REPORT ON PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

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

CORRECTED

At Macquarie Room, Parliament House, Sydney, on Wednesday 24 July 2019

The Committee met at 9:15

PRESENT

The Hon. Niall Blair (Chair)

The Hon. Anthony D'Adam
The Hon. Greg Donnelly (Deputy Chair)
The Hon. Wes Fang
The Hon. Rod Roberts
Mr David Shoebridge
The Hon. Natalie Ward

The CHAIR: Good morning and welcome to the hearing of the Law and Justice Committee inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019. Before I commence I would like to acknowledge the Gadigal people, who are the traditional custodians of this land. I would also like to pay respect to the elders past and present of the Eora nation and extend that respect to other Aboriginal people present today. The Committee's task in conducting the inquiry is to examine the technical legal implications of the bill's proposed amendments to the current law in respect of double jeopardy. The bill is a private member's bill introduced to Parliament by Mr David Shoebridge in May this year, then referred by the Legislative Council to this Committee for us to examine and then to report back to the Legislative Council with recommendations for the New South Wales Government. At this stage the Committee expects to provide its report by the end of August.

Today is the only hearing we plan to hold for this inquiry, although the Committee has met informally with members of the families of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux in Bowraville. A report on the key messages from that meeting has been published on the Committee's website. Our focus today is on key legal stakeholders' views on the bill. We will hear from representatives of the Jumbunna Institute for Indigenous Education and Research at the University of Technology Sydney, Department of Justice, NSW Police Force, Office of the Director of Public Prosecutions, NSW Bar Association, Sydney Law School at the University of Sydney, The Public Defenders and Legal Aid NSW. The day will end with Jumbunna representatives being invited back to the table to respond to evidence of earlier witnesses. Before we commence I would like to make some brief comments about the procedures for today's hearing.

Today's hearing is open to the public and is being broadcast live via the Parliament's website. A transcript of the hearing will be placed on the Committee's website when it becomes available. In accordance with the broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the primary focus of any filming or photography. I would also like to remind media representatives that you must take full responsibility for what you publish about the Committee's proceedings. It is important to remember that Parliamentary privilege does not apply to what witnesses may say outside of their evidence at the hearing. I urge witnesses to be careful about any comments you may make to the media or to others after you complete your evidence as such comments would not be protected by Parliamentary privilege if another person decided to take action for defamation. The guidelines for the broadcast of proceedings are available from the secretariat.

Due to the short time frame of the inquiry the Committee has resolved to request that witnesses provide their answers to questions taken on notice within seven days of receiving them from the secretariat. Witnesses are advised that any tendered documents should be delivered to the Committee members through the Committee staff. To aid the audibility of this hearing may I remind both Committee members and witnesses to speak into the microphones. In addition, several seats have been reserved near the loudspeakers for persons in the public gallery who have hearing difficulties. Finally, I remind everyone to please turn their mobile phones to silent for the duration of the hearing.

LARISSA BEHRENDT, Professor of Law, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, sworn and examined

CRAIG LONGMAN, Head of Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, sworn and examined

The CHAIR: Would you like to make an opening statement?

Professor BEHRENDT: Yes, we have prepared a short statement. Thank you so much for the opportunity to address you today. Our team at Jumbunna have worked in various ways with the families of Evelyn Greenup, Colleen Walker and Clinton Speedy-Duroux since 2011. We are not legal representatives of the families today but we have come to our position in the submissions very mindful of their experiences and of the fact that they are not in a position to argue the intricacies of the law themselves, though they have been clear about the impact of the failure of the legal system to provide them with justice in their cases, as I think their submissions to you in this inquiry attest. We take the view that if the law does not work for the most marginalised and those who have the greatest difficulty accessing justice, then the law should be reviewed; not to accommodate one particular case but to ensure the overall justice, fairness and integrity of the legal system. To this end our submissions support amendment of section 102 of the Crimes (Appeal and Review) Act 2001, or CARA, in a way that mirrors corresponding United Kingdom legislation; namely, around the word "adduced" being changed to "admitted".

The UK legislation, we believe, provides a solid precedent that was crafted without reference to any particular case. We believe adoption of that kind could cure the problem highlighted in the New South Wales law through the experiences of the Bowraville families without providing an opportunity for the opening of floodgates. We also, however and importantly, support an amendment that provides judicial discretion for reapplication to ensure the very case that has highlighted the deficiency in the current legislation has the opportunity for reconsideration under an amended Act. We come to our position as lawyers who respect the rule of law and often find ourselves representing accused in criminal matters, particularly juveniles, and understand the importance of the rights of the accused developed under the common law. But these rights have long been defined and balanced through legislation, as Parliament has played the critical role in ensuring where the lines are drawn on the playing field. We believe the circumstances in the Bowraville case provide a compelling example of where those lines have not been drawn in the right place and our submission asks the Parliament to act accordingly.

Mr DAVID SHOEBRIDGE: First of all, thank you for your submissions and for coming today. There is more than one way to change the law in New South Wales to mirror the way the law operates in the UK in this regard. Can you talk us through an alternative method, rather than the method adopted in the bill that is before this committee?

Mr LONGMAN: Yes. The alternative method that we have proposed is to alter the word "adduced" to "admitted. The central problem in the legislation as it arose in the Bowraville case, *Attorney General for NSW v XX* [2018] NSWCCA 198, was an issue that had been previously flagged in questions of how the principles of double jeopardy should be balanced with the rights of the State and the interest of victims—that is, the question of freshness. Whether the evidence that should be capable of being replied upon on an application to set aside an acquittal should be the evidence that was, in effect, available to prosecutors and police at the time that the initial trial was run or, alternatively, whether it should be the evidence that was admitted before a jury when the jury determined guilt in delivering a verdict.

The UK approach has been to adopt the latter and say that the relevant question is: What evidence was before the jury at the time that the jury found a verdict of either innocence or guilt? Our position is that when you adopt that approach you have an option, as the UK has done, still to consider questions of how the initial investigation was run and how the prosecution was run. Those questions are still very much under consideration in the UK when the court determines an application. They are considered in the interests of justice test, rather than being effectively a threshold question that a case has to pass through before the court is even entitled to start considering: Well, what does this corpus or body of evidence look like in terms of pointing towards guilt?

In the UK, for instance, the court says if the evidence was not before the jury prima facie we can look at it and we can ask ourselves: Where do the interests of justice lie in this particular case? In doing that one of the questions that they ask themselves is: How was this police investigation run and how was the prosecution run? Was this evidence admissible? Should it have been adduced at the time? But they are not the only questions that the court asks itself. It also asks itself: How powerful is this evidence looking at it in conjunction both with what was before the jury and what we now know? One of the things we have seen in the UK, for example, is circumstances where a court can consider an entire corpus of evidence that arises from scientific developments as

well as, what you might call, human developments. For instance, DNA evidence that is now available in conjunction with a witness attending in circumstances where a witness, for example, had fled the jurisdiction.

We say that is the more appropriate case because it provides a more flexible test for what is the most senior criminal court in New South Wales to look at all of the circumstances and answer the question: Recognising how important the rule of law is and how important the protections of double jeopardy are, nonetheless is this the kind of case where we are talking about such serious offending and such powerful evidence that we should set aside an acquittal and return it to a jury to determine guilt?

Professor BEHRENDT: If I can just add, we have had deep discussions about what legislation might cure the issues that we have been working on. We were mindful in terms of looking at the UK example—not just of the arguments that Craig has put forward but also of answering the claims that legislation is just being made to fit a particular case—and the precedent allows us an example where that has not been the case. It gives us the experience of seeing that legislation in action to show that it has not created the floodgates that might be anticipated, or argued to be a result. So there are also some good political reasons as well as legal ones, I think.

Mr DAVID SHOEBRIDGE: That would be crafting the New South Wales law with an express eye to the words and the jurisprudence that is being used in the UK. Is that right?

Mr LONGMAN: That is correct.

Professor BEHRENDT: As precedent, yes.

Mr DAVID SHOEBRIDGE: Have you reviewed the UK cases?

Mr LONGMAN: We have, yes.

Mr DAVID SHOEBRIDGE: Can you cite any example that has raised public or legal controversy when a retrial has been allowed in the UK but senior members of the legal profession or legal bodies or members of the community have said, "No, that has gone too far. That should not have gone to a retrial"?

Mr LONGMAN: There have been no examples of that. It is worth remembering just how powerful the threshold question of compelling evidence is in this context. The requirement that the evidence be highly probative, in conjunction with the UK's capacity to look at how initial investigations were done, means that it is explicitly the case in the UK. Their equivalent of the Director of Public Prosecutions has said on record in the case of *R v A* that really the only cases that we think fit the model in the UK are cases in which the evidence is so compelling that on a retrial, if an acquittal were to follow, it would almost be perverse.

Those are the cases that have arisen in the UK. That is one explanation for why so few cases have arisen in the UK. We are talking about a jurisdiction that is far greater than New South Wales. We are talking about legislation that covers more offences than are covered here. It is legislation that, until recently, covered a jurisdiction which did not allow Crown appeals on evidential points, which New South Wales does, and legislation that does not retain an innate discretion in the court's capacity to reorder a trial. In the United Kingdom if the court finds that there is new evidence, and it is compelling, they must order a retrial if it is in the interests of justice. In New South Wales the legislation still retains a discretion for the Court of Criminal Appeal to say, "Even though this case meets all of the tests set out under legislation, for other reasons, we decline to order a retrial".

In my submission a finding like that from the Court of Criminal Appeal would be the kind of finding that would not be susceptible to an appeal to the High Court. It would be a finding of mixed law and fact. I dare not speak for the High Court, but one could imagine that the approach the High Court would take in that circumstance is if the Court of Criminal Appeal got the law right then that is the most appropriate court to make those types of discretionary judgements.

Professor BEHRENDT: We make further reference to the case law in our submission and they are generally cases that could be, in a similar vein to Bowraville, more likely to raise questions if there has not been a resolution before the courts.

Mr LONGMAN: I might just add too: those cases were considered in both the Wood report and in the Court of Criminal Appeal. There were comments made about those cases but those comments never included any suggestion that any of those cases looked like a gross injustice or the State stepping beyond its appropriate bounds and trying to prosecute an individual for political reasons, which are some of the concerns that have been raised here. There is just no evidence of that occurring in the UK.

The CHAIR: In your submission you talk about the issue of retrospectivity and how this applies and obviously the work that you have been doing with the families from Bowraville. Can you talk us through the issue of retrospectivity and how that is applied because we have also seen other changes to the Evidence Act where,

I think, one of the cases even precedes those recent changes as well, and when I say "recent" I mean the last changes.

Mr LONGMAN: In the submissions there is this reference to the principle of retrospectivity and we have referenced it as well. It is not a single principle in this sense: the principle of retrospectivity is a concern about laws that breach the rule of law because what they effectively do is alter the substantive criminal law. For example, last weekend I took my son to the zoo. Say I was tried for that and acquitted and then in two months time they make that illegal, that is a rule that breaches the rule of law because it is criminalised conduct which, at that time I chose to do it, was not a criminal act.

Even in that case there are exceptions. Polyukhovich, which is a case cited in the submissions, is a case where the conduct was so morally abhorrent that the High Court found that even though it was not technically a crime, people would have known it was criminal. The real evil that the law of retrospectivity is aimed at is making conduct criminal at sometime in the future, when it was not criminal at the time. There is a distinction drawn in the jurisprudence between those kinds of laws and the kinds of laws that change procedure.

When one looks at the way in which the criminal legal system works, we see this every day. If you are tried today for an historical offence then the substantive offence—the law about intent and the law about the actus reus is the law from the time of the offence. But you are tried under the procedure and evidence law of today. A distinction arises in the jurisprudence. I am not suggesting that there is not some complexity about the way in which an Act applies. Let me say two things. Firstly, there is no question that the Parliament can make retrospective laws and the double jeopardy provisions, when they were introduced, were made retrospective. One can see why that would be because, by their very nature, double jeopardy laws have to take as their subject a proceeding that occurred previously in time. Polyukhovich makes it clear that the Parliament has the capacity to make those laws, it just has to make the language explicit.

The second thing we would say is that this does not retrospectively change the substantive law. The law on murder today is no different to the law on murder in 1991, in 1990. It simply says that today you face the evidence that we have as a society, and as a legal profession, we have come to an awareness it is more probative than we initially thought, or is more reliable than we initially thought. Evidence law is, in one view, the evolution of what a community decides is reliable or not. It is what we decide a jury should be able to rely upon to determine guilt or innocence. A law that in circumstances such as this says, "We will allow an application to set aside an acquittal by looking at all of the evidence that we today think is reliable", is in our submission no different to a law that says, "If evidence arises from DNA techniques that did not exist 20 years ago, then it is right that a jury should see it."

Mr DAVID SHOEBRIDGE: There is longstanding High Court authority that says that procedural and evidential changes to the law operate retrospectively. I think one of the submissions might be Professor Hamer referencing *Maxwell v Murphy* in that regard, and this would be no different to that?

Mr LONGMAN: That is right. *Rodway v R* is also a case on point. I think it is fair and important to acknowledge that there can be some complexity in the issue when you are talking about laws that affect a substantive right but in my submission this is not that kind of law. The argument that is being put is that you should not expand double jeopardy exceptions. But when we are talking about this terrain there is no prohibition against reopening these offences. They already exist under section 107 and they exist currently under the fresh evidence exception. The idea that we are creating a law that is retrospective in some manner that is not already contained within the existing exceptions is, in my view, not accurate.

Mr DAVID SHOEBRIDGE: Is there a limitation on the number of occasions that the Crown can apply to the Court of Criminal Appeal if they have evidence that the prior trial was tainted by perjury or some other defect?

Mr LONGMAN: No, there is no limitation. The Parliament has determined that when we are dealing with a perverting the course of justice offence—when someone bribes a witness or threatens the juror, for example—then no amount of acquittals should be allowed to rest on that foundation because it undermines the nature of the very system that is conferring the benefit of the acquittal. We say that there is an analogy to be drawn there with jury verdicts because the Act sets up a different scheme for the treatment of jury verdicts than it does for the treatment of judge-alone acquittals or directed acquittals. So judge-alone or directed acquittals are dealt with under a different part of the Act and there is no limitation on those applications.

Mr DAVID SHOEBRIDGE: So for that avenue of applying to the Court of Criminal Appeal to set aside a prior conviction and allow a retrial, the law, as drafted, allows not just one or two but as many applications as the Crown sees fit and that is the analogy you draw with allowing at least a second application to the Court of Criminal Appeal under these provisions. Is that right?

Mr LONGMAN: Well, that is right. I might add that in many ways it is not our analogy; it is the analogy that arises from a fair reading of the Act, in my submission. You have to look at these general principles of finality and retrospectivity in the context of the compromises and the balance that has already been implemented by the existing law. When one looks at that one sees that the principle of finality in those other circumstances is not permanent and there is no limitation on the number of applications. For instance, under section 107, where an application can be brought to set aside an acquittal that is conferred by a judge-alone or a directed acquittal, not only is it capable of being used multiple times; it has in fact been used multiple times in New South Wales.

So there is a case, which we referred to in our submissions and is referred to elsewhere in other submissions, where the judge misdirected the jury on the elements of manslaughter. The individual was acquitted, an application was brought to set the acquittal aside, which was successful, and a retrial occurred. Again, there was a mistake of law. Another application was brought to set the acquittal aside and on the third trial the individual was convicted. Now, there is nothing in the judgements of those cases that suggests that this was considered to be a miscarriage of justice.

Mr DAVID SHOEBRIDGE: And that is setting aside two prior acquittals?

Mr LONGMAN: Two prior acquittals.

Mr DAVID SHOEBRIDGE: For the same individual—

Mr LONGMAN: For the same offence. Sorry, I should correct: same course of conduct. So just to be clear, in the first trial the indictment carried a charge of murder and manslaughter as an alternative. It was the manslaughter charge that subsequently made its way through the other cases.

The CHAIR: Thinking about your alternative proposal around additional, et cetera, and looking at the UK and New Zealand, does this continue on forever? Are there limitation periods? Is there ever a time when it is considered that it is too far gone? Should limitation periods be looked at, or are they in the UK model?

Mr LONGMAN: The UK model is limited to one application.

The CHAIR: Which would be different to what we have already?

Mr LONGMAN: It would be different to what we propose.

The CHAIR: Yes.

Mr LONGMAN: Usually limitations arise in the criminal law attached to the offence. One of the reasons there are no limitations that arise in these kinds of exceptions is because they are only attached to the most serious offences, which Parliament has determined should never be limited. For example, there is no limitation period on murder. If it takes 40 years to prove, Parliament has said it is the kind of offence that one should always have to answer for. That is probably as far as I can take it.

Professor BEHRENDT: It may be that that is a factor in terms of limitation and time that is taken into account when a court determines whether or not this would be an instance where the application should go ahead or not. It would be part of the issue of whether it is right in terms of a just outcome in the case. So it could be taken into account then, rather than having the legislature be prescriptive about those limitations and narrowing when it might apply.

Mr LONGMAN: To take my colleague's point—which I am very grateful for because I had forgotten entirely—that is without a doubt something that the court looks at. So when the court is looking at whether evidence is compelling and how probative it is, one of the issues that a court looks at—and I don't believe there would be any controversy in this from any of the other submissions—is how long has passed. How reliable are the witnesses given the amount of time that has passed? If the court forms a view that so much time has passed that a defendant would be incapable of putting their case—so, for example, an accusation is made and the defendant says, "Well, I can't remember anything about that period of time"—then the court would look at that and ask the question: Could a fair trial be run?

This is not a question that courts are unfamiliar with. This happens all the time. Particularly in historic sexual assault prosecutions the courts have to look at how much time has passed. In our submission that is the appropriate body to look at that question. The question should be: Is a fair trial capable of being held? Is this evidence such that it should invite answering for an allegation of serious offending?

The CHAIR: We are nearly out of time. I imagine you will be here throughout the day. We know from their submissions that some of the other witnesses are concerned about the issue of the finality of the court and a number of other applications being able to be brought through. We might talk about that this afternoon because I am sure we will hear some evidence throughout the day. Any last pressing questions?

Mr DAVID SHOEBRIDGE: We are hearing from the Department of Justice next. I think you might have actually been in the court for much of the case that was presented in the matter of XX. Is it true that in that case the Crown's basic position was that the word "adduced" should be read as "admitted", consistent with UK authorities, and that was the position put by the New South Wales Government both to the Court of Criminal Appeal and to the High Court?

Mr LONGMAN: Absolutely.

Professor BEHRENDT: Yes, absolutely.

Mr DAVID SHOEBRIDGE: So in fact the alternative formulation that you are putting forward is consistent with the way the Crown had said the law should already be operating in New South Wales. Is that right?

Professor BEHRENDT: That's right.

Mr LONGMAN: That's correct.

Professor BEHRENDT: It does raise the issue about whether the law should be changed or not. That experience shows that there is not a lot of clarity around section 102, anyway, so it is perhaps the job of the Parliament to clarify that.

Mr DAVID SHOEBRIDGE: At least we know that the State of New South Wales and the Court of Criminal Appeal were not agreeing—nor were the High Court—until the decision was handed down.

Professor BEHRENDT: That's right.

Mr DAVID SHOEBRIDGE: Yes.

The Hon. NATALIE WARD: This is a delicate balance to draw, isn't it, between justice and the rights of the accused. We accept that. I will also say that setting aside an acquittal is in the interests of justice on the one hand, but there is also authority that the rights that a person might acquire through, for example, expiration of a limitation period on the other hand needs to be balanced. Could you comment on that? We have a submission that refers to that and I am interested in your view on how we might balance that right as well, because limitation periods are there for the very same reason of certainty and this might play with that to some extent. Can you comment on that?

Mr LONGMAN: Yes. That arises in this question of finality, I think. Obviously limitation periods don't apply to these kinds of offences, but one of the observations made by the Public Defenders—and I think this is the appropriate perception—is that you are entitled to the benefit of your acquittal. The act of acquittal merges with the evidence that was led against you and with the substantive criminal law that existed at the time. But the very nature of double jeopardy provisions recognises that in rare and exceptional and serious cases one needs to draw a line between the rights of the accused to finality—and recognising there are rights of others to finality—with the right of the State to prosecute.

One thing that I think is important to say is that the principle of finality, or the limitation periods, is not just about the rights of the accused, it is also about the rights of witnesses and the rights of other people in the process. And most of the people have spoken to the committee in their various submissions about what they think the current law's standard of justice is and where their faith in the criminal justice system lies. The submissions from the community and the family are the submissions of the witnesses. They are not just the submissions of the family who have lost their children. Aside from that, all I can say is that it is a delicate balance. That might be something that the committee needs to look at, given that these offences, by their nature, don't carry limitations on when they can be prosecuted. That might be something that the committee needs to look at inserting in these provisions.

The Hon. NATALIE WARD: We have a submission, though, from Professor Hamer, that talks about the limitation period and there's authority—I think he quotes Pinder—of a person's acquired right not to be prosecuted through, for example, the expiration of a limitation period. With retrospectivity you have to weigh the rights that a person may have acquired through the expiration of a limitation period. Do you follow what I'm saying?

Professor BEHRENDT: Yes. I think, too, what we would say—

The Hon. NATALIE WARD: Sorry, if I could just finish. He has drawn the Committee's attention to this point. I am asking you to comment on that because there is obviously statutory interpretation in this Pinder authority to say that a right may be acquired. I am just asking you to comment on that.

Professor BEHRENDT: It may be but I think there has always been an understanding that certain crimes are of a level of seriousness that there is no statute of limitations. In reference to, say, the Bowraville case,

we are looking at exactly that kind of behaviour. So I guess what we would say is we accept that observation about limitations, and that is actually a really important thing to look at in terms of ensuring that these sorts of exceptions to double jeopardy don't apply to all kinds of criminal behaviour, but I think there's always been a comfort in not allowing statute of limitations for the most serious of offences.

The Hon. NATALIE WARD: Could it be said, though, that the accused in this Bowraville case has acquired that right?

Mr LONGMAN: If he has acquired that right it is not, in my submission, because of any limitation period; he has acquired it because of the acquittal. It is the question of the effect of the acquittal in the context—

The Hon. NATALIE WARD: It includes the right not to be prosecuted.

Mr LONGMAN: Absolutely.

The Hon. NATALIE WARD: Is that correct?

Mr LONGMAN: Absolutely. Well, it's—

The Hon. NATALIE WARD: I'm not purporting this, I am just asking the question.

Mr LONGMAN: No, I appreciate that. I guess my response would simply be that it is a right to raise as a bar to further prosecution the double jeopardy principles. So it differs from a limitation period in that sense. Estoppel also. It's estoppel. So it differs from a limitation period. It is not something that Parliament has indicated—well, this is how long you have to exercise a particular legal right. It is something that has arisen from common law. But it arises from the existence of the acquittal so that, for example, if it was a tainted acquittal, if one obtains a jury verdict of not guilty and then it is found out that that person obtained that verdict by threatening a juror, well—

The Hon. NATALIE WARD: I accept that, and that is in the English precedent, but in this case—

Mr DAVID SHOEBRIDGE: In our existing law.

The Hon. NATALIE WARD: —there's also, is there not, the High Court decision in the application, and it's been rejected. Could it not be said to arise from that also?

Mr LONGMAN: Well, no. I would have thought that the right not to be re-prosecuted arises from the innate value of an acquittal, which gives birth as it were to a bar against future prosecution. It's not a question of time in relation to these offences, it's a question of the jury verdict.

Mr DAVID SHOEBRIDGE: This bill changes no limitation period at all.

Mr LONGMAN: Not at all.

The CHAIR: Order! We have Jumbunna coming back this afternoon. If we let things slide a bit too much now we will be chasing our tails all day. Given the fact that you are coming back, we'll pull it up there and we can revisit these questions in the last session this afternoon. Thank you.

Mr LONGMAN: Thank you.

Professor BEHRENDT: Thank you.

(The witnesses withdrew.)

LARISA MICHALKO, Director, Criminal Law Specialist, Law Reform and Legal Services Division, Department of Justice, sworn and examined

MARK FOLLETT, Director of Law Enforcement and Crime Team, Law Reform and Legal Services Division, Department of Justice, affirmed and examined

KATHRINA LO, Deputy Secretary, Law Reform and Legal Services Division, Department of Justice, affirmed and examined

STUART SMITH, Acting Assistant Commissioner, and Commander State Crime Command, NSW Police Force, sworn and examined

The CHAIR: Would you like to give an opening statement?

Ms LO: The department thanks the Committee for this opportunity to contribute to this important inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019. The bill, if enacted, would amend the exceptions to the principle of double jeopardy under the Crimes (Appeal and Review) Act 2001, or CARA.

Before I provide a brief overview of the Government's submission to the enquiry, it is important to note the broader context in which this bill has been developed. This bill exists against the backdrop of a devastating incident in our State's history—the homicides of three Aboriginal children: Evelyn Greenup, Colleen Walker Craig and Clinton Speedy-Duroux in Bowraville. I want to begin by acknowledging the terrible loss of those children and the pain and suffering of their families and the Bowraville community, which continues to be felt today. I also want to assure the Committee and the children's families and their community that the Government takes that matter very seriously.

While the bill is a product of that tragedy, it must also be considered in light of its implications, not just in that context but for the wider criminal justice system. So the intention of the Government's submission is to provide background, contextual, historical and factual information that might assist the Committee in its consideration of the bill. The Government's submission outlines the history and policy rationale for the principle of double jeopardy, including that it protects individuals from oppressive pursuit by the State, and promotes legal certainty and finality of criminal proceedings. The submission also addresses reviews of the double jeopardy principle undertaken in the United Kingdom, New Zealand and Australia in the 1990s and early 2000s, and the development of model provisions for limited exceptions to the principle by the Model Criminal Codes Officers Committee.

Those model provisions that have been adopted across Australia include a threshold of fresh evidence and provision for one application for retrial only. The Government's submission also discusses the Standing Committee's 2014 report on the family response to the murders in Bowraville, an earlier private member's bill in similar terms, the Wood report on his 2015 review of section 102 of the Act, and the outcome of the former Attorney General's application to the Court of Criminal Appeal for a retrial of a person for the children's murders and to the High Court for special leave to appeal that decision. Thank you.

The CHAIR: Thank you. Can I kick off with clarifying, Assistant Commissioner, that you're part of the Justice cluster? Police haven't given a separate submission.

Mr SMITH: No.

The CHAIR: If there are specific questions on behalf of the NSW Police Force, I guess you will answer those, but broadly you subscribe to the Department of Justice as part of our structure of Government? Is that right?

Mr SMITH: We are, Mr Chairman.

The CHAIR: Thank you. Do you want to say anything extra?

Mr SMITH: No. There is an opening statement. I think when I answer questions it will deal with more, I suppose, the front face of interaction with the community. I think there will be questions, certainly, around that.

The CHAIR: Thank you.

Mr DAVID SHOEBRIDGE: First of all, thank you for your submission. It really was very helpful background. I am sure it was a collaborative project, but I appreciated the thought and consideration that went into it. I take you back to the Court of Criminal Appeal application and then the High Court application. What was the case that was presented by the Crown in terms of the legal interpretation of the current provisions? This is the interpretation there were days spent on the word "adduced". What was the position adopted by the State of New South Wales at both the Court of Criminal Appeal and the High Court?

Ms MICHALKO: The position that was adopted can be summarised as you summarised it before, in the sense that on behalf of the Attorney General it was argued in the application that "adduced" should be interpreted in accordance with the way it has been interpreted in the United Kingdom to mean "admitted".

Mr DAVID SHOEBRIDGE: I assume that in putting forward that submission there was consideration given for what the effect of that would be more broadly?

Ms MICHALKO: The effect of that was discussed in a Court of Criminal Appeal decision, but I do not think I can give you an answer any broader than that.

Mr DAVID SHOEBRIDGE: The position that was adopted by the State of New South Wales and by the Attorney was that there are some benefits in having the law in New South Wales being consistent with that interpretation or operation, at least in so far as "adduced" and "admitted" go in the United Kingdom.

Ms MICHALKO: The argument in the Court of Criminal Appeal was obviously targeted towards the evidence that was available in that matter and the interpretation that could be relevant to that evidence forming the basis of a finding that it was fresh. I do not really think that I can answer the question any further than that.

Mr DAVID SHOEBRIDGE: Your submission, along with a couple of other submissions, referenced a 2012 UK case—I wish I had it in front of me here but I think it is *R v B* [2012]. There is some controversy in the submissions about whether or not that is authority to say that if there has been a change in the law of evidence and evidence that was previously inadmissible can now be admissible and whether or not that meets the UK test. Could one of you provide a brief summary of that case?

Ms MICHALKO: I can, but I think it is important to note that there is a bit of a distinction between the way that issue has been considered in the UK and what we are discussing here in terms of a change in a law of admissibility. As far as I understand it there have been two substantive UK decisions where the question of the evidence being fresh has at least been in part in relation to evidence not having been admitted in the initial proceedings.

Mr DAVID SHOEBRIDGE: Available but not admitted, which is the distinction.

Ms MICHALKO: Available but not admitted. However, in both of those cases the evidence was sought to be admitted by the Crown, so there was an attempt to tender the evidence and have it admitted. That was the case in the decision of *R v B*. I think the other case is *R v Henry*, but I will check for you in a second. There was an attempt to have that evidence admitted. In *R v B* the issue was that there was, as was subsequently discovered, an erroneous ruling made by the trial judge that excluded the admission of that evidence. There was not, as far as I am aware, a substantive legislative change that then impacted on the admissibility of that evidence. The issue was that in the initial trial proceedings the evidence was sought to be tendered and admitted by the Crown but there was an erroneous ruling made the trial judge excluding the evidence. It was a ruling that was wrong; not a ruling that would be different due to a substantive change in the law. That is a bit different to a situation where there has been a change in the legislation that would alter a decision in respect of the admissibility of the evidence.

The other decision that I am aware of where that issue was considered focused on evidence that was sought to be admitted in the proceedings in respect of a complainant who was not available at that time. What that means is that the complainant—the purported victim of the crime—was not there to give the evidence. They had given a statement or some record of what their evidence would be, but they were not actually there to give the evidence in court and to be cross examined. In that case the Crown again sought to have that evidence admitted in the proceedings. It made an application for it to be admitted in accordance with some hearsay provisions. The evidence was not admitted. It was ruled inadmissible at the time. Subsequently the complainant became available and that evidence was considered by the court to be fresh.

However, it is important to note that in that matter there was also evidence that was considered to be new—which is the UK term—that actually arose after the trial. It was evidence that did not exist at the time that arose after the trial. That was referred to by the court as the Crown's fall-back position. In that case it was not just the evidence that was not admissible at the time because of the unavailability of the complainant; there was also something else that was, if I can use a plain English term, brand new. Again, it was different in nature and in application to a circumstance where there has been a substantive change in the evidence law that would mean that the decision of the court at the time may well have been correct but a different decision could be made now.

Mr DAVID SHOEBRIDGE: The Crown Prosecution Service in the UK has detailed guidelines. I am not going to ask if you are familiar or word perfect with them, but did you review them for the purpose of your submission?

Ms MICHALKO: Not in any great detail, no.

Mr DAVID SHOEBRIDGE: Could I just read to you one of the passages about what counts as new evidence in the UK Crown Prosecution Service guidelines? The passage states:

> Evidence may have been inadmissible, or admissible but not admitted as a result of a ruling by the judge at the original trial, but admissible at any retrial because of a change in the rules on admissibility since the original proceedings. In terms of section 78(2) this is "new" evidence.

The Crown Prosecution Service seems to have a fairly unambiguous view that if evidence becomes admissible by a legislative change or by a change in the rules on admissibility that that satisfies the "new evidence" test. Are you in a position to endorse that or do you have an opinion on the view of the Crown Prosecution Service, which actually makes the application to the UK?

Ms MICHALKO: No. But what I would draw your attention to is the fact that that specific issue—the question of whether evidence is new based on a change in the evidence law—has in and of itself never been determined by a court. It has been raised on one occasion in the decision of *R v Reilly* [2017]. What I would note is that it was absolutely not determined because that case turned on entirely different circumstances.

Mr DAVID SHOEBRIDGE: It is a beautiful phrase: absolutely not determined.

Ms MICHALKO: It turned on entirely different circumstances that related to the interests of justice test. What I would note is that that case referred to similar fact evidence and a change in the admissibility of the evidence. The court did raise the question of whether there may be a dispute as to whether that evidence was new as those matters were known about at the time of the original trial. It ultimately formed the conclusion that it did not need to determine the point because there was not only—if I can again use the plain English term—brand new evidence, but also a very significant interest of justice issue that arose in the bringing of that application by the Crown Prosecution Service.

Mr DAVID SHOEBRIDGE: In that case one of the bases on which the case was put forward but was not decided upon was whether or not the prior convictions themselves could be admitted as evidence because of a change in the Criminal Justice Act since the initial trial that said prior convictions of similar offences could be admitted as evidence in the trial.

Ms MICHALKO: Yes. That was not fully determined.

The CHAIR: A lot of what we are looking at in submissions is the comparison between what is happening in New South Wales and the UK model. You will hear in Jumbunna's evidence that one of the things that is obviously different in the UK is the number of applications. In the UK there is one application. Is that right?

Ms MICHALKO: That can be brought?

The CHAIR: Yes.

Ms MICHALKO: Yes.

The CHAIR: What are the other differences? There is "new' and "fresh". There is a difference in the level that must be reached, is there not?

Mr FOLLETT: One of the key differences is that in the UK it applies to different offences—a broader set of offences. In New South Wales the relevant provision applies to offences that carry a life sentence.

The CHAIR: Does that then also address the issues that we were speaking to Jumbunna about with respect to limitations? Some of those offences in the UK may have limitations. Is that right?

Mr FOLLETT: Do you mean statutory limitations?

The CHAIR: Yes.

Mr FOLLETT: I am not sure.

Mr DAVID SHOEBRIDGE: The UK law does not change any statute of limitations. If there was a statute of limitation available it would be as effective in preventing a retrial as a fresh trial, would it not? Neither the UK nor the New South Wales laws in any way change the statute of limitations.

Ms MICHALKO: Not that I am aware of. But I think when you are talking about a statute of limitations that is something that does not generally apply to the sorts of offences that we are talking about anyway. It is definitely a relevant factor to consider.

The CHAIR: The fire alarm is sounding. We will wait to see if we have to evacuate. There is no point continuing the questioning at this time.

(Short adjournment)

The CHAIR: Thank you for your patience. We were starting to talk about the difference between "fresh" and "new". One sets the bar lower. We have done that.

Ms MICHALKO: The way that their interests of justice test is phrased is a bit different to ours. In terms of the consideration of the idea of fresh in our legislation, "fresh" refers to evidence being fresh if it was not adduced in the proceedings in which the person was acquitted and could not have been adduced in those proceedings with the exercise of reasonable diligence. "New" is a bit different in the United Kingdom legislation, but the UK legislation incorporates the idea of the failure of a prosecutor to act with due diligence or expedition in the interests of justice test. It is in a different part of their legislation.

The other thing I would note that was raised in the Court of Criminal Appeal argument in respect of the applicability of the UK provisions and the interpretation of them, particularly taking into account the decisions that I referred to—*R v B* in particular—as I understand it, was that at the time it was raised in the Court of Criminal Appeal 5F, the equivalent of our 5F of the Criminal Appeal Act did not exist in the UK. The effect of our section 5F is twofold, but I think that the part that they were referring to was 5F (2), which gives the right to the Attorney General, or the Director of Public Prosecutions, to appeal to the Court of Criminal Appeal against an interlocutory judgement or order given or made in proceedings to which that section applies.

Section 5F was inserted in 1987 and essentially it gave the right to the Attorney General or the DPP to test interlocutory judgements. Another subsection, which was 3A, was inserted well after 1987. That gives a right to the DPP or the Attorney General to appeal against any decision or ruling on the admissibility of evidence only if the decision or ruling eliminates or substantially weakens the prosecution's case. In the Court of Criminal Appeal decision in XX there was an issue raised in terms of the interpretation and the relevance of the UK law and how it had been interpreted in that jurisdiction about the absence, at least at the time of the decision in *R v B*, as I understand it, of the section that we have, which is 5F.

Mr DAVID SHOEBRIDGE: The UK law applies to a significantly broader array of offences.

Ms MICHALKO: That is true. That is my understanding, yes.

Mr DAVID SHOEBRIDGE: There is a significantly larger population that it applies to.

Ms MICHALKO: That is true.

Mr DAVID SHOEBRIDGE: So you would assume, all things being equal, that it applies to a significantly larger amount of criminal activity?

Ms MICHALKO: Perhaps.

Mr DAVID SHOEBRIDGE: There is no final discretion in the UK if the court concludes that the evidence is new and meets the interests of justice and is compelling. Is that right? If those statutory tests are met, then a retrial has to be ordered in the UK, whereas in New South Wales if those statutory tests are met there is still an overriding discretion in the court.

The CHAIR: You can take it on notice.

Ms MICHALKO: Yes, I will.

Mr DAVID SHOEBRIDGE: Putting that to one side, with a larger population and a broader number of cases that it applies to, can you point to a single incidence where the UK law has provided an unjust retrial, or a retrial that has raised controversy about the justice of the retrial? Is there a single incidence?

Ms MICHALKO: I suppose I would answer that question in two parts. The first is that there are, as we have already discussed, some differences between the UK law and our law, so in terms of drawing a direct comparison in terms of the impact here, that is difficult. But the second thing that I raise—and this is not by virtue necessarily of an operation of the law because arguably perhaps it could be said that the law operated in the way that it should—is that in the 2017 decision of *R v Reilly* the Crown Prosecution Service was criticised for bringing the case. The court referred to a number of points, which the DPP might want to consider in light of that case. Now that decision obviously resulted in the retrial application not being granted by the court on the basis of the interests of justice test. However, I would just note that that was a matter that drew, as I understand, some publicity by virtue of the nature of the alleged offending, which was horrible, and there was some controversy, I would say, in the fact that the application had been brought.

Mr DAVID SHOEBRIDGE: But it was brought and rejected by the court.

Ms MICHALKO: That is true.

Mr DAVID SHOEBRIDGE: Can you think of a single case? They have got a larger population, broader number of offences that applies to a more open process. It is a less rigorous test. It has been operating for a decade or so. Can you point to a single incident—just one—where there has been criticism of a retrial application in terms of bringing the courts into disrepute, bringing the law into disrepute or even just providing a narrow injustice? Just one, can you point to any?

Ms MICHALKO: Not that I am aware of in terms of the applications that have been brought. I think there were 16 that I know of that were published; a retrial was granted in 11 of them. I am not aware of, where a retrial has been granted, any significant publicity or criticism. But that said, I have not looked into, to any great extent, all of the publicity around all of them.

Mr DAVID SHOEBRIDGE: Some of the submissions that have come to this Committee have said that allowing the more permissive approach, consistent with the United Kingdom, would bring the courts and the legal system into disrepute by allowing this avenue for a retrial. Given that history in the United Kingdom, does the New South Wales Government have any of view about whether or not allowing a more permissive approach consistent with the United Kingdom would bring the criminal justice system into disrepute?

Mr FOLLETT: I do not think we are able to answer that.

The Hon. NATALIE WARD: I think that is a policy question, with respect.

Mr DAVID SHOEBRIDGE: Could I put this proposition to you: Allowing acknowledged injustices to continue, and when the criminal justice system allows glaring acknowledged injustices to continue, do you believe that may bring the criminal justice system into disrepute?

The Hon. NATALIE WARD: I am sorry. The intent is good but through you, Mr Chair, I think the basis of the question is a premise that these witnesses cannot possibly answer.

The CHAIR: Having had the witnesses in front of me for the past half an hour, I am sure if they cannot answer it or will not answer it, they will give the appropriate answer. Mr Shoebridge is trying to make a point and the witnesses, I am sure, will say, "I can't answer that" or "That's not in my jurisdiction".

Ms LO: I would say we cannot answer that question.

The CHAIR: There we go; thank you.

The Hon. NATALIE WARD: It is a well-intended question.

Mr DAVID SHOEBRIDGE: In fairness, I am going to ask this question of other witnesses. In fairness, I should ask it to the principal representatives from the New South Wales Government.

The CHAIR: We all acknowledge that the witnesses are on behalf of the Department of Justice; they are not the Attorney General. They are limited in their ability to be able to comment on government policy but, as I said, I also know that they are all very capable witnesses and can say that for themselves. That is why I did not need to intervene.

Mr DAVID SHOEBRIDGE: It is not Ms Lo's first time.

Mr SMITH: Definitely not.

Mr DAVID SHOEBRIDGE: I might ask this of you, Assistant Commissioner, given this is barren ground over here. The New South Wales police supported the application that was made to the Court of Criminal Appeal. Is that correct?

Mr SMITH: Yes.

Mr DAVID SHOEBRIDGE: Did the New South Wales police turn its mind to the argument that was made by the New South Wales Government, on behalf of the Attorney, that the word "adduced" should be read as "admitted"?

Mr SMITH: Outside the proposed amendment now, which has replaced the word?

Mr DAVID SHOEBRIDGE: Yes. I am talking about in the Court of Criminal Appeal. The argument that was made was that the word "adduced" in the current law should be read as though it means "admitted". Did the New South Wales police have a view about that? Or did they support the application?

Mr SMITH: In terms of the Criminal Court of Appeal, as opposed to our position in 2015 by Andrew Scipione, responding to Justice Wood, was the replacement of the word "adduced" with "admitted". That is our position. In terms of the Criminal Court of Appeal, I think that is too difficult a legal question for me to even contemplate answering.

Mr DAVID SHOEBRIDGE: But you probably answered it more directly. In 2015 in response to the Wood report, the New South Wales police position was that the word "adduced" should be deleted and replaced with "admitted".

Mr SMITH: Yes. I can confirm that I sought advice from the current commissioner. He has no differing view.

The CHAIR: Can I ask about the interests of justice test. If this was to go through and we were to make such amendments, how would an interests of justice test apply and what factors would be considered?

Ms MICHALKO: Interests of justice in the context of an application for a retrial after acquittal has not been considered, and was not considered, by the Court of Criminal Appeal in the only decision that we know that considered those provisions. The interests of justice test does refer the court to having particular regard to the length of time since the acquitted person allegedly committed the offence and 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. But the interests of justice typically can encompass any number of factors that may have an impact on a fair retrial. I note that our interests of justice test explicitly states that 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. So all of the factors that go to whether a retrial will, in fact, be fair would likely be considered. I cannot really enumerate any specific factors, but it could be any number of factors the court would consider.

The CHAIR: Mr Shoebridge, do you want to follow up on that?

Mr DAVID SHOEBRIDGE: No. Just for clarity: the proposed amendments in no way limit or change that very real interests of justice sense that applies in the law.

Ms MICHALKO: They do not make changes to our section in interests of justice, no.

The CHAIR: Other jurisdictions within Australia at a COAG level—obviously if there were some changes in New South Wales that would put us out of step with some other States. Have there been any comments from any of the other States at a COAG level on the discussion of what is proposed here and how that may impact?

Ms LO: I am not aware of any discussions that have occurred at an officer level at this stage. No doubt they are watching with interest.

Mr DAVID SHOEBRIDGE: Are you aware of a single incidence under any of the other State laws where a case has been brought?

Mr FOLLETT: Our understanding is that there was a case in Queensland in 2018. We are not able to find a judgement on that.

Mr DAVID SHOEBRIDGE: Could you take that on notice?

Mr FOLLETT: Yes.

The Hon. ANTHONY D'ADAM: I was going to ask the question that Mr David Shoebridge just asked about whether there had been any applications made in other jurisdictions where comparable provisions apply. I think you have just answered that. Given that the provisions have been in operation since 2006 and the provisions were enacted for a specific purpose—they have not had a lot of work to do—are you able to offer an opinion? Obviously the bill that we are currently considering is designed to remedy deficiencies that have been exposed by the Bowraville case. Are you able to offer an opinion about what you think the reasons are for lack of applications in this jurisdiction and in other jurisdictions where comparable provisions apply? It might be that the remedies that we are looking at might not be the primary reason that there has been a lack of applications. Do you have some comments about that?

Ms MICHALKO: It is interesting to draw a comparison with the United Kingdom, which is obviously a jurisdiction where some focus is being placed at the moment, taking into account that their test is that there is new evidence which has been interpreted a bit more broadly. Noting that there might be decisions that have not been reported—there might still be retrials or things like that—it is interesting to note that, as far as I am aware, there have been 16 applications in that jurisdiction. Note that those provisions apply to a significantly greater number of offences and it is a larger population.

The other interesting thing about the overwhelming majority of those applications is that they have been based on—I will use a plain English term—brand-new evidence. That is, things that did not exist at the time of the initial trial like DNA evidence and subsequent confessions that happened well after the trial. I think the first application that was made was made on the basis of a person who subsequently admitted the offending a

significant number of times and then pleaded guilty to perjuring themselves in their trial because they lied about their innocence.

That is obviously something that is brand-new. It is not anything to do with a change in evidence or admissibility. DNA, subsequent witnesses and further offending, subsequent confessions are all brand-new things. I cannot posit an opinion about why there have not been applications brought in our State or in other States or Territories in Australia, but I note that the overwhelming number of the UK applications have been brought on the basis of absolutely brand-new evidence.

Mr DAVID SHOEBRIDGE: It does seem unusual—which I suppose is why Mr D'Adam puts the question—that none of those cases has successfully been brought in New South Wales under the current law. Is there some other underlying reason why those cases are not being brought forward? Maybe I will ask both you and the Assistant Commissioner.

Mr SMITH: I could talk about unsolved matters in New South Wales, in instant terms, to give some context. Two years ago I inherited 470 unsolved cases. Those are put through a very stringent process. It probably had its origins in what occurred in Bowraville. We used 122 senior investigators to review those unsolved homicides. They then came back into the unsolved category and were quantified. An algorithm is applied and they go before an external committee, including the commissioner of Victims, the senior advocate from the Coroner's Court, a psychiatrist and a specialist in forensics. In 1991 we did not even contemplate how evidence would be collected in 2019.

Each of these cases may have a history of going before the Coroner's Court on numerous occasions, with the desire that an individual would face a court and all of the evidence available would be presented to it to give it the opportunity, properly instructed, to determine guilt. In this particular case, I do not know of another that has the circumstances that Bowraville has. In all those unsolved cases there is always a trigger in terms of new strategies applied to gather a confessional evidence post, or DNA changes. We are about to take that familiar DNA step this year, and biometrics are going to be introduced. They did not have those tools in 1995 when the law changed to give us a tendency coincidence certificate.

That is where we sit now, but this is an unusual circumstance. In 1996, when the matter was reinvestigated diligently by the investigators of Strike Force ANCUD, suddenly we had evidence that we had not contemplated—the serial nature and the segregated community. We needed to look at the way we collected evidence from vulnerable people. The outcomes from that are now taught to every investigator in New South Wales. Every police officer coming into the force gets cultural awareness training so that we can understand how best to collect that evidence. I could not point to a single case with those circumstances.

The CHAIR: That is an important point. Looking at the proposed amendments, we have spent time talking about—and we have received submissions—not allowing others to go through the same tragic circumstances and injustice to get to this point. So extending on what the Assistant Commissioner is saying, this is about systematic changes in the way that the police operate now. Are there also subsequent changes within the system?

We can make recommendations about the system as well as make observations and comments in relation to the amendments in the legislation before us. We need to be satisfied in our minds that the system has looked at this. This is not the first time we have examined these issues. Assistant Commissioner, do you believe there are any other changes to the system that have come out of the lessons to this point? That was a great example, but is there anything else? Then I might ask the representatives from the Department of Justice if they have any examples of how the system has been improved so that we can have confidence that there will not be any more of these injustices.

Mr SMITH: I can acknowledge, as we always seem to, that we have to learn with the community. The government has walked a long walk with this matter since 1991. There has been a lot of work done by various Attorney Generals to try to bring what is a very difficult case into a court. The evidence of a serial nature and the specifics around tendency coincidences have not yet found their way into any court of law in relation to this. That is what we are talking about here today. We changed everything. We changed the way we train our people. The commissioner has a Police Aboriginal Strategic Advisory Council [PASAC] panel. Every local area commander, police district commander and police area commander has an Aboriginal advisory committee. We have an Aboriginal strategic direction. I have been a commander at Dubbo. I know the specifics of how communities can find themselves segregated.

The police is a learning machine. We learn with the community and we are adjusted quite regularly by government when we do not learn. We get policy changes and legislative outcomes. This State has been on the front foot in terms of providing us with legislature to disrupt people. Justice walks that walk with us normally.

Everything we do falls into the hands of a competent prosecution and the Director of Public Prosecutions to diligently get an individual to face a court. I can only reaffirm that in 2015 a commissioner took the step of supporting this amendment. We are still at that point today. We still hold that position.

The CHAIR: Do you have anything to add in terms of systematic changes?

Ms LO: There have been both systematic changes and cultural changes. The way in which government works with Aboriginal communities is an important thing to note rather than doing things to Aboriginal communities. The approach under OCHRE and the approach under local decision-making accords—

The CHAIR: Sorry, for Hansard, what is OCHRE?

Ms LO: OCHRE is the Government's approach to working with Aboriginal communities.

The CHAIR: It is an acronym?

Ms LO: I will take that on notice so that I get the acronym correct. My colleague from police has mentioned the training of staff, which is incredibly important. It includes not only cultural awareness training but also cultural competency training, which is really a higher bar. From my personal experience, I have had some really amazing experiences with Aboriginal communities that have organised cultural immersion experiences for me where I have spent time on country. I know other senior officers from Justice have done that as well. I think those sorts of cultural changes and working with Aboriginal communities in partnership have been the most important changes I have seen in my time. That is not to say that we do not have a long way to go. But I think attitudes are changing and moving in the right direction now.

Mr DAVID SHOEBRIDGE: Wouldn't it be fair to say that this is the one occasion when the Aboriginal community has come to the Government of New South Wales and said, "We are normally the recipients and victims of criminal law changes that impact negatively on us", but this is the one occasion that they have said, "Can you toughen up the law for us?" It is fairly unusual, is it not? Assistant Commissioner, can you think of another occasion when the Aboriginal community has said, "Toughen up the law for us; we are the victims here."

Mr SMITH: I have been working with the community for 34 years. I have been around Indigenous people and I have Indigenous people in my family. That statement could not be truer. This is a very unusual case.

The CHAIR: What about courts and juries? We have talked about systematic cultural awareness training within the police and within the Department of Justice. Can you comment on the courts and any improvements to the system? What about juries? Are there any instructions or is there any advice or assistance provided for cultural awareness for jurors, for example?

Ms LO: We might take that question on notice and ask the Sheriff of New South Wales what is done in relation to juries. I am certainly aware that the Judicial Commission supports judicial officers with regard to cultural awareness training. On the court administration side of things there are identified Aboriginal positions within courts; they are on the ground.

The Hon. ANTHONY D'ADAM: I want to come back to the answers provided by Ms Michalko. With regard to the notions of "fresh" versus "new" in the UK jurisdiction, "fresh" obviously has a higher threshold. Similarly, this question of "adduced" versus "admitted", "adduced" is obviously a higher threshold. Given your assessment of the UK case law that in the majority of cases it was new evidence, had the New South Wales provisions applied in most of those cases, would they have succeeded in terms of having a new application made?

Ms MICHALKO: The difficulty for me in answering that question is that there has only ever been one consideration of our term "fresh" and it was in the matter of XX. I cannot answer that question with any sense of certainty. What I would note is the comparison that, largely, the UK decisions relied on things that were brand-new. I note that in the second reading speech that relates to our provisions there was reference to things like, for example, DNA evidence. Those might be things that would be relevant for a court to consider, but given that there has only been one case in New South Wales that has considered our provisions I do not think I can answer that question with any degree of absolute certainty.

The Hon. ANTHONY D'ADAM: My point goes to those higher thresholds being applied to the UK cases. Given it was new evidence, they would have passed both thresholds because they had not been adduced at the original trial and the evidence was not available at the time. Is it not the case that that evidence would have been considered as fresh?

Ms MICHALKO: Sorry, are you asking whether the evidence that has been considered new in all of the UK decisions would also meet our higher threshold of fresh?

The Hon. ANTHONY D'ADAM: Yes.

Ms MICHALKO: That is what my answer goes to. By virtue of the fact that there has only been one decision in New South Wales that has considered the interpretation of our term "fresh", it is difficult for me to answer that because I am not absolutely certain how that would be interpreted. What I would point to is that "fresh", in so far as it is present in our legislation, was referred to in the second reading speech for our provisions and there was an example given of DNA evidence, which is what some of the UK decisions have related to. That might be a tool that a court uses to interpret our provision of "fresh". But I cannot answer that with any degree of absolute certainty because there has been only one decision considering our New South Wales provisions.

The CHAIR: What is the difference between "new" and "brand-new"?

Ms MICHALKO: Brand-new is just a term that I am using to try to extricate the evidence from the difficulties of "fresh" and "new". It is not a legal term at all. I just think it is easier to think of evidence as not the legal conception of new or the legal conception of fresh. But when you are actually trying to describe what it is, if you call it brand-new it takes it outside the intricacies of that and it makes it obvious that it is something that did not exist before.

Mr SMITH: I might be able to clarify. With forensics now, mitochondrial and familial, they are all new terms that we are learning as detectives. The issue with some of these forensics, the answer may be a new one. If we take a bone shard from a bone that has been retained for 30 years, suddenly we may have a family tree answer, even though someone had died ages ago. That is what we are talking about when we say it is brand-new evidence. It is something that was not known and it could not have been captured at the time.

Mr DAVID SHOEBRIDGE: It was not available at trial, that is what you mean by brand-new?

Ms MICHALKO: Yes.

Mr SMITH: Correct, yes.

The Hon. ROD ROBERTS: I direct my question to the Acting Assistant Commissioner. There is a perception, or a suggestion perhaps, that any potential changes to the legislation would open floodgates in terms of further prosecutions. Are you aware, or do you have access to any information to suggest that the NSW Police Force is sitting on a heap of briefs just waiting for potential legislation changes to be able to bring those forward?

Mr SMITH: No, I am not. Do you want a simple answer, or do you want a longer one?

The Hon. ROD ROBERTS: No, I want the simple answer.

Mr SMITH: No.

The Hon. NATALIE WARD: My question was pretty much the same. Mr Acting Assistant Commissioner, do you confirm that you are unaware of any cases that could be the subject of a retrial application?

Mr SMITH: As I said, there are 470 unsolved matters. We are 186 matters in to probably a five-year project and as they progress they are reviewed by three independent sets of eyes and I do not know of any other.

Mr DAVID SHOEBRIDGE: But if in the course of that you found available evidence that was not admissible, but was compelling, the interests of justice supported it and it related to a very serious crime, I imagine the NSW Police Force would want the opportunity to bring such a case?

Mr SMITH: Yes. It would be shared quick down the road.

Mr DAVID SHOEBRIDGE: I imagine the New South Wales community would support that outcome broadly.

Mr SMITH: We always represent the community. Whatever change we make it is normally their view channelled through government.

The Hon. WES FANG: For clarification, the 470 cases that are being re-examined at the moment, some may have been unsolved, some have gone to trial, or are they just unsolved? In this instance, of those 470 how many have been to trial?

Mr SMITH: Almost all are unsolved matters. We segregated. Originally we started with 823 cases. We removed all of the ones that have been through some process. We are left with 470 that are unsolved. Out of those we have re-commenced investigation in 10 of them; two have been referred to unsolved and are in the stages of resolution. So there is a good outcome. To answer your question; almost all are unsolved, although they have been through a coronial process numerous times.

The Hon. WES FANG: Unsolved means that they have not actually been to trial?

Mr SMITH: Yes.

The Hon. NATALIE WARD: But some may have been the subject of coronial inquiries?

Mr SMITH: Yes. A lot of them. Some have had as many as three coronial inquests.

The CHAIR: Are you able to take on notice the breakdowns?

Mr SMITH: Yes.

The CHAIR: You say 800-and-something, some have been through a process, what are left and what have been referred to where?

Mr SMITH: Yes.

The Hon. WES FANG: Is there any process where matters that have been taken to trial and there has been an acquittal, that there is a review that would utilise what we are talking about today? Obviously those 470, any prosecutions that would lead out of that would be fresh prosecutions.

Mr DAVID SHOEBRIDGE: That is not his evidence. His evidence is that he is not aware of any.

Mr SMITH: Yes, not aware of.

Mr DAVID SHOEBRIDGE: You have put it at a higher level, Wes.

Mr SMITH: Yes. I am not aware of any. The issue I think you are trying to get to is this; that they used to record every homicide that came via the Homicide Squad. That had to be pulled out to the unsolved. The unsolved cases; we never stop looking at them until they go to resolution. We never stop.

The CHAIR: If this was to change, would the police then go back and relook at some of the ones that may have gone to trial, been acquitted and look over that again with the new interpretation?

Mr SMITH: I cannot answer that hypothesis I guess, Chair, at this time. That would be a matter obviously for the DPP and the Attorney. If we were directed to relook at it—

The CHAIR: Maybe we will ask the DPP in a second, because they are up next.

The Hon. GREG DONNELLY: This is probably best directed to Ms Michalko. Beyond the UK and New Zealand jurisdictions, which are referred to in the Government's submission, and indeed other submissions, are there any other jurisdictions around the world perhaps worth us looking at, or being able to draw from their experiences that you would like to draw to our attention?

The CHAIR: You can take it on notice.

The Hon. GREG DONNELLY: Yes. I am not putting you on the spot.

Ms MICHALKO: There are not any that I would immediately draw your attention to, no. Though I suppose it is relevant to look at any common law jurisdiction that has equivalent provisions, if that is something that the Committee is interested in.

The Hon. GREG DONNELLY: It is just that they are the two that keep coming up in other submissions but none other. For example, Canada. I have not seen any—and I stand to be corrected—for Canada. If you could take it on notice.

Mr FOLLETT: Some jurisdictions do not allow for a retrial under any circumstance. We will take it on notice, but the approach is varied around the world.

The CHAIR: Unfortunately we did lose some time, so we have gone over. Is there anything else, last thing that you need to tell us why you are here?

Mr DAVID SHOEBRIDGE: Could they maybe address the retrospectivity point?

The CHAIR: Yes.

Mr DAVID SHOEBRIDGE: In terms of evidential, procedural and substantive changes to the criminal law and retrospectivity? Some submissions have criticised these double jeopardy law proposals as being retrospective. Of course, the original 2006-2007 laws were retrospective almost by the essential nature of changes to double jeopardy. Can you address the difference between retrospectivity for procedural, evidential and substantive criminal law changes?

Ms MICHALKO: I think most helpfully what we can talk about are a few things. The first thing in relation to retrospectivity that a few of the submissions raise, and the concern I suppose in relation to there being an approach of retrospectivity in the context of an acquittal and in the context of that retrospectivity applying to a subsequent change in the evidence law. I think the Bar Association and the Public Defenders raised this, that there

is a general well accepted right to be tried in accordance with the law and the law that exists at the time of your trial.

The Bar Association and the Public Defenders raise the concern that if a person is facing a criminal trial they face it on the basis of the evidence that is presented in the brief and the rules of admissibility that relate to that evidence. I think it is the Bar Association that points out, perhaps, one of the concerns in respect of retrospectivity being attached to a change in admissibility of the law is that a person may not know the case that they have to meet at the time that they are being tried because they will have to meet an ever evolving case based on ever evolving evidence law. So they may well lead evidence or make arguments or take a particular approach based on their understanding and their knowledge of the admissibility of the evidence at the time—

Mr DAVID SHOEBRIDGE: That is a tactical concern.

Ms MICHALKO: Potentially, yes. And that will then change by virtue of the fact that a law is made that changes the way that that evidence would be admissible. So in the future they are exposed to a future prosecution that they never would have anticipated or addressed in the way that they dealt with their case in the first place. I think that that tends to be the crux of the concerns expressed about that issue of admissibility in some of the submissions.

The other thing that I note is that there was some discussion earlier in relation to the application of section 107 of the Crimes (Appeal and Review) Act and that enables an appeal in relation to an acquittal of a person for a directed verdict where there is a jury or by a judge alone on a question of law alone. So it does not relate to jury verdicts that are not directed where you really do not know the reasoning or the background. These are things where you do because either the acquittal is directed so you know what the judge has told the jury.

Mr DAVID SHOEBRIDGE: But it still goes to that issue of finality, does it not?

Ms MICHALKO: It does.

Mr DAVID SHOEBRIDGE: Fundamentally it is the same principle of finality.

Ms MICHALKO: It does but the thing that I would note about that section, section 107 (8) provides that that section does not apply to a person who is acquitted before the commencement of that section. So although I understand in the typical way that we talk about retrospectivity, well of course it has to apply to an acquittal that has already happened, it does not apply to a person who is acquitted before that section commenced. That is different to the legislation that we are talking about.

The CHAIR: When did that come in?

Ms MICHALKO: I do not know when section 107 came in. I take it on notice if you like.

The CHAIR: Please.

Mr DAVID SHOEBRIDGE: But the substantive double jeopardy laws that the Parliament passed in 2006-2007, there was no ambiguity about it.

Ms MICHALKO: That is true.

Mr DAVID SHOEBRIDGE: They applied retrospectively insofar as other changes to process and procedure. They apply as at the time of trial.

Ms MICHALKO: They apply as at the time of trial, yes. In relation to their application and the interpretation of "fresh" relating to changes for process and procedure, I do not know. The other think I note in respect of tainted acquittals, which was spoken about previously, there was an issue raised about the possibility of someone being—essentially multiple applications being made in the case of a tainted acquittal. I think there are two things that are relevant in relation to that. Our definition of a tainted acquittal is if an accused person or another person is convicted of an administration of justice offence in connection with the proceedings in which the person was acquitted, and it is more likely than not that but for the commission of the administration of justice offence the accused person would have been convicted. Maybe in a plain English way, we think of "tainted" as like there is broadly something wrong with it, but it is actually quite specific, and also—

Mr DAVID SHOEBRIDGE: But you can have unlimited applications.

Ms MICHALKO: What I would note in relation to that is if you read the subsection that applies, which is 105 (1A):

> An application may be made for a further retrial of a person acquitted in a retrial under this Part but only if it is made on the basis that the acquittal at the retrial was tainted.

My reading of that is that it does not say that you can make repeated applications on the same basis and if they fail you get another go.

Mr DAVID SHOEBRIDGE: That is repeated applications and retrials for the same criminal conduct.

Ms MICHALKO: But where, at the retrial, that is tainted—the retrial is.

Mr DAVID SHOEBRIDGE: But an individual can go to trial on repeated occasions for the same criminal conduct—

Ms MICHALKO: That is true.

Mr DAVID SHOEBRIDGE: —which is the principle at stake here.

Ms MICHALKO: That is true but it is really a question of the degree of the diminution of the principle. In this case, it is only where, at the retrial, it is tainted, keeping in mind the definition of a "tainted acquittal".

Mr FOLLETT: I might just add one thing in relation to the retrospectivity point that might be helpful for the Committee's deliberations. The bill at issue talks about a substantive change—a legislative change—in evidence law. To the best of our knowledge, there have been 27 changes, I think, to the Evidence Act since 1995. I do not know because the substantive is not defined in the bill but that obviously goes to the potential retrospective application of the bill at issue for the Committee.

Mr DAVID SHOEBRIDGE: We are not going to revisit the floodgates argument, are we?

Mr FOLLETT: I am just making the point there.

Mr DAVID SHOEBRIDGE: I thought we shut the floodgates earlier.

The CHAIR: If there are 27 then you are saying out of the 27 changes what are substantive and what are not is not defined in the draft that we have before us.

Ms LO: We do not know and we would not know until we have a judicial interpretation of that.

The CHAIR: You could not even talk about floodgates unless you knew what the interpretation was as to what is substantive.

Ms LO: Yes.

Mr FOLLETT: That is right.

The CHAIR: So they were not suggesting that. So what we will do is we will say thank you to your colleagues in Justice who sorted out the fire alarm for us from the fire brigade. Thank you for your time this morning. You have taken a number of questions on notice. You need to note that we have a short time frame and the Committee has resolved that it is a seven-day return for those, not 21 as is normal procedure. Thank you for your time.

Mr SMITH: Thank you.

Ms LO: Thank you.

Mr FOLLETT: Thank you.

Ms MICHALKO: Thank you.

(The witnesses withdrew.)

JOHANNA PHEILS, Deputy Solicitor for Public Prosecutions (Legal), Office of the Director of Public Prosecutions, sworn and examined

PETER JOHN McGRATH, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, sworn and examined

The CHAIR: Would you like to give an opening statement?

Mr McGRATH: Thanks. The Office of the Director of the Public Prosecutions is an independent, impartial prosecutor and all decisions made in individual cases have to be made to maintain the integrity of the criminal justice system as a whole. Prosecution decisions in any individual case affect not just the victims of crime in that case, those who investigated it and those accused of it but they affect the criminal justice system as a whole and the community generally. The DPP opposes the bill, accepting unreservedly the motivation of its proponents and the background of this Bowraville case. My submission is that the bill is not in the interest of the community and will adversely affect the integrity of the criminal justice system in this State.

The bill seeks to overturn the finality of litigation represented by a criminal verdict—and they are not just fine, wise words; it is an important principle. It seeks to do so only in respect of those who were said to be wrongfully acquitted of the most serious crimes but not for those who might be thought to be wrongfully convicted of the same crimes. It does so not by using the later emergence of fresh and compelling evidence, something that is recognised throughout the common law world as evidence, which may lead to the reopening of an acquittal verdict, but rather the device of a later change in law of admissibility of evidence, which can then be retrospectively applied to the same evidence not admissible at the earlier trial to achieve a different and, it might be thought, more socially acceptable result.

It represents a fundamental and unwarranted departure from the established legal principles against, in combination retrospectivity of criminality and ex post facto criminal law—changing the rules to change an earlier result. Importantly, it must be recognised that the bill seeks to effect this fundamental and profound change to the prosecution of offences, which carry a possible life sentence, a change not just affecting prospective prosecutions but prosecutions that have long since been finalised for one reason only: to attempt to change the result of one particular case. It is bad policy and bad lawmaking. No matter how disturbing are the facts of, the results of and the effects of the Bowraville investigation, prosecutions and trials, it is just bad lawmaking to attempt to effect a change in the law for the purpose of ultimately changing the result of one case.

The present law concerning double jeopardy in this State strikes the right balance: fresh and compelling evidence, which could not, with appropriate investigatory or prosecutorial diligence, have been adduced in the earlier proceedings. The present law is in accordance with international criminal laws and with human rights covenants. The sad reality is—and I will speak very carefully because I am the acting head of the independent prosecution agency that may yet be tasked with the task of reviewing the evidence for a further retrial—should the bill be passed, there is no guarantee that a further prosecution would proceed or let alone would be successful.

I stress I have not examined the brief of evidence. No issue has been prejudged but in considering the application of present tendency and coincidence laws to the evidence, which was sought to be led at the trials under the old common law regime, it has been considered. A former Director of Public Prosecutions, Nicholas Cowdery, QC, widely respected throughout the spectrum of the criminal law, did consider in 2007 the evidence rejected in the previous trials in the light of the present—as they stood in 2007—tendency and coincidence provisions of the Evidence Act, which, of course, would now apply to the term of the admissibility of the evidence we are discussing. Nicholas Cowdery, QC, found as follows:

> Specifically, in my view the suggested tendency and coincidence evidence is not fresh, it is not compelling in the required sense and legal changes since the Speedy trial—

He is referring to the Speedy-Duroux trail—

> … do not affect the admissibility of the evidence identified.

I should add that in relation to the notion of compelling evidence there is one particular segment or portion of evidence said to fit into that category in particular. That has been referred to as the Norco Corner evidence. Mr Cowdery's examination of that evidence was:

> Further, even accepting that any admissible evidence concerning the Norco Corner incident is fresh, in my view it is not compelling in the required sense.

These comments can be found in Report 55 of the Standing Committee on Law and Justice, November 2014. The change to the law proposed will, in many cases, give false hope and false expectation to victims' family members and investigators that there can or will be an appeal from an acquittal. The criminal law system cannot get away

from the fact that in respect of any verdict in a criminal trial of a serious matter there will be aggrieved persons, whether it be a conviction or an acquittal.

The DPP has concerns that the bill establishes a two-tiered appeal system for trials of offences carrying potential life sentences. A person convicted on evidence admissible at their trial, or convicted after evidence was rejected at their trial, will not get to appeal their conviction on the basis of awaited change to the law of the admissibility of evidence, which will have led to a different evidentiary ruling in their trial, and possibly an acquittal, but a person acquitted in these circumstances will remain at risk of their acquittal being appealed until they die. It is worth perhaps stepping back and asking, "What does our legal system value more, or what does it seek to avoid more?"—wrongful acquittals of those said to be guilty or wrongful convictions and imprisonments of those people who are innocent of these serious offences?

The DPP does not make a floodgates-type argument in opposition to the proposed bill. I think it is fair to say that the UK experience has produced only a handful of murder acquittals which have been re-opened and in which there have been retrials on the basis of their legislation. I have, in listening to Mr Shoebridge's question to the last witnesses about some aspects of the UK cases, made a couple of notes about a couple of those cases. If it is appropriate I might make comment to those, if that line of questioning is to be followed.

The CHAIR: Sure.

Mr McGRATH: Having said that, it is worth pointing out that it is not just murder acquittals to which the present legislation applies, or the proposed legislation will apply. There are a number of sexual offences—

Mr DAVID SHOEBRIDGE: The most extreme examples, that carry life sentences. We are talking about life-sentences. We all understand that.

Mr McGRATH: Yes. They include a number of sexual offences, as I was saying, and a number of drug manufacturing, cultivation and supply offences. In relation to serious sexual offences carrying life sentences, the volume of prosecutions for those sorts of offences, particularly against children, has increased dramatically—I use the word "dramatically" advisedly—in recent years in the New South Wales District Court. The laws of evidence relating to the trials of those serious sexual offences have also undergone substantial amendments—the vast majority of which have been directed at assisting the admissibility of evidence and the likelihood of conviction. Without making the floodgates argument it is worth considering that there is an historically all-time high number of offences being prosecuted in this State to which the legislation could potentially apply.

The CHAIR: Are you saying the majority of those are in the other categories around sexual offences rather than murder? Is that the area where you have seen the increase?

Mr McGRATH: That area. Sexual offences generally and in those that carry life sentences, included in that category.

Mr DAVID SHOEBRIDGE: Repeated brutal sexual assaults on children under 10 and the like, is what we are talking about.

Mr McGRATH: The most serious offences that carry the most serious penalty—

Mr DAVID SHOEBRIDGE: That is what we are talking about.

Mr McGRATH: —including the persistent sexual abuse of a child under 10—

Mr DAVID SHOEBRIDGE: Correct.

Mr McGRATH: —and the specially aggravated sexual assault provisions. They are the most horrible of crimes, which carry the maximum penalty, as does murder.

What does a substantive legislative change in the law of evidence mean? Does the word "substantive" have any work to do? The law of evidence is found in many pieces of legislation. The Criminal Procedure Act 1986 governs the admissibility of evidence in many types of proceedings, particularly sexual assault and child sexual offences, to the more serious of which life penalties apply. The Crimes Act 1900 contains provisions relating to defences and partial defences of lawful authority or excuse, self defence and intoxication, and also makes provisions in relation to substantial impairment by abnormality of mind and extreme provocation—the partial defences. Are these provisions laws of evidence? These are two pieces of legislation; there are many more. One of the previous witnesses from the department advised that there have been something like 27 amendments to the Evidence Act since its inception. Of course they may be minor, procedural types of things, and until they are interpreted by the courts many of these changes—the Criminal Procedure Act and the Crimes Act are regularly amended, sometimes in clusters of amendment bills in every year—we have to bear that in mind.

I would caution the Committee in taking too great a notice of the UK experience, principally because of what has been referred to in many of the submissions, and was referred to by the witnesses from the Department of Justice this morning, of the existence in New South Wales of section 5F (2) and 5F (3A), the likes of which I understand have been proposed in the UK but never enacted. They do enable, in New South Wales, the prosecution to put its best case, and if a judge is thought to have wrongly ruled inadmissible, very important evidence that will substantially undermine the prosecution case—for example, tendency and coincidence type evidence or confessional evidence—the prosecution has the opportunity of seeking the Court of Criminal Appeal to review that ruling before the trial commences before the jury, so that if that ruling is established to be erroneous according to existing law it can be sent back to the judge for a proper ruling. In those circumstances we, unlike in the UK, have the benefit of being in a position of being able to put forward our best prosecution case.

In those circumstances this is what we prepare to do. 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. If that is insufficient according to the laws of the day that—subject to there being a tainted acquittal or subject to truly fresh and compelling evidence coming forward which could not have been, with due diligence, discovered—should be the finality of the matter. Those are the sorts of matters I wish to raise by way of opening statement. Thank you.

Mr DAVID SHOEBRIDGE: Thank you for your submission. You say that the present law strikes the right balance—a law that has been on the statute books for 12 years and has never once successfully been used. Indeed, it has only had one application before it.

Mr McGRATH: Yes.

Mr DAVID SHOEBRIDGE: It is a hard argument to make, isn't it, that it strikes the right balance, if it has never been used? Was it designed to be used, or just designed to sit there and make people feel better in 2006?

Mr McGRATH: It was designed to be used. Perhaps there has not been a call for it to be used.

Mr DAVID SHOEBRIDGE: I find it difficult to understand how, if there was a need for it in 2006 and 2007, and that there are more permissive laws in the UK, where there have been 16 applications, that it has not once been used here. How can you say it strikes the right balance?

Mr McGRATH: Perhaps we have a pretty robust criminal justice system.

Mr DAVID SHOEBRIDGE: The perfection of the New South Wales criminal justice system is the explanation?

Mr McGRATH: I said robust; not perfect.

Mr DAVID SHOEBRIDGE: You said before that you are not running a floodgates argument. Is that right?

Mr McGRATH: That is right.

Mr DAVID SHOEBRIDGE: But in your submission you said that if the changes were made it will give false hope in many cases. What do you mean by "many cases"?

Mr McGRATH: In the face of acquittals families of murder victims, police investigators and victims of the most serious sexual offences and their families may be led to think that the acquittal is not the end of the matter, that there can be an appeal against the acquittal if the law of evidence changes or if the government changes a law in relation to the admissibility of evidence that was ruled inadmissible and that they will be able to get another go.

Mr DAVID SHOEBRIDGE: Are you seriously proposing the idea that Parliament will in many cases amend the law of evidence in response to those sorts of requests? Are you suggesting that Parliament is so reactive, responsive and highly politicised in that regard that in many cases Parliament will change the law? Is that your view about the nature of Parliament?

Mr McGRATH: No. With great respect to you and your good will and motivation in propounding this bill, I think it is effectively what you are seeking to do with this bill in relation to the Bowraville matter. But I am not at all attributing any cynicism to the parliamentary process or law-making process. It is just that I would suggest that the change could not help but engender a false hope that an acquittal is not the end. If there is some evidence that people thought ought to have been admissible and was not, there will be a possibility of false hope engendered by some change to the law in the future.

Mr DAVID SHOEBRIDGE: You have not reviewed the brief of evidence in the Bowraville case, is that right?

Mr McGRATH: I have not.

Mr DAVID SHOEBRIDGE: You referenced some observations in 2007 by the former DPP Nicholas Cowdery about the nature of the evidence. Are you aware that as recently as last year the Crown, along with, I assume, the assistance of your office, presented a case to the Court of Criminal Appeal in the matter of *Attorney General for NSW v XX* that made a very different argument to the Court of Criminal Appeal?

Mr McGRATH: Yes.

Mr DAVID SHOEBRIDGE: What weight should we give to the opinion of Nicholas Cowdery in 2007 in light of the fact that after months and months of consideration the State of New South Wales presented a 100 per cent different case saying there was compelling evidence and fresh evidence to the Court of Criminal Appeal? What weight do we give to your repetition of Nicholas Cowdery's opinion from 2007 against the fact that an entire case was run premised on a very different conclusion of the evidence?

Mr McGRATH: Mr Cowdery's opinion appears to have been borne out by the decisions of the Court of Criminal Appeal and the High Court.

Mr DAVID SHOEBRIDGE: Did they make any conclusions on the nature of the evidence?

Mr McGRATH: They made conclusions on the application—

Mr DAVID SHOEBRIDGE: Mr McGrath, did they make any conclusion on the nature of the evidence?

Mr McGRATH: I will take the question on notice.

Mr DAVID SHOEBRIDGE: I make a proposition to you: they did not. What you just said then about the High Court and the Court of Criminal Appeal vindicating Nicholas Cowdery's opinion is plainly wrong. It troubles me that you are putting a proposition that is plainly and unquestionably wrong on such an important matter.

Mr McGRATH: The premise of your question was how could the Attorney General—

Mr DAVID SHOEBRIDGE: Don't worry about the premise of my question. I asked a very plain question.

The CHAIR: Order! If you are going to ask questions you do need to afford Mr McGrath the ability to provide the answer. He has also indicated that he will take a substantive part of the question on notice.

Mr DAVID SHOEBRIDGE: You were positing a view about the premise of my question.

Mr McGRATH: Yes. As I understand it, the premise of your question was how can I say Mr Cowdery's opinion is right when the Attorney General, through his work with the lawyers, put a different proposition to the Court of Criminal Appeal. I really do not understand the premise of that question.

Mr DAVID SHOEBRIDGE: I will be clear. One of the most senior criminal prosecutors, along with a team of capable junior counsel and, I assume, senior members of your office—

Mr McGRATH: No.

Mr DAVID SHOEBRIDGE: Well, senior criminal prosecutors.

Mr McGRATH: The DPP was not involved.

Mr DAVID SHOEBRIDGE: Alright. They put a directly contrary position to the Court of Criminal Appeal as recently as last year. Do you say that we should give that no weight and that we should privilege the view of Nicholas Cowdery from 2007?

Mr McGRATH: I did not say we should give it no weight.

Mr DAVID SHOEBRIDGE: You did not refer to it, which I found troubling.

Mr McGRATH: We all know the result of the application.

Mr DAVID SHOEBRIDGE: You are again suggesting that the Court of Criminal Appeal considered the evidence and formed a view on the evidence. That is your suggestion.

Mr McGRATH: No, I am suggesting that there are real arguments about the freshness and compellingness of the evidence that in part founded the application.

Mr DAVID SHOEBRIDGE: Your submission states, "In my submission there is a real possibility that this amendment will unfairly impact a significant number of completed cases." Is that statement a reference to those primarily historical child sexual assault cases? What are the "completed cases" you are referring to?

Mr McGRATH: I think I can refer back to the assistant commissioner's evidence about the review of unsolved cases and the volume of cases there. Were the bill to become law it could not help but lead to calls for reviews of all acquittals in potential life penalty cases going back some years.

Mr DAVID SHOEBRIDGE: Did you listen to the assistant commissioner's evidence that he was not aware of any of the current live reviews that this would apply to?

Mr McGRATH: I did listen to it and I did understand it. That was why in my answer to your question I said that should this law be enacted I would think that in those circumstances it could not help but put in a call for review of acquittals in those circumstances.

The CHAIR: Is that going to the point of the questioning of Mr Fang, which you may of heard, when he asked the assistant commissioner about the difference between those cases that are unsolved cases versus those that may have got to a conclusion and the difference between the number of those cases and the process? Would the DPP need to receive applications or have people calling for those cases to be re-examined if the law was to change or would you have a system in place to go back and look at that?

Mr McGRATH: The way that the prosecution system works is that the DPP does not investigate or call for the investigations of any matters. The DPP investigation is done by the police. Should the police seek advice from the DPP as to the sufficiency of evidence the DPP may advise lines of inquiry that may be followed in the giving of that advice. With the benefit of that explanation, the DPP would not be making any applications for the reinvestigation of matters. But I could imagine the DPP being in receipt of requests for advice in relation to such matters.

The CHAIR: From the police?

Mr McGRATH: From the police, or other investigative agencies, but principally the police.

The Hon. NATALIE WARD: I appreciate your submission and your assessment of the position. It is not easy to raise concerns and it is important that we do that. I note that you mention the issue of raising false hope.

Mr McGRATH: Yes.

The Hon. NATALIE WARD: That is a concern of this Committee also and weighs heavily on us, this process. You spoke about, I think you called it "truly fresh and compelling evidence".

Mr McGRATH: As distinct from brand-new.

The Hon. NATALIE WARD: Yes, that was exactly my point, that we also had the term brand-new evidence. It seems that witnesses are trying to distinguish, put another category in place. Do you care to comment on that in the context of this?

Mr McGRATH: It is an area that I find difficult because, particularly in relation to the UK cases, I think so much of the evidence that has been held to be new or perhaps even totally new is evidence that was there all along, it just had not been discovered. It is not a significant witness coming forward or a confession that happens long after the acquittal in question. That raises a grey area about whether that evidence is new or fresh. Was it with reasonable diligence able to be discovered with—let us confine ourselves to DNA or blood stains—was it with reasonable diligence able to be discovered with the technology at the time? This leads on to, Mr Shoebridge in answer to one of your questions to the previous witnesses—

Mr DAVID SHOEBRIDGE: Maybe there was a chance.

Mr McGRATH: Yes. And I will leave it to the Committee whether it will be of more assistance to you to do this in a more formal way, that is under notice in writing rather than sort of ramble, give my thoughts about a couple of cases now.

Mr DAVID SHOEBRIDGE: Anything you give your initial thoughts on here you could expand upon in writing. That is an open invitation.

Mr McGRATH: Thank you. I appreciate that. One of the DNA cases in the UK was the case of *R v Mark Weston* [2010] EWCA Crim 1576. On one view it may demonstrate how low the bar of certainly due diligence and perhaps newness is. As with many of these cases, it was an awful case, a rape and murder case. The victim was attacked and killed in 1995 a short distance from her home in the Cotswolds. Prior to the original trial

in 1996 the accused's boots had been examined by a scientist and his assistant from the Forensic Science Service using their naked eye under fluorescent tubes and something called an Anglepoise lamp, which was in fact a white-bulb desk light on manoeuvrable arms that could be swung around, as well as a microscope, and there was chemical testing. No blood or DNA was found.

Twelve years after the acquittal the boots were re-examined by a different team and four areas of blood, not one, but four areas of blood were located. There was a strong argument made that missing one—not paraphrasing Oscar Wilde because it is too serious for that—but missing one area of blood might not reflect an absence of due diligence, but missing four areas of blood was not consistent with careful and diligent inspection. The judgement did criticise the Forensic Science Service in not providing proper and up-to-date lighting to conduct these examinations in 1995-96. But that of itself was not held to be a failure of due diligence.

The Hon. NATALIE WARD: Can I pick up on that point?

Mr McGRATH: Yes.

The Hon. NATALIE WARD: You talk about careful and diligent inspection, and no-one wants a murderer to go free, if I can put the dead cat on the table.

Mr McGRATH: I accept that, yes.

The Hon. NATALIE WARD: I think everyone is agreed on that. No-one would like fresh and compelling evidence to be available to right this wrong than all of us here. But, it is a matter of careful and diligent inspection. Are we crossing lines between what was perhaps an investigation that was not sufficient, that was not careful and diligent, and missed a number of things that may or may not be able to be righted? Is that a different thing to impacting evidence going forward on a whole number of other matters? What I am getting to is the intent. We are all trying here to find justice but are we able to do that through this avenue or is it a matter of careful and diligent inspection was not undertaken and there has been justice there that needs to be righted? Is there a different avenue to right?

Mr McGRATH: There is a blurring. The difference between those two things I think can be very, very blurred. Of course new techniques can lead to better results not available back when the original testing was done. That evidence can be fresh and compelling.

Mr DAVID SHOEBRIDGE: That is the case in Weston. I remember reviewing the case and in that case the forensic laboratory at the time perhaps did not have state-of-the-art lighting that might have been available at the time. Later they got state-of-the-art light and I think there was another technological innovation and they discovered blood that had not been discovered earlier. That satisfied the reasonable diligence test, it satisfied the fresh evidence test, or the new evidence test in the UK, and somebody who sexually assaulted and murdered somebody was ultimately convicted. If that is the best case of the UK system misfiring, I am not very persuaded by your argument.

Mr McGRATH: I am not saying it is misfiring. I think the lamps were available but had not been provided to the laboratory at the time.

Mr DAVID SHOEBRIDGE: Correct. That seems to me like the law eventually, without grossly prejudicing anybody's rights, coming to the right conclusion for the right reasons.

The Hon. NATALIE WARD: Is not the Norco Corner evidence—and I appreciate you have not reviewed the brief—

Mr McGRATH: Sure.

The Hon. NATALIE WARD: At a higher level, is not the Norco Corner evidence something similar to that? It has been reviewed and I understand the review found that it was not compelling, but is that not a similar thing to the wrong lamps being used?

Mr McGRATH: It depends in those circumstances, how diligent was the police investigation.

The Hon. NATALIE WARD: Clearly not.

Mr McGRATH: All those people have been spoken to. Was there an opportunity to take statements from those witnesses who saw the man standing over the Aboriginal youth at night?

The Hon. NATALIE WARD: Was it adduced? Was it currently presented?

Mr DAVID SHOEBRIDGE: There are complex arguments that we cannot answer on a hypothetical point about if you are looking at reasonable diligence, are you looking at reasonable diligence of the police from a 2019 perspective, or are you looking at reasonable diligence of police from a 1990 perspective. Because what

was considered reasonable diligence in 1990 is quite distinct from what the reasonable diligence would be in 2019, including cultural competence, Aboriginal cultural competence and the like. We cannot necessarily answer that in the abstract but those will be the kinds of issues the court will have to grapple with, and they are very real.

Mr McGRATH: Yes.

Mr DAVID SHOEBRIDGE: And they bring into account all these issues. But judging the NSW Police actions in 1990 from a 2019 standard seems to me to be a peculiar way of proceeding, if I could say that.

Mr McGRATH: Certainly I understand commissioners of police to have done, and they have apologised for the standard of the police investigation conducted in 1990, and I do not understand you to be suggesting by your question that the police investigation in 1990 ticked all the boxes. As we know it was anything but.

Mr DAVID SHOEBRIDGE: Looking at it now, the 1990 investigation was woefully inadequate. There have been substantial changes since 1996 and the like.

Mr McGRATH: Any objective analysis of it at the time I think would have had to come to a pretty similar conclusion.

Mr DAVID SHOEBRIDGE: You raise the issue of this legal change being applied to historic child sexual assault cases and I suppose I want to engage with that very briefly.

Mr McGRATH: Yes.

Mr DAVID SHOEBRIDGE: There have been a whole series of changes to laws of admissibility, the way in which witnesses are treated, and directions to the jury in relation to child sexual assault matters, because we now know that the way child sexual assault cases were previously run, if we go back to the 1980s and 1990s—much as we challenge the way police operations happened in 1990, we could challenge the way the courts operated because they were grossly unfair to victims and grossly privileged and inappropriately and unjustly privileged to perpetrators. It may be, may it not, that some of those cases, the most extreme of those cases carrying life imprisonment, may be reviewed through the lens of these legal changes?

Mr McGRATH: I agree that that is possible.

Mr DAVID SHOEBRIDGE: I am yet to be persuaded, though, that that produces an injustice.

Mr McGRATH: That it is not desirable.

Mr DAVID SHOEBRIDGE: This is your opportunity.

The Hon. NATALIE WARD: I think he is agreeing with you.

Mr DAVID SHOEBRIDGE: I am yet to be persuaded that reviewing those cases in accordance with the changes proposed in this bill produce an injustice and I am giving you the opportunity to persuade me it would produce an injustice.

Mr McGRATH: We would have to look at individual cases.

Mr DAVID SHOEBRIDGE: Systemically—

Mr McGRATH: I find it very hard to answer in the broad sense that you are asking me.

Mr DAVID SHOEBRIDGE: Because of the way the laws of evidence operated in 1989 or 1987, if evidence was excluded that would now be admitted and that would potentially see the worst historic child sexual offenders being retried for the crimes they committed against children as a result of these changes under much fairer laws that fairly balance the rights of victims and offenders, how would that produce an injustice and how would that in any way impair the public's confidence in the legal system? Surely it would do the opposite.

Mr McGRATH: There are arguments either way. If someone in 1989 was acquitted and was sought to be put back on trial in 2019, 30 years later, for the same offence that would be—

Mr DAVID SHOEBRIDGE: I accept there are arguments both ways but you have to accept—

Mr McGRATH: That would be troubling for the criminal justice system.

Mr DAVID SHOEBRIDGE: But you have to accept that producing a just outcome on a fair set of evidentiary rules when a gross injustice had happened earlier and a perpetrator had been acquitted and a victim had been denigrated—justice operates both ways, but your submission suggests it operates only one way and that it would be unfair to the perpetrator.

Mr McGRATH: Everyone at the time of that trial thought the rules were operating fairly at the time.

Mr DAVID SHOEBRIDGE: But nobody now does.

Mr McGRATH: In 30 years time they will look at our laws now and they may be changed again. Where do we draw that line?

Mr DAVID SHOEBRIDGE: You draw that line with a whole series of very detailed, comprehensive tests that need to be satisfied by the Court of Criminal Appeal, such as the interests of justice, a fair trial, compelling, fresh—that is where you draw the line and this bill does not change that.

Mr McGRATH: What it changes is the change in the law of admissibility of evidence from time to time.

Mr DAVID SHOEBRIDGE: Correct.

The Hon. ROD ROBERTS: I have just one very quick question. It goes towards having this on the record, really. I certainly don't want to put words in your mouth so correct me if I am wrong. I am trying to paraphrase what you said in your opening submission, and that is something along the lines of, "It is bad to create a law because one particular case", or something to that effect. Do you agree though—and, as I say, it is mainly for the point of having it on the record—that there is usually a catalyst or root cause or reason for any law to be changed?

Mr McGRATH: I do. I agree with that proposition. I understand the question. I do.

Mr DAVID SHOEBRIDGE: A case can illustrate a general problem.

Mr McGRATH: Yes.

The CHAIR: Finally, have you had a chance to read any other submissions, such as the alternate method that Jumbunna has put forward?

Mr McGRATH: I did get that quite late, without being critical of them. If you wanted my thoughts on that, could I do so under notice in writing?

The CHAIR: That would be great because on the difference between "adduced" et cetera, we would value your views. One of the advantages of having their submission late is that they have looked at what other people have said about some of the criticisms and have sought to address those. It would be beneficial for us if you could maybe take that on notice and provide some information.

The Hon. NATALIE WARD: I think that is specifically in relation to "adduced" versus "admitted".

Mr DAVID SHOEBRIDGE: Their alternate remedy.

The CHAIR: I thank you both for your time this morning and I apologise that we are running behind schedule. Just a reminder: There are seven days, rather than the normal 21, for questions taken on notice.

Mr McGRATH: Thank you. Sure.

Ms PHEILS: Thank you.

(The witnesses withdrew.)

(Short adjournment)

GABRIELLE ANTOINETTE BASHIR, Junior Vice President and Co-Chair, Criminal Law Committee, NSW Bar Association, sworn and examined

MICHAEL McHUGH, SC, Senior Vice President, NSW Bar Association, affirmed and examined

The CHAIR: Would you like to give an opening statement?

Ms BASHIR: Yes, thank you. On behalf of the NSW Bar Association we acknowledge that we meet on the land of the Gadigal people of the Eora Nation and we pay our respects to elders past, present and emerging. We also acknowledge and pay our respects to those Aboriginal and Torres Strait Islander persons from Sawtell, Tenterfield and Bowraville who are deeply concerned with the subject matter of this inquiry.

The NSW Bar Association welcomes the opportunity to appear before the inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019, which I will refer to as the 2019 bill. Mr Michael McHugh, as you have heard, is the Senior Vice President of the NSW Bar Association, and gives evidence in that capacity. I give evidence in my capacity as the Junior Vice President and also the Co-Chair of the Association's Criminal Law Committee. I also am a member of the Bar Association's joint working party on the over-representation of Indigenous people in the New South Wales criminal justice system. The work of that joint working party extends beyond over-representation of Aboriginal and Torres Strait Islander persons in custody into other aspects of their contact with the criminal justice system.

We wish to note our respect for Distinguished Professor Behrendt and her advocacy for Aboriginal and Torres Strait Islander persons over many years, along with the important work of Jumbunna Institute for Indigenous Education and Research. We have had the opportunity to read the Jumbunna submission and we respectfully maintain in our submission that the current legislation ought not be amended. This should not be understood in any way as denying the pain and suffering of the families, their disappointment or their advocacy for their deceased loved ones. The submission of the Bar Association is, ultimately, that we do not support the proposed amendments in the 2019 bill. Our submission should be read alongside the current part 8, division 2 of the Act which the bill seeks to amend.

The acquittals to which the bill would have application are life sentence offences—namely, murder or any other offence punishable by imprisonment for life in so far as proposed sections 102 (2A) and (2B) of the bill are concerned. The many acquittals that we speak of in our submission predating even 1995 should be read as acquittals of such offences. However, acquittals for a 15-or-more sentence offence—of course, including a life sentence offence—are also draw into this bill in so far as the proposed amendments of section 105 (1AA) and (1AB) are concerned. Those are what are called "second application" and "exceptional circumstances". Those sections draw in the tainted acquittals, too, because it applies to the whole division.

The association's submission has set out in brief terms the double jeopardy principle and the rationale behind that rule as described by Justice Black in *Green v United States* in a passage adopted by our High Court of Australia. In explaining the rationale this is what was said:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence …

The current legislative provisions in the Act provide for an exception to that principle in very carefully safeguarded provisions, which were introduced following extensive consideration and consultation, and they allow for only one such application to be made under this provision.

Acting Justice Matthews in 2003 concluded that in the event of amendment an absolute limitation of only one application for retrial was essential. The 2003 Model Criminal Code Officers Committee (MCCOC) discussion paper "Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals" concluded that a fresh and compelling evidence exemption was justified only with stringent minimum safeguards to preclude its abuse, and this included that evidence be relevantly fresh. I can certainly come back and address questions about the difference between "fresh" and "new". "Fresh" as understood in this State, that is, not available to be presented at the first trial, and that the investigation was conducted with due diligence.

In 2016 in December the review of section 102 of the Crimes Appeal and Review Act 2001 by James Wood, former Chief Judge at Common Law in this State did not recommend amendment of the existing provision. The matters that he concerned himself with included those parts in the top part of the bill—that is, the fresh and compelling proposed amendments. The Wood review and the recommendations continue to warrant careful consideration by this Committee. The Wood review also raised concern that the proposal in relevantly similar terms to the proposed bill at 2A and 2B would open the possibility for a change in admissibility or 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. We note that that same concern would apply to the added proposals in the bill to amend 105 (1AA) and (1BB).

The NSW Bar Association notes that the submissions of Professor Hamer appear to speak in support of the proposal. We do not support Professor Hamer's submission. We are happy to answer questions as to why this is so or put in something further in writing should that be necessary. We will make a few brief points now, which may answer some questions you might have. First, we do not agree with the fundamental premise that the goals of efficiency, finality, closure and the prevention of prosecution being used as an instrument of oppression are at odds with victims and society's interests or those of law enforcement. The existing exception to double jeopardy in section 102 speaks to fresh and compelling evidence and the interests of justice. The interests of justice necessarily incorporates all of those matters.

Further to this, the association rejects the apparent foundation of the legislation on a presumption that it is contrary to the presumption of innocence that undermines our criminal justice system, namely a presumption of guilt. We say that about Professor Hamer's submission. Second, an argument that the current legislation is incoherent not only rejects the analysis of the Court of Criminal Appeal, which delivered a unanimous judgement, but also rejects the correctness of the High Court of Australia's refusal of special leave to appeal, which stated that there was no reason to doubt the correctness of the Court of Criminal Appeal decision. Furthermore, in this State section 5F (3A)—I think the Department of Justice referred to section 5F (2)—specifically relates to evidence being rejected in trial. That is a significant weapon in the prosecution's arsenal. It is efficient. It occurs prior to the completion of a trial, or occasionally following a pre-trial ruling to any acquittal or conviction being entered by the jury, and avoids the difficulties associated with traversing an acquittal. This provision was not available in England at the time of its amendments and it is a highly significant difference between our jurisdictions. It is used and it is used effectively.

The 2019 bill allows for a trial to be run on one basis according to the law as it stands at the time of trial and then seeks to impugn the verdict that was rendered in accordance with law on the basis that the law that has been passed subsequently to the verdict should now be applied to the facts. The inadmissibility of the evidence in accordance with law at the time of the trial becomes the reason for the retrial under the bill. That, in our submission, is the end of fair trial as we know it. As the High Court pointed out, as we have put on page 6 of our submission, and as was repeated by the Court of Criminal Appeal in the judgement of *Attorney General for NSW v XX* at paragraphs 244 and 245, 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.

The Court of Criminal Appeal, having referred to that High Court authority, went on to note, "Once this is understood it follows that there can be no miscarriage of justice in limiting the circumstances in which an acquittal is to be set aside to a situation where evidence was not available at the trial and could not have been made available with the exercise of reasonable diligence." Such a limitation, in our opinion, does not bring the system of justice into disrepute. We endorse those statements by the Court of Criminal Appeal and the High Court. We do not accept the suggestion that the proposal is a narrow exception, particularly given the passage of the Evidence Act 1995 in this State. It is speculative to attribute non-use of the provisions to the so-called narrowness of their reach. The provisions in the bill would apply to acquittals for relevant offences prior to 1995 in addition to evidence law changes of the same effect outside the Evidence Act. Differently to the UK—and I will come to the UK's position—we have the Evidence Act 1995. On Professor Hamer's analysis that is a substantive change in itself to the change of evidence.

Similarly, the bill would have operation for post-1995 acquittals where there has been substantive evidence law reform rendering previously inadmissible evidence now admissible. The DPP opposed the proposal in 2015 and does so again now, recognising that it would significantly expand the number of acquittals subject to application and would allow the DPP to re-litigate issues on which the primary court had ruled, rather than what was or could not have been adduced. This would lead to further erosion of the principle of finality and would erode confidence in the administration of justice. Comparisons with what has occurred in other jurisdictions to date are not relevant in circumstances where our own director says that that is so. I am going on for a little while but I think I might be answering some of your questions along the way.

What is referred to as the UK legislation in relation to new evidence is only applicable in England and Wales. That is apparent in the section itself. Changes to the English evidence laws, such as to hearsay and what they call "bad character", which is similar to our "coincidence and tendency", happened later, in 2003. There has not been a whole new Evidence Act like we have. We say it is not as extensive and came later than our Evidence Act 1995. It is significant that the expanded definition of the UK "new evidence" has been expressly not permitted in Scotland. Scotland subsequently enacted the Double Jeopardy (Scotland) Act 2011. In that Act it was expressly provided that evidence that was inadmissible which has subsequently become admissible does not fall within its

definition of "new" evidence. Scotland has gone along the lines of what we have and it has done so having understood the experience in England and Wales. The English and Welsh law allows for one application for retrial only.

Scotland also permits only one application. This is in contrast to the current proposal in the bill and the Jumbunna proposal, which would allow for unlimited applications based on the same acquittal. Reference to cases such as *R v PL*, which dealt with directed verdict-type acquittals, is very different because the different applications attach to the different acquittals; it is not attaching to the same acquittal. There was an acquittal and then a retrial was ordered in *R v PL*, and then there was a separate acquittal in that retrial. It is not a reapplication based on the same acquittal so the analogy does not work, in our submission. The provisions in the UK have never been considered by the UK Supreme Court or the House of Lords before the Supreme Court came into being.

We can go into detail, but a proper understanding of the cases cited by proponents for the legislation, including *R v B*—which was not a murder case, but a rape case—and *R v Reilly* expose that they do not assist an argument in support of the proposal. In fact we would go so far as to say that in terms of the murder acquittals—and I can go into a detailed analysis of that—none of them have turned on changes in law and none of them have turned on what this bill proposes. There has been fresh evidence in the majority of cases, including fresh propensity evidence—which is post-acquittal evidence that was not available at the time. In our submission, retrospective application to persons acquitted prior to the introduction of part 8 of the Act breaches article 14 (7) of the International Covenant on Civil and Political Rights [ICCPR], which Australia has ratified. Where double jeopardy exceptions existed at the time of the acquittal—I will explain that in more detail, Mr Chair—

The CHAIR: Did you see the confused look on my face?

Ms BASHIR: Yes, I did. I will come back to explain that because it is important to answer an issue Mr David Shoebridge raised in respect of our submission. There was a comment that we had a tactical concern, but actually our concern in relation to retrospectivity goes to the very heart of the administration of justice and what the judicial process means. It goes to the separation of powers. In terms of retrospectivity, it also means that it is in breach of article 14 (7) in separate ways. If I could explain this way; where double jeopardy exceptions existed at the time of the acquittal, an accused person is arguably never finally acquitted in accordance with law. But going back to what we have said before, if there was no such provision at the time of the acquittal, they have been acquitted in accordance with law. So to then give retrospective application breaches, in our submission, that article of the ICCPR. There was a final acquittal in accordance with law for those matters predating the double jeopardy exceptions.

We say there is a further breach in circumstances adverted to in *Polyukhovic v The Commonwealth* regarding what Justice Gaudron called laws invented to fit the facts after they have become known, and what Justice McHugh referred to as changes to the rules of evidence for the purpose of conviction. In Justice Gaudron's judgement she referred to what she said that laws invented to fit the facts is a travesty of the judicial process. Justice McHugh referred to changes to the rules of evidence for the purpose of conviction as being one thing that was prohibited in terms of retrospectivity. Should the proposals pass, an accused person would no longer have to meet the case at trial in accordance with the laws and procedure as they stood at the time of trial, but also changes in the laws of evidence after the trial that make the further evidence admissible against him or her, rendering the acquittal open to review and retrial.

We have one more point to make and it is something that we did not raise in our submission but it is raised in Professor Hamer's submission. I think it is important we make it. The New South Wales Bar does not agree that the wholesale statement of Professor Hamer, that the present bill would present no difficulties under the Kable principle—we do not agree with that wholesale statement. It is true that the bill does not invoke the name of XX, nor could it. The name is supressed. However, the aim of the legislation is clear and the fact that there has been only one application ensures that the target of what is effectively an exception against triple jeopardy—we call it in those submissions—can only apply to one person. If this faces considering a proposal to design and enact a further exception to target a particular case following from an unwanted result, there are questions raised under Kable, how does it promote equal justice? I will draw into that the unsolved murders that are being looked into, for example, but also equal justice with other acquitted persons. Are there questions raised as to the separation of powers? If I could quote something that Justice Gaudron said in Kable just to help with understanding:

> The integrity of the courts depends on their acting in accordance with the judicial process …

That is applying the law as it stands to the facts:

> … and, in no small measure, on the maintenance of public confidence in that process. Particularly is that so in relation to criminal proceedings which involve the most important of all judicial functions, namely, the determination of the guilt or innocence of persons accused of criminal offences.

She went on later to say:

> Public confidence in the courts requires that they act consistently and that their proceedings be conducted according to rules of general application. That is an essential feature of the judicial process. It is that feature which serves to distinguish between …

I use the term "ad hoc justice" not based on legal principles or rules and equal justice:

> Public confidence cannot be maintained in a judicial system which is not predicated on equal justice.

Justice McHugh in Kable stressed that the courts must be perceived to be free from legislative or executive interference if the plain purpose of overturning of acquittals of a particular person—if that is the plain purpose. We do not have the same confidence that there are no problems under Kable. We do not go so far as to give an advice on Kable. We simply say there are questions raised. The legislation will, in terms of the triple jeopardy provisions, that is the section 105 proposed amendments, effectively place XX outside of the general regime for trials and acquittals, and as we understand it, that person alone. We simply raise there are questions. That is all we were going to say by way of opening.

The CHAIR: Can I ask you to go back to your comments around section 5 and the provision, is it 5E?

Mr McHUGH: 5F.

Ms BASHIR: Section 5F(3A), yes.

The CHAIR: You said that the provision is used widely. Do you have any statistics or numbers on that that you may be able to take on notice and come back to the Committee?

Ms BASHIR: We could take that on notice. In fact, we can get those from the director's office, they are the ones bringing it. I think Mr McHugh said widely, but certainly it is utilised and what it allows for from when it has come in is if the prosecution case will be substantially weakened or destroyed by a ruling as to the inadmissibility of evidence, then that can be appealed to the Court of Criminal Appeal. It often happens very quickly. It could be that week or the next week so the trial, in which the jury is waiting or is about to be empanelled, does not go off the rails. It allows for there to be a judgement delivered quite quickly and the trial to proceed prior to there being any verdict of acquittal or conviction.

The CHAIR: You have read the Jumbunna submission?

Ms BASHIR: Yes.

The CHAIR: Around that term conditional?

Ms BASHIR: Around admissible?

The CHAIR: Admitted, sorry. Admitted, not adduced.

Ms BASHIR: That change we have answered in our submission. That is, the Wood review looked at that and it did not adopt that. But in relation to admission, it still has the same fundamental difficulty. That is that what will occur is the rules as they applied at the time, there will be a change allowed. In fact, we say it is the very difficulty that what was not admitted before, now becomes admissible. It is a changing of the rules of the trial. Professor Hamer refers to it rather glibly in an effort to smack it down, as changing the rules of the game. We certainly do not. No practitioner who has appeared in a criminal trial or on an appeal, or on an appeal in relation to fresh evidence, would ever, ever call what goes on in the criminal justice system a game. We do not. It is much more serious than that. It is the application of the law at the time of trial to the evidence as presented at trial.

The Hon. NATALIE WARD: Thank you for your submission and for your assessment of the other submissions, which is helpful. As a formerly practising lawyer I understand all of the concepts that you speak about. I do not think anyone is under a misapprehension about those. You referred in your statement—I forget the words—something about the evidence being fresh, new and compelling, and then an outcome provided an investigation was conducted with due diligence. They were your words, "provided it is conducted with due diligence". Stepping aside from all of the other issues I think one of the overriding considerations here is that there is a question mark, and it has been acknowledged, and with all due respect to police—

Ms BASHIR: I understand.

The Hon. NATALIE WARD: —around the due diligence of the investigation.

Ms BASHIR: Yes.

The Hon. NATALIE WARD: Which is perhaps the root cause of all of this. I ask you to comment on that. Is it the case that that could be a consideration, parking adduced, admissible, and all the other things, are we not here today considering whether there should be something else, in circumstances where there has not been an

investigation that was conducted with due diligence? That may well be a view of 2019 as opposed to when it was conducted, but none the less can you comment on that?

Ms BASHIR: In some circumstances and in many circumstances where that has occurred, what will happen is there will be fresh evidence exposed. It is not the case that a lack of due diligence means that there is only—and I use the distinctions that we have—existing evidence. When I speak of new evidence, I do not mean what the UK means, which picks up both what we refer to as new evidence and fresh evidence. I mention that just so that you can understand. What may happen is that through a reinvestigation a further witness is discovered; some different evidence is discovered; there may be new tests run that were not run before, which means there is fresh DNA evidence or scientific evidence. So we do not share those concerns. We say that the provisions that are there now absolutely provide the right threshold for when something will become fresh.

I hope I have not misled you by virtue of our opening submission, but in many of those cases what we will see is fresh evidence. On the conviction side or conviction appeals we have run fresh evidence appeals. Sometimes that means going back and having another look at the evidence and having tests run that were not run, which permits then the fresh evidence argument to be run.

The Hon. NATALIE WARD: Where that is possible. Maybe the investigation was conducted in such a way that that is not now possible. Interviews were not undertaken or evidence was not properly documented at the time. We have the Norco corner evidence. It is a bit like whipping egg whites. If you get a bit of the yoke in there, it is all over. You cannot undo that and fix it up. You have got to start again. I use that analogy because you cannot try to retrofit it to fix that up once it has not been done properly. You have to start that investigation again if you have messed it up.

Ms BASHIR: Can I just say in relation to that—because I know there were some comments here earlier in relation to compelling and perhaps particularly in the context of the Norco corner evidence—in terms of our understanding, it is this: Of course there were not only submissions made in relation to that on behalf of the Attorney. There were also, as we understand it, submissions challenging that made by the representatives of XX. Both senior counsel on both sides have now been appointed to the bench. There are real arguments as to whether or not the evidence is compelling but our understanding is that the analysis of both parties is currently subject to a suppression order. So we are certainly not in a position to comment on any of that and we will not; nor are we privy to it, I have to say.

The Hon. NATALIE WARD: Just one other question quickly on the Hamer submission: I understand you do not support it. That is clear. Can I ask you to comment on the issue of retrospectivity and the right to finality, if you like. He talks about:

> The line between procedural law and substantive law is not … easy to draw. Double jeopardy exceptions may lie on the border.

I think this is what we are all struggling with. He goes on to state:

> On the one hand, if a person has committed murder and is acquitted, this is a serious injustice.

Ms BASHIR: A serious injustice if they have committed murder and they have been acquitted?

The Hon. NATALIE WARD: Yes, on the one hand. He goes on to state, "Setting aside the acquittal so that the defendant can be convicted furthers justice …" in that case. But, he goes on to state, there is authority that where the person has been acquitted, they acquire the right to not be prosecuted. That is the finality argument that you are talking about. That can be, for example, due to expiration of a limitation period or otherwise: For example, here there has been an application and it has been determined. As I understand your submission, that should give finality. Can you comment on that?

Ms BASHIR: Finality, of course, subject to the exception that we already have. But just in relation to the fundamental premise, which is something that we started on in relation to Professor Hamer's submission, one of his starting points is that the corollary to the criminal standard of proof—that is, beyond reasonable doubt—is an expectation that many acquitted defendants are actually guilty. We say we do not embrace that. We also say that that is speculative. In order to access to many of the propositions of Professor Hamer, which understood properly are premised actually on a rejection of the rule of law that is at the very heart of the administration of justice and how our system operates, that feeds into the administration of justice and equal justice also.

The Hon. NATALIE WARD: And a decision based on a fully contested hearing, subsequent applications and appeals.

Ms BASHIR: In relation to the change of law and retrospectivity, we have real concerns—in particular for those matters where there were acquittals prior to the introduction of any of the exceptions to acquittals. There are real problems for it. This bill has those problems, in our submission.

The Hon. NATALIE WARD: I would like to ask you about sexual abuse cases and the changes in those, but I expect my colleague will do that in his own time. I am afraid I have to leave questioning for now.

Ms BASHIR: I can answer that very quickly.

The Hon. NATALIE WARD: I am sure Mr Shoebridge will do that when he is ready.

Ms BASHIR: Could I say in relation to that and the example that Mr Shoebridge asked about before—that is, and please correct me if I am wrong, Mr Shoebridge—

The CHAIR: He will, I am sure.

Ms BASHIR: —what about if there was an acquittal in 1986?

Mr DAVID SHOEBRIDGE: I will just rely on the *Hansard*.

The CHAIR: Okay.

Ms BASHIR: What if there was an acquittal in 1986, the laws have changed, and now tendency and propensity evidence has gone in. What we know now, particularly from the royal commission into child sexual offences, is that often people who have offended—for example, against children—will continue to do that. So we would say that probably, very probably in that case, with the proper and further investigation you would actually be looking at a fresh evidence case because there would probably be further victims subsequent to 1986 who have come forward. In those circumstances you are already through the fresh and, hopefully, compelling threshold. We agree with the director that really you need to have a look at—

Mr DAVID SHOEBRIDGE: You are relying on evidence of later criminal offences.

Ms BASHIR: That are discovered at the time.

The Hon. WES FANG: Well, no. You are actually more relying on later criminal activity.

Mr McHUGH: It is a whole new case.

Ms BASHIR: It is fresh evidence because it was not available at the time of trial. Does that make sense? If, for example, there has been a trial in 1986 based on a particular complainant's evidence and the person was acquitted, what is sought is to reopen that acquittal. In most cases—for example, if there is further offending conduct, which we know from the royal commission is often the case with child sexual assault offences so subsequent conduct—those witnesses come forward and that is fresh evidence.

The Hon. WES FANG: Granted, but there was still an acquittal on charges where there was perhaps guilt.

Ms BASHIR: But in our submission the current provisions would work.

Mr DAVID SHOEBRIDGE: Provided they continued to offend in very similar circumstances.

The Hon. WES FANG: Yes.

Mr DAVID SHOEBRIDGE: You say that that is sufficient. We should just rely upon that.

Ms BASHIR: No, that was not what we said.

Mr DAVID SHOEBRIDGE: Because that is what you would need.

Ms BASHIR: No. With respect, no. I am sorry I think you are paraphrasing.

The Hon. WES FANG: That is my interpretation of it as well.

Ms BASHIR: What we are saying is that in many cases—I am sorry I cannot hear.

The CHAIR: This works only if members speak one at a time. Ask a question, allow the witness to provide the answer. That helps Hansard and it helps everyone understand where we are. Let's go one at a time. Please proceed, Ms Bashir. Have you lost your train of thought?

Ms BASHIR: I was caught in the crossfire. I stand by what I have said on the record and it is there. The answer is there.

Mr DAVID SHOEBRIDGE: Ms Bashir, you say you are—I think there is a working party, is there, on Indigenous over-representation?

Ms BASHIR: Yes.

Mr DAVID SHOEBRIDGE: Have you consulted with any members of the Aboriginal community about the submission that you have made in this case?

Ms BASHIR: In relation to this case it has been through our criminal law committee and to our bar council. I haven't consulted with the Bowraville families.

Mr DAVID SHOEBRIDGE: Have you consulted with any part of the Aboriginal community about it?

Ms BASHIR: I haven't sat down with the Indigenous community in relation to this. This is the view of the Bar Association. We do have a First Nations committee. Could I say this just in relation to some of the evidence that was given before in relation to systemic changes, because I think this feeds into some of our work with the working party and some of the questions that were asked before in relation the bench as well. I haven't got the exact name for it but there is a bench book that is particular to the interactions of Indigenous people with the bench. It is available on the Judicial Commission website and it is constantly being developed. Also The Public Defenders are developing—and Ms Rigg is coming later—a resource tool which will assist the profession, and we hope the bench, with looking to, for example, understanding the sequelae of domestic violence and trauma sequelae that is particular to Indigenous communities and also the vulnerability of witnesses.

Jumbunna itself has done some very valuable empirical research in relation to the histories of communities and there is a Bugmy bench book that we are seeking to develop. The Aboriginal Legal Service is seeking to develop it. It looks into actual communities and what has happened in those communities, particularly, for example, in terms of their interaction in relation to the royal commissions into deaths in custody, stolen generations and the like.

Mr DAVID SHOEBRIDGE: I am not a shrinking violet. I do not mind considered, focused criticism of the bill that I put forward, but when the Bar Association submission says that the changes proposed in this bill "render the criminal law unworkable" and, at a later point, say that it would be "a complete erosion of fair trial principles" putting your case at that point I do not think does credit to the merit of your argument. Are you really saying that if the New South Wales Parliament passed this change to a provision of the crime appeal laws that it would render the criminal law unworkable. Is that really your case?

Ms BASHIR: Our case is certainly that if what is proposed is passed it will mean—I am answering your question—

Mr DAVID SHOEBRIDGE: It was very specific. Do you say that it would render the criminal law unworkable?

Ms BASHIR: Yes. We maintain our submission and we have diametrically opposed views as to how the change in law through the Evidence Act will operate. So we have a very different view of that. We do support the preservation of a trial being conducted in accordance with law and we have referred to those passages from the decision of the Court of Criminal Appeal, the Chief Justice, the Chief Judge at common law and the like in relation to applying the laws to the facts of the case.

Mr DAVID SHOEBRIDGE: Your position here is predicated on accepting that the changes that were made in 2006 and 2007 get the balance right. Is it right that the current law gets the balance right?

Ms BASHIR: We accept that that is an appropriate balance. We know that it has not been used—or only once. So we do not have examples of how it is used but we have seen, on the conviction side, how fresh evidence can be used and has been upheld by the courts.

Mr DAVID SHOEBRIDGE: In 2006 the Bar Association opposed the changes.

Ms BASHIR: We did. That is true.

Mr DAVID SHOEBRIDGE: In fact, you opposed it on the basis that you said innocent people would go to jail based upon the current law that you now support. Do you see the problem with over-egging your opposition? In 2006 you opposed the current laws that you are now supporting. Now you are opposing another change with quite strong words saying that it would "render the criminal law unworkable". Do you see the problem? It makes it difficult to accept the argument when it is put at such a high level when in the past you have opposed laws that you now support.

Mr McHUGH: It is the same argument that Justice James Wood set out. All those arguments there we support. That was looked at in 2015—very recently. This Parliament asked a very distinguished jurist to look at these questions.

Mr DAVID SHOEBRIDGE: The Government asked.

Mr McHUGH: Sorry, the Government asked. He gave a report which we say is still very on point. It looks at your current proposal, apart from the repetition point, and it looks at the amendment and adduce questions. We have not expressly adopted it—we have our own submissions—but I think that you are using a rhetorical aspect of something we said 10 years ago compared to something different that we are saying now. We are not saying something different. We have accepted the status quo. We have accepted that there is a balance. We say that in our submission, but we say that this proposal goes too far. We have set out the reasons. Particularly, it is about the question of finality. I am happy to explore that and to go into those reasons.

The Hon. WES FANG: Given that evidence, is it reasonable that we may take that component of your submission where you say it will be unworkable and perhaps give it a little less weight because it could be reasonable expected that in 10 years, if it was adopted, you would adapt around it, much as you did in the circumstances where the 2006 and 2007 changes did not see the sky fall in?

Mr McHUGH: That assumes that what we were saying in 2007 was that the sky would fall in. I have not gone back and looked at that. I accept that the member has said that that was our position. Certainly I know that we opposed it. Whether we put it at such a level I am not sure, but I do not think it is going to assist your deliberations on a very important point in the criminal justice system—we are talking about fundamental aspects here—

The Hon. WES FANG: Maybe the fundamentals are wrong.

Mr McHUGH: Well, then they have been wrong for hundreds of years. Double jeopardy goes right back to the Star Chamber and so on. They are very important principles: the presumption of innocence. There was talk here earlier today that people would just assume people were guilty. We are just not there.

Mr DAVID SHOEBRIDGE: I did not hear that conversation.

Mr McHUGH: Perhaps we hear things differently.

Mr DAVID SHOEBRIDGE: Ms Bashir, you critiqued Professor Hamer's position. Professor Hamer makes an observation that the criminal law is predicated on the fact that it is likely that multiple guilty people will walk free in order to prevent having an innocent person convicted. You say that that you do not accept that as a part of the fundamental underpinning of the criminal justice system. That is one of the core observations of Blackstone in *Blackstone's Commentaries*—I think it was that it was better for 20 guilty people walk free than for one innocent person be convicted. I could be wrong but I think that Benjamin Franklin put it at 100 guilty people walking free rather than one innocent person get convicted. It is a trite observation repeatedly directed at the criminal law. Do you say that that is all wrong—that Professor Hamer is out on a limb on that?

Ms BASHIR: No. With respect, I think you have either miss-heard or misstated what I said. I have what I said written down in front of me. What I said is that Professor Hamer states that a corollary of the criminal standard of proof—that is, that it be beyond reasonable doubt—is an expectation that many acquitted defendants are actually guilty. That is not what Blackstone says. Could I just develop further what has happened in the interim—between 2006 and now—which is the English experience? I said that I would come back to that.

Mr DAVID SHOEBRIDGE: I have a couple of questions. You did get quite a long opening.

Ms BASHIR: Sure.

The Hon. ANTHONY D'ADAM: You are not sharing the meeting.

Mr DAVID SHOEBRIDGE: I am happy to pass it over.

The CHAIR: We are getting close to the end of this session. We have another witness waiting. We can ask the witnesses to take questions on notice. Let's try and fire through a few more questions.

Mr DAVID SHOEBRIDGE: You repeatedly reference some of the observations of the court in Polyukhovich going to the issue of retrospectivity. But the core of Polyukovich—I could be wrong—was the War Crimes Act 1945, which retrospectively made criminal offences for war crimes that occurred between 1939 and 1945. The whole basis of the War Crimes Act was retrospective legislation. Despite all of the observations you point to in the High Court, the majority of the High Court said that that was a valid exercise of the Commonwealth's legislation powers and did not infringe on chapter 3 of the Constitution and they signed off on the retrospective laws. In your observations about the commentary of judges X, Y and Z you failed to draw to the Committee's attention the fact that the court found valid that retrospective legislative exercise in those circumstances for very good reasons.

Ms BASHIR: As you point out, they are different circumstances to what this bill proposes. We were taking the Committee to those portions of Polyukovich which may more relevantly refer to the concerns of the Committee.

Mr DAVID SHOEBRIDGE: You did that without taking the Committee to the fact that the High Court unquestionably considered retrospective laws that were not just about procedure but were about substantive criminal offending valid. Do you not think you should have taken the Committee to the outcome in Polyukovich, although it degrades your argument, as opposed to just the observations of the court?

Ms BASHIR: In our submission, it does not degrade from our argument. I have otherwise answered the question.

Mr McHUGH: It is also referred to on page 5 of our previous submission. We talk about Polyukovich and a particular aspect about the change of the rules of evidence. That is why we are highlighting it. We are not misleading the Committee. Clearly you are aware of the outcome of Polyukovich. As I remember it, everything turned on jurisdictional issues.

Mr DAVID SHOEBRIDGE: But to fairly assess those observations you need to know that in that case the High Court said that criminal law passed by the Commonwealth Parliament that was 100 per cent retrospective was constitutionally valid and did not offend any of those principles and remains on the statute books to this day. That was obviously relevant, was it not?

Mr McHUGH: I cannot answer that because what is relevant to you may not be. We are highlighting a particular part of a judgement, which is necessarily obiter, and saying that looking at that this Committee would take into account the concerns.

Mr DAVID SHOEBRIDGE: Telling us it was obiter would be useful.

The CHAIR: This is not going to change where we are now. David, you have got one more question. You can use it on the same topic again or you can ask something else.

Mr DAVID SHOEBRIDGE: Ms Bashir, you quite rightly said that the UK Supreme Court has not considered the English changes. There are two conclusions we can make from that. One conclusions is that yes, we do not have a determinative conclusion from the current highest court of appeal on these issues in the UK and therefore we should travel with some trepidation by looking at the reported cases. The other conclusion we could make is that the conclusions have been so uncontroversial and have not been challenged or brought to the highest court in the UK, which shows a level of acceptance of the conclusions and the way the law operates in the UK that we should take comfort in. Even in those 11 cases where somebody has been ordered for a retrial they have not challenged the conclusions in the highest court. My point is that the argument goes both ways.

Ms BASHIR: In relation to the proposals for change that the bill requests, in our submission, in those 10 cases—that is the murder cases—the outcomes have not turned on any change of law or what the bill proposes. Those cases—by our reading of the cases—have turned on what we call "fresh" evidence, which is what the Department of Justice was calling "brand new evidence", for example DNA evidence or a confession. *R v B* was an appeal of a rape conviction. It is often not referred to that there was actually fresh DNA evidence. It is referred to in the case as "DNA evidence emerging from further investigation" along with the DNA evidence that was not fresh in that case but that was available at the time of trial and was held to have been wrongly rejected as inadmissible. Under our existing provisions such DNA evidence would ground an application under section 5F but post acquittal fresh DNA evidence would fall within our existing legislative regime. The case of *R v B* was not a case based on interim change in the laws of evidence. It is also not a Court of Appeal decision and the arguments of the contradictor were withdrawn.

In Reilly, which is a murder case that Professor Hamer refers to, there was fresh DNA evidence in 2015 and 2016 in relation to a 1986 acquittal. That is what formed the basis of the application. What Professor Hamer said must be read with that in mind, but it is not stated. There was also previously known propensity evidence that was available at the time of trial. The Court of Appeal took the view that the fresh DNA evidence was sufficient and the admissibility or otherwise of the propensity evidence could be left to the trial judge if they ordered a new trial on that basis. It was conceded that the DNA evidence was "new" and "compelling". It would be "fresh" under our provisions.

By the time of the application Reilly was terminally ill with a life expectancy of weeks. He was in custody, unlikely to ever be released and he was not fit to plead or stand trial. The Court of Appeal held that it was not fair or in the interests of justice for Reilly to stand trial. We do not think it is correct when Professor Hamer says that the issue in Reilly was "very similar" to the issue raised in XX and we invite you to read Reilly more closely. The application did not turn on change of law provisions or their interpretation.

The CHAIR: Time has gotten away from us. You mentioned that you had a more in depth analysis on what we will call the English model. Would you like to take that on notice and provide that as a subsequent answer to the Committee if you have got something pre-prepared?

Ms BASHIR: We could do. We have said almost everything that we were going to say. We have got some more details about the Scottish system that we could put to you in writing. We do have an analysis. We have uncovered 17 applications. Many of the results in terms of what occurred at retrial are unknown. We cannot offer an opinion as to whether in all cases the application has been correctly upheld and not all of them have been upheld.

The Hon. ROD ROBERTS: I have one quick question for Mr McHugh—the author of the submission.

Mr McHUGH: I signed it.

The Hon. ROD ROBERTS: I take it you are the author then. Under the heading of "The Association's View" the submission states, "The justifications advanced for the bill apply with equal force to conviction appeals. The adoption of such a change will inevitably have enormous repercussions for conviction appeals that appear not to have been considered by proponents of the bill." I am a bit perplexed about that considering the bill talks about acquitted people only.

Mr McHUGH: Sure. It is about the policy underlying it. If you have a policy to allow the opening up of acquittals there is a danger—and this the problem with so much of this. You will hear the expression—Professor Hamer referred to it—"Hard cases make bad law". There are some real difficulties. I just finished a trial where I was defending for a life imprisonment. We knocked out some coincidence evidence. There is a question of whether I would call the accused in that case. If this legislation goes through, as a tactical decision—I prosecute a lot, I should say, but I am defending in this case—do I call the accused? Because he may give evidence in that case. Five years later, the law of evidence changes, that coincidence evidence would have gone in. Now he is on record, so his right to silence is gone. Those sorts of concerns are—I should not use the expression Pandora's box. We just do not know where this is going to go. To come back to your question, we are putting that up because the policy reasons underlying this—hopefully we have set that out on page 2—could also refer to convictions.

The Hon. ROD ROBERTS: It does not though, does it?

Mr McHUGH: No, it does not. The point of that submission is that the policy reasoning could apply. You are quite right, the bill is specific. We highlight that as perhaps—I will not say anything else.

Ms BASHIR: Could I supplement that very quickly? Either there is a two-tier system, which is not equal justice if what the public defenders say is correct. If convicted persons cannot rely on a change of the law, so a change to the laws of evidence that work in their favour, so to exclude prejudicial evidence from their trial, then there will be two tiers; one for people who are acquitted and one for people who are convicted. That is on one view. On the other view, what policy considerations that apply for acquitted persons must surely apply for convicted persons, people who are sitting in custody convicted of the most serious crimes but there is a change in law that now says that that evidence should never have been admitted in their trial.

That second point is the point that we make in relation to the policy considerations. If you are going to apply it for people who are acquitted, then surely the policy reasons behind it, that is to remedy a miscarriage of justice, would apply to someone who is sitting locked up in custody convicted of a very serious offence where the law has changed such that a whole bundle of the evidence, for example, that was admitted in their trial, is now seen in the eyes of the law to be inadmissible. It is like the converse. Maybe I have confused you more but I am just trying to explain.

The Hon. ROD ROBERTS: You have not confused me. I fail to see any relevance in that, to be honest.

Mr DAVID SHOEBRIDGE: Criticising a law we have not seen.

The CHAIR: We have resolved, because of our short timeframe, that questions taken on notice be returned within seven days, not the normal 21. The secretariat will liaise with you on that. Thank you for your submission and your evidence today.

(The witnesses withdrew.)

DAVID HAMER, Professor, Sydney Law School, University of Sydney, affirmed and examined

The CHAIR: Would you like to make an opening statement?

Professor HAMER: Yes, I will. I support the slight expansion of the fresh and compelling evidence exception to the double jeopardy protection so that it covers freshly admissible evidence. Defendants' interests have to be balanced against other interests, including those of the victims and the victims' families. The protection against double jeopardy is not a fundamental right, at least not in the sense of being absolute and immune from exceptions. One of the chief aims of double jeopardy protection is finality and closure but where there is fresh and compelling evidence of an acquitted person's guilt, including freshly admissible evidence, well then finality and closure are illusory. The Bowraville case shows this clearly.

It has been suggested that to expand the double jeopardy exception would bring the system into disrepute but the way that the system has handled the Bowraville case has already damaged its reputation. Many of the submissions opposing the expansion of the exception have suggested that it would open the floodgates to prosecution appeals against acquittals. This appears very unlikely. Even with the slight expansion the exception would remain a very narrow exception to the protection against double jeopardy. There is another aspect of the bill that requires consideration besides the slight expansion to the exception. That is that the bill is designed to allow a second application in the Bowraville case. In this respect it is somewhat ad hominem and ex post facto. That does raise concerns about separation of powers but I do not consider these concerns to be overpowering.

The bill would not dictate the result in the Bowraville case. It would not impinge upon due process. It would simply allow a second application in the Bowraville case, or potential second application, and for that to be considered under a slightly different set of principles, but the new principles that it establishes appear appropriate principles. If a second application were to be made the Court of Criminal Appeal would still be acting judicially. It would not be acting as an instrument of the Government. It would not be acting under the Government's direction. The Wood Review notes the objection that if this kind of amendment were made, 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 short answer to that is that justice is not a game.

Mr DAVID SHOEBRIDGE: Thank you for your submission, particularly the way you grapple with the competing priorities in it. I find that very helpful, a reasoned grappling with the different priorities. One of the issues you raise is the unprincipled outcome that the current law produces. You deal with this on page 4 of your submission where you give those alternate scenarios under the current law and how the current law provides an inequitable and unprincipled series of potential outcomes. Could you take us through that.

Professor HAMER: Yes. The exception as it currently stands does not prevent evidence that was inadmissible at trial from being considered fresh evidence. In fact there is a specific provision which provides that the fact that evidence was inadmissible at trial does not preclude it being fresh evidence. It is only when the inadmissible evidence was adduced at trial, and that does seem to create a potential tension in that, if that evidence has not been presented at trial but is inadmissible, then it can later be considered fresh evidence. But if the evidence is found by the prosecution—perhaps the prosecution or the police have gone to considerable lengths and conducted a very thorough investigation that uncovers this evidence and they use it to test its admissibility, and it is held to be inadmissible—it would be precluded from being fresh evidence. That does seem odd in that there is a tension there. If the inadmissible evidence was not found and was not adduced, then it can be considered fresh evidence. But if the evidence was found and was adduced and its admissibility was tested, which seems quite appropriate, then it would be precluded from being fresh evidence.

Mr DAVID SHOEBRIDGE: Your submission probably puts it more neatly. Could you give a hypothetical example where there had been a murder prosecution? Say there had been a murder and a prosecution and there had been similar violence against another victim, and you give two variations on that. You say in one case where the other victim comes forward but the prosecution elects not to adduce the evidence—and by "adduce", you mean tender—they do not tender the evidence because they correctly consider it inadmissible and the defendant is acquitted. The other is where the other victim had come forward and the prosecution, while doubting its admissibility, adduces the evidence but it is held inadmissible and the defendant is acquitted. Both of them end up with the defendant being acquitted: One where the prosecution decides not to leave the evidence because they doubt its admissibility, and the other where they give it a go and lose.

Professor HAMER: Yes.

Mr DAVID SHOEBRIDGE: Under the current law, if there is then a change in the Evidence Act, the first scenario I put forward would be able to be proceeded with under the current law in accordance with the interpretation of the Court of Criminal Appeal, but the second one could not. Is that right?

Professor HAMER: I think that is an arguable interpretation of the double jeopardy exception as it currently operates. In fact, when I put my submission in there was a passage in XX that I had not picked up on. They suggest that, if the evidence is available and the prosecution actually has the evidence and the prosecution chooses not to test its admissibility, then that evidence would still be considered to be reasonably available and so would not be considered fresh for the purposes of an application under the double jeopardy exception.

That seems to me to be a bit of an odd approach to take because, if the evidence is not admissible, then it seems reasonable for the prosecution not to adduce it. To suggest that inadmissible evidence is reasonably available and should be adduced, as the Court of Criminal Appeal does in XX, that seems to me to be an odd interpretation of the legislation. It was an obiter point anyway. It is not as though it is ratio because it did not describe the situation that actually arose in XX and it does seem to be a strange interpretation.

Mr DAVID SHOEBRIDGE: The issue about retrospectivity: You reference, I think, the Maxwell case, which is a High Court case and which draws a distinction between the usual operation of changes to evidence and procedure as against substantive changes to the criminal law. Could you take us through that and how it relates to double jeopardy?

Professor HAMER: Parliament clearly does have the—well, I should not say "clearly"; not many things are clear when it comes to this area of law. In many situations, Parliament can make retrospective legislation. I refer to the war crimes case, Polyukhovich, where the Commonwealth Parliament retrospectively created new war crimes offences. That legislation was tested in the High Court and it was upheld. That was the situation where, at the time the conduct was engaged in, that law did not exist it to say that that conduct actually constituted a war crime. Parliament came along at a later stage and said, "Well, that kind of conduct we are now going to call a war crime." That legislation had retrospective effect.

When it comes to war crimes, perhaps that is not such an issue because we are talking about murder, genocide and so on. But, generally speaking, if there is a change made to the substantive criminal law, such that conduct when it was engaged in was entirely legal and it is only later that Parliament decides, "Well, actually, we would like to criminalise that conduct." that obviously poses serious rule of law problems because at the time the conduct was engaged in the defendant would have had no way of knowing that that conduct was criminal. But if we are talking about procedural changes such that there is no change to the substantive law and at the time the conduct was engaged in it was criminal conduct but subsequently there is a change to, for example, the rules of evidence such that by the time the trial occurs, then more evidence is admissible than might have been at an earlier stage and more evidence is admissible than at the time the criminal conduct was engaged in. In those circumstances, the defendant really is not in a position to object and say, "Well, I want to be tried under the old law when this evidence was not admissible." Defendants do not have a right to be tried in any particular way.

The changes to double jeopardy are not exactly comparable to a change in the substantive definition of the offence or to a change in evidence law. For example, there is authority that, if we are talking about the limitations period such that the defendant has committed an offence and there is a limitation period applying to the offence and the limitation period has expired, the defendant has obtained a right not to be tried and prosecuted. If Parliament came along and sought to retrospectively extend to the limitation period, there is authority that that does pose a problem. Parliament can still do it, it appears, but courts would be resistant to interpreting the legislation so that it would take away this vested right that the defendant has not to be prosecuted.

Mr DAVID SHOEBRIDGE: It would have to be express.

Professor HAMER: It would have to be express. The court would lean against an interpretation that would take away that right. Double jeopardy laws do something similar to extending a limitation period, really, because if the defendant has been tried and acquitted, then the defendant, under the double jeopardy protection, does have a vested right not to have that acquittal set aside. Having said that, that is not an absolute right, as I said at the outset. It is not a fundamental right that cannot be subject to exceptions. There is still the argument, of course, that the double jeopardy exceptions, such as the fresh and compelling evidence exception, only apply to the most serious cases. If we are talking about someone who has committed murder and they have been acquitted and there is fresh and compelling evidence of their guilt, yes, it is a bit problematic to take away their vested right not to have the acquittal set aside, not to be retried. That does seem to be a bit problematic. On the other hand, should we allow a murderer to remain free and unpunished where the victims and the victims' families have rights too? It is a matter of balancing those competing rights.

The CHAIR: You were not here for the Bar Association's evidence. May I ask, firstly, around the issue of finality and the impact that that may have on either a prosecution or a defence case where there is concern that, if there are changes to the Evidence Act subsequently that may have an impact on the ability for someone to be brought back later, do you have a view about how that may change the way in which a case is presented and whether even they call the accused to give evidence, et cetera, and how that may impact later on?

Professor HAMER: Based on the Bar Association's submissions, and perhaps the DPP as well, I think they raised concerns that if an acquittal was set aside and sometime later the defendant was retried, there could be difficulty ensuring a fair trial because of the time that has passed and also, if the evidence law has changed, the defendant would be facing quite a different case from what the defendant faced initially, which could pose fair trial issues for the defendant. If the concern about the fair trial is insurmountable, then under the double jeopardy exception the Court of Criminal Appeal could reject the application on the basis that it is not possible to hold a fair trial. That is expressly mentioned as one of the considerations going to the interest of justice.

If that really does pose a problem, that could be handled in that way. I should say, though, that it isn't unusual for there to be retrials. Under the current appeal legislation dealing with conviction appeals, it is quite common for convictions to be set aside and for the Court of Criminal Appeal to order a retrial; and the situation might be a bit different at the stage of the retrial. The trial court has ways of handling that situation.

The CHAIR: Let's talk about convictions, because, again, that is another thing that the Bar Association spoke about then as a policy setting. If you were to go down this path for acquittals, you then need to apply the same principles for convictions.

Professor HAMER: It's difficult drawing a comparison, really. There is plenty of scope for conviction appeals as it is. There isn't any—

The CHAIR: But if the Evidence Act changes, do you, as a principle, still then need to allow those changes to those that have been convicted, not just to those that have been acquitted? I think that is the crux of what the Bar Association was arguing from a policy point of view. If I am sitting there, sitting out my life sentence, and there is a change in the Evidence Act that the Bar Association are arguing should be afforded to me if I had been acquitted, for the prosecution to bring me back for another trial, should that be available to those that have been convicted?

Professor HAMER: I think the ultimate question is, particularly if you are talking about convicted defendants, what were the true facts? If the change in evidence law is such that now there is clearly admissible evidence that suggests that that conviction is a wrongful conviction, I wouldn't have any problem at all with that evidence being considered. I think that would be quite appropriate. For an example, there is actually a Victorian case—the case of Baker—which is perhaps a good example to consider. In that case the defendant was convicted of murder and there was what's known as a third-party confession. Someone else had said, "No, it wasn't the defendant, it wasn't Baker; it was me that committed that murder." Under the common law, which applied at the time, that third-party confession was hearsay evidence and it was excluded—I'm simplifying somewhat.

The CHAIR: Sure. That is good for me, because I am not a lawyer, so that's good.

Professor HAMER: So the defendant wasn't able to rely upon that third-party confession to prove the defendant's innocence. That was in—2007, I think, was the trial. It actually went to the High Court. The defendant argued in the High Court that the common law governing hearsay should be changed so that third-party confessions were admissible. The High Court rejected that as a matter of common law. In the meantime Victoria adopted the Uniform Evidence Law. The Uniform Evidence Law includes a very broad exception for hearsay that can be relied upon by the defendant—section 65, subsection 8, I think it is. The defendant, Baker, has recently been released from prison, and he is arguing, "I'm innocent." The other person, the third party, is still saying, "Yes, it wasn't the defendant; it was me." I think it would be appropriate to allow the defendant to have the conviction set aside and for there to be a retrial with that evidence now admitted under the new Evidence Act provisions. I don't have a problem with that.

Just on the point of symmetry between defence appeals and prosecution appeals, it should be noted—and perhaps this has been raised—that South Australia actually introduced a subsequent appeal provision based upon the double jeopardy exceptions. In South Australia, and Tasmania has picked this up, too—and I think there's a bill before the WA Parliament as well—if the defendant has been convicted, the defendant has failed on first appeal, in these jurisdictions—South Australia and Tasmania—the defendant can apply for leave for an exceptional subsequent appeal—because, ordinarily, defendants just have one appeal—on the basis that there is fresh and compelling evidence of innocence. I think that's quite a good innovation which it would be worth New South Wales considering that as well.

Mr DAVID SHOEBRIDGE: So there is no in principle objection to it. It is not required for this bill, but there is no in principle objection to extending it to conviction appeals.

Professor HAMER: No, there wouldn't be. There wouldn't be any in principle objection. In New South Wales the defendant does have the right to apply to the Supreme Court for a subsequent appeal.

Mr DAVID SHOEBRIDGE: When it comes to finality there is already a capacity to an appeal, an acquittal, from a judge-alone trial.

Professor HAMER: Yes, that's right.

Mr DAVID SHOEBRIDGE: I mean, that is evidence already, isn't it, that this fetish with finality, as an absolute, unambiguous principle, that that's not how the law works already? Because a finality from a defendant's perspective—acquittal by a judge or acquittal by a jury is still the same final outcome, yet the law already allows appeal against one but not against the other.

Professor HAMER: That's right, and finality isn't an end in itself. The reason that finality is seen as desirable is that it provides society with closure and it provides society and affected parties the opportunity to get on with their lives. But if you've got fresh and compelling evidence of guilt, well, then, in spite of it, the acquittal then doesn't provide that closure; it doesn't provide people peace and security. So finality, in that situation, is illusory.

Mr DAVID SHOEBRIDGE: A number of the opponents of these changes have said that allowing these changes and degrading the principle of finality will bring the criminal justice system and the courts into disrepute. There is another way of looking at it, which is: not providing a just outcome when the evidence available would suggest that a murderer should be in jail, or a very serious sexual assailant should be in jail, by the criminal justice system not having an avenue to bring those people to justice, that brings the criminal justice system and the courts into disrepute. What do you say to that?

Professor HAMER: Yes, I agree. That's right. Actually, the repute of the criminal justice system these days—apparently, the High Court's questioned whether that should be such a major consideration. The High Court's now talking in terms of integrity, preserving the integrity of the court, and that's partly on the basis that we're talking about the repute of the criminal justice system. I mean, who knows what that means? It can be a bit of a fiction. People have different ideas of what a certain event means for the criminal justice system. But in talking about the integrity of the criminal justice system, the integrity of the system can be questioned where defendants that have been acquitted of extremely serious offences, those acquittals appear factually incorrect. I mean, that would challenge the integrity of the criminal justice system because, ultimately, the criminal justice system, its function, is to convict the guilty and to acquit the innocent. That is its ultimate function.

I mean, in the case of very minor offences, finality might have more importance, because it isn't worth continually revisiting charges and questioning verdicts—acquittals and convictions—with minor offences. But with more serious offences—arguably to preserve the integrity of the system—there should be limited, carefully constrained opportunities for verdicts to be corrected.

The Hon. WES FANG: Thank you for your submission. We have discussed this morning and into this afternoon the proposed legislation that will amend 102 and 105. In your opinion, do you think that this is an efficient way to do it? We have discussed some other models which could potentially achieve similar outcomes. Do you have any commentary on the proposed legislation versus some of the other models and perhaps the UK example?

Mr DAVID SHOEBRIDGE: Changing "adduced" to "admitted" is the other option.

Professor HAMER: Yes, I saw that alternative proposal in the Jumbunna Institute submission, that is just simply replacing the word "adduced" with "admitted". I think that would be simpler. I think that would operate more simply and so then evidence would be fresh if it has not been admitted and if the failure to admit it is reasonable, essentially. I think that would be simpler. It would pose fewer historical questions about the admissibility of evidence at the time of the trial. The current bill provides that evidence will also be fresh if it was inadmissible at the time of trial but is now admissible. The way that that is expressed, that would require the court in a case where this was relied upon to conduct some kind of historical investigation of whether the evidence was admissible at the time. The Jumbunna Institute alternative would often avoid that issue. Particularly if the evidence actually has been adduced and was held inadmissible, then you could say that all reasonable steps were taken but the evidence was not admitted so that on an application to set aside the acquittal the court could then just focus on whether the evidence is now admissible. I think it might be simpler in that respect.

The Hon. WES FANG: And efficient?

Professor HAMER: And more efficient, yes. If the prosecution chose not to test the admissibility of evidence and if the prosecution chose not to test it on the basis that it considered the evidence inadmissible, then you might still have that historical question about whether the evidence of the time was admissible. But I think that historical hypothetical question would arise in fewer instances so it would be more efficient.

The Hon. WES FANG: And it would depend on retrospectivity as well.

Professor HAMER: Yes.

The CHAIR: Jumbunna also in their submission looked at allowing only one retrial rather than only one application for retrial, so multiple applications. Do you have a view on that?

Professor HAMER: Yes, I like the idea of limiting it to one retrial. I think that would certainly be worth considering. But at the same time I think it would be good to—as the current bill does—limit further applications to those exceptional circumstances. I think you could have both. If there has been one application and that has been unsuccessful then a further application should only be permitted in exceptional circumstances, as the bill currently provides. Perhaps there should be an additional provision that there should only be one retrial.

Mr DAVID SHOEBRIDGE: If you have had an initial successful application and had a retrial, you do not get another go?

Professor HAMER: That is right. Under the tainted acquittal exception—which never seems to be used anywhere, so that is another exception to double jeopardy—if there has been a tainted acquittal that has been set aside, a retrial and a further tainted acquittal, then there can be a further application and yet another retrial. That would be the tainted acquittal exception that might be handled differently, but for fresh and compelling evidence you could just limit it to a single retrial.

The CHAIR: The other thing is that we have heard today that we cannot refer to the UK model because Scotland is different to England and Wales. Have you done a bit of an analysis on the Scottish system and would you mind taking that on notice and providing some comments? The Bar Association said that Scotland has recently made some changes to their legislation, in light of knowing what is in the English system, to tighten that up a little bit.

Professor HAMER: Yes, I could have a look at that. I could take that on notice. I am aware of the Scottish system but not in detail so I cannot really comment here.

Mr DAVID SHOEBRIDGE: Scotland is a jurisdiction that it is hard to draw many comparisons from because they have quite a different mixed common-law and civil system, don't they? We talk about apples and apples but, given how they have many of the continental approaches to the criminal law, it really is apples and tangerines in Scotland.

The CHAIR: Yes, but you will have the benefit of the *Hansard* on what the Bar Association has said in relation to the Scottish system and you will be able to help a horticulturalist like me interpret which are apples and apples, and oranges and apples, and which is a juice made of the things all mashed up together. I would appreciate that.

The Hon. GREG DONNELLY: What are your thoughts in regard to any implications in other Australian jurisdictions if we move forward in New South Wales and adopt something like the proposed bill?

Professor HAMER: It would be a negative step in terms of uniformity across the jurisdictions, obviously, but when it comes to the criminal law there is quite a lot of difference between the different jurisdictions anyway and that does extend to the double jeopardy exception. In New South Wales, the fresh and compelling evidence exception only applies to life sentence offences; in other jurisdictions it applies to serious offences or very serious offences and so on. There is already that difference. WA is already quite different in the way in which it operates. The ACT is quite different in the way in which it defines fresh evidence. I think the ACT expressly prevents evidence that was inadmissible at the time of trial from being considered fresh evidence. WA might go the other way. WA provisions are kind of hard to interpret.

Also I do not think there is such a great concern about the jurisdictions all being the same since this legislation almost never gets used, so the whole thing is very hypothetical. While in some areas there is a lot to be said for uniformity across the jurisdictions in a Federal system, there is also something to be said for different jurisdictions trying out different approaches to difficult questions and seeing which one works best. If New South Wales adopts this amendment and it works well, then that is a nice experiment that the Federal system has tried out and other jurisdictions may be able to benefit from it.

The CHAIR: Why is it not used?

Professor HAMER: That is really difficult to say. Because I think there would be a lot of acquittals which are wrong. That just follows from the fact that to get a conviction you need to prove guilt beyond a reasonable doubt. So there would be a lot of defendants that the court considered probably guilty but still acquitted them. You might expect that a lot of defendants that were acquitted would actually be guilty. I think it is because the double jeopardy exceptions are firstly very narrow. I think it is also because there is cultural resistance to using the double jeopardy exceptions. The DPP, for example, opposed the creation of the exceptions in the first place. The DPP opposes the extension of the exception that is being considered in this bill, and the DPP does have quite a bit of control. Under the current provisions, for an acquitted defendant to be reinvestigated the DPP's permission has to be obtained. Given that the DPP is so opposed to relaxing the double jeopardy protection you could imagine the DPP would not grant that permission.

The CHAIR: Do you think the system at the moment is adequate? I know, and it is widely acknowledged, that in the Bowraville circumstance we have a unique injustice. Let's just put it that way. This goes back from the investigation to the trials, the lack of evidence in some cases—the whole gamut. In my old business we used to talk about the Swiss cheese model of accident theory. You have got this one that has managed to get all the way through. Put that to one side. Is the system in itself and the current laws that we have, the provisions and the ability for people to bring in new evidence, for example, as we change with technology—do we need this broadly or is it not used because everything that we have has evolved to a point where it seems to be working? With all of these comments I am not referring to Bowraville because we acknowledge that that is something that unfortunately seems to have fallen all the way through that block of Swiss cheese.

Professor HAMER: First of all, as time passes, evidence generally gets lost; its quality deteriorates. And so if you've had a trial and that trial has ended up with a certain result, it becomes increasingly difficult to look back and say that the trial got it wrong. Even if, as probably is the case, trials do get the result wrong quite regularly. As time passes since the trial though, it becomes increasingly difficult to show that the trial result was incorrect. Technology provides a bit of an exception to that traditional situation, particularly DNA profiling technology. You can have just a small piece of evidence that has been preserved and it is now possible with DNA profiling technology to re-examine that piece of evidence and come up with extremely probative evidence— extremely strong evidence that may call into question the results of the trial. So DNA is a bit of an exception. But even with DNA evidence—as far as I know—there's only been one, possibly two, convictions overturned in Australia on the basis of fresh DNA evidence. Strangely, in the US there has been more than 350.

For some reason in Australia there's been very few and in the UK there's been very few. I'm not sure why that is. Maybe that again reflects practical difficulties in retaining that evidence—you know, the resource limitations involved in going back over the historical record and finding that evidence and retesting it. Certainly, defendants who have been convicted of serious offences and failed on their first appeal lack the resources to discover that fresh evidence and to use it as a basis for challenging the conviction. I think, broadly speaking, the same may be true with acquittals—many of which, as I said, probably are incorrect. The system just isn't set up in order to go back and challenge them. The resources probably just aren't available for the police to consider whether perhaps some of those old files are open to being reopened and further challenged.

The CHAIR: I guess part of the argument that is being used is that because we cannot identify a whole gamut of cases where this may be, it is almost the reverse of the floodgate scenario. At the moment there are not a lot of people saying that there are a whole lot of cases that would be brought before us. Therefore we are blurring that line between the separation of powers, between potentially passing legislation almost for a single case—the reverse of the floodgate argument. Do you have a view on that? At the moment we do not have a queue of people outside saying the law has to change in New South Wales because we believe there are all these cases that need to be retried. Therefore, if we head down the path and change it because we know that there is particularly one that is glaring and standing out, are we crossing that separation of power line and does that then have an impact on the ability for a fair trial if that was to be the case?

Professor HAMER: I do not think it is crossing the line because—

The CHAIR: Because we are not determining the outcome?

Professor HAMER: You are not determining the outcome. The risk in focusing on an individual case and trying to achieve a just outcome for an individual case is that you make bad law—hard cases make bad law. But hard cases don't necessarily make bad law. You have got to make sure that the law you come up with is appropriate law. Even though the Bowraville case has raised this question—it has been a situation that challenges the way that the law currently operates—the questions that the Bowraville case raises are more general questions. Provided that that is kept in mind and any amendments that are passed as a result of the Bowraville case stand up on their own merits, and that you would be happy for the amended law to operate to any future cases that arose, then I think that it is appropriate to consider the amendments.

I do not think there is a separation of powers issue. Individual cases often prompt law reform. The Stephen Lawrence case in the UK prompted the creation of double jeopardy exceptions there; many examples could be given. Often Parliament, and for that matter the courts, change the law in response to individual cases. There is no problem with that. You have just got to make sure that the laws that you come up with are appropriate, not just for that individual case but for cases more broadly.

Mr DAVID SHOEBRIDGE: We are yet to see the numbers from the police. They say there are about 400-odd cold cases and I think we are going to get a breakdown to see if any of those relate to acquittals or judge-directed verdicts. It may be that there is a small corpus of cases that this could potentially refer to but that is no reason not to proceed with law reform, is it?

Professor HAMER: No. Are they cases where evidence was excluded at trial?

Mr DAVID SHOEBRIDGE: I would just be speculating. I am just saying there may be some acquittals.

Professor HAMER: Even if as a result of change in evidence law evidence that was excluded then is now freshly admissible, that would not provide a basis for a successful application to have the acquittal set aside. The evidence would also have to be compelling. I really don't think there are too many areas of evidence law that have been changed such that not only is evidence freshly admissible, compelling evidence is freshly admissible. Because if the evidence was compelling it probably would have been admissible under the pre-existing law.

Mr DAVID SHOEBRIDGE: One of the areas that it may potentially arise is in the area of historic child sexual abuse. We have had significant procedural and other evidentiary changes in that regard.

Professor HAMER: Yes.

Mr DAVID SHOEBRIDGE: Would you see a difficulty in applying the kind of principles set out in the bill to historical acquittals for child sexual abuse, the most extreme instances, which would be covered by a life sentence?

Professor HAMER: I think the general principles that are being advanced in the bill would be appropriate for those cases. I think that was a point that was raised in The Public Defenders' submission. They had specific reference to potential changes to the law following the royal commission. Under those changes to the law in child sexual assault cases, evidence of other alleged victims would be deemed to have significant probative value. Then it would be up to the defence, effectively, to argue that evidence should be excluded because it is deemed to have significant probative value. If those laws were introduced and that evidence was deemed to have significant probative value that does not mean that evidence is compelling. For evidence to be compelling, I think the language of the Act is it has to be "highly probative". Significant probative value is not highly probative. In the case of *Hughes v The Queen*, the 2017 High Court appeal, Justice Gageler said that "significant probative value is less than substantive probative value" and I think "highly probative" would be higher again.

Certainly, "compelling" seems to be quite a bit above "significant probative" value. Not only that, if an application was made for an acquittal to be set aside on the basis of fresh tendency and coincidence evidence, which is now admissible, the Court of Criminal Appeal, in considering whether the evidence was compelling, could consider its credibility. It is told to consider whether that evidence is reliable and substantial. That is in the definition of compelling evidence: evidence has to be highly probative, reliable and substantial. So that question, which arises on the application to have an acquittal set aside, is different again from the admissibility question of significant probative value because the way that the courts approach that admissibility question is to assume that the evidence is credible. In that respect too, the threshold for evidence to be considered compelling is quite a bit higher than at the admissibility stage.

Mr DAVID SHOEBRIDGE: Even if admissible, it is by no means a certainty that that would then meet the additional tests in the—

Professor HAMER: No. In fact, if you are talking about tendency and coincidence evidence, if that evidence was compelling then chances are it would have been admissible back then anyway. That evidence has been admissible for a long time. At common law the evidence is admissible if it is sufficiently probative. If the evidence was compelling, perhaps it would have been admissible in the first place.

Mr DAVID SHOEBRIDGE: The Bar Association took issue with your formulation about the evidentiary test in criminal law producing an outcome that assumes you will have a number of guilty people walk free. They took issue with your formulation.

Professor HAMER: Yes.

Mr DAVID SHOEBRIDGE: I offer you the opportunity if you want it, on review of the transcript, to respond to that—but only if you want it.

Professor HAMER: Sure, I'll have a look at that.

The CHAIR: Yes, I was going to say that you have taken some questions on notice. We have resolved—I hope you do not have anything planned for next week. We have got a quick turnaround, so we have asked for a seven-day return for those rather than the normal 21 days. I apologise for that. I would ask you to have a look at the Hansard transcript because other witnesses have referred to your submission. As you are putting in information from those questions on notice feel free to add other things as part of your submission.

Professor HAMER: Okay, thank you.

The CHAIR: Once again, I apologise for the lateness. Thank you for your time.

(The witness withdrew.)

(Luncheon adjournment)

BELINDA RIGG, Senior Public Defender of NSW, The Public Defenders and Legal Aid NSW, affirmed and examined

The CHAIR: Would you like to give an opening statement?

Ms RIGG: The Public Defenders and Legal Aid oppose the bill. The main reasons for this are all connected with the importance of the principle of finality in our legal system. This is a principle which is multifaceted and is essential for the stability of the community. It is essential for the proper development of the law and for the fair application of the rule of law. Historically this principle has found particular poignancy in relation to the incontrovertibility of acquittals in an accusatorial system such as ours. Those principles apply so as to not have repeated harassment of individuals lead to instability and insecurity, bearing in mind the serious consequences of criminal prosecutions and the resources of the State in prosecuting someone as compared to the individual.

Of particular importance is the fact that the proposed legislation would, in my submission, mark not only a disparity which evens out between the incontrovertibility of acquittals and convictions so as to not pay due recognition to principles of double jeopardy; it would in fact place the incontrovertibility of acquittals as weaker and less guarded than the incontrovertibility of convictions. It is suggesting that there should be entitlements to review acquittals which don't have any similar reflection in the ability to review questionable convictions, even though our society has always treated as more palatable an inaccurate acquittal than an inaccurate conviction. The submissions of both parties are also concerned with undue interference in the political process, either by placing pressure on politicians to change the law to address a particular case or in fact deflecting or disabling them from good motivation to change the law because of having to think through the consequences of reopening multiple closed cases. The law needs to be an evolving process. It needs to be able to move forward without needing to bear in mind constantly what might be reopened by final and settled cases.

Mr DAVID SHOEBRIDGE: The proposition that Legal Aid put forward is that the bill may encourage pressure on the legislature to amend the rules of evidence following evidentiary rulings that are unfavourable for the prosecution case.

Ms RIGG: Yes.

Mr DAVID SHOEBRIDGE: Can you cite an example where you've seen those kinds of kneejerk responses from the Parliament in the past, based upon any detailed evidential ruling or similar sort of pressure being put forward?

Ms RIGG: My response to that would in effect be there has been no reason for it to exist in the past. Because the change of substantial law would not have any ongoing consequences there would be no perceived benefit to agitate for legislative change to bring about a result in a particular case.

Mr DAVID SHOEBRIDGE: So it's an academic concern that at some point in the future there may well be a campaign to change the rules of evidence in order to acknowledge that the rules of evidence operated in a particular fashion in a particular case to make evidence inadmissible and to change the rules of evidence to make that evidence admissible in order to allow a fresh application to the Court of Criminal Appeal subject to all the other checks and balances and then to allow a retrial?

Ms RIGG: Yes, well this was something that was considered—

Mr DAVID SHOEBRIDGE: Sorry, and to achieve that there would be a public campaign to get the Parliament to amend the Evidence Act?

Ms RIGG: Yes, that is something that's suggested as probable. Almost all submissions that were put forward for the purposes of the Wood inquiry in 2015 described in detail that realistic prospect and it was certainly accepted as a realistic one by Mr Wood. To take the current climate, it's very well known, I would suggest, that media attention to court processes and a highly voluble level of disagreement with the rulings of courts is tolerated—that the temper of that discussion publicly is at a record pitch. Currently the Law Reform Commission is considering amendments to the issue of naming juvenile offenders; that has been brought about very substantially because of public agitation about that issue in response to a particular case. It seems to be inevitable that that would occur in relation to this type of situation.

Mr DAVID SHOEBRIDGE: First of all, the public is allowed to agitate for changes to the law.

Ms RIGG: Of course. Yes.

Mr DAVID SHOEBRIDGE: The legal profession doesn't have some kind of monopoly of wisdom on it.

Ms RIGG: Yes, I've acknowledged that in my submission.

Mr DAVID SHOEBRIDGE: Secondly, all of those concerns about public pressure on the legislature have all come from the legal communities, which, with all due respect, don't often have a strong grasp on the kind of pressures that make legislatures or parliaments move. I haven't seen that submission put by any external member of the community or any external think tank. It has all come from the legal community. There is a temptation, then, to discount that view as a kind of convenient anti-political opposition rather than a considered, well thought out, academically well-founded opposition.

Ms RIGG: In terms of academic support for it, as I said before, there really hasn't been any precisely in relation to this situation because the power hasn't been there to amend to address a result in a particular case. However, basically it is reflective of principles of the separation of powers and the need for politicians to be able to consider things without having that pressure placed upon them.

Mr DAVID SHOEBRIDGE: But it is perfectly legitimate to place pressure upon parliaments to change the law when individual cases of injustice are raised. It is Parliament's job then, I would have thought, to weigh up the competing priorities in that case and work out whether or not the law should change. It's a fact of politics that hard, difficult notorious cases will always put some pressure on politics.

Ms RIGG: Yes, certainly, and that's traditionally been done with assistance from law reform bodies, standing committees, bodies such as the Sentencing Council and so on who do analyse and weigh up the different perspectives of different stakeholders in relation to the results of particular cases. That is of course the case, but is a different thing altogether to then have the responsibility of that being done knowing it is to bring about a change of result in a particular case that has already happened.

Mr DAVID SHOEBRIDGE: We may have to agree to disagree on the extent to which substantive criminal legal changes or policy changes are now being driven through those kinds of deep-thinking law reform processes or through other processes. But this is a political concern without a previous example to attach it to and without any kind of academic or considered course of study that underpins it. It's a speculative political concern from Legal Aid.

Ms RIGG: It is not only Legal Aid. It has been referred to in The Public Defenders' submissions as well, so I can answer from both of us, and it's advanced—

Mr DAVID SHOEBRIDGE: I do not mean to minimise it: Legal Aid, Public Defenders, Bar Association, Law Society.

Ms RIGG: Yes. Bodies that are concerned with the separation of powers and the rule of law and know first-hand the volume of media attention that is given to unpopular decisions of courts—the cases that we are appearing in every day.

Mr DAVID SHOEBRIDGE: Can you point to an instance in the UK where that has happened?

Ms RIGG: I am not overly familiar with what the media attention has been in the UK but the United Kingdom provisions are, in my submission, not comparable to this proposed amendment. There are significant differences, such as the United Kingdom not having had an equivalent to section 5F of the Criminal Appeal Act that we have in New South Wales which explains a number of the earlier decisions of the United Kingdom. As far as I understood from reading the submissions, there is only one decision in the United Kingdom—I think it is the matter of Reilly, which is referred to in the Sydney University submissions—which suggests that it may be open to reopen a trial resulting in an acquittal in the United Kingdom in consequence of their legislation. So there has not yet, even there, been a decision saying it is possible.

Mr DAVID SHOEBRIDGE: Could I point you to the guidelines that are issued by the Crown Prosecution Service? The Crown Prosecution Service in England is the equivalent of the Office of the Director of Public Prosecutions here. They are the ones who bring all the applications.

Ms RIGG: Yes.

Mr DAVID SHOEBRIDGE: In their current version—and it is about this question of whether or not evidence that was inadmissible and is now admissible may be considered "new"—they say this:

> Evidence may have been inadmissible, or admissible but not admitted as a result of a ruling by the judge at the original trial, but admissible at any retrial because of a change in the rules on admissibility since the original proceedings. In terms of section 78(2) this is "new" evidence.

So there is no question from the publicly available guidelines from the Crown Prosecution Service in the UK that that is a possible avenue. You can change the rules of evidence, change the admissibility and get yourself a retrial through their system. But I have not seen a single instance—and I would be interested if you could point to a single instance—that fleshes out the theoretical concern that you have, puts some tofu on the bones of the theoretical concern that you have put forward.

Ms RIGG: I am not aware of such an example in the United Kingdom but, as I said, there is not any decision by the courts, whatever the prosecution guidelines say, that the courts are able to do that. The decision of Reilly [2017] EWCA Crim 1333 is referred to at page 11 of the University of Sydney submissions, and even there it was left as a possibility but there was certainly no positive ruling that that is able to be done. So if there comes to be either a clear statement of law in the legislation in the United Kingdom or by the courts that that is able to be done, it would be at that point that it would be interesting to see whether there are any such examples.

Mr DAVID SHOEBRIDGE: But the Crown Prosecution Service, in a publicly available set of their guidelines, have said that this is an avenue.

Ms RIGG: Yes. That does not then mean that the media have an understanding of it or that members of the public have an understanding of it. And, as here, the Crown often takes a very responsible position, bearing its special role in the community and not agitating things that really should be left alone.

Mr DAVID SHOEBRIDGE: Like this.

Ms RIGG: Well, in circumstances where the law in the United Kingdom, legislatively and judicially, is not clear to the effect that inquiries, as are currently being proposed here, could in fact be made. It may be that that is the reason why they have not been done.

Mr DAVID SHOEBRIDGE: Could I just make this final proposition on this?

Ms RIGG: Yes.

Mr DAVID SHOEBRIDGE: The UK media is notorious for its aggressive campaigning, some might suggest unprincipled, no-holds-barred style. I cannot point to a single instance where the UK media, which is much bigger and, on one view, much more aggressive than our media, has run the kind of campaign you are concerned about. And that troubles me with giving any significant weight to the concern that you put forward.

Ms RIGG: Well, that's—

Mr DAVID SHOEBRIDGE: It is a very abstract campaign, you have to join, like, seven dots, technical campaign, hard to see how it could be run, but history in the UK would suggest it won't be run.

Ms RIGG: That is something that should be researched perhaps in more detail—that is, what the media has done there. I don't know. I have got no ability to give evidence about what the media in the United Kingdom—

The Hon. WES FANG: But the proposition you are putting forward is—

The CHAIR: Please allow Ms Rigg to finish her answer.

Ms RIGG: This is not something about which I am able to give evidence. All I can point to is the fact that the situation has not yet there arisen for it to be a relevant consideration, in any event.

The Hon. WES FANG: But it is something that you are putting forward as a proposition, and a likely proposition, yet you are saying that there is no evidence and you cannot give an example or even, I guess, start to speculate on what that might be. But, again, in the submissions, you have said that this is an avenue that you have great concern about, which is why we cannot go down this path.

Ms RIGG: It is based on having a deep understanding of the volume here of media attention to cases in relation to very serious crimes that are unpopular and the capacity and preparedness of the media to speak in uneducated and voluble terms. Now, that has occurred to date in circumstances where it has not had any capacity to influence change to bring about a result in a particular case. My real fear would be, given my experience, that that is what would occur if the law was changed to allow that to be done.

The CHAIR: I just pick up on the area of finality you mentioned in your opening address. We have heard a bit of evidence about that today and about the longstanding principle of finality et cetera, but is there any point where finality versus an ongoing injustice, where the balance tips? I mean, in the public's eyes, who cares? If you get off on a technicality once or twice but you are still guilty, and guilty of a heinous crime, the most serious sexual abuse or murder, who cares about finality? The victims and their families do not have finality. Do you have any views on where that balance tips? Because the families and the victims would say that they have suffered the

injustice so therefore some technicality or black and white legal argument really doesn't matter if there is a guilty person who is still walking the streets.

Ms RIGG: Yes, I understand. On behalf of The Public Defenders and Legal Aid I offer my deepest sympathy for the ongoing grief and loss and frustration of the families of the three deceased children from the Bowraville community. The balance has, traditionally, in an accusatorial system, been held such that—to quote Blackstone, for example—is it better to see 10 guilty men go free than an innocent person convicted?

The appellate system in New South Wales has remained stable for convicted people for a long time. So for an appeal to be allowed there has to be an error of law, or of mixed law and fact; that is, the trial judge has given a wrong direction to the jury or allowed into evidence something that should not have been allowed into evidence, or if it can be shown that the verdict is unreasonable; that is, a proper jury must have entertained or really should have entertained a doubt, or there has for some other reason been a miscarriage of justice, like inflammatory language from a crown prosecutor. And, as is currently the situation pursuant to the Crimes (Appeal and Review) Act, convicted people can also, in very limited circumstances, say that their conviction should be overturned because compelling, fresh, cogent evidence has turned up after the final result. That has been the law for a long time for convicted people.

Developments, because of the provisions of the Crimes (Appeal and Review) Act have provided some ability for acquittals to not have their previously incontrovertible state. So there are allowed by the DPP or the Attorney General appeals against jury acquittals that are on a question of law alone. That has been utilised reasonably infrequently, and that provision has been referred to in a number of the submissions. The important thing to point out in relation to that provision is that it does not expose the acquitted person to a never-ending sense of the possibility that they could have their acquittal reconsidered, because essentially the DPP has to act immediately after the acquittal to have that considered. A question of law alone is a very specific test. It is much narrower than simply what is called "a question of law". So there is a specific purpose, which is to address the wrong in a particular case—that is, a person who should not have been acquitted—but it is also to fix the law, and it is done immediately.

There are also provisions in relation to tainted acquittals. I am personally appearing in March in the Court of Criminal Appeal in the DPP's first application to have a tainted acquittal set aside. That has been set down for three days. But there is now the provisions otherwise in section 102, where fresh and compelling evidence that comes about afterwards is able to be the subject of an application. That bears some balance with the rights that are available to convicted people—that is, the inroads in relation to double jeopardy have looked at those situations where, despite the importance of double jeopardy, it really could be seen to be a blight on the system if a person afterwards confesses to a crime they have been acquitted of, or there is DNA evidence which shows, very powerfully that they were, in fact, guilty.

Those, of course, are the types of situations where, in the equivalent scenario, an acquitted person could also have their conviction reconsidered, that acquittals can now be considered. That was the type of situation that was covered in the second reading speech by Premier Iemma, when the provisions were introduced in 2006, and it is also was the intention of the MCCOC as set out in the government's submissions—

The CHAIR: For Hansard, what does MCCOC stand for?

Ms RIGG: MCCOC is the Model Criminal Code Officers Committee. Their recommendation was that fresh evidence would not apply in a situation where there is a change of law or rules that makes something previously inadmissible, admissible. In terms of looking at the Chair's question about balance, the convicted people do not have any entitlement to have a conviction that might be unjust reviewed in similar circumstances.

The CHAIR: This is an argument that was put forward earlier today—that if we were to make these changes to the Evidence Act for people that have been acquitted then the argument should then apply to those that have been convicted as well.

Ms RIGG: Yes.

The CHAIR: Other than the normal processes that exist at the moment?

Ms RIGG: That is right. I have read the Bar Association's submission. The written submission tended to indicated that an unforeseen consequence of this bill might be that the legislation in fact applies for convictions to be—

Mr DAVID SHOEBRIDGE: They retreated from that, and made it clear that it was a philosophical concern.

Ms RIGG: I see. My concern is more that those policy issues that have been raised about the actual justice or the truth of the individual result really apply even more resoundingly in relation to someone who has been convicted of a serious crime, for all the traditional reasons in an accusatorial system, than they do for someone who has been acquitted. There are two situations which could be considered. Even looking at the strictly identical avenue of appeal, that does not exist. For example, if there is a substantial change to the law of evidence which would mean that evidence at an accused person's previous trial that was inadmissible would now be admissible—for example, if there was helpful hearsay evidence that was inadmissible but because of the loosening of the laws of hearsay evidence it would now be arguably admissible—the person could seek a review That does not exist. A convicted person has no such entitlement to do that. Everything is based on factual error, fresh evidence after the trial or error at law as at the time of the trial.

What needs to be looked at more importantly than there not being a strictly identical provision, the more meaningful substantive provision, would be this: The Crown in a criminal trial has a duty to produce all relevant evidence, but really what they are doing—and doing well and strongly in cases where convictions occur—is presenting evidence to incriminate the accused person. So more than the strictly mirrored provision it would be more relevant to thing about this—what, if as a result of substantial legislative change a compelling case could be put forward that evidence that was admitted at the trial would now be ruled to be inadmissible, and if that evidence had not been before the court a jury would likely have acquitted? Because the Crown puts incriminatory evidence against the accused that is the more relevant provision. Obviously nothing like that exists.

The Suteski case is the example that I have put forward in my written submissions. A person who was serving a 22-year sentence for murder in circumstances where the operation of section 65 (2D) of the Evidence Act, as it then stood at the time of her trial, allowed evidence from a co-accused, who would not give evidence—so it was hearsay evidence of the co-accused's account out of court—to be put in front of the jury to convict her. It was really incriminatory evidence. On the law as it stood at the time, the Court of Criminal Appeal said that there was not an error in the trial judge's decision. The High Court refused special leave.

She has no entitlement to say, "Well, the law has changed." The law has recognised, as the Law Reform Commission did in specifically looking at her case, that that law at that time was too permissive in terms of allowing hearsay evidence. She does not have the chance to go and ask for her conviction to be reviewed because there is a compelling case that had that evidence not gone before the jury she would have been acquitted. Police verbals, as they are colloquially known, is another good example that was raised by a colleague with me the other day.

Mr DAVID SHOEBRIDGE: It sounds to me—I could be wrong—that you are not suggesting that police verbals were a good way of good way of convicting people, or that the hearsay evidence you refer to in that other case was good evidence to convict somebody.

Ms RIGG: No.

Mr DAVID SHOEBRIDGE: Aren't you saying that if we changed the law as proposed in the bill to allow a more permissive approach on convictions, that it will put pressure to allow a more permissive approach on acquittals? How is that producing a bad outcome? Why is there opposition from you for this? I do not understand.

Ms RIGG: In addressing the question of balance that I was asked to address by the Chair, my submission is that if there is going to be change to introduce that capacity it should, of course, first be allowed to review questionable convictions. No-one has suggested such a thing occur in relation to questionable conviction.

Mr DAVID SHOEBRIDGE: But that is putting the perfect as an enemy of the good. You would like it on both sides but if it only happens on one side then you would not like it.

Ms RIGG: No, not necessarily. 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.

The CHAIR: We have heard a bit of evidence about the potential impact that the proposed changes may have on the way in which a case is defended, particularly if changes to the Evidence Act in the future can then be brought in to look at a retrial of an acquitted person.

Ms RIGG: Yes.

The CHAIR: On behalf of the public defenders, is that something that you would consider is an issue?

Ms RIGG: No. I do not consider that that is a particular problem. A number of the submissions have suggested that the crown would be forced, for example, to try to tender material that they know is inadmissible. I do not see that as being a problem of the legislation. It is not a concern of mine.

The Hon. ANTHONY D'ADAM: It may be suggested that the Parliament is legislating to try and create a clearer pathway for a specific case to be retried. We have heard some evidence that that does not necessarily offend the principles in Kable. Do you have anything to say about that suggestion?

Ms RIGG: It is not like we are all on fours with the Kable problem but in my submission the appearance of targeting legislative change for a particular case is not conducive and it tends to bring the interest of justice into disrepute. I am not a constitutional lawyer so I do not wish to express a final opinion on that. Similarly, the Polyukhovich issue has been raised in a number of the submissions, and I accept that there is a difference between retrospective change of substantive law, on the one hand, and procedural on the other. Neither is great but retrospective change in relation to substantive law is significantly worse.

Mr DAVID SHOEBRIDGE: But nevertheless the High Court permitted that in Polyukhovich, an extreme example of retrospective law where they think the 1945 Act made war crimes committed between 1939 and 1945 statutory offences under the Commonwealth regime.

Ms RIGG: There were very particular reasons for the reasons of the High Court in that case.

The CHAIR: Have you looked at Jumbunna's submission?

Ms RIGG: I have, yes.

The CHAIR: What did you think about their alternate proposal, changing the word "adduced" to "admitted"?

Ms RIGG: It seemed to me that that would, if the substance of the change is desired, perhaps be a neater way of achieving it. However, my submission is still one opposed to the substance of the change. If that change were made my submission would be that there would then need to be—this is looking at page 3 of the Jumbunna submissions—I would seek an additional point to make clear that evidence is not fresh simply because it was not admitted at the time of the trial because of the legislation or interpretation of the law as it then stood. But obviously there would be no point in amending the law, it is really just to preserve the status quo. I hope that answers the question.

The CHAIR: That changes the word that then puts a clarification in to put it back to the way it is.

Ms RIGG: Exactly. So it is pointless.

The CHAIR: What about their view that you should be able to make multiple applications but only one retrial?

Ms RIGG: No. That is not supported. The problem with multiple applications is that even though there is a difference between undergoing the appellate process and undergoing a trial with a jury verdict, it still does not answer the problem of an acquitted person having the acquittal basically as not final because it means that at some point it can still be called into question again. It is still a deep impingement, in my submission, on the double jeopardy principle.

The Hon. WES FANG: In your opening statement you talked about the balance and that if we were to go down the path where those acquittals could be set aside that you would want some balance and that potentially similar ideas to be applied to those who were convicted, so retrospective changes happened, the evidentiary rules changed that would allow them to be acquitted, that you would want that balance. That is the way that I interpreted your opening statement. As the Chair said, it is something that we discussed earlier in the Committee. You also spoke about the fundamentals of the law, I guess, and this is effectively changing the fundamentals of the law. Is the objection that the balance is not struck between—offset the acquittal versus offset the conviction? Is it a fundamental rule of law that you object to? Or is it both? Is there any way in which a determination that is clearly unjust could be corrected?

Ms RIGG: Firstly, I was not indicating that I am seeking change to have those convictions that can be argued to be unjust in those circumstances, able to be set aside. The point was one based on the fundamentals of the finality principles. Then saying if ever there was to be an imbalance, it should be with greater ability to review possibly unjust convictions. That does not exist, so there is no rationale for even a higher ability to review arguably unjust acquittals. If the ability to do that for both was there, it would simply just create chaos. It is deeply destabilising to have the decisions of courts validly entered set aside. It does not apply in other areas of law. We are talking just about crime. It does not apply in other areas of law and it is a fundamental principle; that is the principle of finality.

One further point; reference is being made to clearly wrong convictions or clearly wrong acquittals. These cases are never of that nature. I think in particular that is why in some ways I am not able to respond to aspects of the Jumbunna submissions because I am not personally privy to all of the evidence that was relevant to the trial courts or the Court of Criminal Appeal in relation to the XX proceedings. Whereas a lot of those submissions proceed on the basis that their obviously was a clear injustice. That is something that those not personally involved and knowledgeable about can make any comment on. Certainly it is the case that it is far from clear that it would be able to be categorically argued that the evidence was in fact inadmissible at the time and that it is admissible now, in relation to that particular case. These are difficult issues. That is why I have raised as well the really drawn-out process that would have to happen before the Court of Criminal Appeal if the proposed amendments were to occur. There would have to be long arguments about whether certain aspects of evidence were in fact inadmissible at the time; whether they are admissible now; the district or Supreme Court then, if there is a retrial, has the matter argued all over again; there is then an appeal about it. It is very unfortunate.

Who looks at it all? If this were to occur, is the DPP under an obligation to review all old cases to see—for example in relation to this newly proposed reform or rebuttable presumption of tendency evidence to go in, in relation to a child sex offence—if the person has indicated or acted on a sexual interest in a child? This is the proposed upcoming legislative change. There are a number of child sex offences that carry life sentences. Is the DPP to then review every acquittal in such a case and have investigations done as to whether those people, any of them, could be said to have had a sexual interest in children?

Mr DAVID SHOEBRIDGE: They made it clear in their earlier evidence that is not their job.

The Hon. WES FANG: My observation throughout today, and having read the submissions, is that there is an objection from the law fraternity to a change here that does not necessarily mirror the concerns of the populace that there is potential for a crime to go unpunished here because of the rule of law and the fundamentals of law. I am getting a really good understanding from the testimony today that the rules of finality and double jeopardy—I am not a lawyer—I am getting the sense that these are positions that the law fraternity holds dear and that has been based on that for a long time, they are the principles. I am looking at it saying: Are those principles right? That is part of what we are doing here. We are looking at it and saying yes, the finality of law is important and it is important to the law fraternity. But, as the Chair said earlier, the public is not concerned about the finality of law for somebody who is acquitted who may be guilty. The family does not care about it. The populace out there want justice. Where is that balance? Can you see that argument and acknowledge that that is a problem with the way that the current structure could potentially be?

Ms RIGG: Yes. Clearly, the job of politicians is different in being required to take into account broad views of the community in relation to issues that pertain to the development of the law. My perspective is different because I am coming at it from a legal perspective, but a perspective that is deeply committed to justice and to the administration of justice in this State. 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. It seems that there is community support for that. I do not know that the community in general necessarily has a problem with the prospect that sometimes—because the rule of law is important and because the burden of proof is important and the obligations on the Crown are important—that sometimes guilty people will be acquitted.

The CHAIR: There are five minutes left.

Mr DAVID SHOEBRIDGE: You have referred in your submission, or at least in your oral evidence, to the fundamental principle of finality. If you were talking about the common law system 200 years ago when there were almost no appeal rights, when pretty much everything was determined at trial and that was the end of it, then I would see strength in that submission when you are talking about a fundamental principle of finality.

Ms RIGG: Yes.

Mr DAVID SHOEBRIDGE: But in the last 200 years the common law system has been dragged, kicking and screaming, to eventually have a whole series of appeal rights. And, you know, we could point to section 107 of the current Act that we are considering. We could point to section 105. We also point to appeals from the Local Court to the District Court. We have appeals against sentence, appeals on points of law and every single one of those changes in the past 200 years has run against this so-called fundamental principle of finality. Is it really such a fundamental principle? Can you really put it forward as a fundamental principle, given all of the erosions, if you like, of that principle—all for good reason—over the past two centuries?

Ms RIGG: Yes. The appellate rights that exist at the moment strike the appropriate balance, in my submission. Obviously, the importance of wrongful convictions being overturned is of fundamental importance,

so it was a positive development that convicted people were allowed rights of appeal. That is important. But, if they were validly entered at the time, then, subject to appeal rights, they stand. As I said earlier, if they existed because of a proper application of the law at the time, they are still required to stand. The amendments that have been made in terms of review of acquittals have been specific and have been guarded and with careful consideration of appropriate safeguards.

Mr DAVID SHOEBRIDGE: But you can appeal the acquittal of a person by a jury at the direction of a trial judge.

Ms RIGG: Yes.

Mr DAVID SHOEBRIDGE: That is contrary to this so-called fundamental principle.

Ms RIGG: No, not necessarily because there are very specific circumstances in which that can be done. As I said earlier, Crown appeals under this part of the Crimes Appeal and Review Act are done immediately and they are done to correct legal questions. They have those simultaneous points of fixing the law and of not leaving someone in an endless state of not knowing whether their acquittal could be overturned.

Mr DAVID SHOEBRIDGE: When the so-called fundamental principle of finality was raised in the common law, that was raised, and has been repeatedly raised, to oppose any appeal right whether it is on a question of law or a mixed question of law and fact. It would also argue against the current capacity in part 7 of the Act for a convicted person to make a petition to the Supreme Court for a quashing of their conviction. That acts against the so-called principle of finality. I do not see opposition to that.

Ms RIGG: But once again those part 7 petitions which, if successful, are referred to the Court of Criminal Appeal require a demonstration of error at the time; that is, there was a wrong application of law at the time. For example, it is not because of subsequent legislative changed. It was because of error of law at the time or there has been some other factual, fresh development. They are some inroads in relation to the principle of finality but they have been very specific. Historically over the past 200 years they have been mainly to consider wrongful convictions. So far as there has been permission to question the incontrovertibility of acquittals, that has been with very, very important safeguards in place that are not to just leave a person having an endless idea that their acquittal is temporary or transient.

Mr DAVID SHOEBRIDGE: Ms Rigg, I do not want to have a long argument with you about this. All I am putting to you is this: Far from being a fundamental principle, the principle of finality is one of a number of competing, countervailing factors in the criminal justice system that we need to have in our mind.

Ms RIGG: Yes.

Mr DAVID SHOEBRIDGE: But it does not answer the question of itself.

Ms RIGG: It is a very important one for the reasons I have set out.

The CHAIR: Are there any final questions? As there are none, Ms Rigg I thank you for your submission and your time this afternoon. We appreciate it.

Ms RIGG: Thank you for hearing me. Thank you very much.

The CHAIR: Did you take any questions on notice?

Ms RIGG: No, I did not.

(The witness withdrew.)

(Short adjournment)

LARISSA BEHRENDT, Professor of Law, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, on former oath

CRAIG LONGMAN, Head of Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, on former oath

The CHAIR: You have had the luxury of listening to the evidence throughout the day. This is an opportunity for you to address any of the issues raised and then for the Committee to address those as well.

Professor BEHRENDT: I have a couple of comments and general statements, then Mr Longman will follow up. We wanted to clarify one thing. It was mentioned earlier that we had seen the other submissions when we wrote ours. We had not and the material we quoted from Professor Hamer we had actually taken from an interview with him. Not that that makes a big difference in things but we thought we should clarify that we did not actually read them until after we got ours in.

Some of the things that we wanted to touch on: One of the things that has been mentioned a lot today was about the importance of maintaining the status quo. In thinking about that, I would reiterate our comment this morning that if the law does not work for the most marginalised and those who have the greatest difficulty accessing justice, then that law should be reviewed. I think that is something that the Committee and the Parliament is well versed to be able to do. I would also add that the status quo argument, of course, only takes you so far, which has been pointed out at various times today. If we had kept that, then we would not have seen the overturning of the doctrine of terra nullius and other significant things. We come to that point of view about the importance of the status quo with some scepticism.

The other thing that we would like to stress from the point of view from which we have written our submissions is that there has also been much said about the extent to which public confidence might be undermined in the system if the provisions were changed along the lines that are suggested. It has been noted, and we would add our voice to that, that it is evident from the submissions made from the Bowraville families that confidence in the system has already been eroded and this is an opportunity to address that.

We also thought it was important to acknowledge on the record today, as was noted at the beginning of the proceedings, that this Committee has gone to determined and sensitive lengths to ensure that the family voices were part of this inquiry. That is an important point since, of course, there was little other consultation with the indigenous community, evidenced in some of the submissions here today. It is an important acknowledgement that this Committee has made sure that those voices that could be easily marginalised from the day of legal argument have had a space within the contemplations that are taking place around this legislation.

We also do not accept the arguments that have been pointed to today by some of the submissions and oral representations that the judicial system would be in some danger if there is any clarifying or altering of the operation of section 102 as proposed by the bill or by our submission, especially since the definition that is being looked at today is one that is being made and argued recently by the Attorney General in the application for the Court of Criminal Appeal. These are matters that have long been in fact a grey area and this is an opportunity to clarify this issue. To that extent we do not accept the questioning that the legislation is a matter for Parliament. Of course it is. Parliament should be involved in rebalancing the rights of the accused with the rights of victims of crime to ensure justice. We have seen the Bowraville case give us an example of the very instance where Parliament needs to be taking a proactive view in balancing the many rights and testing whether we have that line right.

We note in our submission at paragraph 30 that Justice Wood's report—which obviously was very influential to people who have given submissions today—concluded with:

> I suggest that the statutory definitions to the rule against double jeopardy be reviewed again at a later date, when Australian courts have had the opportunity to apply and interpret the relevant sections.

Because they had not been, of course, when he did the review. They have been now. We are at that point now that Justice Wood identified. It is a matter for Parliament to now consider whether the line is drawn in the right place. Of course, as the submissions and evidence given by the families in their submissions to you say, this is an instance where the law is not right and they have asked you specifically to fix it, and fix it in a way that I think acknowledges that it is complex, there are a lot of other rights to balance, but that is the thing that parliaments do every day, balance the rights of many stakeholders to make sure we get the balance right. Mr Longman will address the issue about whether the High Court decision to dismiss the application gives rise to an expectation of a limitation, which was a specific question we were asked, and then make a few more points to follow up on that.

Mr LONGMAN: The Hon. Natalie Ward asked earlier about the High Court decision and whether that generated a right of an expectation. In essence it did not. The High Court decision was limited simply to a consideration of whether the High Court should even consider the question of the legislation having regard to how the Court of Criminal Appeal had approached interpreting section 102. The High Court said: We see no problems with the interpretation of the word "fresh". Which, to tie this into another point that was made, as I understood it, there was a suggestion perhaps that the judgement of the Court of Criminal Appeal validated a prior opinion by Nicholas Cowdery that this evidence was not fresh and compelling. That, in my submission, is not what the judgement of the Court of Criminal Appeal held.

The judgement of the Court of Criminal Appeal is in some ways quite narrow. Because what it held was, when considering fresh and compelling evidence, we look first to the question of fresh, and then the question of compelling. When we look at the question of fresh we look at the evidence relied upon in regards to each separate acquittal and that because the case had been run on the basis that the evidence was most compelling when all three cases were brought together, the fact that the evidence relating to Colleen Walker's murder was certainly available in 2006 when Evelyn Greenup's trial was run, it could not be fresh on that basis and therefore could not be fresh for all bases. To the extent where there is a submission made that the Court of Criminal Appeal agreed with those prior determinations, I respectfully disagree with that.

There were some questions around the use of the words "fresh" and "new" and how they work. In our submission this goes to the very core of why we say the UK position is to be preferred. The Hon. Natalie Ward was suggesting: Are we not looking here at an investigation that failed in its diligence? As we have noted in our submissions, that is simplifying the historic circumstances that are addressed in this Committee's prior report. There was systemic discrimination evident in the first investigation. One must note that that investigation occurred before the Royal Commission into Aboriginal Deaths in Custody first raised that systemic discrimination and racism was prevalent in a lot of police organisations, if not all of them, in Australia at the time.

Moreover, the evidence also arose because police at that stage in the reinvestigation in this matter had the benefits of all of the lessons they had learnt from the Milat investigation. One investigates serial offending in a very different manner from the way that one investigates a direct crime, as it were. We say the evidence that arose, arose very much in a parallel way as evolution of scientific investigation. There has been no suggestion from anyone who has presented evidence today that a new DNA test that suddenly generates new evidence should not fall legitimately within the fresh or compelling evidence exception.

The last point that I make is simply this, it is not intended as criticism of anyone, but there has been a lot of talk today about the fact that one case makes bad law. This is not one case. This is three victims who died within a broader context of sexual predation against women. I think it is important to remember that this is a complex and unique case. Returning to my previous point; that is why we say the UK position is the appropriate one. Because the UK position does not prevent the court from considering the circumstances in which the evidence was originally obtained or new evidence was obtained or how the prosecution was run. These are all legitimate questions for the court. What it does do though is it puts these in the same decision and the same process of reasoning as looking at the other interests of justice. That includes, as we said earlier, interests that arise under the double jeopardy principle.

The CHAIR: We have heard throughout the day, I have asked a couple of witnesses about your submission, the "admitted" versus "adduced"—they are probably in more agreement with that than not. What about the second question I was asking around the number of applications or multiple applications? If we parked Bowraville to one side, is it necessary for multiple applications, or is that part only really there because of the Bowraville case?

Should we really need multiple applications if we were not talking about Bowraville, or is that part only really applicable to Bowraville because of the history and the journey to get to this point? That seems to be one area where there is concern from the other witnesses. If you look at the UK, it is one application and that is a difference here, right? Has that part been put in because of the specifics of Bowraville?

Professor BEHRENDT: I guess I would answer it in this way: Obviously when we were putting forward a proposal we wanted something that we would ensure would capture the issue of Bowraville.

The CHAIR: Sure.

Professor BEHRENDT: It would be disingenuous of us to say otherwise. But we thought carefully about the implications of that. Much was made about people's own practice. We also represent accused. In fact, we would represent the accused much more than we represent victims of crime, and very vulnerable accused. We do not take these fundamental principles lightly. In fact we come from the parts of the community that hold them most dear.

The CHAIR: Please, if anything that I or we have suggested is otherwise—

Professor BEHRENDT: No, no. But the forcefulness with which other members of the profession embrace those principles, of course we do too. We do not walk away from them lightly but we do not believe we are in this instance. Bowraville throws up a mirror; really that is what it does. It puts in stark relief the way in which the most vulnerable in our community can fall through the cracks. There is a long history to that of which, because of the work done by this Committee and the previous report, you probably have a deeper understanding of the many ways in which the legal system let these families down other than just the police investigation. The proposal we came up with, which did have of course making sure it would capture Bowraville, was one that left the discretion of whether a case goes forward to the judiciary in exceptional circumstances that would allow for the fact that, yes, this is an exceptional case. But that is not to say that it will only ever be the only exceptional case. If there was another case like this, you would want to have a similar outcome.

Where we draw the line is to say that once you have a successful application—so there is a bar; there has to be fresh and compelling evidence—and once you meet that bar once you get one retrial, and then we draw the line. We feel that is consistent with principles around finality. It is consistent with principles around double jeopardy and consistent with where there has been deep reflection on making exceptions to that fundamental principle. We feel that that may well be the place to draw the line in this instance, bearing in mind that we are also mindful that it is easy to come here today and say Bowraville is an exception so you cannot make law based on one case, which we do not say anyway: We take Professor Hamer's view on that. But at the end of the day the reality is that we are here because of that case.

The CHAIR: Yes.

Professor BEHRENDT: It would be a huge injustice to the families to go through this process, to have asked them to go through this process and once again relive their trauma and their experience under the legal process, and come up with an option that leaves them again without an option for going forward. Our submission was crafted with those principles in mind.

Mr LONGMAN: I might just supplement that by saying that part of the reason we proposed the model that we did is because there has been a lot of discussion today about the way in which the criminal law works, primary principles and fundamental principles. One of the fundamental principles of our criminal legal system is that you sit in front of a jury of your peers. The reason that we have proposed the model that we have proposed is a second jury acquittal is a complete bar. The legislation already contemplates a different treatment. I take Mr David Shoebridge's earlier point, which I think is an important point, that there has been some discussion about a two-tier system. It already is a two-tier system. There are asymmetric rights of appeal for the Crown and the accused throughout all of the levels of the criminal justice system.

Last year I think it was somewhere in the vicinity of 92 per cent of all criminal cases prosecuted in New South Wales were prosecuted in the Local Court—charges that these provisions could never apply to. There is an issue between the definition of fresh and new, which has not really been raised today but which is worth noting. The distinction between fresh and new arose first in the common law and first in the civil jurisdiction of the common law and then in the criminal jurisdiction of the common law. It arose in the context of appeal rights. *Ratten v R*, which is a Commonwealth High Court decision that is often cited as to this distinction, addressed the distinction in a very specific way. It said, yes, evidence should be fresh if what you are arguing is you lost the chance of an acquittal. If there was evidence that a jury may have acquitted you on, it needs to be fresh. But if evidence proves innocence, it does not need to be fresh. It never needed to be fresh. It could be new.

I would like to go away and write some of this down as a supplementary submission because I do not want to overreach, but that strain in the common law has existed for a long time. The appeal rights have always been asymmetric. The circumstances under which one can appeal final verdicts have always changed and morphed in response to the common law and do in response to Parliament. We say that some of the submissions to date perhaps fail to properly grasp that reality.

The CHAIR: I will formalise that. Could you take a question on notice and come back with your definitions or differences between fresh and new in that interpretation?

Mr LONGMAN: Certainly.

The CHAIR: What about in relation to the interest of justice test? For any future appeal, if it was permitted, what safeguards do you envisage should be applied there?

Mr LONGMAN: We address some of them in the submissions. The interest of justice really is a question of whether Parliament wishes to put an exhaustive list or an un-exhaustive list of things in there, but the sorts of things that the courts would always look at is: How long has it been since the trial? How strong are the

witnesses? Are all of the witnesses available? Is the defence prejudiced by not being capable of generating evidence or calling it or testing the prosecution case? I should say that when we are talking about the interest of justice, this is not a term unknown to the legal system by any stretch of the imagination. There is a lot of jurisprudence on this and the Court of Criminal Appeal would have great familiarity with that approach.

My view is that one of the strong benefits of the United Kingdom's approach is that they do not try to handcuff the court into an explicit list of what is and what is not in the interest of justice. In my view the senior criminal judges of a State are probably the people best trained and best equipped to work out what is and what is not in the interest of justice, given that that test will be applied on the facts of a particular case.

The CHAIR: Will you also take this on notice—or you can answer it, it is up to you. You would have heard from the Department of Justice and the police questioning around changes to the system, and even the Bar Association. I think they referenced even the fact that Jumbunna is involved in that developing some of the work in relation to cultural sensitivity and guidance towards practices within the courts system. Do you want to make any comments as to any other areas that may need to be addressed or any areas in that part of the system—I will call it the judicial system as a whole—that it may be beneficial for us to also make other recommendations on, or will assist in? Again, you can take that on notice.

Professor BEHRENDT: Thank you.

The CHAIR: But it is quite clear that throughout the last inquiry and subsequent cases and things that have arisen that there have been some changes. The unfortunate thing is they are not changes that have led to the outcome that the families can point to and say that that is the outcome that gives them probably the comfort that they are after. But we are looking at the system proper, and not just the one case. Anything we can learn or get some advice on as far as systematic improvements are concerned, we would also be open to.

Professor BEHRENDT: I think we would welcome an opportunity to do that and take your question a little broadly, both in terms of what sorts of education, reforms, the sorts of things that were alluded to earlier, the bench books and things that are being developed, some of which we are involved in. But also, if you will allow it, we have continued to think deeply because of our experiences of working with the Bowraville families and other Aboriginal families particularly, who are going through coronial inquests and deaths in custody, what more structural support could be given to victims of crime. If we may also include that in the submissions that would be really helpful from our point of view in terms of giving a broader answer to that question.

Mr DAVID SHOEBRIDGE: If you are doing that, one of the issues that might be useful to look at would be the extent to which the previous recommendations from this Committee have been implemented by the courts and the Executive.

Professor BEHRENDT: We would be happy to have a look. We have kept an eye on them so we would be happy to make some comments on that too.

The CHAIR: You heard some of the questioning around you represent people who have been accused as much as anyone. Some of my questioning was around whether that would change the way that a case is presented if there were later changes to the Evidence Act. Do you have a view on that?

Professor BEHRENDT: We did. It was perhaps a cheeky view. Did you want to maybe speak to that discussion we had, Mr Longman?

Mr LONGMAN: Our view is that it is really not the role of Parliament to protect the tactics of defence counsel. I do not mean that in a disparaging way but my point really is that every day defence counsel and solicitors have to work with whatever the current framework is in the way that they run cases. The tactical decisions are never easy. This is not going to introduce a level of complexity that suddenly changes the nature of running a criminal trial. It is also, I would think, one of those things that the courts would be capable of taking account of, both in the context of this kind of application but also in other applications. For example, if you are arguing an appeal against conviction on the basis that you have incompetent counsel. These kind of judgements are the kind of judgements courts make all the time.

Professor BEHRENDT: If I could add to that; obviously there has been a lot of evidence put before you about the fact that this is not going to open the floodgates, so this is not going to fundamentally alter the day-to-day running of most legal matters. These are provisions that will come into play in extraordinarily exceptional circumstances. We did reflect on whether that would impact on how we would prepare cases and we could not think that it would every day. It is not the sort of thing that would be front of mind. As Mr Longman says, there are so many other complex issues to think about in terms of strategy when you run a criminal case, it is hard to agree with the proposition that this would fundamentally change how you approach that.

Mr LONGMAN: We have not seen any evidence from the UK that the practitioners there are thinking about these things, notwithstanding that the Crown Prosecution Service has been open about its view that the extent of the provisions there would allow these kind of applications.

The CHAIR: That then raises the question: Does that then make it harder if there were to be a process to go through to then enable a fair trial because there are not floodgates opening? And let's be frank, we are probably only talking about one case that we know of. Do we then run the risk? Mr Shoebridge has been able to prosecute the fact that the floodgates will not open, and a lot of witnesses have agreed with that. Our concern has been that separation of powers. Do you have a view that because this is potentially so narrow that we could be crossing that threshold in which it could be argued that a fair trial was impossible because of this? I am not a lawyer, this is just my observation.

Professor BEHRENDT: Certainly, the separation of powers argument is not universally accepted. We do not think it is an issue. If it is in relation to one case, there are a whole range of other considerations, given the profile of that case, that would have to be considered about whether a fair trial is possible. I do not think that is something we should prejudge and say, therefore it should not be done. I think the narrowness of the change is one that is appropriate. Exceptions to the double jeopardy rule should be in exceptional circumstances. Quite frankly, I think it is accepted that when the rules were changed earlier it was with a view that it would cure the problems in the Bowraville case. It has turned out, through a very tortuous and long process, that that was not the case.

I see this more as an opportunity for the legislature, that had the best of intentions when it changed the double jeopardy the last time, narrowly, to capture this case, to find out that that was not where it should be drawn. Now is the time, after everything the families and the process have been through, to redraw that. It has always been put up not just because of the legislation that this might be an issue going forward, it is because of the publicity, the podcasts, the books, etcetera, has always meant that that is an issue in this case. As I said, I think that is a matter for decision in terms of whether it is in the interests of justice for the application to proceed. I think it might get the legislature into tricky ground to try to pre-empt that. Again, it is one of the reasons why we thought deeply about the benefits of relying on the UK legislation, which was crafted without any view around a particular case.

Mr LONGMAN: If I could supplement that too. The evil of Kable is it was the Parliament telling the court how to exercise its judicial discretion. This is not the terrain we are in. The terrain we are in is Parliament setting the test down, which then goes to the court to interpret in the context of an individual case, particularly in circumstances where no-one is suggesting a change to this provision that would take away the residual discretion of the court. We could set the test for the court and the court could say: We find all of this evidence meets the test but we still choose not to send it back. I do not see that there is a concern in that regard.

Mr DAVID SHOEBRIDGE: When it comes to the argument that the only reason to do this is for this one case, Professor Hamer's submission points out how the current law has very idiosyncratic and quite unprincipled outcomes if you apply it to an array of theoretical situations. If only to cure that idiosyncratic and unjust potential operation of law, that would be a reason to reform the law, would it not?

Professor BEHRENDT: Yes. Obviously we have worked on that because we understood where the concerns from the legal fraternity would come from. They are consistent with concerns that have been raised around these issues before. Without reading the submissions we were able to somewhat anticipate them. It is certainly put forward as though it is a negative for the Parliament to respond to a gross miscarriage of justice. I think the point was made by the Committee earlier that actually for the general public that is not a negative, it is an absolute positive. It is when you expect the Parliament to act. I am not sure I answered your question actually.

Mr DAVID SHOEBRIDGE: No. I think your answer was better than my question.

The CHAIR: That has been the case all day.

Mr LONGMAN: I might add on that point; there has been during the course of the day perhaps a tendency to speak either from the profession's idea of bringing the system into disrepute or the families'. I note too, all the public submissions that were received by the Committee, with the exception of one, were in favour of amending the legislation. There is some evidence that the community, outside of the families and our submission, does not feel at the moment that the system is fulfilling the job.

The CHAIR: Again, that was part of the reasoning why there was questioning around the balance and finality. If you probably took a straw poll in the street today I am sure that—if the question was simple enough about, regardless of the technicality, whether someone accused of a very serious crime should ever sleep at night—the general public would have a view on that. I think that is some of the questioning that has come out today as well.

The Hon. WES FANG: I want to give you an opportunity to address some of the submissions and some of the testimony we have had today. It sort of leads into what you were just talking about—the erosion of the principle of finality, how it will inevitably reduce public confidence not only in the courts and in the criminal justice system but in the rule of law, and if we were to introduce the changes as we discussed today, the law, to paraphrase, would become unworkable. Is that what they said?

Professor BEHRENDT: Yes. We do not accept the argument about the erosion of the principle of finality. We think it is one factor among many that get balanced in thinking about whether something is in the interests of justice. We certainly would reject the idea that such a change would undermine the whole system. It is clearly a view from the legal fraternity. I think what has been reflected elsewhere today is perhaps not the common view. It is certainly not the view taken by members of the public who have been victims of crime. I think it overstates the place of that principle. As has been mentioned today, there have been many changes to some of these things that the fraternity says are absolutes—central principles that cannot be moved—and there have been lots of times in which the Parliament has stepped in to put caveats or exceptions, often to improve the way that the justice system works.

This would be one such instance where a gross injustice that has been very visible and sends a clear message, especially to particular members of the public, about the failures of the system, and it would be seen as fixing that. I think that that is a stronger message than what the average person in the street would think about the justice system and the undermining of the sense of finality, which is a bit of a fiction anyway. I do not know if Mr Longman wants to add to that.

Mr LONGMAN: I think the first thing to note is there is no question that new scientific advancements that generate evidence will reopen acquittals. The idea that there is this absolute sense of finality now in relation to serious offences is not sustainable. The argument is that the criminal system will become unworkable. Well, it has not since the introduction of these provisions. There has been one application. I do not see any evidence in Australia or in the United Kingdom to substantiate that concern.

The CHAIR: You may choose whether you answer this or not. I am not trying to force an answer. It is probably going to be the last question for the day. A large part of your role has been on behalf of and working with the families. You have put a lot of work and detail into trying to look at this issue and propose alternatives and options. Do you think what you have proposed, if the proposals were to go through—I know that there are things that are out of your control and there is a process to follow—that process would provide for the cases in which you have been working and working with the families? Do you think it provides a way through to another attempt, or do you think it is the best option that we have, but still there are so many variables that you could not predict an outcome?

Professor BEHRENDT: It is a bit of both. We believe that this is an option that will provide the space for the arguments to take the case forward. It then would fall to the courts again to make the decision about whether the case could go forward. So it is a bit of both. We believe this provides the pathway. We have no control over what happens, as no-one does once it gets to the courts and there is discretion. But I think we have learnt a lot about what did not work last time. We certainly have reflected on that when we have put forward the proposal. As I said, it is the worst outcome for the families if all of their activism and their agitation and the emotion they have put in to this campaign led to a change in the legislation that would prevent this kind of injustice from happening again but did not apply to them.

As you know, because you have spoken to them, one of the things that I think has always kind of ensured our ruled commitment to this case is that these are, first of all as you know—you have seen Bowraville—these are people with very little resources and very little access to justice, yet they have fought a tremendous battle. They have always been adamant and they have said over and over to us and to you that, for them, justice in this case is a day in court. That is what they want. Any other compromise, everything else that has been given that they have appreciated and needed—the support for healing, the memorials—they have been steadfast. The fact that they have never been side-tracked by compensation or money—they cannot be bought away from this, given how little resources they have—I think it is a commitment to the fact that, for them, ironically for a system that has really let them down, they still believe it is the only place in which they can get justice. I find that a very compelling case. I will just leave it there before I cry.

The CHAIR: I thank you not only for the submission but also your evidence and the role that you have played for the families and for helping to facilitate the meeting we had in Bowraville, which was an important part of this inquiry. We will close proceedings there, but I will make a final statement because I know that there is interest and people are probably following this online and they will follow this through the *Hansard* transcript. I want to place on the record that throughout the day, our role is to play devil's advocate on all sides of the arguments for all witnesses. From where I have sat today every witness has been challenged probably on their

own views but also challenged on which side of the fence they sit in relation to the proposed amendments and challenged by different members of the Committee. That is important for us as we keep an open mind into our deliberations to have done that. I do not want anyone to take any of the lines of questioning from any of the members as a preconceived idea that they were trying to force an outcome and influence the Committee.

The Committee has to look at all the pros and cons. We have had a balance of witnesses today and we make no apology for that. It is important to make sure that whatever the recommendations and the outcome of this report and ultimately what happens from there, we can all confidently say that we have challenged every aspect of this. This is a very complex matter. I have been a member of the Legislative Council for over only eight years and I have sat through enough of these things to see quite often when you start a journey like this or a day like today, the answers jump out at you. This has been more difficult than some because I do not think we are dealing with something in which we have been able to find silver bullets. We are able to probably identify some areas we have examined and I am sure there will be more examination after we get the answers to questions on notice and any subsequent information.

I want to place that on record for everyone who has been participating, to thank all witnesses and everyone who has made submissions to the inquiry as well as those who have attended here in person today and those who have been following this online. This is a unique and complex area. This is something that this Committee is taking very seriously. It is our job to examine all aspects. Again, I thank you for your time. I thank everyone and I thank members of the Committee. I call the meeting to a close.

(The witnesses withdrew.)

The Committee adjourned at 16:07.