA Crim 414, in which the Court of Appeal of England and Wales stated, relevantly, at [8]:

> …as a matter of statutory construction it does not follow that all evidence which was available to be deployed in the earlier proceedings must fall outside the ambit of the 'new' evidence provision on which s 76 applications must, whether in whole or in part, be based. Subject to the interests of justice requirement found in s 79, evidence which was available to be used, but which was not used, may be 'new' evidence for the purposes of s 78(2). This provides the context in which to reflect that s 78(2) is concerned with evidence – that is admissible evidence capable of being deployed against a defendant in accordance with the rules of admissibility."

In considering the meaning of 'adduced', the Court stated at [9]-[10]:

> …once the judge ruled that it [the evidence] should not be admitted at the respondent's trial, notwithstanding that it was available for his consideration, and indeed that he considered it, it was not, in our judgment, 'adduced' in the proceedings.
>
> In the present case the judge ruled (wrongly, as the House of Lords found) that crucial admissible evidence should not be admitted. His ruling was wrong. As a result this crucial evidence was not, and could not be, adduced by the Crown in the proceedings against the respondent. In our judgment, the evidence excluded by the judge constitutes new evidence for the purposes of s 78(2) on the basis that it was never adduced in or brought forward for consideration as admissible evidence at the original trial…

In support of this construction, the Court of Appeal of England and Wales considered the parliamentary debates on the issues regarding the 2002 UK Bill, at [11]-[12]:

> …From these debates, it is clear that the language of cl 65(2) of the original Bill (the predecessor to s 78(2) of the 2003 Act to the effect that where the original trial evidence was available in the broad sense, it should not be treated as new evidence) **was deliberately amended to the current position that whether or not it was available, it is new evidence if it was not adduced in the proceedings**.
>
> The contents of the debate are entirely consistent with our interpretation of the statutory provision. Accordingly, the mere fact that evidence was available at the original trial does not mean that it was adduced in those proceedings.
>
> [emphasis added].

The Court of Appeal of England and Wales again considered the meaning of 'new' evidence, and 'adduced', in *R v Henry* [2014] EWCA Crim 1816 at [21]-[22]:

> …They [the Crown] submit that the meaning of "adduced" in s.78(2) relates to whether the particular evidence was "put forward in evidence" in the proceedings. They submit that, in reality, service of the papers and the hearsay application represent what lawyers would consider to be applications to adduce the evidence rather than the actual adducing of the evidence.
>
> The factual position before the court was that AO was not physically available as a witness since at that stage the prosecution had lost touch with her. It was not in a position to call her before the court or to put her evidence before the court for that reason. That was why it had resorted to the hearsay application. The application to admit the evidence as hearsay was refused by the judge. Because of the judge's ruling the Crown was never able to adduce that evidence in the sense contended for by the Crown. The Crown submit that it can derive some support for its submission from the terms of s.78(5). It seems to us that that provides

> somewhat limited support for the proposition. In addition, we have been referred to the provisions of s.62(8) of the 2003 Act, dealing with terminating rulings, which refers to evidence being adduced when it is tendered in evidence. We think in the context of the type of application which is comprehended by the provisions of Pt 10 of the Criminal Justice Act 2003 (that is s.75 onwards), that the construction contended for by the Crown in relation to AO's evidence is the correct one and that AO's evidence is to be regarded as new evidence for the purposes of this application.

It should be noted that, under the UK 2003 Act, applications for retrial can be made in relation to persons who have been acquitted of a qualifying offence as listed in Schedule 5 to the 2003 UK Act (at **Annex B**). This includes a wider range of offences than those for which applications can be made in Australia (see below). The 2003 UK Act allows for one application for retrial to be made only.

A number of applications for retrials have been made under the UK provisions. The UK case law continues to develop in the context of the applications made and the types of 'new' evidence upon which those applications are based.

4.2 New Zealand

In March 2001, the Law Commission of New Zealand released its report, Acquittal Following Perversion of the Course of Justice. The report discussed the double jeopardy rule and recommended that an exception to the rule be introduced in new Zealand in relation to cases involving tainted acquittals only (that is, acquittals that were affected by administration of justice offences such as perjury).

The Law Commission considered the English reviews and proposed reform directions discussed above, but concluded that no case had been established in New Zealand for reforming the double jeopardy principle to allow for retrial where 'new' or 'fresh' evidence is obtained.

5. Inquiries and reform: Australia

The decision in *Carroll* prompted calls for review and potential reform of the double jeopardy rule throughout Australia. NSW was the first jurisdiction to take action to investigate such reform.

5.1 Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW)

In September 2003, the then NSW Government developed the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW) (**2003 Consultation Bill**)[14] and provided to key stakeholders for consideration and submissions on a confidential basis.

The 2003 Consultation Bill, modelled on the 2002 UK Bill, proposed to insert a new Part 3A in the (then) *Criminal Appeal Act 1912* (NSW). As most relevant, clause 9C provided that the DPP could apply to the NSW Court of Criminal Appeal (**NSWCCA**) for a retrial of a person previously acquitted of a 'very serious offence' (an offence punishable by life imprisonment, or manslaughter, per clause 9B) where there is 'fresh and compelling evidence' against the acquitted person and it is in the interests of justice (clause 9C(2)(a)). Clause 9D(2) defined evidence as 'fresh' if:

[14] Criminal Appeal Amendment (Double Jeopardy) Bill 2003 – Consultation Draft. Accessible at: https://legislation.nsw.gov.au/bills/91b35512-86b2-11dc-8fad-00144f4fe975

(a) it was not led in the proceedings in which the person was acquitted, and

(b) it could not have been led in those proceedings with the exercise of reasonable diligence.

Clause 9F provided that, in determining whether a retrial was in the interests of justice, the NSWCCA was to have regard to:

(a) whether existing circumstances make a fair trial unlikely,

(b) the length of time since the acquitted person allegedly committed the offence, and

(c) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with a retrial of the acquitted person.

Clause 9C(3) provided that the DPP could only make one application for retrial in relation to an acquittal. The reforms were to apply retrospectively.

5.1.1 Commentary on Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW)

In its October 2003 Draft Report on the 2003 Consultation Bill,[15] the Legislation Review Committee noted that:

> The requirements that the evidence be "fresh" and "compelling" are **designed to set a relatively high threshold** for the exercise of the Court of Criminal Appeal's power to order a retrial. The "fresh" requirement is primarily designed to ensure that the CCA's power to order a retrial cannot be relied upon where the original acquittal was the product of incompetence on the part of the police or prosecution.
>
> [emphasis added]

Acting Justice Jane Mathews was also asked by the then Attorney General to consider the 15 submissions made on the 2003 Consultation Bill and to report on the suitability of its safeguards. In her November 2003 Report,[16] Acting Justice Mathews noted that many stakeholders:

- strongly objected to any exemptions to the double jeopardy rule;
- opposed any proposal for an exemption in the case of new or fresh evidence, and that, if such an exemption were to be adopted, very stringent safeguards were required;
- suggested that work on the 2003 Bill be deferred until a concurrent national review by the Model Criminal Code Officers Committee (**MCCOC**; discussed below) was completed;
- suggested narrower definitions of 'fresh' and 'compelling' evidence [NB: some stakeholders were satisfied with the form proposed in the 2003 Bill. No stakeholders were cited as suggesting wider definitions]; and
- opposed the proposed retrospective application of the reforms.

[15] Legislation Review Committee, *Draft Report - Consultation Draft Bill – Criminal Appeal Amendment (Double Jeopardy) Bill 2003*, 2003. Accessible at: https://www.parliament.nsw.gov.au/ladocs/digests/565/Criminal%20Appeal%20Amendment%20Double%20Jeopardy%20Bill%202003.pdf

[16] Acting Justice Mathews, *Advice to the Attorney General – Safeguards in relation to Proposed Double jeopardy Legislation*, 2003, NSW Department of Justice. Accessible at: https://www.justice.nsw.gov.au/justicepolicy/Documents/advice_from_justice_mathews_final.doc

To ensure that the exemption could not be used oppressively, Acting Justice Mathews concluded that an absolute limitation of only one application for retrial was essential. She also recommended that the exemption not apply to manslaughter, and that a time limit of three years after the conclusion of any original trial be imposed for any application for retrial.

5.2 MCCOC Review

At its August 2003 meeting, the (former) Standing Committee of Attorneys General (**SCAG**) agreed that MCCOC should review the double jeopardy principle.

In late 2003, MCCOC released a discussion paper, '*Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals*',[17] which included detailed discussion of the double jeopardy rule and its application, and the potential need for reform. With respect to reform to allow for retrials of serious offences where there is 'fresh and compelling' evidence, the paper considered *Carroll*, the UK and New Zealand reviews, the 2002 UK Bill and the 2003 Consultation Bill at length. It concluded that a 'fresh and compelling' evidence exemption was justified, providing that stringent minimum safeguards were adopted to preclude its abuse. Most relevantly, MCCOC recommended that:

- the Court of Criminal Appeal must be satisfied that there is 'fresh' evidence that "**was not available** to be presented **at the first trial** and that the investigation was conducted with due diligence - and **a change in legal rules of inadmissibility since the acquittal** allowing the evidence **will not make that evidence fresh** evidence for these purpose"[18] [emphasis added]; and
- only one application for a retrial may be made, and the decision be not appealable.

MCCOC was careful to highlight the technical legal distinction between the terms 'new' and 'fresh' evidence; 'new' evidence is evidence that **existed at the time of the original trial but was not adduced** (for whatever reason), while 'fresh' evidence is more restrictive, and is evidence **that could not have been brought to the original trial** because it could not have been obtained at the time. MCCOC cited various cases which have held that, in order to be considered 'fresh', the evidence:

1. could not have been obtained with reasonable diligence for use at the trial;
2. must be such that there must be a high degree of probability that there would be a different verdict; and
3. must be credible.[19]

MCCOC noted that a 'new' evidence threshold could allow for a retrial if a crucial piece of evidence that existed at the time of the original trial was not presented, for example, because of a mistake or a tactical decision by police or prosecution, while the 'fresh' evidence threshold could not. It further observed that the UK had opted for the lower threshold of 'new' evidence, and that the higher 'fresh' evidence threshold had been proposed in the 2003 NSW Bill. It concluded:

[17] MCCOC Discussion Paper.
[18] MCCOC Discussion Paper, p. 76.
[19] *Akins v National Australia Bank* (1994) 34 NSWLR 155, at 160. See also: *Mickelberg v The Queen* (1989) 167 CLR 259; *Crouch v Hudson* (1970) 44 ALJR 31; *Hashman v Downie* (1996) 39 NSWLR 169.

> The [MCCOC] believes that **allowing retrials for all 'new' evidence is not appropriate** given the departure from long-standing legal principle being suggested with these double jeopardy reforms. **The evidence should not have been available**, through the exercise of due diligence, **at the time of the original acquittal** – **this is the essence of 'fresh'**.[20]
>
> The Court of Criminal Appeal would have to be satisfied that, in addition to being fresh, the evidence is reliable, substantial and highly probative of the case against the acquitted person. A **typical example of such evidence may be DNA evidence**…. The Court must also be satisfied that it is **in the interests of justice** to order a retrial. The length of time since the acquitted person allegedly committed the offence and the length of time since the person was acquitted are factors that the Court must consider in determining what the 'interests of justice' require. For example, **if the length of time passed suggests to the Court that a fair trial is unlikely, a retrial should not be ordered**. **The Crown is permitted only one retrial application in relation to a particular acquittal**.[21]
>
> [emphasis added]

The ultimate form of the relevant provisions proposed as by the MCCOC are at paras 2.8.5 and 2.8.6 of the discussion paper.

5.3 Crimes (Appeals and Review) Amendment (Double Jeopardy) Bill 2006 (NSW)

In 2006, the then Government introduced the Criminal Appeal Amendment (Double Jeopardy) Bill 2006 (NSW) (**2006 Bill**). The 2006 Bill was in largely in the same form as the 2003 Consultation Bill, subject to some minor revisions consistent with the conclusions and recommendations of Acting Justice Mathews and the MCCOC model provisions (most relevantly, to confine applications for retrials to offences that carry a maximum penalty of life imprisonment, thereby excluding manslaughter).

In the 2006 Bill's second reading speech, the then Premier, Hon Morris Iemma, stated:

> The ancient rule of double jeopardy provides that a person may not be tried for the same offence twice… criminal proceedings can be brought to a conclusion, and the result in a trial can be regarded as final. It protects individuals against repeated attempts by the State to prosecute…[and] encourages police and prosecutors to be diligent and careful in their investigation and to gather as much evidence as possible against the accused…. However, the strengths of the double jeopardy rule also bring weaknesses and too rigid an adherence to the rule may bring the law into disrepute.
>
> There will sometimes be cases where **diligent police and prosecutors will still fail to find all the possible evidence**. Perhaps it is being concealed from them deliberately, or perhaps developments in forensic technology will reveal new evidence or new conclusions to be drawn from existing evidence. **In such cases, there may well be grounds to bring the accused back to trial**. In fact, not to do so risks perpetrating a major injustice by allowing a guilty person to walk free even when there is compelling evidence of his or her guilt and this can bring the justice system into disrepute.
>
> There are other cases where an acquittal is obtained by subverting the trial by threatening witnesses, by tampering with the jury, or by perjury by defence witnesses. Where such cases come to light the double jeopardy law can stand in the way of justice. For these reasons the government is proposing **reforms to the double jeopardy rule in a**

[20] MCCOC Discussion Paper, p. 109.
[21] MCCOC Discussion Paper, p. iii.

> **measured way by creating exceptions framed with precision and containing appropriate safeguards.** These reforms will ensure that justice can be done in our courts. The proposals in this bill are the result of a long and careful process of consultation with the community.
>
> As honourable members will be aware, the Government first announced its intention to reform the ancient rule of double jeopardy in 2003. The Government released an exposure draft bill in 2004 and sought expert advice from Acting Justice Jane Mathews. We also considered models proposed by the national Model Criminal Code Officers Committee, as well as pioneering reforms already enacted in the United Kingdom. **The community's views and the view of experts in the field have all been taken into account in drafting this bill.**
>
> … Fresh evidence is defined by new section 102 to be any evidence that was not adduced at trial and could not have been adduced at trial with reasonable diligence…
>
> … The need for these reforms is shown by the case of *R v Carroll*. Carroll was originally tried on a charge of murdering a young girl in Queensland over 30 years ago. He was convicted at trial but that conviction was overturned on appeal. Subsequently, new dental evidence was found casting doubt on that acquittal.
>
> As it happened, Carroll had testified at his own trial. As a result, the prosecution brought perjury charges using the new evidence and Carroll was convicted at first instance. However, in 2002 the High Court upheld the Queensland Court of Appeal's decision overturning this conviction on the grounds of double jeopardy. It found the prosecution for perjury amounted to trying Carroll twice for the same offence. This bill would overcome this problem in New South Wales **because a similar case here could potentially be retried on the basis of fresh and compelling evidence under section 100**. [22]
>
> [emphasis added]

The Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 was introduced together with the Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006. These Bills combined were described in the second reading speech as, *"major reforms…that will help bring the criminal law of this State into the twenty-first century. They are related bills, in part responding to changes in technology, helping to ensure that the guilty are convicted and the innocent are set free, and ensuring the balance of the criminal justice system."*[23]

In the course of the debate concerning these Bills, the then Attorney General, Hon Bob Debus, stated the following:

> In November 2003 the United Kingdom enacted part 10 of the Criminal Justice Act 2003, the UK Act, which overturned the double jeopardy rule in cases of new and compelling evidence. Acting Justice Jane Matthews, of the Supreme Court of New South Wales, was then asked to examine the draft bill and the submissions received in the consultation process and to provide an advice, with particular emphasis on the adequacy of the safeguards in the bill…

[22] Morris Iemma, *Second Reading*, 2006, NSW Legislative Assembly Hansard. Accessible at: https://www.parliament.nsw.gov.au/bill/files/1075/LA%2069-7006.pdf

[23] Morris Iemma, *Second Reading*, 2006, NSW Legislative Assembly Hansard. Accessible at: https://www.parliament.nsw.gov.au/bill/files/1075/LA%2069-7006.pdf

> The various measures, safeguards and tests built into the current bill will ensure that the quashing of an acquittal will occur only in extremely limited and compelling cases and will guard against these powers being used recklessly or capriciously. It is those safeguards that answer the arguments made by, for instance, the Law Society of New South Wales and the New South Wales Bar Association. In summary, the key safeguards are: the restriction to very serious offences; the requirement for fresh and compelling evidence; the interests of justice test; only one application for a retrial can be made, and only one retrial held; the Director of Public Prosecutions [DPP] must approve re-investigations; the potential for restrictions on publication; and a statutory review after five years…
>
> The bill defines evidence as "fresh" if it was not adduced in the proceedings in which the person was acquitted and it could not have been adduced in those proceedings with the exercise of reasonable diligence.
>
> The bill defines evidence as "compelling" if it is reliable and substantial and, in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person. These provisions are similar to their counterparts in the UK Act. I emphasise again that these safeguards are to prevent prosecutors or police from using these exceptional powers in a reckless, capricious or speculative fashion. The definition of "fresh" evidence is designed to ensure that tactical prosecutorial decisions do not give rise to the opportunity for a retrial. For example, a decision not to call a particular witness to give evidence should not be the basis upon which a retrial is ordered.[24]

The *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* passed the NSW Parliament in October 2006, and commenced on 15 December 2006.

5.4 Reform in other jurisdictions

Most Australian jurisdictions reformed their laws with respect to double jeopardy shortly after NSW, consistent with the MCCOC recommendations and with NSW's reforms. As relevant:

- In October 2007, **Queensland** amended its laws to allow for a retrial for murder where 'fresh and compelling' evidence becomes available after an acquittal. Evidence is 'fresh' if it 'was not adduced in the proceedings' and 'could not have been adduced in those proceedings with the exercise of reasonable diligence.' Only one application for a retrial may be made.25
- In July 2008, **South Australia** amended its laws to allow retrials of persons acquitted of serious offences where there is 'fresh and compelling' evidence. Evidence is 'fresh' if it 'was not adduced in the proceedings' and 'could not have been adduced in those proceedings with the exercise of reasonable diligence.' Only one application for a retrial may be made.[26]
- In August 2008, **Tasmania** amended its laws to allow retrials of 'very serious crimes' where there is 'fresh and compelling' evidence. Evidence is 'fresh' if it 'was not adduced in the proceedings' and 'could not have been adduced in those proceedings with the exercise of reasonable diligence.' Only one application for a retrial may be made.[27]

[24] NSW. Parliamentary Debates. Legislative Assembly. 27 September 2006.
[25] *Criminal Code Act 1899* (QLD), ss678B; 678D.
[26] *Criminal Procedure Act 1921* (SA), ss142; 147.
[27] *Criminal Code Act 1924* (TAS), ss393; 395, 397AC.

- In September 2011, **Western Australia** amended its laws to allow retrials of serious offences if there is 'fresh and compelling' evidence. Evidence is 'fresh' if 'despite the exercise of reasonable diligence by those who [originally] investigated the offence… it was not and could not have been made available to the prosecutor in [the original] trial' or 'it was available to the prosecutor in [the original] trial… but was not and could not have been adduced'. Only one application for a retrial may be made.[28]
- In November 2011, **Victoria** amended its laws to allow for a retrial for a serious offence if 'fresh and compelling evidence' is obtained after acquittal. Evidence is 'fresh' if it 'was not adduced at the trial of the offence', and 'could not, even with the exercise of reasonable diligence, have been adduced at the trial'. Only one application for a retrial may be made.[29]
- In June 2016, the **Australian Capital Territory** amended its laws to allow for retrial of an offence punishable by life imprisonment if there is 'fresh and compelling' evidence. Evidence is 'fresh' if it was not tendered in the original proceeding, and 'could not, in the course of an exercise of reasonable diligence, have been tendered'. Evidence is not 'fresh' if it was, or was considered to be, inadmissible in the original proceeding, and would, 'as a result of a change in the law on or after the person was acquitted', be admissible in a proceeding in which the person is retried for the offence. Only one application for a retrial may be made.[30]

6. Double jeopardy principle in the context of Bowraville

6.1 Standing Committee Report

In November 2013, the Legislative Council Standing Committee on Law and Justice established an inquiry into the family response to the murders of Clinton, Evelyn and Colleen. It received 30 submissions and held several public hearings.

The Inquiry report was tabled in November 2014.[31] It made 15 recommendations to Government. With respect to the issue of retrial of acquitted persons, Recommendation 8 provided:

> That the NSW Government review section 102 of the *Crimes (Appeal and Review) Act 2001* to clarify the definition of 'adduced', and in doing so consider:
>
> - the legal or other ramifications of defining adduced as 'admitted', particularly on the finality of prosecutions;
> - the matters considered by the English courts under the equivalent UK legislation;
> - the merit of replacing section 102 of the *Crimes (Appeal and Review) Act 2001* with the provisions in section 461 of the Criminal Appeals Act 2004 (WA); and
> - the merit of expressly broadening the scope of the provision to enable a retrial where a change in the law renders evidence admissible at a later date.
>
> The report of this review should be tabled in the NSW Legislative Council as soon as practicable.

[28] *Criminal Appeals Act 2004* (WA), ss46E; 46H; 46I.
[29] *Criminal Procedure Act 2009* (VIC), ss327C, 327H, 327J.
[30] *Supreme Court Act 1933* (ACT), ss68K, 68M, 68Q.
[31] Legislative Council Standing Committee on Law and Justice, *The family response to the murders in Bowraville*, 2014, NSW Parliament. Accessible at: https://www.parliament.nsw.gov.au/lcdocs/inquiries/2131/Bowraville%20-%20Final%20report.pdf

On 2 June 2015, the Government issued its response to the SCLJ report.[32] It supported or noted each of the 15 recommendations. All Government responses to the recommendations have been implemented. In response to Recommendation 8, on 5 June 2015, the Government engaged the Hon James Wood AO QC to conduct a review of section 102 of the CARA.

6.2 2015 Amendment Bill

On 4 June 2015, David Shoebridge MLC introduced a Private Member's Bill, the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015 (NSW) (the 2015 Amendment Bill) into the Legislative Council. The 2015 Amendment Bill sought to amend section 102 of the CARA to provide 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."[33]

The second reading speech for the 2015 Amendment Bill indicated that it was directed specifically at allowing for the retrial of XX.[34] The Bill was negatived on division on 5 May 2016.

6.3 Wood Review

In December 2015, the '*Review of Section 102 of the* Crimes (Appeal and Review) Act 2001 *(NSW) – To clarify the definition of "adduced"*[35] was tabled. As part of the review, Mr Wood considered the question of whether the section 102 definition of 'fresh' should be amended to include evidence that was inadmissible at the time of the original proceedings that has since become admissible due to a change of law, as proposed in the 2015 Amendment Bill.

By virtue of the nature of his review, Mr Wood explicitly considered the question of whether section 102 should be widened by:

> redefining the word 'adduced' to expressly mean 'admitted', or by explicitly broadening the provision to enable an application to quash an acquittal where a change in law renders evidence that was previously available but inadmissible to now be admissible.[36]

Mr Wood stated that he understood that the amendment could clear the way for an application to quash an acquittal in three scenarios, namely where:

(1) The court wrongly rejects admissible evidence and as a consequence the accused is acquitted;

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[32] NSW Government, *NSW Government Response to the Legislative Standing Committee on law and Justice Inquiry into the family response to the murders in Bowraville*, 2014, NSW Parliament. Accessible at: https://www.parliament.nsw.gov.au/lcdocs/inquiries/2131/Government%20response%20-Bowraville%20-received%202%20June%202.pdf

[33] Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015. Accessible at: https://www.parliament.nsw.gov.au/bill/files/2929/First%20Print.pdf

[34] David Shoebridge, *Second Reading*, 2015, NSW Legislative Council Hansard, p. 2. Accessible at: https://www.parliament.nsw.gov.au/bill/files/2929/Double%20Jeopardy%20-%202nd%20Read.pdf.

[35] 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

[36] Wood Review, para 6.2.

(2) The prosecution had evidence that was available, but chose not to tender it because it was assumed not to be of probative value or to be inadmissible, and the accused is acquitted, and the significance of this evidence changes, and/or it later becomes admissible through a change in the law; and
(3) Evidence is tendered to the court, the court correctly rejects it as inadmissible in the light of the current law, the accused is acquitted, and the evidence later becomes admissible as a result of a change in the law.

Mr Wood formed the view that, under the CARA, an application to quash the acquittal would be rejected in all three scenarios and that, further, amending the word, "adduced," to "admitted," could "enliven an application under s 102 in relation to the second and third scenarios" outlined above. It is noted that Mr Wood was of the view that there was a 'deliberate choice' by the legislature to:

> confine fresh evidence to evidence **arising through recent developments, such as a post-acquittal confession, newly-discovered DNA evidence**, or the **emergence of an eyewitness** whose existence was **previously unknown**.[37]
>
> [emphasis added]

Mr Wood concluded that it was premature to amend section 102 without knowing how the NSWCCA would apply it (noting no applications had been made at that time). He further considered that:

> There are a number of concerns with the proposed changes to the definition of 'fresh', primarily broadening the types of evidence that could constitute 'fresh' evidence has the potential to destabilise the principle of finality in prosecutions, which will impact upon defendants, victims and the community's confidence in the courts.[38]

He concluded that the existing legislation appeared to serve its policy intent of balancing the rights of acquitted persons and the pursuit of justice.

Additional findings of importance include that:

- 'fresh' was well understood to mean evidence that was not previously available, and therefore could not have been tendered at the original trial;[39]
- 'adduced' does not mean 'admitted', but rather must be taken to mean 'tendered';[40]
- amendment to allow evidence that was available but inadmissible in an original trial to later be admitted if there is a change in the law would "open the possibility for a change in admissibility/evidence law to be brought about to address a specific case, most notably one where there was a degree of publicity and an unpopular acquittal";[41]
- section "102(4) conveys a clear legislative intention that focuses its application **only in relation to the admissibility at a retrial of newly emerged evidence**. It seeks to do no more than to allow its admission at a new trial even though it may not have been admissible at the earlier trial, had it then been known;"[42] and

[37] Wood Review, para 6.5.
[38] Wood Review, p. viii.
[39] Wood Review, para 6.13.
[40] Wood Review, para 1.17.
[41] Wood Review, para 6.15.
[42] Wood Review, para 6.16.

- "the term 'fresh' was carefully considered and intentionally inserted into the provision **because of its restrictions**. An amendment would have ramifications beyond Bowraville, as it potentially paves the way to revive a number of acquittals where similar fact evidence was rejected. Accordingly, I cannot recommend that s 102 of CARA be amended [in the manner sought by the 2015 Amendment Bill]."[43]

6.4 Application for retrial in relation to the Bowraville murders

On 16 December 2016, the former Attorney General, the Hon Gabrielle Upton MP, made an application to the NSWCCA under s 100(1) of the CARA for an order for a retrial of XX for the murders of Clinton Speedy-Duroux and Evelyn Greenup. The application expressed its purpose to be to enable a retrial of XX for the alleged murders of Clinton and Evelyn jointly on an indictment for the murder of Colleen Walker.

On 13 September 2018, the NSWCCA (Bathurst CJ, Hoeben CJ at CL and McCallum J) delivered its decision on the application for retrial.[44] The application was dismissed.

A critical issue in the application was what constituted 'fresh' evidence and, in particular, the meaning of 'adduced.'

The NSWCCA held that 'adduced' means 'tendered' or 'brought forward'. On this point, it stated:

> Thus, s 102(2)(a) looks to whether the evidence was in fact 'tendered' in the 'proceedings in which the person was acquitted,' irrespective of its admissibility, while s 102(2)(b) looks to whether it could have been 'tendered' or 'brought forward' in 'those proceedings with the exercise of reasonable diligence.' The question of the admissibility of the evidence at the previous trial plays no part in this inquiry. Thus, evidence available to the police or prosecutor but not tendered due to a view as to its likely admissibility, whether correct or otherwise, would not be evidence which falls within s 102(2)(b).[45]

Following the decision of the NSWCCA, the Attorney General sought urgent legal advice from three Senior Counsel and, subsequently, made an application to the High Court of Australia for special leave to appeal the decision of the NSWCCA. On 22 March 2019, the High Court of Australia refused the application for special leave, stating, with reference to the decision of the NSWCCA:

> Evidence which is available to a party is not fresh evidence within the meaning of section 100. That is the way the term 'adduced' is generally understood in the law and it is what it means in the statutory context of section 100, the Court of Criminal Appeal held.
>
> We can find no reason to doubt the correctness of the decision of the Court of Criminal Appeal. It follows that there is no basis for the grant of special leave and the application must be refused.

[43] Wood Review, para 6.22.
[44] *Attorney General for NSW v XX* [2018] NSWCCA 198.

Annex A

Crimes (Appeals and Review) Act 2001 (NSW)

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.

102: Fresh and compelling evidence—meaning

(1)This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.

(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.

(3) Evidence is compelling if:

a. it is reliable, and

b. it is substantial, and

c. in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.

(4) 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.

104: Interests of justice—matters for consideration

(1)This section applies for the purpose of determining under this Division whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.

(2)It is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances.

(3)The Court is to have regard in particular to:

a. the length of time since the acquitted person allegedly committed the offence, and

b. whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for the retrial of the acquitted person.

105: Application for retrial—procedure

(1) Not more than one application for the retrial of an acquitted person may be made under this Division in relation to an acquittal.

[…]

(7) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned should be tried on the same indictment.

Annex B

Criminal Justice Act 2003 (UK)

75 Cases that may be retried

(1) This Part applies where a person has been acquitted of a qualifying offence in proceedings—
- *a. on indictment in England and Wales,*
- *b. on appeal against a conviction, verdict or finding in proceedings on indictment in England and Wales, or*
- *c. on appeal from a decision on such an appeal.*

(2) A person acquitted of an offence in proceedings mentioned in subsection (1) is treated for the purposes of that subsection as also acquitted of any qualifying offence of which he could have been convicted in the proceedings because of the first-mentioned offence being charged in the indictment, except an offence—
- *a. of which he has been convicted,*
- *b. of which he has been found not guilty by reason of insanity, or*
- *c. in respect of which, in proceedings where he has been found to be under a disability (as defined by section 4 of the Criminal Procedure (Insanity) Act 1964 (c. 84)), a finding has been made that he did the act or made the omission charged against him.*

(3) References in subsections (1) and (2) to a qualifying offence do not include references to an offence which, at the time of the acquittal, was the subject of an order under section 77(1) or (3).

(4) This Part also applies where a person has been acquitted, in proceedings elsewhere than in the United Kingdom, of an offence under the law of the place where the proceedings were held, if the commission of the offence as alleged would have amounted to or included the commission (in the United Kingdom or elsewhere) of a qualifying offence.

(5) Conduct punishable under the law in force elsewhere than in the United Kingdom is an offence under that law for the purposes of subsection (4), however it is described in that law.

(6) This Part applies whether the acquittal was before or after the passing of this Act.

(7) References in this Part to acquittal are to acquittal in circumstances within subsection (1) or (4).

(8) In this Part "qualifying offence" means an offence listed in Part 1 of Schedule 5.

76 Application to Court of Appeal

(1) A prosecutor may apply to the Court of Appeal for an order—
- *a. quashing a person's acquittal in proceedings within section 75(1), and*
- *b. ordering him to be retried for the qualifying offence.*

(2) A prosecutor may apply to the Court of Appeal, in the case of a person acquitted elsewhere than in the United Kingdom, for—
- *a. a determination whether the acquittal is a bar to the person being tried in England and Wales for the qualifying offence, and*
- *b. if it is, an order that the acquittal is not to be a bar.*

(3) A prosecutor may make an application under subsection (1) or (2) only with the written consent of the Director of Public Prosecutions.

(4) The Director of Public Prosecutions may give his consent only if satisfied that—
- *a. there is evidence as respects which the requirements of section 78 appear to be met,*
- *b. it is in the public interest for the application to proceed, and*
- *c. any trial pursuant to an order on the application would not be inconsistent with obligations of the United Kingdom under [F1Article 31 or 34 of the Treaty on European Union (as it had effect before 1 December 2009) or Article 82, 83 or 85 of the Treaty on the Functioning of the European Union] relating to the principle of ne bis in idem.*

(5) Not more than one application may be made under subsection (1) or (2) in relation to an acquittal.

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.

78 New and compelling evidence

(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.

(2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).

(3) Evidence is compelling if—
- *a. it is reliable,*
- *b. it is substantial, and*
- *c. in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.*

(4) The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

(5) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

79 Interests of justice

(1) The requirements of this section are met if in all the circumstances it is in the interests of justice for the court to make the order under section 77.

(2) That question is to be determined having regard in particular to—
- *a. whether existing circumstances make a fair trial unlikely;*
- *b. for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;*
- *c. whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition;*
- *d. whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.*

(3) In subsection (2) references to an officer or prosecutor include references to a person charged with corresponding duties under the law in force elsewhere than in England and Wales.

(4) Where the earlier prosecution was conducted by a person other than a prosecutor, subsection (2)(c) applies in relation to that person as well as in relation to a prosecutor.

Schedule 5 – Qualifying offences for purposes of Part 10

Part 1 List of offences for England and Wales

Offences against the person

(1) Murder.

(2) *An offence under section 1 of the* Criminal Attempts Act 1981 *(c. 47) of attempting to commit murder.* [Attempted murder]

(3) *An offence under section 4 of the* Offences against the Person Act 1861 *(c. 100).* [Soliciting murder]

(4) *Manslaughter.*

(4A) *An offence under section 1 of the* Corporate Manslaughter and Corporate Homicide Act 2007*.* [Corporate manslaughter]

(5) *Kidnapping.*

Sexual Offences

(6) *An offence under section 1 of the Sexual Offences Act 1956 (c. 69) or section 1 of the* Sexual Offences Act 2003 *(c. 42).* [Rape]

(7) *An offence under section 1 of the* Criminal Attempts Act 1981 *of attempting to commit an offence under section 1 of the* Sexual Offences Act 1956 *or section 1 of the* Sexual Offences Act 2003. [Attempted rape]

(8) *An offence under section 5 of the* Sexual Offences Act 1956*.* [Intercourse with a girl under 13]

(9) *An offence under section 10 of the* Sexual Offences Act 1956 *alleged to have been committed with a girl under thirteen.* [Incest with a girl under 13]

(10) *An offence under section 2 of the* Sexual Offences Act 2003 *(c. 42).* [Assault by penetration]

(11) *An offence under section 4 of the* Sexual Offences Act 2003 *where it is alleged that the activity caused involved penetration within subsection (4)(a) to (d) of that section.* [Causing a person to engage in sexual intercourse without consent]

(12) *An offence under section 5 of the* Sexual Offences Act 2003*.* [Rape of a child under 13]

(13) *An offence under section 1 of the* Criminal Attempts Act 1981 *(c. 47) of attempting to commit an offence under section 5 of the* Sexual Offences Act 2003*.* [Attempted rape of a child under 13]

(14) *An offence under section 6 of the* Sexual Offences Act 2003*.* [Assault of a child under 13 by penetration]

(15) *An offence under section 8 of the* Sexual Offences Act 2003 *where it is alleged that an activity involving penetration within subsection (2)(a) to (d) of that section was caused.* [Causing a child under 13 to engage in sexual activity]

(16) *An offence under section 30 of the* Sexual Offences Act 2003 *where it is alleged that the touching involved penetration within subsection (3)(a) to (d) of that section.* [Sexual activity with a person with a mental disorder impeding choice]

(17) *An offence under section 31 of the* Sexual Offences Act 2003 *where it is alleged that an activity involving penetration within subsection (3)(a) to (d) of that section was caused.* [Causing a person with a mental disorder impeding choice to engage in sexual activity]

Drugs Offences

(18) *An offence under section 50(2) of the* Customs and Excise Management Act 1979 *(c. 2) alleged to have been committed in respect of a Class A drug (as defined by section 2 of the M*isuse of Drugs Act 1971 *(c. 38)).* [Unlawful importation of Class A drug]

(19) *An offence under section 68(2) of the* Customs and Excise Management Act 1979 *alleged to have been committed in respect of a Class A drug (as defined by section 2 of the M*isuse of Drugs Act 1971*)* [Unlawful exportation of Class A drug].

(20) An offence under section 170(1) or (2) of the Customs and Excise Management Act 1979 *(c. 2) alleged to have been committed in respect of a Class A drug (as defined by section 2 of the* Misuse of Drugs Act 1971 *(c. 38)).* [Fraudulent evasion in respect of Class A drug]

(21) An offence under section 4(2) of the Misuse of Drugs Act 1971 *alleged to have been committed in relation to a Class A drug (as defined by section 2 of that Act).* [Producing or being concerned in production of Class A drug]

(22) An offence under section 1(2) of the Criminal Damage Act 1971 *(c. 48) alleged to have been committed by destroying or damaging property by fire.* [Arson endangering life]

(23) An offence under section 2 of the Explosive Substances Act 1883 *(c. 3).* [Causing explosion likely to endanger life or property]

(24) An offence under section 3(1)(a) of the Explosive Substances Act 1883*.* [Intent or conspiracy to cause explosion likely to endanger life or property]

(25) An offence under section 51 or 52 of the International Criminal Court Act 2001 *(c. 17).* [Genocide, crimes against humanity and war crimes]

(26) An offence under section 1 of the Geneva Conventions Act 1957 *(c. 52).* [Grave breaches of the Geneva Conventions]

(27) An offence under section 56 of the Terrorism Act 2000 *(c. 11).* [Directing terrorist organisation]

(28) An offence under section 1 of the Taking of Hostages Act 1982 *(c. 28).* [Hostage-taking]

(29) An offence under section 1 of the Criminal Law Act 1977 *(c. 45) of conspiracy to commit an offence listed in this Part of this Schedule.* [Conspiracy]