**Supplementary Submission No 21a**

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

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**Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019**
**Standing Committee on Law and Justice**
**3. Supplementary Submission**

Here I would like to pick up a few further points coming out of the other submissions and the evidence given at the hearing.

**A. Symmetry with defence appeals**

Some of the opponents to the Bill seem to suggest that the Bill is inconsistent with defence appeals, and that it would have the effect that acquittal appeals would pay less respect to the principle of finality than conviction appeals. For example, Mr McGrath in his evidence for the DPP suggested the Bill would create a 'two-tiered appeal system' with the prosecution having greater scope for appeals than the defence. Ms Bashir echoed his comments in her evidence for the Bar Association: 'there will be two tiers; one for people who are acquitted and one for people who are convicted'.

Actually, it is difficult to compare defence and prosecution appeals. Generally, across criminal procedure including appeals, there is an asymmetry which strongly favours the defence. This is appropriate, given that the prosecution, a state actor, has far greater resources while the defendant has far more at stake. If there are two tiers, the convicted defendant is on the higher tier. The defendant generally has greater appeal rights than the prosecution.

At the first regular conviction appeal a defendant may adduce 'fresh evidence'. It need not be compelling. The appeal will be upheld if the appeal court considers there to be a significant possibility that, had the fresh evidence been before it at the trial, the jury would have acquitted the defendant: eg *Van Beelen v The Queen* [2017] HCA 48 [22]. Opponents of the Bill suggest that in this context, 'fresh evidence' does not include 'freshly admissible evidence'. I am not aware of any decisions where courts have squarely addressed this issue, but I think this is correct.

It should be noted that, as well as 'fresh evidence' defence appeals, the defence can also have a conviction set aside on the basis of evidence that is merely 'new' (evidence that was reasonably available to the defence at trial). However, for the appeal to succeed, the new evidence must be very strong. In *Rich v The Queen* (2014) 43 VR 558 the court indicated

> [133] [T]he court must consider all of the evidence called at trial together with *any new evidence (whether or not the new evidence was available to the applicant to be called at trial)* and, on that basis, form its own view of the facts …. If the court is thereby satisfied of the applicant's innocence, or entertains such a doubt as to the applicant's guilt that it considers the verdict should not

> be allowed to stand, the court will quash the conviction and enter a judgment and verdict of acquittal. ...
>
> [135] … 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)

On one view this suggests that evidence that is freshly admissible may provide the basis for a successful defence appeal if it is strong enough.

These principles govern regular first appeals. In addition there is scope for the government or the court to refer a conviction back for an exceptional subsequent appeal. It will be difficult for the defendant to secure such a referral. This mechanism 'is not intended to provide a convicted person with yet another avenue of appeal after the usual avenues have been exhausted': *Milat* (2005) 157 A Crim R 565, 574 [26] (Barr J). While in other respects these appeals resemble regular appeals, they are broader in terms of the evidence available for consideration. The legislation indicates that they encompass 'the whole case' (eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 79(1)(b). In *Mallard v The Queen* (2005) 224 CLR 125 a majority of the High Court held

> *the explicit reference to "the whole case" conveys no hint of any inhibition* upon the jurisdiction of the Court of Criminal Appeal on a reference. Indeed, to the contrary, the words "the whole case" embrace the whole of the evidence properly admissible, whether "new", "fresh" or previously adduced, in the case against, and the case for the appellant. (at 131 [10], Gummow, Hayne, Callinan and Heydon JJ, emphasis added)

These subsequent appeals are relatively rare, and, as far as I know, the issue of whether the court may consider freshly admissible evidence, excluded at trial, has not arisen. However, given the breadth of this statement, it appears quite possible that freshly admissible evidence could be considered.

As I mentioned in my evidence at the hearing, South Australia and Tasmania allow the defendant to apply to the court for a subsequent appeal on the basis of 'fresh and compelling evidence': eg, *Criminal Procedure Act 1921* (SA) s 159. (A Bill before Western Australia's Parliament would introduce the reform there.) This legislation is explicitly modelled on the 'fresh and compelling evidence' exception to double jeopardy. There have only been half a dozen or so cases so far and, as far as I know, the issue of whether the defence may rely upon freshly admissible evidence, excluded at trial, has not arisen.

However, it is interesting to note that a related issue was considered in *R v Bromley* [2018] SASCFC 41. The issue and its treatment are both rather unusual, and it is difficult to know what to make of them. However, it does appear potentially relevant, so I will mention it here.

In Bromley case *the prosecution* was allowed to present propensity evidence in opposition to the defendant's application for a subsequent appeal. This was allowed in support of an argument that it would be against the interests of justice to give the defence leave for a subsequent appeal. The Court indicated that the 'interests of justice' include 'acquittal of the innocent, the conviction of the guilty [and] the public interest in seeing those things happen': [385]-[387]. *Bromley* was concerned with a 1985 conviction for a 1984 murder, and the propensity evidence related to an assault in very similar circumstances several years prior to the murder in 1981: see at [36], [433]-[473]. The propensity evidence had not been adduced at the murder trial: [36]. The reason for the prosecution not relying on the evidence was not discussed. On the face of it the evidence would have been reasonably available to the prosecution.

The Court considered the basis for the admissibility of the prosecution propensity evidence on the defence application for a subsequent appeal: mere relevance, the common law admissibility test which was applicable at the time of the trial, and the current legislative test under s 34P of the *Evidence Act 1929* (SA): [476]-[481]. The Court held it was not necessary to decide upon a particular test since the evidence would satisfy them all: [482]-[502].

This aspect of the *Bromley* decision is strange. Given that the defence was required to present *fresh and compelling* evidence in order to be granted a further appeal, it seems odd that the prosecution was able to counter the application with evidence that appears to be merely new and probably not compelling. Nevertheless, for present purposes, it is a further illustration of the relative openness with which courts sometimes approach these subsequent appeals.

## B. Adversarialism and truth

The finality principle and double jeopardy protection are integral parts of the adversarial criminal trial. The trial aims to resolve the outstanding issues in a single dramatic contest. As Mr McGrath said in his evidence for the DPP: 'We expect that we will have one shot at this trial, and we marshal our best evidence and, in fairness to the justice system and the accused and all the participants, give it our best go.'

Ms Rigg, for the Public Defenders and Legal Aid, also emphasised the importance of finality and standing by the trial verdict. She illustrated her commitment to finality by suggesting a defendant should not be permitted to take advantage of reforms police verballing – police-fabricated confessions.

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> My submission is that because of the importance of finality, even in relation to those situations of people who could say, "I was convicted at a time where unrecorded confessions were admitted. Now they are not; I want to have my trial again," I always argued against that. It really is fundamentally problematic for the principle of finality for those types of reviews to be ongoing.

Of course, in this situation, a defendant may well be able to rely upon fresh evidence that the police officer in charge of the investigation was corrupt and had engaged in verballing practices. (I do not take Ms Rigg to suggest the contrary.) The work of the Royal Commission into the NSW Police Service, and following that, the Police Integrity Commission and ICAC, led to quite a few 'fresh evidence' appeals: eg *Pedrana* (2001) 123 A Crim R 1; *Rix* [2005] NSWCCA 31.

Ms Rigg stated

> I think that there is currently broad community support, given that we have an accusatorial system, for the fact that sometimes people who are in fact guilty will not be found guilty. The burden of proof in a criminal trial, for example, reflects that. It is a reflection of the fact that a guilty person may in fact be acquitted. *It is not an inquiry into the truth of the matter*; otherwise we would have an inquisitorial system. (emphasis added)

I do not agree that the trial is not an inquiry into the truth. The trial is an attempt to determine the truth, although it serves other values at the same time. The prosecution's heavy burden of proof reflects concern about the 'searing injustice and consequential social injury ... when the law turns upon itself and convicts an innocent person': *Van der Meer* (1988) 82 ALR 10, 31 (Deane J). In order to avoid the more harmful factual error – convicting the innocent – the system tolerates an elevated risk of the less harmful error – acquitting the guilty. This calculation does reflect a concern for the truth.

More generally, the trial is not an unconstrained inquiry into the truth. It is hemmed in by rules of procedure and evidence, many of which may be viewed as 'methods for correcting and improving the making of judgments of fact under conditions of uncertainty': Gageler, 'Evidence and Truth', (2017) 13 *The Judicial Review* 249, 256. Again, the desire to arrive a the true facts is a factor governing the operation of trials.

In other respects, however, principles governing criminal litigation may inhibit the search for truth. The finality principle is one of these. However, it is worth bearing in mind Kirby J's warning: 'Just as in the law, we can love truth, like all other good things, unwisely; pursue it too keenly; and be willing to pay for it too high a price, so we can also love finality too much': *Burrell* (2008) 238 CLR 218, 236 [72].

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**C. Tension and incoherence in current legislation**

In my submission I noted incoherence in the operation of the current 'fresh and compelling evidence' exception to double jeopardy, as interpreted in *XX*. Evidence that is inadmissible at trial may be considered fresh (under s 102(4)), but not if the evidence has been tendered (and excluded) at trial, as was the case in *XX*. This may, in effect, penalise the prosecution and police for conducting a thorough investigation to discover that evidence (my scenario (b), p 4). Had they conducted a less thorough, though still reasonable, investigation and not discovered the evidence prior to trial, they would be able to later rely upon the evidence as 'fresh evidence' for an application to overturn the acquittal (scenario (a), p 4).

I suggested in my submission that, if the prosecution found the evidence but did not adduce on the basis of its inadmissibility, they would be able to rely upon the evidence as fresh evidence in a later application (scenario (c), p 4). I suggested they would be penalised for testing its admissibility (scenario (d), p 4). As I mentioned in my evidence, this statement regarding scenario (c) requires correction or qualification. There is a passage in *XX* which was not in my mind when writing my submission. The court said '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)': [225]. As mentioned in my evidence, this was obiter, and its correctness may be questioned. The implication of this statement is that it would be *unreasonable* for the prosecution to not tender *inadmissible* evidence. As the Attorney argued in *XX* this appears difficult to accept: [185]. Surely it is reasonable not to tender inadmissible evidence.

**D. The alternative formulation – replacing 'adduced' with 'admitted'**

The Jumbunna Institute's alternative suggestion for amendment (at p 16 of their submission) is to replace 'adduced' with 'admitted' in s 102(2). It would then read

> Evidence is "fresh" if:
> (a) it was not *admitted* in the proceedings in which the person was acquitted, and
> (b) it could not have been *admitted* in those proceedings with the exercise of reasonable diligence.

Note that this alternative was briefly dealt with in the Wood Review (pp 61-62). No specific technical objections were raised with it, just the familiar broad policy objections.

This definition of freshness is narrower than the English/Welsh notion of 'new evidence' which merely requires that evidence was not admitted at trial. (The UK Act uses the term 'adduced', but it has been interpreted to mean 'admitted'.) It doesn't matter whether the prosecution exercised reasonable diligence or not, although this is considered as a factor going to the interests of justice.

There may be an ambiguity in (b). What if the prosecutor adduced the evidence at trial but it was wrongly excluded by the trial judge? The prosecutor may have acted with reasonable diligence but not the trial judge. Should 'freshness' turn only on the prosecutor's reasonable diligence? In this event, wrongly excluded evidence could be 'fresh' for the purpose of an application to set aside the acquittal. If 'freshness' demands reasonable diligence by the trial judge as well, then wrongly excluded evidence could not be considered fresh. This may not matter a great deal since, after 1987, wrongly excluded prosecution evidence can be challenged by an interlocutory prosecution appeal: *Criminal Appeal Act 1912* (NSW) s 5F. However, if this alternative proposal is to go forward the ambiguity should be addressed.

Subject to that issue, this alternative appears simpler than that appearing in the current Bill. As the Jumbunna Institute notes at p 16, it avoids the potentially tricky issue of determining whether a change in admissibility has flowed from a 'substantive change in evidence law'.

This alternative may also reduce the scope for potentially tricky historical enquiries as to whether evidence would have been admissible at the time of the trial. If it is only the prosecutor's reasonable diligence that is in question, then, in a case like *XX* it will be enough that the evidence was adduced but excluded. Freshness would then turn on whether the evidence is now admissible. (This requirement should also be spelt out in the double jeopardy exception.) However, if the trial judge's reasonable diligence is also in question in the definition of freshness, then the historical question may arise whether the evidence was correctly excluded.

If the evidence was reasonably available at trial but not adduced, then the historical admissibility issue may arise. The prosecution may argue that, at trial, the evidence was not adduced because it was not then admissible.

**E. Repute and integrity**

Members of the committee and witnesses (including myself) in their submissions and evidence made occasional references to the risk of bringing the legal system into disrepute. As I noted in my evidence, the High Court has recently identified difficulties with appeals to repute, instead emphasising the system's integrity. The difficulty with the notion of repute is that it is at some remove what is actually happening with the system. One would hope that if the system maintains its integrity it will maintain good repute. But many other factors may play into how people view the system. In *Fardon v AG* (2004) 223 CLR 575, Kirby J said at [144] 'It is singularly inappropriate to place undue emphasis on the fiction of public perceptions in this context. … [I]t is quite possible that the public will share, at least in the short run, some of the passions that may have led to the legislation under consideration'.

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**F. Strategic changes to evidence law**

Those opposing the Bill, in their submissions and evidence, argue that it would create an environment where pressure may be brought against the government for strategic changes in evidence law so as to enable an unpopular acquittal to be overturned. In my submission I argued this was implausible for various reasons.

Quite apart from its implausibility, this objection to the Bill appears misdirected. The objection is that the *current* Bill is problematic not in and of itself but just because it may lead to *further* problematic changes to the law down the track. But assuming that the current Bill is otherwise sound, then the solution would be to prevent the *further* legislation, not the *current* Bill.