



The Hon Gabrielle Upton MP
Attorney General

File12/001198

Mr David Blunt
Clerk of the Legislative Council
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Blunt

Please find enclosed a copy of the *Review of Section 102 of the Crimes (Appeal and Review) Act 2001 (NSW)* by the Hon James Wood AO QC. The report is part of the NSW Government's response to the Legislative Council's Standing Committee on Law and Justice Report titled *Inquiry into the Family Response to the Murders in Bowraville*.

I would be grateful if you could arrange for the report to be tabled.

Yours sincerely

GABRIELLE UPTON MP
Attorney General

17.12.15

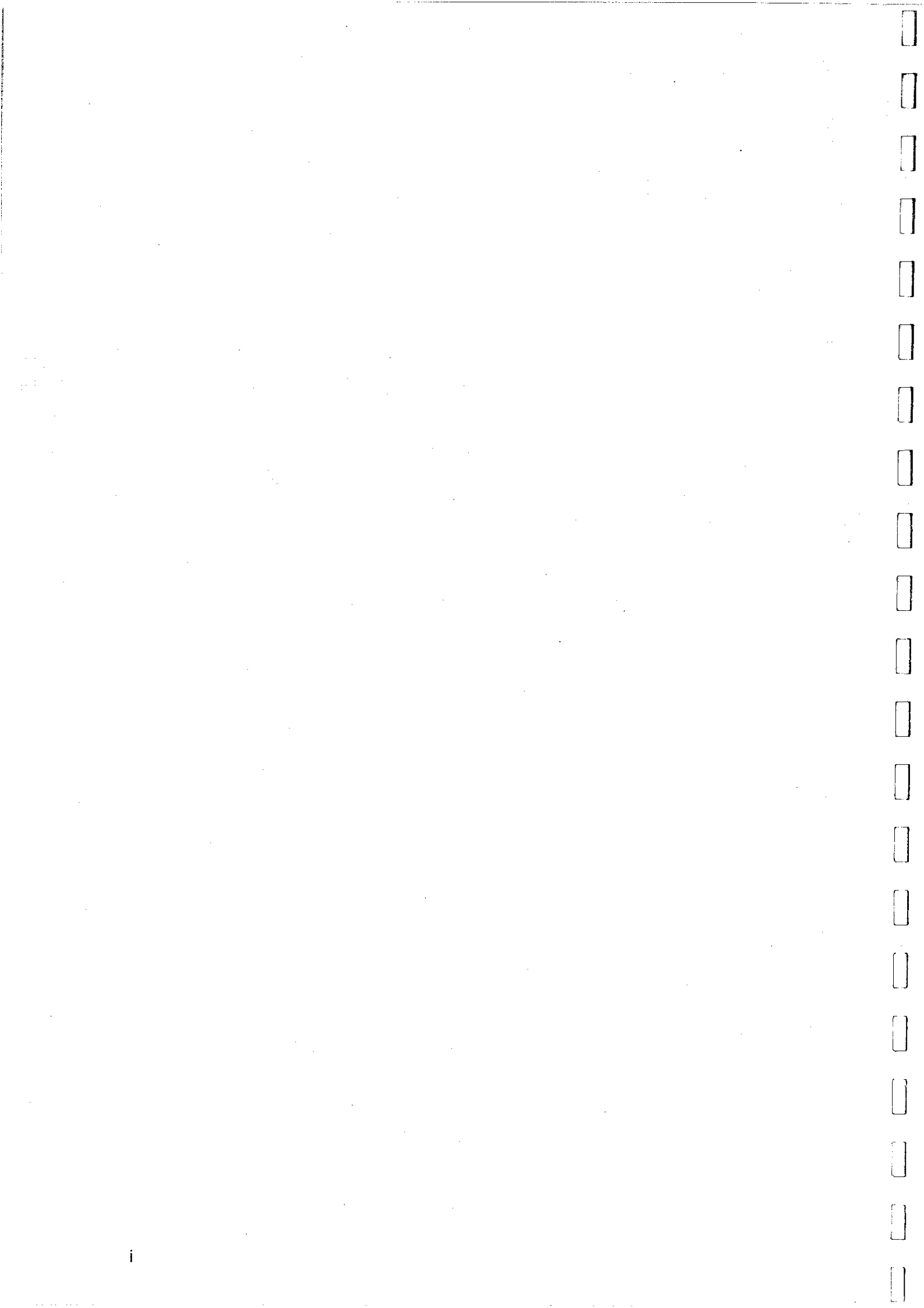
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The Hon James Wood AO QC

REVIEW OF SECTION 102 OF THE CRIMES (APPEAL AND REVIEW) ACT 2001(NSW)

To clarify the definition of "adduced".



September 2015

The Hon G Upton MP
Attorney General and Minister for Justice
Level 19, 52 Martin Place
SYDNEY NSW 2000

Dear Attorney

Review of section 102 of the Crimes (Appeal and Review) Act 2001

I make this report pursuant to the reference received by me on 5 June 2015.

I wish to acknowledge the support I have received from Ms Sallie McLean and Ms Anna Williams in the conduct of the review. I also acknowledge with gratitude the assistance of all those who made submissions.


The Hon James Wood AO QC

September 2015

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Executive Summary

In NSW, the rule against double jeopardy – trying a person twice for the same or a similar offence – is not absolute. Statutory provisions provide for an exception to the rule against double jeopardy in life sentence offences where the prosecution has “fresh” and “compelling” evidence, and it is in the interests of justice for the courts to order a retrial. The prosecution can also apply for a retrial where it has been proven that the acquittal was tainted by an administration against justice offence, such as perjury or bribing a juror.

This review considers the definition of “fresh” evidence. Section 102 of the *Crimes (Appeal and Review) Act 2001* (NSW) defines “fresh” evidence as evidence that was not adduced in the proceedings in which the person was acquitted and that could not have been adduced with the exercise of reasonable diligence. This confines applications under s 102 to evidence that was not tendered to the court in the original proceedings. This review examines the ramifications of amending the provision so that only evidence that was *admitted* into evidence is excluded from the definition of “fresh” (Option 1). This means that evidence tendered and rejected by the court could constitute “fresh” evidence for the purposes of the provision.

This review also considers the merit of adding a further definition of “fresh” evidence to the statute, so that evidence that was inadmissible at the time of the original proceedings that has since become admissible due to a change of law could come within the definition (Option 2). The approach of Western Australia, which may include tendered evidence in its definition of “fresh”, is also canvassed.

There have been no applications by the prosecution to quash an acquittal due to “fresh” evidence in NSW since the provision was enacted in 2006. This is the same in the five other Australian jurisdictions that have implemented similar legislation, mostly following the model recommended by the Council of Australian Governments. The NSW provision was derived from cognate legislation in England and Wales, and this review has been directed to look to that jurisdiction for guidance.

I conclude that case law from England and Wales has limited application to NSW – England and Wales operates under a different legislative framework, and this affects the reasoning of the judgments.

I also conclude that it is premature to amend s 102 without knowing how the NSW Court of Criminal Appeal will apply it. There are a number of concerns with the proposed changes to the definition of “fresh”, primarily broadening the types of evidence that could constitute “fresh” evidence has the potential to destabilise the principle of finality in prosecutions, which will impact upon defendants, victims and the community’s confidence in the courts.

In my view, the existing legislation appears to serve its policy objectives, and delicately balances the rights of a person acquitted of a serious offence with the pursuit of justice. 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.

1. Introduction

I acknowledge the circumstances that led to this review. I recognise that the Bowraville murders have produced suffering for the families and community that extends beyond their grief. This review, however, is one of statutory interpretation. Other than identifying the legal issues that led to this review, I do not revisit the circumstances surrounding the Bowraville murders. The terms of reference do not require me to; instead I am directed to look more broadly at the operation of the relevant provision and how any reform may affect the criminal justice system in NSW.

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1.1 This introductory chapter presents the terms of reference to the review. It provides some background context, and discusses the scope of this review and the processes adopted.

Background

Terms of reference

1.2 On 5 June 2015, I was asked to conduct a review in the following terms:

review section 102 of the Crimes (Appeal and Review) Act 2001 to clarify the definition of "adduced" and in doing so consider:

- the legal or other ramifications of defining adduced as "admitted", particularly on the finality of prosecutions
- the matters considered by the English courts under the equivalent UK legislation
- the merit of replacing section 102 of the Crimes (Appeal and Review) Act 2001 with the provisions in section 46I of the Criminal Appeals Act 2004 (WA), and
- the merit of expressly broadening the scope of the provision to enable a retrial where a change in law renders evidence admissible at a later date.

- 1.3 The terms of reference for the review came from a recommendation from the 2014 report *The Family Response to the Murders in Bowraville* by the NSW Standing Committee on Law and Justice.¹ The report presented the issues identified by the families of the victims of the 1990-1991 Bowraville murders, including their initial adverse interaction with local police; the allegedly mismanaged criminal investigation; and the outcome of the first two trials of the person of interest, it having been suggested that the substandard level of investigation resulted in the acquittals of the accused. The report recommended areas for reform in police practice, criminal procedure and Aboriginal access to justice.
- 1.4 The report expressed dissatisfaction with the lack of prosecutorial options now open to police and the NSW Director of Public Prosecutions (DPP) regarding the acquitted person of interest, and suggested that the statutory exceptions to the double jeopardy principle relating to fresh evidence needed to be reviewed.²

A brief history of the criminal trials for the Bowraville murders

- 1.5 Between September 1990 and February 1991, Colleen Walker (16 years), Clinton Speedy-Duroux (16 years) and Evelyn Greenup (4 years) were allegedly murdered in the northern NSW township of Bowraville. The body of Colleen Walker has never been discovered, although in 1993 the State Coroner gave an open finding that Colleen was deceased³ and in 2004 the Coroner found that Colleen had died of a homicide.⁴

Similar fact evidence was rejected by the court and separate trials were ordered

- 1.6 In 1993, the DPP sought to prosecute an accused person in a single trial containing two indictments relating to the murder of both Evelyn and Clinton.⁵ The Crown sought to rely upon similar fact evidence to prove that each crime was committed by the same person. The Crown argued that the evidence of one offence was admissible in respect of the other because there was a "striking similarity, an underlying unity" between the two crimes capable of satisfying the jury that both were committed by the same person.
- 1.7 The defence successfully moved for an order that the two counts be tried separately. This was based on a contention that evidence of either offence was not admissible in respect of the other, and that the accused would be seriously and unfairly prejudiced by a joint trial. On this point, the judge referred to the High Court case of *Sutton*:⁶

1. NSW Legislative Council, Standing Committee on Law and Justice, *The Family Response to the Murders in Bowraville*, Report 55 (2014) Recommendation 8.

2. NSW Legislative Council, Standing Committee on Law and Justice, *The Family Response to the Murders in Bowraville*, Report 55 (2014). Ch 6.

3. NSW Legislative Council, Standing Committee on Law and Justice, *The Family Response to the Murders in Bowraville*, Report 55 (2014) [2.11].

4. *Inquest into the deaths of Evelyn Clarice Greenup and Colleen Anne Walker* (Unreported, NSW Coroner's Court, Bellingen, Abernethy J, 10 September 2004) 28.

5. *R v Hart* (unreported, Supreme Court of NSW, Badgery-Parker J, 25 August 1993).

6. *Sutton v R* (1984) 152 CLR 528, 541-542.

1. Introduction

When two or more counts constituting a series of offences of a similar character are joined in the same information, a real risk of prejudice to an accused person may arise from the adverse effect which evidence of his implication in one of the offences charged in the indictment is likely to have upon the jury's mind in deciding whether he is guilty of another of those offences. Where that evidence is not admissible towards proof of his guilt of the other offence, some step must be taken to protect the accused person against the risk of impermissible prejudice ...

1.8 According to *Sutton*, the admission of similar fact evidence was the exception rather than the rule. Similar fact evidence was only admissible if, viewed independently and together with the remaining evidence, it was strongly probative of the offence charged.

1.9 The Bowraville judge was unconvinced that the similar fact evidence presented by the Crown proved that each person had been killed by the same person. The similar fact evidence was relied upon to form a case in respect of the killing of Evelyn. Unless evidence relating to the killing of Clinton was admitted as similar fact evidence, the Crown would not have a case in the Evelyn matter. In accordance with *Sutton*, the judge ordered that the similar fact evidence was not admissible and that the trials be severed.

The accused is acquitted

1.10 The murder of Clinton was tried in the Supreme Court of NSW in 1994, and the accused was acquitted by jury verdict.⁷ The prosecution then no-billed the charges for the murder of Evelyn against the same accused.⁸

1.11 In 2006, the prosecution for Evelyn's murder recommenced, and the accused was acquitted by a jury in March 2006.

The introduction of the Evidence Act 1995 (NSW)

1.12 The *Evidence Act 1995 (NSW)* introduced tendency and coincidence provisions, which replaced the common law rules of propensity and similar fact. The relevant provisions are reproduced at Appendix A of this report.

1.13 Section 101(2) of the *Evidence Act 1995 (NSW)* sets the critical test for the admissibility of tendency and coincidence evidence, namely that the *probative value* of the evidence *substantially* outweighs any prejudicial effect it may have on the defendant.⁹ This test is considered to be more permissive than the similar fact threshold.

7. *R v Hart* (Unreported, Supreme Court of NSW, Badgery-Parker J, 18 February 1994).

8. NSW Legislative Council, Standing Committee on Law and Justice, *The Family Response to the Murders in Bowraville*, Report 55 (2014) [2.15].

9. *R v Ellis* [2003] NSWCCA 319; 58 NSWLR 700 [33].

The scope of this review

- 1.14 Of critical significance for this review are the definition of “fresh” evidence and the interpretation of the expression “not adduced” as used in s 102 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA). As noted below, it has been understood in accordance with its ordinary meaning to denote evidence that was not tendered or presented in evidence at the initial trial. On this basis, it has been assumed that evidence that was tendered (but not admitted) at a first trial by reason of an application of existing evidentiary law, could not qualify as “fresh” evidence within the meaning of the section.
- 1.15 As a matter of context, this means that the similar fact evidence tendered to the court in the first Bowraville matter would not constitute “fresh” evidence for the purposes of s 102, even though it may have subsequently become admissible by reason of amendment of the *Evidence Act 1995* in relation to tendency and coincidence, or by reason of judicial restatement of the similar fact rules.
- 1.16 In summary, the issue for consideration is whether “adduced” should be replaced by the word “admitted”, or whether the section should be otherwise amended to include as an exception to the double jeopardy principle the case where a change of the law renders admissible evidence that was rejected at the original trial as inadmissible.

Adduced does not mean “admitted” in s 102 of CARA

- 1.17 At the outset, I confirm I am of the view that “adduced” in s 102 of CARA cannot be understood to mean anything other than tendered to the court. “Adduced” in this context does not mean “admitted” – these terms represent two different steps: a party adduces (or tenders) evidence to the court and the court then either admits or rejects that evidence.
- 1.18 This construction is consistent with current criminal practice in NSW and is supported in the submissions which have been received. It has been supported in case law relevant to the use of “adduced” in the *Evidence Act 1995* (NSW).¹⁰ It is also consistent with the ordinary meaning of the terms as outlined in English dictionaries, and the legal meaning extracted from legal dictionaries. A supporting table summarising the dictionary definitions of “adduced” and “admitted” is provided in Appendix B of this report.

Process of the review

- 1.19 The terms of reference to this review were received in June 2015. I invited and received submissions on the terms of reference from 12 key stakeholders. These submissions helped to inform my recommendations. A summary of the key issues raised in submissions is provided in Chapter 5.
- 1.20 A list of contributors is set out below:

10. *R v Zhang* [2005] NSWCCA 437; 158 A Crim R 504 [38].

1. Introduction

Table 1.1: Stakeholders who made submissions to this review

Stakeholder name	Submission received
Allens	14 August 2015
The Attorney General (Cth)	4 August 2015
The NSW Bar Association	30 June 2015
The District Court of NSW	27 June 2015
The Law Society of NSW	29 June 2015
Legal Aid NSW	14 August 2015
The Office of the Director of Public Prosecutions (Cth)	28 June 2015
The Office of the Director of Public Prosecutions (NSW)	30 June 2015
The Police Force (NSW)	7 August 2015
The Public Defenders (NSW)	14 August 2015
The Supreme Court of NSW	27 June 2015
Young Lawyers (NSW)	27 August 2015

- 1.21 I consulted with representatives from the NSW Department of Justice who have worked closely on the Bowraville matters, which has included contact with the families. The Aboriginal Legal Services (NSW) were contacted, but were not in a position to make a submission. Submissions received by other key stakeholders on the terms of reference to this review were comprehensive and clearly expressed, so I was not required to conduct further consultations to understand the issues.
- 1.22 This report is due to the NSW Attorney General by the 1 November 2015.

The report structure

- 1.23 This review examines the merits of amending s 102 so to:
- define “adduced” as “admitted” (or replace “adduced” with “admitted”), or to
 - replace the provision with s 46I of the *Criminal Appeals Act 2004* (WA), or to
 - expressly broaden the scope of the provision to enable a retrial where a substantive change in legislation or restatement of the common law has rendered evidence admissible that had not been admissible in the earlier trial.
- 1.24 This report is structured as follows:
- **Chapter 2** examines the double jeopardy rule and reproduces the statutory exceptions currently in operation in NSW.

- **Chapter 3** presents the cognate provisions of England and Wales and looks at the way in which the Court of Appeal has dealt with those provisions. This chapter also outlines the provisions in force in Western Australia.
- **Chapter 4** explores the possibility of replacing “adduced” with “admitted” in the NSW provision (option 1). It also reviews the merits of amending the provision so that a change in law can produce “fresh” evidence (option 2).
- **Chapter 5** reproduces stakeholder views that were given to me in written submissions.
- **Chapter 6** presents my recommendations to Government regarding the merits of any amendment to s 102.

2. Double Jeopardy

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- 2.1 The common law rule against double jeopardy precludes a person from being prosecuted and retried for criminal conduct following a previous trial and acquittal for the same conduct by a competent court.¹ The rule is based on the principle that acquittal of a criminal offence must be treated as final: once a person has been tried and acquitted of an offence, the finding should be incontrovertible.
- 2.2 This chapter briefly describes the rule against double jeopardy. I then outline the statutory exceptions to double jeopardy currently operating in NSW, with particular focus on s 102 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA).

The components of double jeopardy

- 2.3 In the High Court case of *R v Carroll (Carroll)*, McHugh J summarised the many components underpinning the rule against double jeopardy:

It is a fundamental rule of the criminal law "that no man is to be brought into jeopardy of his life, more than once, for the same offence". If the prosecution attempts to do so, the accused may plead that he has already been convicted (autrefois convict) or acquitted (autrefois acquit) of the same matter. The rule is an aspect or application of the principle of double jeopardy whose "main rationale ... is that it prevents the unwarranted harassment of the accused by multiple prosecutions". Policy considerations that go to the heart of the administration of justice and the retention of public confidence in the justice system reinforce this rationale. Judicial determinations need to be final, binding and conclusive if the determinations of courts are to retain public confidence. Consequently, the decisions of the courts, unless set aside or quashed, must be accepted as incontrovertibly correct. As Lord Halsbury LC said in *Reichel v Magrath*, "it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again". In addition, the double jeopardy principle "conserves judicial resources and court facilities".²

- 2.4 It has been observed that the rule against double jeopardy serves four key purposes. It:
- **Promotes the legitimacy of the courts:** A final verdict reached after a fair trial is presumed to be factually correct and morally authoritative, and the principle of

1. See *R v Carroll* [2001] QCA 394; *Pearce v R* [1998] HCA 57; 194 CLR 610.
2. *R v Carroll* [2002] HCA 55; 213 CLR 635 [128].

double jeopardy recognises and protects the "incontrovertibility of verdicts".³ Jury verdicts are upheld and the jury as an institution maintains its integrity.

- **Protects individuals from harassment by the state:** The principle of finality acts as a restraint over the abuse of executive power and government oppression.⁴ The double jeopardy rule provides an important limit on the exercise of the prosecutors' power; it constrains prosecutors and politically motivated prosecutions.⁵
- **Promotes the efficient and effective investigation and prosecution of offences:** Police and prosecutors know that they have only one opportunity to convict an offender, so they appropriately and proportionally marshal resources.⁶
- **Protects the finality of prosecutions:** Finality of prosecutions has historically been prioritised over the need for conviction. In *Carroll*, the High Court quoted what was said by Lord Wilberforce in *The Amphyll Peerage* with approval:

Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality.⁷

- 2.5 The High Court, did, however, also note that these tenets must be balanced against the "very root" of the criminal law system, the recognition that people are to be held responsible for criminal behaviour.⁸

Moves away from double jeopardy – statutory exceptions

- 2.6 In recent times, Australia, New Zealand, England and Wales, Scotland and Ireland have introduced statutory exceptions to the principle of double jeopardy.⁹ In each jurisdiction, statutory exceptions have been introduced to permit a retrial where there is fresh and compelling evidence against the acquitted person and it is in the

3. M Edgely, "Truth or Justice: double Jeopardy Reform for Queensland: Rights in Jeopardy" (2007) 7 *Queensland University of Technology Law and Justice Journal* 108.

4. C Parkinson, "Double Jeopardy Reform: the New Evidence Exception for Acquittals" (2003) 26 *University of NSW Law Journal* 603, 616.

5. C Parkinson, "Double Jeopardy Reform: the New Evidence Exception for Acquittals" (2003) 26 *University of NSW Law Journal* 603, 616; *R v Carroll* [2002] HCA 55; 213 CLR 635 [21]-[22].

6. M Edgely, "Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy" (2007) 7 *Queensland University of Technology Law and Justice Journal* 108, 123 notes that this facet of the argument has been criticised for being weak: it is contingent upon the notion that police and prosecutors are driven by case outcomes and ignores that during the original investigation and prosecution it could not be known whether a second trial would be available because the circumstances that permit it are unknowable in advance.

7. *R v Carroll* [2002] HCA 55; 213 CLR 635 [22].

8. *R v Carroll* [2002] HCA 55; 213 CLR 635 [23].

9. See Appendix C for relevant provisions.

2. Double Jeopardy

interests of justice to do so, or where there has been a tainted acquittal. Statutory exceptions have been carefully constructed. As noted by Acting Justice Mathews, who reviewed the consultation Bill proposing exceptions in NSW, "the values which the double jeopardy rule serves are so fundamental to the fairness of our criminal justice system that any exceptions to the rule must be framed with great precision and must contain appropriate safeguards".¹⁰

2.7 The introduction of statutory exceptions to double jeopardy in NSW occurred in 2006 after a long period of consultation. It provided a legislative response to the High Court judgment of *Carroll*, which disallowed the prosecution of a person for perjury who had been acquitted of murder in the original trial. The introduction of the NSW exceptions was also inextricably tied to the introduction of similar legislation in England and Wales, and the recommendations of the Council of Australian Governments (COAG).

2.8 Below I summarise the critical events in the lead up to the 2006 legislative provisions in NSW in a table.

Table 2.1: Timeline of critical events regarding statutory double jeopardy exceptions

Date	Jurisdiction	Event	Comment
1985	Qld	<i>R v Carroll</i> (1985) 19 A Crim R 410: Carroll is acquitted of child sexual assault and murder on appeal.	This is the first step in a protracted prosecution process that would lead to double jeopardy reform throughout Australia.
1993	England and Wales	Stephen Lawrence is murdered.	This is a highly publicised racially motivated murder.
1995	England and Wales	Prosecution against five defendants for Stephen Lawrence's murder begins. There is insufficient evidence and the judge directs the jury to acquit the three defendants.	The acquittals of the accused people trigger various reviews into double jeopardy reform in England and Wales.
1999	England and Wales	Stephen Lawrence Parliamentary inquiry commences.	The inquiry recommends, among other things, that consideration be given to permitting prosecution after acquittal where fresh and viable evidence is presented.
2001	England and Wales	The Law Commission of England and Wales publishes a final report on double jeopardy. England and Wales, Law Commission, <i>Double Jeopardy and Prosecution Appeals</i> , Report 267 (2001).	The Commission proposes a statutory framework for double jeopardy exceptions that could apply where: a person had been acquitted of murder, genocide or reckless killing new evidence that appears to be reliable and compelling has arisen the new evidence was not available to the prosecution at the time of acquittal, and

10. J Mathews, *Advice to the Attorney General: Safeguards in Relation to Proposed Double Jeopardy Legislation* (NSW Attorney General's Department, 2003) 5.

Date	Jurisdiction	Event	Comment
			<p>the court was satisfied that it was in the interests of justice to order a retrial.</p> <p>Evidence would not be "new" where the evidence was in the possession of the prosecution at the time of the acquittal but was not adduced because it was inadmissible – even if it would now be admissible because of a change in the law.</p>
2001	England and Wales	R Auld, <i>Review of the Criminal Courts of England and Wales: Report</i> (HMSO, 2001) 634.	<p>The Auld report recommends that:</p> <ul style="list-style-type: none"> • the exceptions should not be limited to murder and allied offences, but should extend to other grave offences punishable with life and/or long terms of imprisonment as Parliament might specify; and • there should be no reopening of an investigation of a case following an acquittal without the Director of Public Prosecution's prior, personal consent and recommendation as to which police force should conduct it.
2002	Australia	Carroll is convicted of perjury following new evidence. Consequently acquitted on appeal. <i>R v Carroll</i> (2002) 213 CLR 635.	The High Court does not allow an appeal from acquittal of Carroll on perjury offences related to the previous murder trial. Triggers a national discussion on the restrictions of double jeopardy.
2003	England and Wales	<i>Criminal Justice Act 2003</i> (England and Wales) introduces statutory exceptions to double jeopardy. The provisions do not commence until 2005.	<p>Relevant to this review, the Act prescribes that:</p> <p>s 78 New and Compelling evidence</p> <p>(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.</p> <p>(2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related) ...</p> <p>(5) for the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.</p>
2003	NSW	NSW Government produces a consultation Bill that replicates the <i>Criminal Justice Act 2003</i> (England and Wales). The Carroll case is the primary justification for the reforms. ¹¹	Mathews AJ provides advice to Government that, among other things, NSW should adopt the term "fresh" in place of the expression "new" and define fresh as evidence not adduced, nor able to be produced, in proceedings with the exercise of due diligence. Mathews AJ also recommends diverging from and clarifying s 78(5).

11. NSW, *Parliamentary Debates*, Legislative Assembly, 3 September 2003, 3076.

2. Double Jeopardy

Date	Jurisdiction	Event	Comment
2003	Australia	The issue of reform of the rule against double jeopardy was referred to the Standing Council on Law and Justice (which comprises the Attorneys-General of the Commonwealth and State and Territories and the Minister of Justice of New Zealand). The Council referred the matter to the Model Criminal Code Officers Committee (MCCOC), which produced a discussion paper. ¹²	<p>The MCCOC discussion paper recommends a code for double jeopardy exceptions. Fresh evidence is defined as:</p> <p>(2) Evidence is fresh if:</p> <p>(a) it was not adduced in the proceedings in which the person was acquitted, and</p> <p>(b) it could not have been adduced in those proceedings with the exercise of reasonable diligence ...</p> <p>(4) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.</p>
2006	NSW	Part 8 of the <i>Crimes (Appeal and Review) Act 2001 (NSW)</i> commences.	<p>Crimes (Appeal and Review) Act 2001, Division 2 Retrial after acquittal for very serious offences</p> <p>s 100 Court of Criminal Appeal may order retrial – fresh and compelling evidence ...</p> <p>s 102 Fresh and compelling evidence – meaning</p> <p>(1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.</p> <p>(2) Evidence is fresh if:</p> <p>(a) it was not adduced in the proceedings in which the person was acquitted, and</p> <p>(b) it could not have been adduced in those proceedings with the exercise of reasonable diligence</p> <p>...</p> <p>(4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in earlier proceedings against the acquitted person.</p>
2007	Australia	Councils of Australian Governments (COAG) endorses model produced by MCCOC, and releases a COAG model for adoption by states and territories	<p>It is noted that the COAG model adopted NSW formulation of:</p> <p><i>Evidence is not precluded from being fresh and compelling merely because it would have been inadmissible in the earlier proceedings against an acquitted person.</i></p>

12. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals*, Discussion Paper (2003).

Date	Jurisdiction	Event	Comment
2007	England and Wales	The first application is made under s 78 of the <i>Criminal Justice Act 2003</i> (<i>R v Dunlop</i> [2007] 1 WLR 1657)	This application is based on a confession, and is approved by the court.

Statutory exceptions to double jeopardy in NSW

- 2.9 In NSW, various statutory provisions encroach upon the doctrine of double jeopardy. These include the statutory exceptions to double jeopardy mentioned above; the existence of limited rights of prosecution appeals against acquittal and against sentence; and interlocutory appeals against a ruling that does not admit evidence pertinent to the prosecution's case. These statutory provisions are reproduced below.

Crown appeal against acquittal

- 2.10 Appeals on acquittal were introduced in NSW with the statutory exceptions to double jeopardy.¹³
- 2.11 Section 107 of CARA provides that, in certain circumstances, the Attorney General or DPP can appeal to the Court of Criminal Appeal from an acquittal on any ground that involves a question of law alone. It does not extend to non-directed acquittals by a jury, or to any ground involving a question of fact or a question of mixed fact and law. This right of appeal has rarely been used.¹⁴
- 2.12 The relevant provision is as follows:

107 Directed jury acquittals or acquittals in trials without juries

(1) This section applies to the acquittal of a person:

(a) by a jury at the direction of the trial Judge, or

(b) by a Judge of the Supreme Court or District Court in criminal proceedings for an indictable offence tried by the Judge without a jury, or

(c) by the Supreme Court or the Land and Environment Court in its summary jurisdiction in any proceedings in which the Crown was a party.

(2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any such acquittal on any ground that involves a question of law alone.

(3) An appeal may be made within 28 days after the acquittal or, with the leave of the Court of Criminal Appeal, may be made after that period.

13. *Crimes (Appeal and Review) Act 2001* (NSW) pt 8.

14. NSW Law Reform Commission, *Criminal Appeals*, Report 140 (2014) [9.7]. The provision had been used three times since it commenced.

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(4) The accused person is entitled to be present and heard at the appeal. However, the appeal can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.

(5) The Court of Criminal Appeal may affirm or quash the acquittal appealed against.

(6) If the acquittal is quashed, the Court of Criminal Appeal may order a new trial in such manner as the Court thinks fit. For that purpose, the Court may (subject to the *Bail Act 2013*) order the detention or return to custody of the accused person in connection with the new trial.

(7) If the acquittal is quashed, the Court of Criminal Appeal cannot proceed to convict or sentence the accused person for the offence charged nor direct the court conducting the new trial to do so.

(8) This section does not apply to a person who was acquitted before the commencement of this section.

Note. See section 5C of the *Criminal Appeal Act 1912* for appeals against the quashing of an indictment.

Crown appeal against sentence

2.13 Crown appeals against sentence are contained in the *Criminal Appeal Act 1912* (NSW) (below) and the *Crimes (Appeal and Review) Act 2001* (NSW) s 23.

5D Appeal by Crown against sentence

(1) The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.

(1A) The Environment Protection Authority may appeal to the Court of Criminal Appeal against any sentence pronounced by the Supreme Court or the Land and Environment Court in any proceedings for an environmental offence (otherwise than on an appeal), if those proceedings have been instituted or carried on by, or on behalf of, the Environment Protection Authority. The Court of Criminal Appeal may impose such sentence as to it may seem proper.

(2) In this section, a reference to proceedings to which the Crown was a party includes a reference to proceedings instituted by or on behalf of:

(a) the Crown, or

(b) an authority within the meaning of the Public Finance and Audit Act 1983,

or by an officer or employee of such an authority acting in the course of his or her employment.

(2A) In this section, a reference to an environmental offence is a reference to an offence against the environment protection legislation as defined in the Protection of the Environment Administration Act 1991.

(3) This section does not apply to an appeal referred to in section 5DA or 5DC.

Interlocutory appeals

- 2.14 Pre-trial orders (orders made after the presentation of indictment and before the jury is empanelled)¹⁵ and orders made during trial are generally binding on the trial judge.¹⁶ To avoid any doubt, s 130A(5) of the *Criminal Procedure Act 1986* (NSW) specifically notes that this extends to a ruling given on the admissibility of evidence. It is noted that s 102(2) of CARA includes evidence that was not adduced "in the proceedings", and it is clear that "proceedings" would include evidence tendered during a pre-trial hearing and evidence tendered on the *voir dire* or during a Basha inquiry during the trial.
- 2.15 The DPP or the Attorney General can, however, appeal against decisions or rulings on the admissibility of evidence where the decision or ruling eliminates or substantially weakens the prosecution's case.¹⁷
- 2.16 This appeal right is prescribed by section 5F of the *Criminal Appeal Act 1912* (NSW):

5F Appeal against interlocutory judgment or order

(1) This section applies to:

(a) proceedings (including committal proceedings) for the prosecution of offenders on indictment in the Supreme Court or in the District Court, and

(b) proceedings under Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986*, and

(c) proceedings in Class 5 of the Land and Environment Court's jurisdiction (as referred to in section 21 of the *Land and Environment Court Act 1979*).

(2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in proceedings to which this section applies.

...

(3A) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.

(4) An appeal under this section shall, unless the Court of Criminal Appeal gives leave to adduce fresh, additional or substituted evidence, be determined on the evidence (if any) given in the proceedings to which the appeal relates.

(5) The Court of Criminal Appeal:

(a) may affirm or vacate the judgment, order, decision or ruling appealed against, and

15. *Criminal Procedure Act 1986* (NSW) s 130A(4).

16. *Criminal Procedure Act 1986* (NSW) s 130A.

17. *Criminal Appeal Act 1912* (NSW) s 5F(3A).

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(b) if it vacates the judgment, order, decision or ruling, may give or make some other judgment, order, decision or ruling instead of the judgment, order, decision or ruling appealed against.

(6) If leave to appeal under this section is refused by the Court of Criminal Appeal, the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related.

(7) A person may not appeal to the Court of Criminal Appeal under this section against an interlocutory judgment or order if the person has instituted an appeal against the interlocutory judgment or order to the Supreme Court under Part 5 of the Crimes (Appeal and Review) Act 2001.

Statutory exceptions to double jeopardy

2.17 NSW introduced statutory exceptions to the double jeopardy principle in 2006. Exceptions are confined to cases where the offence charged comprises a possible life sentence, and applies where there is fresh and compelling evidence or a tainted acquittal.

2.18 The relevant provisions of CARA are contained in s 100 - s 104. These are reproduced below.

100 Court of Criminal Appeal may order retrial—fresh and compelling evidence

(1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence if satisfied that:

(a) there is fresh and compelling evidence against the acquitted person in relation to the offence, and

(b) in all the circumstances it is in the interests of justice for the order to be made.

(2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).

(3) The Court of Criminal Appeal may order a person to be retried for a life sentence offence under this section even if the person had been charged with and acquitted of manslaughter or other lesser offence.

(4) The Court of Criminal Appeal cannot order a person to be retried for a life sentence offence under this section where the person had been charged with and acquitted of the life sentence offence but had been convicted instead of manslaughter or other lesser offence

101 Court of Criminal Appeal may order retrial—tainted acquittals

(1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a 15 years or more sentence offence if satisfied that:

(a) the acquittal is a tainted acquittal, and

(b) in all the circumstances it is in the interests of justice for the order to be made.

(2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).

(3) The Court of Criminal Appeal may order a person to be retried for a 15 years or more sentence offence under this section even if the person had been charged with and acquitted of a lesser offence

102 Fresh and compelling evidence—meaning

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

(2) Evidence is fresh if:

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

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

(3) Evidence is compelling if:

(a) it is reliable, and

(b) it is substantial, and

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

(4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

103 Tainted acquittals—meaning

(1) This section applies for the purpose of determining under this Division whether the acquittal of an accused person is a tainted acquittal.

(2) An acquittal is tainted if:

(a) the accused person or another person has been convicted (in this State or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted, and

(b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

(3) An acquittal is not a tainted acquittal if the conviction for the administration of justice offence is subject to appeal as of right.

(4) If the conviction for the administration of justice offence is, on appeal, quashed after the Court of Criminal Appeal has ordered the acquitted person to be retried under this Division because of the conviction, the person may apply to the Court to set aside the order and:

(a) to restore the acquittal that was quashed, or

(b) to restore the acquittal as a bar to the person being retried for the offence, as the case requires

2. Double Jeopardy

104 Interests of justice—matters for consideration

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

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

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

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

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

2.19 To date, no applications to quash an acquittal have been made under CARA, and the provisions have not been judicially considered in NSW.

2.20 As noted above, the scope of this review is confined to s 102(2) of CARA, specifically the consequence of the use of the word "adduced" in the sections and the question whether amendment is required. The tainted acquittal provision is not addressed and it has no further relevance in this review.

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- 3.1 There have been a number of cases in England and Wales where re-trials have been ordered following successful applications under the *Criminal Justice Act 2003* (England and Wales) (CJA).
- 3.2 Most Australian jurisdictions have enacted similar legislation, generally replicating the Council of Australian Governments (COAG) code, which reflects the NSW provision. New Zealand, Scotland and Northern Ireland have also implemented similar provisions. There has been limited or no use of the provisions in any of these other jurisdictions. A table of cognate provisions in other jurisdictions is provided in Appendix C.
- 3.3 In this chapter, I note the genesis of the UK provisions and refer to their application in England and Wales. I briefly review the WA provisions.

England and Wales

- 3.4 England and Wales was the first common law jurisdiction to implement statutory exceptions to the rule against double jeopardy. A term of this review has been to “consider the matters considered by the English courts under the equivalent legislation” as part of the review of s102 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA).
- 3.5 It is noted that judgments from the Court of Appeal (England and Wales) are not binding in Australia. The CJA and CARA have some potentially significant points of departure and review of the judgments is “useful only to the degree of the persuasiveness of their reasoning”.¹

1. *Cook v Cook* [1986] 162 CLR 376, 389-390.

Background

Report of the Law Commission of England and Wales

- 3.6 In 1999, the Law Commission of England and Wales undertook a reference to reform the double jeopardy rule. The reference to the Commission followed an inquiry into the racially motivated murder of Stephen Lawrence in 1993,² where three accused people had been acquitted.³ The inquiry recommended that consideration be given to permitting prosecution after acquittal where fresh and viable evidence is presented.⁴
- 3.7 The Law Commission published a report on double jeopardy in 2001. The Commission concluded that only the most serious case, where new and rigorous evidence is presented, should "override the collective and individual process values served by the [double jeopardy] rule".⁵ Accordingly, the Commission proposed a statutory framework for double jeopardy exceptions that could apply where:
- a person had been acquitted of murder, genocide or reckless killing⁶
 - new evidence that appears to be reliable and compelling has arisen⁷
 - the new evidence was not available to the prosecution at the time of acquittal,⁸ and
 - the court was satisfied that it was in the interests of justice to order a retrial.⁹
- 3.8 The Law Commission accepted that evidence would not be "new" where it was in the possession of the prosecution at the time of the acquittal but was not adduced because it was inadmissible – even if it would now be admissible because of a change in the law.¹⁰

The Criminal Justice Act 2003

- 3.9 Part 10 of the CJA, which in part responded to the Law Commission Report, commenced in 2005. The statute widened the potential application of the double

2. W Macpherson, *The Stephen Lawrence Inquiry*, Cm 4262 (1999).

3. The case is discussed at para [3.32]-[3.35].

4. W Macpherson, *The Stephen Lawrence Inquiry*, Cm 4262 (1999), Recommendation 38.

5. England and Wales, Law Commission, *Double Jeopardy and Prosecution Appeals*, Report 267 (2001) [4.2].

6. England and Wales, Law Commission, *Double Jeopardy and Prosecution Appeals*, Report 267 (2001) Recommendation 1.

7. England and Wales, Law Commission, *Double Jeopardy and Prosecution Appeals*, Report 267 (2001) Recommendation 3.

8. England and Wales, Law Commission, *Double Jeopardy and Prosecution Appeals*, Report 267 (2001) Recommendation 6.

9. England and Wales, Law Commission, *Double Jeopardy and Prosecution Appeals*, Report 267 (2001) Recommendation 4.

10. England and Wales, Law Commission, *Double Jeopardy and Prosecution Appeals*, Report 267 (2001) Recommendation 6.

3. Jurisdictional Comparison

jeopardy exceptions beyond the recommendations of the Law Commission. It is noted that under the CJA:

- The double jeopardy exceptions of Part 10 may apply to up to 50 "serious offences", including certain homicide offences, sexual assaults, child sexual assaults, and drug offences.¹¹
- Evidence must be "new and compelling".¹²
- New evidence is assessed in accordance with current rules and standards of evidence, and it is those standards and rules of evidence that would apply in a retrial.¹³ Evidence which is otherwise new and compelling is not to be excluded from consideration of the court solely because it would not have been admissible at the previous trial.¹⁴
- The Director of Public Prosecutions can only consent to an application if satisfied that there is evidence that appears to satisfy the requirement of s 78 and s 79 and, additionally, that it is in "the public interest" for the application to proceed.¹⁵
- It must be in the interests of justice for the Court of Appeal to order a retrial, which is to be determined having particular regard to, among other things, whether it is likely that the new evidence would have been adduced in the earlier proceedings but for a failure by an officer or by a prosecutor to act with due diligence or expedition.¹⁶

3.10 Sections 75 – 79 of the CJA are reproduced in Appendix D. The key provisions regarding new and compelling evidence from the CJA are presented in the table below alongside the NSW statutory counterpart.

11. *Criminal Justice Act 2003* (England and Wales) Schedule 5.

12. *Criminal Justice Act 2003* (England and Wales) s 76, s 78.

13. *Criminal Justice Act 2003* (England and Wales) s 78(5).

14. This interpretation of s 78(5) is drawn from United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, vol 651, col 1085.

15. *Criminal Justice Act 2003* (England and Wales) s 76(4).

16. *Criminal Justice Act 2003* (England and Wales) s 79(2)(c).

Table 3.1: Relevant provisions from CJA and CARA

<p align="center">England and Wales Commenced 2005</p>	<p align="center">New South Wales Commenced 2006</p>
<p><i>Criminal Justice Act 2003, Part 10: Retrial for Serious Offences</i></p>	<p><i>Crimes (Appeal and Review) Act 2001, Part 8: Retrial after acquittal for very serious offences</i></p>
<p>s 76 Application to Court of Appeal ... (4) The Director of Public Prosecutions may give his (sic) consent only if satisfied that – (a) there is evidence as respects which the requirements of section 78 appear to be met (b) it is in the public interest for the application to proceed ... s 77 Determination by Court of Appeal. (1) On an application under section 76(1), the Court of Appeal— (a) if satisfied that the requirements of sections 78 and 79 are met, must make the order applied for; . (b) otherwise, must dismiss the application...</p>	<p>s 100 Court of Criminal Appeal may order retrial – fresh and compelling evidence ... (1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence if satisfied that: (a) there is fresh and compelling evidence against the acquitted person in relation to the offence, and (b) in all the circumstances it is in the interests of justice for the order to be made.</p>
<p>s 78 New and Compelling evidence (1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence. (2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related) ... (5) for the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.</p>	<p>s 102 Fresh and compelling evidence – meaning (1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence. (2) Evidence is fresh if: (a) it was not adduced in the proceedings in which the person was acquitted, and (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence ... (4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in earlier proceedings against the acquitted person.</p>
<p>s 79 Interests of Justice ... (2)(c) whether it was likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer of by a prosecutor to act with due diligence or expedition. (2)(d) whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.</p>	<p>s 104 Interest of justice – matters for consideration ... (3)(b) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for the retrial of the acquitted person.</p>

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3.11 The red text in the table indicates points of difference between the two jurisdictions, and suggests that the CJA has a wider application than CARA: If there is new and compelling evidence and it is in the interest of justice, the court under the CJA does not have discretion whether to make an order for a retrial; and there is less emphasis on whether “new” evidence could have been adduced at the earlier trial (under the CJA it is only a consideration under the interests of justice provision).

The impact of the fresh/new dichotomy

3.12 The central difference between the two statutory frameworks is the use of the terms “fresh” in NSW and “new” in England and Wales.

3.13 There is a technical legal distinction between “fresh” and “new”. Fresh evidence equates to evidence that could not have been brought to the primary trial. New evidence is evidence that may have existed at the time of the primary trial, but was not, for whatever reason, brought to that trial. Cases from England and Wales below support the proposition that “new” does not necessarily mean “newly-discovered”.

3.14 The definition of “fresh” has three parts:

- It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
- The evidence must be such that there must be a high degree of probability that there would be a different verdict.
- The evidence must be credible.¹⁷

3.15 The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Australia (MCCOC) discussion paper on double jeopardy states: “The difference is clear. If the “new evidence” test is applied then ... a defendant may be retried if a crucial piece of existing evidence was not presented at trial because of a mistake by police or prosecution. If a “fresh evidence” test is applied, then there can be no retrial on that basis”.¹⁸ The MCCOC discussion paper confirms that this “necessarily means also that evidence not led by the prosecution at the original trial as a matter of tactics cannot be “fresh evidence” for the purposes of retrial”.¹⁹

3.16 The differences between “new” and “fresh” may impact on the way “adduced” is interpreted in the two jurisdictions. For example, as the term “new” does not inherently prevent evidence existing at the time of trial from coming within its purview, the resulting interpretation of “adduced” by the Court of Appeal in England

17. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 76; *Akins v National Australia Bank* (1994) 34 NSWLR 155, 160; *Mickelberg v R* (1989) 167 CLR 259.

18. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 76.

19. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 76, footnote 221.

and Wales may be more permissive than a NSW court. Nonetheless, at this point, the judgments of the Court of Appeal are the only judicial guidance to the application of “adduced”, and are reviewed below.

Statutory interpretation of s 78(2) by the Court of Appeal (England and Wales)

- 3.17 The relevant judgments outlined below suggest that the Court of Appeal adopts a flexible definition of “new” and “adduced”, applying varying meanings depending on the particular facts of each case. There has been no authoritative definition of “adduced” nor has the Court clearly delineated a point in proceedings when evidence can be said to have been adduced compared with when evidence is “admitted”. Nonetheless, there is some limited support in the case law towards a construction whereby the term “adduced” includes “not admitted at trial”.

The prosecution in England and Wales does not have the right to appeal an evidentiary ruling. Prosecution appeals on evidentiary rulings have been introduced in legislation, but are yet to commence.²⁰ This means that where the trial judge does not admit evidence crucial to proving the matter, the prosecution has no channel to proceed.

- 3.18 The cases below are presented in order of the most relevant to this review.

***R v B* [2012] EWCA Crim 414**

- 3.19 This judgment concerned an application under s 78 of the CJA to quash an acquittal and to instigate a retrial for a rape matter. In this case strong evidence of the defendant’s guilt existed at the time of the original trial, but the prosecutor was prohibited from introducing it because of the manner in which the police obtained the evidence. In the original 1999 trial the judge rejected evidence of a DNA match due to perceived non-compliance with statutory requirements by police regarding the taking, use and retention of the samples. Due to this ruling (and the unavailability in England and Wales to the prosecution of an avenue to appeal what was a “terminating ruling”) the prosecution offered no evidence and the accused was acquitted.
- 3.20 In December 2000, the House of Lords concluded that that the relevant statute did not mean that DNA evidence obtained in consequence of a breach of the statutory provisions concerning its collection and use was inadmissible. Therefore the decision to exclude the DNA evidence was wrong.²¹ This ruling did not affect the status of the acquittal.
- 3.21 In 2012, the Court of Appeal was asked to determine whether the DNA evidence constituted “new and compelling” evidence against the acquitted person. The court

20. *Criminal Justice Act 2003* (England and Wales) s 62.

21. Attorney General’s Reference No 3 of 1999 [2001] 1 Cr App R 34.

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found the DNA evidence to be compelling,²² but it was argued by the defence that the evidence was not “new” because it had been adduced in the earlier proceedings when it formed the basis of the trial judge’s ruling. It further argued that the application by the prosecutor “in truth constitutes an appeal against the terminating ruling in 1999, at a date when no such proceeding was available or permitted”,²³ and that it was not intended by Parliament that section 78 should apply to evidence available at the original trial but ruled inadmissible.

3.22 The Court of Appeal found that the word “proceedings” was not defined or explained under Part 10, and interpreted it to mean the entire process that resulted in the original acquittal. It did not follow that “all evidence which was available to be deployed in the earlier proceedings must fall outside the ambit of the “new” evidence provision...[s]ubject to the interests of justice requirement found in section 79, evidence which was available to be used, but which was not used, may be “new” evidence for the purposes of section 78(2)”.²⁴

3.23 The court concluded that that “section 78(2) is concerned with evidence – that is admissible evidence capable of being deployed against a defendant in accordance with the rules of admissibility”.²⁵ Critically, the Court stated:

Evidence sought to be advanced by the Crown at the original trial was undoubtedly available to be considered by the trial judge when he was asked to decide whether the evidence could or could not be adduced in, or should or should be excluded, the evidence to be placed before the jury. Without considering it, he could not provide a proper ruling on the question. However, once the judge ruled that it should not be admitted at the respondent’s trial, notwithstanding that it was available for his consideration, and indeed that he considered it, it was not, in our judgment, “adduced” in the proceedings ...²⁶

In the present case the judge ruled (wrongly, as the House of Lords found) that crucial admissible evidence should not be admitted. His ruling was wrong. As a result this crucial evidence was not, and could not be, adduced by the Crown in the proceedings against the respondent. In our judgment, the evidence excluded by the Judge constitutes new evidence for the purposes of section 78(2) on the basis that it was never adduced in or brought forward for consideration as admissible evidence at the original trial...the mere fact that evidence was available at the original trial does not mean that it was adduced in those proceedings...²⁷

Extra judicial interpretations of R v B [2012] EWCA Crim 414

3.24 *R v B* has been referred to in support of the proposition that “adduced” in CARA means, or could be interpreted to mean, “admitted”.²⁸

22. *R v B* [2012] EWCA Crim 414 [5].

23. *R v B* [2012] EWCA Crim 414 [6].

24. *R v B* [2012] EWCA Crim 414 [8].

25. *R v B* [2012] EWCA Crim 414 [8].

26. *R v B* [2012] EWCA Crim 414 [9].

27. *R v B* [2012] EWCA Crim 414 [10, 12].

28. Allens, *Inquiry into Family Response to the Murders in Bowraville* (2014) Submission 19.

Table 3.2: Interpretations of the authority in *R v B*

Source	Proposition
Emeritus Professor of Law and Director of the Centre for Criminal Law UCL Ian Dennis: <i>Quashing Acquittals Applying the New and Compelling Evidence Exception to Double Jeopardy</i> [2014] <i>Criminal Law Review.</i> , 4, 247.	Evidence which was available to be used at the trial, but which was not used, could still be "new" evidence for the purposes of s.78(2). The question was simply whether the evidence was "adduced" in the proceedings in which the person was acquitted. In the court's view, this meant <i>adduced before the jury</i> , which did not include consideration by the trial judge for the purpose of a ruling on admissibility.
Archbold, <i>Criminal Pleading, Evidence and Practice</i> (2015) Chapter 7, Part VI Retrial for Serious Offences, Section B, Application for retrial.	This case shows that "evidence that was available to be used in earlier proceedings, but which was not in fact used (here, because it was wrongly ruled by the trial judge to have been inadmissible), can constitute "new" evidence for these purposes".
Sarah Elliot QC, <i>Insight</i> (2013) Westlaw UK.	This case is authority for the notion that evidence which was available but not used may still be new evidence for the purposes of s78: "DNA evidence wrongly excluded by the Judge at the original trial was never adduced as admissible evidence and therefore could constitute new evidence, subject to the interests of justice test".

3.25 There are other possibilities:

- The lack of an interlocutory appeal right on the "terminating ruling" meant that the court was more receptive to the prosecution's argument.
- The judgment may indicate that evidence *wrongly excluded* from the first trial cannot be defined as evidence that was previously "adduced" for the purposes of s78. On this construction, it does not matter when the evidence was excluded in the original proceedings – its erroneous exclusion from proceedings has resulted in the evidence not being [legitimately] adduced.
- It could also be argued that the judgment is authority for the proposition that evidence inadmissible due to a technical fault (in the way it was collected or stored in contravention of a statutory requirement) but not due to a fault in the substance of the evidence (i.e. because it failed to meet an evidential standard) is evidence that has not been adduced. Under this construction, where the court rejects evidence without considering the substance of the evidence, the evidence was not "adduced" for the purposes of s 78(2). This view is supported in the findings of *R v H*, discussed below, where the Court distinguished between an "application to adduce" evidence and adducing evidence.

3.26 It may be that the Court of Appeal in *R v B* considered that it was appropriate to apply the provision flexibly to correct a perceived previous injustice.

3.27 This decision in *R v B* is unique among the case law in England and Wales because the Court may have been acting to correct an erroneous "terminating ruling". Once the provision permitting prosecution interlocutory appeals commences in England and Wales,²⁹ it will be unlikely that a case with a similar background will come before the Court for an application to retrial.

29. *Criminal Justice Act 2003* (England and Wales) s 62.

3. Jurisdictional Comparison

***R v H* [2014] EWCA Crim 1816**

- 3.28 This matter concerned an application for retrial after an acquittal for the rape and sexual assault of a Romanian sex worker in 2013. At the initial trial the victim did not appear at the trial, and an application for an exception to the hearsay rule to admit the victim's statements into evidence was rejected by the court.
- 3.29 After the trial, further evidence of similar attacks by the accused came to light and the victim subsequently became available to police/prosecutors. The prosecution argued that the evidence of the victim would be "new" because it was not adduced in the previous trial "in the sense that it was not put forward in evidence". "Adduced", it was contended, relates to whether the particular evidence was "put forward in evidence" in the proceedings. The argument continued that the service of papers and the hearsay application represented what lawyers would consider to be an "application to adduce" rather than evidence that was "adduced".
- 3.30 The defence argued that the victim's evidence was adduced in the original trial because "adduced" should take its ordinary meaning, which is "something which is brought forward for consideration".³⁰ The defence further supported their argument by observing that s 62(8) of the same Act referred to evidence being "adduced" when it is tendered into evidence.
- 3.31 In this case, the Court considered that Part 10 of the Act's intended construction supported the arguments of the prosecution. The Court did not refer to *R v B* in its judgment.

***R v Dobson* [2011] EWCA Crim 1255**

- 3.32 This matter concerned the high-profile 1993 murder of Stephen Lawrence. It is widely acknowledged that the police investigation following the murder was inadequate, and there were evidential issues in the trial. Video evidence had been collected, but was considered inadmissible by the Crown Prosecution Service (CPS). DNA evidence was also inconclusive. During the course of the original prosecution, the judge ruled that identification evidence was inadmissible and there was insufficient evidence to justify the continuation of the prosecution. The jury was directed to acquit the defendants.
- 3.33 The prosecution sought an order to quash the acquittal of one of the original defendants and order a retrial under s 76, with which another defendant (not a part of the original prosecution) should be joined.
- 3.34 Scientific evidence collected using new techniques in relation to clothing worn by the defendant was the "critical feature" in the application. The Court needed to determine whether the difficulties in the investigative process should lead the court to doubt the reliability of the DNA findings, and whether the history of incompetence impacted upon the "interests of justice" question – particularly whether the absence of this new evidence from the first trial resulted from investigative failings.³¹

30. *R v H* [2014] EWCA Crim 1816 [20].

31. *R v Dobson* [2011] EWCA Crim 1255 [40].

- 3.35 The Court granted the application to quash the acquittal and a retrial was ordered. The court did not consider whether the evidence, as available in form at the time of trial, was new. Under the advanced scientific techniques, it was assumed to be new.

R v A [2008] EWCA Crim 2908

- 3.36 In this case the prosecution sought an order to quash an acquittal and to reopen the prosecution based on new propensity evidence. The defendant had been acquitted in 2004 on two counts of indecent assault and one count of rape. The victim was 15 years old.

- 3.37 After the acquittal new tendency evidence came to light that demonstrated a history/pattern of child sexual assault on the part of the defendant, including evidence from various other complainants. The Court considered that the evidence of the complainants in the other cases was “new” evidence, although it did not directly connect to the “qualifying offence”.

- 3.38 In a 2014 article, legal academic Ian Dennis notes that this case meant that under s 78(2):

“evidence” means any relevant and admissible evidence; it does not have to be “direct” evidence that the defendant committed the offence of which he or she was acquitted.³²

- 3.39 This decision provides some support for the view that similar fact evidence of the commission by the defendant of *other* offences comes within the section.³³

Western Australia

- 3.40 The terms of the review require that consideration be given to the merit of replacing s 102 of CARA with s 46I of the *Criminal Appeals Act 2004 (WA) (CAA)*.

- 3.41 In this section, consideration is given to the WA provision.

Criminal Appeals Act 2004 (WA) s 46I

- 3.42 The WA provision commenced in 2012.³⁴ It departs from NSW and other jurisdictions in its framing of the exceptions.

32. I Dennis, “Quashing Acquittals Applying the New and Compelling Evidence Exception to Double Jeopardy” [2014] *Criminal Law Review* 247, 253.

33. See, for example, *R v A [2008] EWCA Crim 2908*; *R v C [2009] EWCA Crim 633*.

34. *Criminal Appeals Amendment (Double Jeopardy) Act 2012(WA) s 4*.

3. Jurisdictional Comparison

S 46I Meaning of fresh and compelling evidence

(1) For the purposes of section 46H, evidence is fresh in relation to the new charge if:

a) despite the exercise of reasonable diligence by those who investigated offence A, it was not and could not have been made available to the prosecutor in trial A; or

b) it was available to the prosecutor in trial A but was not and could not have been adduced in it.

(2) For the purposes of section 46H, evidence is compelling in relation to the new charge if, in the context of the issues in dispute in trial A, it is highly probative of the new charge.

(3) For the purposes of this section, it is irrelevant whether the evidence being considered by the Court of Appeal would have been admissible in trial A against the acquitted accused.

3.43 It was suggested by the Standing Committee on Law and Justice that the only class of evidence that s 46I(1)(b) could be referring to was evidence that had been available yet was rejected by the trial judge, and that, as a consequence, "adduced" in this provision was to be read as "admitted".³⁵ That the provision uses "adduced" in s 46I(1)(b) and "admissible" in s 46I(3) was not seen to be significant. Rather s 46I(3) was suggested to be a separate consideration: "a legislative statement to the effect that even if the evidence might have been inadmissible at the initial trial (due to more restrictive evidentiary provisions) this will not prevent it from being considered fresh evidence in any further proceedings".³⁶

35. NSW, Standing Committee on Law and Justice, *The Family Response to the Murders in Bowraville*, Report 55 (2014) [6.32], [6.33].

36. NSW, Standing Committee on Law and Justice, *The Family Response to the Murders in Bowraville*, Report 55 (2014) [6.34].

4. The options for amending s 102 of CARA

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- 4.1 Three possible options for amendment have been suggested. The first would involve an amendment to either define “adduced” to mean “admitted”, or to replace “adduced with “admitted”. The second would be to amend the section so as to expressly extend s 102 to encompass the case where, as a result of a change in the law, previously inadmissible evidence becomes admissible. The third option would be to adopt the provision in force in WA.
- 4.2 In this chapter I first consider the legal or other ramifications of (re)defining “adduced” to embrace “admitted” in s 102 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA). I identify the effect that characterising “adduced” as “admitted” may have in this context, principally that it would expand the categories of case that may be eligible for a retrial.
- 4.3 Next I consider the option of amending CARA so that previously inadmissible evidence rendered admissible by a change of law could constitute “fresh” evidence for the purposes of s 102, and the potential consequences of adopting that option.
- 4.4 Finally, I consider the statutory exception to double jeopardy in force in WA.

Option 1: Redefining or replacing “adduced” with “admitted”

- 4.5 There are two ways to ensure that “adduced” is defined as “admitted”. The first would be to add a definition to that effect in the legislation. The second would be to amend the provision so that “adduced” was replaced with “admitted”.
- 4.6 If amended in the latter way, s 102 would appear as:

102 Fresh and compelling evidence—meaning

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

(2) Evidence is fresh if:

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

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

(3) Evidence is compelling if:

(a) it is reliable, and

(b) it is substantial, and

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

(4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

4.7 An amendment of this type would permit any evidence not admitted at trial to be considered "fresh" evidence for the purposes of Part 8 of CARA, so long as the additional threshold tests of compelling evidence and interests of justice were met,¹ and the evidence was admissible in accordance with current evidentiary laws. Evidence put before the trial judge but rejected could be considered "fresh" evidence, as could evidence existing at the time of trial that was not adduced or disclosed (as long as the exercise of due diligence is apparent).

4.8 The issues are canvassed below.

Eroding double jeopardy

4.9 The statutory exceptions to double jeopardy were cautiously introduced with safeguards to minimise the eroding of the double jeopardy rule in NSW.² The key arguments against replacing "adduced" with "admitted" in s 102 of CARA are concerned with further erosion of the double jeopardy rule by legislative provision and include:

- The amendment would expand the category of case which could come into the purview of Part 8 of CARA.
- It could encourage applications for a retrial where very little had changed about the case.
- It could be used strategically where an appeal from an acquittal is not available.

1. *Crimes (Appeal and Review) Act 2001* (NSW) s 102(3), s 104.

2. NSW, *Parliamentary Debates*, Legislative Assembly, 19 September 2006, 1812.

4. The Options for Amending s 102 of CARA

4.10 Underpinning these arguments is the concern that these outcomes will impact on the finality of prosecutions, leaving an acquitted person uncertain that the prosecution has ceased, and potentially further victimising relatives of a deceased victim through re-agitation of the case.

4.11 There is a counter argument. In England and Wales – where the cognate legislation covers over 50 offences³ - there were only 13 applications to quash an acquittal under that legislation between 2006 and 2014.⁴ Of these nine were successful. The Court of Appeal has interpreted “adduced” flexibly, so that “new” evidence can include evidence produced in an “application to adduce”⁵ or evidence that had previously (incorrectly) been ruled inadmissible.⁶ This has not appeared to have any significant bearing on the number of applications before the court.

Flow on effect with other legislative provisions and criminal procedure

4.12 Changing the definition of “fresh” in CARA so that “adduced” is replaced with “admitted” could impact upon the definition of “fresh” as adopted in conviction (and sentence) appeals.

Fresh evidence is evidence not available at trial for appeals on conviction

4.13 Conviction appeals are available for defendants across jurisdictions. A person convicted of an offence on indictment can appeal that conviction under the *Criminal Appeal Act 1912* (NSW) (CCA) on a question of law, or with leave of the Court of Criminal Appeal, on any grounds that appear to be a sufficient ground of appeal.⁷

4.14 The grounds for an appeal against conviction are:

The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.⁸

4.15 The “miscarriage of justice” ground requires the court to examine whether there has been a miscarriage of justice on any other ground. This encompasses many sets of circumstances and includes when there has been a departure from the proper conduct of a trial and instances where there has been no irregularity, for example,

3. NSW legislation refers only to offences that generate a maximum life sentence.

4. M McMahon, “Retrials of Persons Acquitted of Indictable Offences in England and Australia: Exceptions to the Rule Against Double Jeopardy” (2014) 38 *Criminal Law Journal* 159, 173-174.

5. *R v H* [2014] EWCA Crim 1816.

6. *R v B* [2012] EWCA Crim 414.

7. *Criminal Appeal Act 1912* (NSW) s 5(1).

8. *Criminal Appeal Act 1912* (NSW) s 6(1).

where the ground relies on the discovery of fresh evidence that was not available at the trial, or where counsel failed to call or elicit evidence.⁹

- 4.16 “Fresh” evidence in regards to criminal appeals is currently understood as evidence not available at the time of trial. It has been differentiated from “new” evidence on those grounds. This interpretation has been carried across to the retrial provisions of CARA. Changing the definition so that “fresh” can encompass evidence that was tendered at trial brings “fresh” closer to “new”. This may inadvertently broaden the type of matters that could support an appeal against conviction.

“Adduced” and “admitted” have ordinary meanings in the Evidence Act 1995

- 4.17 Including a definition of “adduced” so that it means “admitted” in CARA could impact upon the *Evidence Act 1995* (NSW), where “adduced” is currently used to mean something other than admitted. The *Evidence Act 1995* (NSW) uses the terms “adduced”, “admitted” and “used” to indicate different stages of entering evidence. “Adduced” is not defined in the *Evidence Act 1995* (NSW), but section 137 states:

In a criminal proceeding, the court *must refuse to admit evidence adduced by the prosecutor* if its probative value is outweighed by the danger of unfair prejudice to the defendant.

- 4.18 This indicates that “adduced” means evidence that is tendered to the court, from which the court can either admit and use or reject the evidence.¹⁰
- 4.19 Any changes to the definition of “fresh” in s 102 of CARA would need to be confined to that Act so to not disrupt the definitions or understandings already in place, particularly in the *Evidence Act 1995*.

Interlocutory appeals

- 4.20 An amendment defining/replacing “adduced” with “admitted” needs to be considered in the context of the legislation permitting interlocutory appeals. Currently in NSW the Director of Public Prosecutions (DPP) and the Attorney General can appeal against decisions or rulings on the admissibility of evidence where the decision or ruling eliminates or substantially weakens the prosecution’s case.¹¹ The evidence that is the subject matter of an interlocutory appeal is extremely unlikely to be considered “fresh” evidence under the existing CARA framework.
- 4.21 An amendment that only excludes admitted evidence from the purview of “fresh” evidence could indirectly impact on the interlocutory appeal regime. Under an amendment of the kind discussed, two scenarios could arise for consideration. First, whether evidence that was ruled inadmissible and was then the subject of an unsuccessful prosecution interlocutory appeal could be considered “fresh” evidence. Second, whether evidence ruled inadmissible and not appealed by the prosecution when an appeal was available to them could be considered “fresh” evidence. In both cases, the evidence is ruled inadmissible, and caution should be employed so

9. *TKWJ v R* [2002] HCA 46; 212 CLR 124 [29] (Gaudron J); *Nudd v R* [2006] HCA 9; 162 A Crim R 301 [24] (Gummow and Hayne JJ).

10. *R v Zhang* [2005] NSWCCA 437; 158 A Crim R 504 [38].

11. *Criminal Appeal Act 1912* (NSW) s 5F(3A); see para [2.14]-[2.17].

4. The Options for Amending s 102 of CARA

that an amendment does not provide another chance to effectively “appeal” admissibility under the double jeopardy exceptions.

Option 2: Broadening the scope of s 102

Critical to this review is a consideration of the second option and the merits of expressly broadening the scope of s 102 of CARA to enable a retrial where a change of the law renders previously inadmissible evidence admissible at a later date. A possible amendment to this effect is reflected in the Bill recently introduced by Mr David Shoebridge MLC, which is extracted at Appendix E.

- 4.22 Below I examine whether this is already permitted under the current legislation. Arguments for and against any statutory amendment that would produce this outcome are presented.

Is this option already captured in legislation?

- 4.23 It has been argued in NSW that there is no need for the amendment as the option is already advanced through the combination of s 102(2) and s 102(4) of CARA:

102 Fresh and compelling evidence—meaning

...

(2) Evidence is fresh if:

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

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

....

(4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

- 4.24 The NSW provision has not been judicially considered, and there is little in terms of an explanation of the intended operation of s 102(4). Some assistance can be gained by reference to the cognate provision in England and Wales and to the circumstances in which s 102 came to be enacted in its current form.

The *Criminal Justice Act 2003* (England and Wales)

- 4.25 Section 102(4) of CARA was derived from Part 10 of the *Criminal Justice Act 2003* (England and Wales) (CJA), which is stated in different terms:

78 New and compelling evidence.

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

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

4.26 In 2003, the NSW Parliament reproduced the CJA provision in a Consultation Draft Bill on the double jeopardy exceptions.¹² This Bill was comprehensively reviewed by Acting Justice Jane Mathews, who considered that the reproduced provision was

intended to exclude from the purview of 'fresh evidence' any evidence which was not introduced in the earlier proceedings because it was, or was considered to be, inadmissible.¹³

4.27 This interpretation aligns the CJA provision with the recommendations of the Law Commission of England and Wales in the Commission's 2001 report on double jeopardy.¹⁴ In that report, the Law Commission expressed concern that permitting evidence inadmissible in the first trial to become admissible through a change in the law may amount to a situation where the law is changed merely to secure a second trial. The Law Commission was emphatic in its recommendation that it should not be possible to apply for a retrial on the basis of evidence which was in the possession of the prosecution at the time of the acquittal but could not be adduced because it was inadmissible, even if it would now be admissible because of a change of law.¹⁵

4.28 However, the drafting of s 78(5) of the CJA left open the question whether it embraces evidence that was previously inadmissible but would now be admissible due to a change in law. There are no cases directly on point.

4.29 There are two interpretations:

- i) The subsection permits evidence that was available but previously inadmissible to ground an application for a new trial.
- ii) The second is more restrictive. It deals only with the question of admissibility at a retrial once fresh evidence is found to exist, and applies the current evidentiary rules to that evidence.

4.30 The House of Lords debates seemed to have adopted both interpretations. First, it was stated that s 78(5) could operate

to ensure that any new evidence is assessed in accordance with current rules and standards of evidence and that in any potential retrial, those standards and rules of evidence would apply. Evidence which is otherwise new and compelling

12. Consultation draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW).

13. J Mathews, *Advice to the Attorney General: Safeguards in the Relation to Proposed Double Jeopardy Legislation* (2003) 9.

14. England and Wales, Law Commission, *Double Jeopardy and Prosecution Appeals*, Report 267 (2001).

15. England and Wales, Law Commission, *Double Jeopardy and Prosecution Appeals*, Report 267 (2001) [4.94] Recommendation 6.

4. The Options for Amending s 102 of CARA

would not be excluded from consideration of the court solely because it would not have been admissible at some previous date.¹⁶

4.31 This would appear to reflect the second of the interpretations noted above. However, later in the debate it was asserted that the provision takes “two bites of the cherry – what was available before is not new in the sense that I have described ... it was there but it was not admissible under the then rules. It now becomes new, it would appear, because the rules have been changed”.¹⁷ This would appear to support the first of the interpretations noted above.

4.32 A 2008 academic article also appears to take the first view. Here, author David Hamer,¹⁸ posed:

A more interesting question is whether evidence is “fresh” if it was inadmissible at trial but is subsequently made admissible by a change in evidence law....Poor drafting leaves it unclear which position was adopted in the CJA. It provides that “it is irrelevant whether any evidence would have been admissible in earlier proceedings”. This suggests that the evidence would be “new” since it “was not adduced” at the original trial.¹⁹

4.33 The second interpretation prevails in the commentary and the case law. In *R v A* the Court of Appeal stated:

It is perhaps worth noting in passing that the effect of section 78(5) is that the admissibility of evidence in any re-trial consequent on a successful application will be decided in accordance with the rules of evidence which apply at the date of the hearing of the application rather than the rules in force at the date of the original trial.²⁰

4.34 The Hong Kong Law Reform Commission took a firm position and noted: “There is a clear difference between a case where the evidence was already available but inadmissible (by reason of the rules of evidence prevailing at the time) at the time of the original trial ... and a case where the evidence was not in the hands of the prosecution at all at the original trial (as provided under section 78(5))”.²¹ The Hong Kong Law Reform Commission considers s 78(5) to encompass only newly-available evidence that *would have been* inadmissible at trial but is now, for whatever reason, admissible.

16. United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, vol 651, col 1085. [emphasis added].

17. United Kingdom, *Parliamentary Debates*, House of Lords, 17 July 2003, vol 651, col 1086.

18. Senior Lecturer, TC Beirne School of Law University of Queensland.

19. D Hamer, “The (Dys)Functionality of Double Jeopardy Reform In Queensland” (2008) 19 *Public Law Review* 5, 15.

20. *R v A* [2008] EWCA Crim 2908 [33].

21. Hong Kong, Law Reform Commission, *Double Jeopardy*, Report (2012) [3.71].

Comparing the relevant provisions of the CJA to CARA

4.35 The CJA provision is structured differently to s 102(5) of CARA.

Table 4.1: Comparison of relevant provisions England and Wales with NSW

<i>Criminal Justice Act 2003 (England and Wales)</i> s 78(5)	<i>Crimes (Appeal and Review) Act 2001 (NSW)</i> s 102(5)
For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person	Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

4.36 At first glance, the sections appear to have a similar structure and intent. However, there are some factors that point strongly in favour of the CARA provision reflecting the second of the two interpretations mentioned above.

The impact of the fresh/new dichotomy

4.37 As previously discussed, NSW intentionally used the term “fresh” in CARA. With regards to appeals on convictions, “fresh” has been interpreted to mean evidence that could not have been obtained with reasonable diligence for use at the original trial.²² There is no reason to assume that the meaning is altered in prosecution applications for a retrial on acquittal. This assertion is strengthened by s 102(2)(b), which prescribes that evidence is fresh if it could not have been adduced in those proceedings with the exercise of reasonable diligence.

4.38 The adoption of “fresh” by the NSW legislature leads to a conclusion that it is the second construction rather than the first that was intended. As does the use of the phrase “is not precluded” in s 102(4) of CARA, when compared to the word “irrelevant” in s 78(5) of the CJA, indicating a temporal connection with a potential retrial so far as current admissibility is concerned.

The Model Criminal Code Officers Committee

4.39 In 2003, the MCCOC produced a discussion paper that included a draft codification of the general principles of double jeopardy and exceptions that may apply.²³ The relevant section of the MCCOC draft code mirrored s 78(5) of the CJA.²⁴ The MCCOC, however, explicitly intended for the provision to operate so that recent admissibility **will not** deem evidence to be “fresh”. This statutory intention, MCCOC asserts, is inherent in the adoption of the term “fresh” over “new” (see above).

22. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 76; *Akins v National Australia Bank* (1994) 34 NSWLR 155, 160; *Mickelberg v R* (1989) 167 CLR 259.

23. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 129-139.

24. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 108.

4. The Options for Amending s 102 of CARA

4.40 The MCCOC notes:

The court must be satisfied that the fresh evidence was not available to be presented at the first trial and that the investigation was conducted with due diligence – and a change in legal rules of inadmissibility since the acquittal allowing the evidence will not make that evidence fresh evidence for these purposes.²⁵

4.41 The MCCOC provides an example:

Suppose that an accused is acquitted on a charge (it is conjectured, in part) because certain evidence of a scientific nature is ruled inadmissible on the grounds that there is no ascertainable body of scientific opinion upon which expert evidence can be founded. Suppose also that, a year later, another court rules that there is. The fact of that ruling does not make the rejected evidence “fresh evidence”.²⁶

The option is not already captured

4.42 Having regard to the legislative history, and the potential impact of the second option, I am not persuaded that option 2 is captured by s 102 as currently drafted. Whether this option should be implemented is further considered in the final chapter of this report.

“Change in law” is differentiated from “change in technology”

4.43 Double jeopardy exceptions were introduced specifically to address new evidence that may be produced by DNA technology.²⁷ It is widely accepted that this means newly-discovered evidence that can be tested for DNA, and previously submitted or attained evidence that can now be tested using new or better forensic technologies.²⁸ In the second reading speech of the implementing Bill, the Premier for NSW stated that the provisions will operate where “...developments in forensic technology will reveal new evidence or new conclusions to be drawn from existing evidence. In such cases, there may well be grounds to bring the accused back to trial...”²⁹

4.44 It is the outcome or output of the DNA testing or other forensic investigative methodology which produces the “fresh” evidence, not the actual article that is tested (which may be old evidence). In regards to Part 8 of CARA, it is of no

25. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 75.

26. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 75 footnote 219.

27. NSW, *Parliamentary Debates*, Legislative Assembly, 19 September 2006, 1811.

28. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 77; NSW, *Parliamentary Debates*, Legislative Assembly, 19 September 2006, 1811; England and Wales, Law Commission, *Double Jeopardy and Prosecution Appeals*, Report 267 (2001) [1.5]; *R v Dobson* [2011] EWCA Crim 1255.

29. NSW, *Parliamentary Debates*, Legislative Assembly, 19 September 2006, 1812.

consequence whether or when the article that is newly tested was attained, adduced or admitted.³⁰ If the article can only be tested in a new way that is now available (and was not simply over-looked at the time of trial), it is likely to constitute “fresh” evidence.³¹ DNA evidence, like other “fresh” evidence must also be compelling evidence, and the court must find that it is in the interests of justice to quash the acquittal.³²

Option 3: Adopt the WA provision

- 4.45 The WA provision, s46I of the *Criminal Appeals Act 2004 (WA)* (CAA) is presented at para 3.42 of this report. The focus of which is s 46I(1)(b), which prescribes that evidence can be fresh if it was available to prosecutor in the original trial but was not and could not have been adduced in it.
- 4.46 The second reading speech and explanatory memorandum to the WA provision does not acknowledge the departure from NSW and other Australian jurisdictions taken by the CAA, nor is any rationale for this departure articulated.

Table 4.2: Comparison between s 46I CAA and s 102 CARA

Criminal Appeals Act 2004 (WA)	Crimes (Appeal and Review) Act 2001 (NSW)
<p>Section 46I - meaning of fresh and compelling evidence</p> <p>(1) For the purposes of section 46H, evidence is fresh in relation to the new charge if:</p> <p>a) despite the exercise of reasonable diligence by those who investigated offence A, it was not and could not have been made available to the prosecutor in trial A; or</p> <p>b) it was available to the prosecutor in trial A but was not and could not have been adduced in it. ...</p> <p>(3) For the purposes of this section, it is irrelevant whether the evidence being considered by the Court of Appeal would have been admissible in trial A against the acquitted accused.</p>	<p>Section 102 - fresh and compelling evidence - meaning</p> <p>...</p> <p>(2) Evidence is fresh if:</p> <p>(a) it was not adduced in the proceedings in which the person was acquitted, and</p> <p>(b) it could not have been adduced in the those proceedings with the exercise of reasonable diligence</p> <p>...</p> <p>(4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.</p>

30. See for example, *R v Dobson* [2011] EWCA Crim 1255.

31. Cf. K Burton, “Reform of the Double Jeopardy Rule on the Basis of Fresh and Compelling DNA Evidence in NSW and Queensland” (2004) 11 *James Cook University Law Review* 94. Burton argued that the definition of fresh could exclude new DNA results from old evidence. It is noted that this article was written before the cognate provisions in the UK were commenced. The author may form a different view now.

32. *Crimes (Appeal and Review) Act 2001 (NSW)* s 100–106.

4. The Options for Amending s 102 of CARA

Would the WA provision operate differently from the NSW provision?

- 4.47 There has been no judicial consideration in WA of s 46I or in NSW of s 102. This makes comparison of the operation of the provisions extremely difficult. Further, there is no available rationale for the departure in WA.
- 4.48 Whether the WA provision is more permissive than the NSW provision is arguable, for the following reasons:
- **Both provisions adopt the term “fresh”:** As discussed above, the term “fresh” has been intentionally adopted in Australian jurisdictions to restrict the purview of evidence that can be considered under the legislation. Particularly, “fresh” evidence is understood to be evidence that was not available at the time of the trial.
 - **The WA provision was drawn from the Model Criminal Code:** The draft code of the Model Criminal Code Officers Committee (MCCOC) - which was one of the models from which the WA provisions were drawn³³ - considered it necessary that the court be satisfied that the fresh evidence was *not* available to be presented at the first trial, and added that a change in legal rules of inadmissibility since the acquittal, allowing the evidence, will *not* deem inadmissible evidence fresh evidence for these purposes.³⁴
- 4.49 It may be that s 46I(1) was directed towards the situation where evidence was unavailable at the time of trial, or where it was withheld because it was assessed to be immaterial at the time of trial, but has now gained significance through technological advances or some other set of circumstances.

Interlocutory appeals in WA

- 4.50 In WA either party may appeal, with leave, against an order for or refusal of separate trials, and the prosecutor may also appeal against an adjournment.³⁵ Otherwise there is no apparent statutory right to appeal an interlocutory ruling on evidence admissibility. Possibly, s 46I(1)(b) was framed differently from the model criminal code provisions to cater for this omission.

33. WA, *Parliamentary Debates*, Legislative Assembly, 28 February 2012, 368.

34. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, Discussion Paper (2003) 75.

35. *Criminal Appeals Act 2004* (WA) s 24, s 26(1), s 26(3).

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5.1 Seven out of the 12 stakeholders who contributed to this review indicated strong opposition to amending s 102 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA) by way of either of the options identified in Chapter 4. Three stakeholders, including two Commonwealth agencies and the Supreme Court of NSW did not provide a view. Two directly advocated for change. This chapter outlines the key reasons against amendment as expressed by stakeholders, as well as the minority view in support of amendment.

Table 5.1: Stakeholder submissions received regarding amending s 102 of CARA

Stakeholders opposed to amendment of s 102	Stakeholders in support of amendment of s 102	Stakeholders that did not provide a view
01. The Office of the Director of Public Prosecutions	08. The NSW Police Force	10. The Commonwealth Director of Public Prosecutions
02. Legal Aid NSW	09. Allens (lawyers)	11. The Commonwealth Attorney General
03. NSW Public Defenders		12. The Supreme Court of NSW
04. NSW Bar Association		
05. The Law Society of NSW		
06. NSW Young Lawyers		
07. The District Court of NSW		

Reasons put forward against amendment

5.2 The stakeholders that are opposed to amending s 102 of CARA were generally of the view that any broadening of the statutory exceptions to double jeopardy would

further erode finality of prosecutions and reduce public confidence in the administration of justice.¹

5.3 I summarise the key arguments put forward in opposition below.

“Adduced” does not currently mean “admitted” in CARA

5.4 Stakeholders agreed with an interpretation of “adduced” in CARA as meaning the first step in the submission of evidence to the court.² The NSW Public Defenders proposed that parties adduce or lead evidence, and then evidentiary rules of exclusion operate to admit or exclude the evidence sought to be adduced.³ The Law Society of NSW observed that defining “adduced” as “admitted” is contrary to the ordinary meaning of the word, and noted that it was generally agreed that “adduced” evidence may or may not become “admitted” evidence, but evidence cannot be “admitted” without first being “adduced”.⁴

5.5 It was also noted by the Law Society that should “adduced” be defined as “admitted”, the prosecution may argue that the prosecutor was incorrect in his or her original assessment that the evidence was inadmissible or that the prosecutor argued for admissibility poorly, and that a retrial should be granted.⁵

5.6 Legal Aid NSW observed that if “adduced” was meant to mean “admitted” then s 102(4) would have no purpose.⁶

Amendment would expand the double jeopardy exceptions

5.7 The Office of the Director of Public Prosecutions (ODPP), the Law Society of NSW, the NSW Bar Association, and Legal Aid NSW pointed to the potential for an unintended increase in applications for retrials resulting from amendment to the provision.

5.8 The ODPP noted that the proposed changes represented a “significant departure from the current provision and would provide the foundation to greatly broaden the number of acquittals eligible for consideration”.⁷ The proposed amendments extend the grounds on which the prosecution could make an application under s 102. An amendment would allow the “prosecution to re-litigate issues on which the primary court had already ruled, whereas currently the prosecution is confined to evidence that was not or could not have been adduced in the initial proceedings”.⁸

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1. Office of the Director of Public Prosecutions, *Submission 01*, 3; Law Society of NSW, *Submission 06*, 1-3; Public Defenders, NSW, *Submission 04*, 2-3, 7; Legal Aid NSW, *Submission 02*, 1; Young Lawyers, *Submission 07*, 4.
 2. Office of the Director of Public Prosecutions, *Submission 01*; Law Society of NSW, *Submission 06*; Legal Aid NSW, *Submission 02*, 2.
 3. NSW Public Defenders, *Submission 04*, 5.
 4. The Law Society of NSW, *Submission 06*, 3.
 5. The Law Society of NSW, *Submission 06*, 3.
 6. Legal Aid NSW, *Submission 02*, 3.
 7. Office of the Director of Public Prosecutions, *Submission 01*, 2.
 8. Office of the Director of Public Prosecutions, *Submission 01*, 3.

5. Stakeholder Views

- 5.9 The concern regarding expansion of use was most pronounced when stakeholders discussed option 2, the proposal that previously unadmitted evidence could constitute “fresh” evidence following a change in law. The ODPF observed that the introduction of the *Evidence Act 1995* (NSW) would most likely amount to a change in law that would permit previously rejected evidence, or known evidence that was not adduced, to be “fresh” evidence under the proposed changes. So could each and every time the Court of Criminal Appeal applied different interpretations to provisions within the *Evidence Act*. The Law Society also noted that there are “innumerable ways that a change to the rules of evidence could result in ‘fresh’ evidence following such an amendment. By way of example, a change in approach by the Court of Criminal Appeal to admissibility of tendency evidence, or an amendment to the *Evidence Act 1995*, may result in previously inadmissible evidence becoming ‘fresh’ evidence”.⁹
- 5.10 The Law Society of NSW and Legal Aid NSW observed that defining “adduced” as “admitted” places the emphasis on the admissibility of evidence rather than the intended consequences of the discovery of genuine ‘fresh’ evidence”,¹⁰ stating that the “inevitable” consequence for life sentence offences would be to remove the finality of the verdict resulting in these matters becoming subject to continual review following any change in the law.¹¹
- 5.11 The NSW Public Defenders noted that if such an amendment was made
- ...prosecution evidence that was inadmissible in previous proceedings would have the extraordinary capacity to be regarded by the Court as ‘fresh’ evidence if amendments to the law of evidence later permitted its admission. This would have the worrying capacity to expand the narrow range of matters susceptible to a retrial. ...the term ‘admitted’ places the central focus of the question on the notion of the admissibility of evidence rather than the intended discovery of ‘fresh’ and compelling evidence which is the intended aim of the provision. If the suggested amendment was to occur, a person could be put to a second trial without any alteration in the available evidence at all.¹²
- 5.12 This, it argued, would be a “totally unacceptable and scandalous erosion of a fundamental human right”.¹³

Changes in law could be advanced for the purpose of a retrial

- 5.13 Stakeholders have expressed concern that allowing for a retrial on the basis of a change in evidence law could result in the legislature acting to “correct” a serious or high profile matter where the accused was otherwise acquitted by the court.
- 5.14 The Law Society of NSW contended that an amendment to allow fresh evidence on a change in law would result in pressure on the legislature to retrospectively change the law of evidence whenever there was an unpopular verdict in a high profile trial, and “changes in such circumstances would lead to unpredictable and undesirable

9. Law Society of NSW, *Submission 06*, 3.

10. Law Society of NSW, *Submission 06*, 3; Legal Aid NSW, *Submission 02*, 2.

11. The Law Society of NSW, *Submission 06*, 3; Legal Aid NSW, *Submission 02*, 3.

12. NSW Public Defenders, *Submission 04*, 5.

13. NSW Public Defenders, *Submission 04*, 7.

outcomes".¹⁴ Young Lawyers NSW and the NSW Public Defenders expressed a similar concern, with the Public Defenders noting that an amendment of this type may "encourage capricious changes to the laws of evidence to ensure the retrial of accused persons in notorious cases. Political expediency or forceful media campaigns could improperly influence law making".¹⁵

- 5.15 Legal Aid NSW considered it likely that repeated campaigns calling for legislative change in response to unfavourable evidentiary rulings in trials for very serious offences, and the politicising of the trial process would follow any amendment.¹⁶ The NSW Bar Association suggested the amendment could produce a "powerful incentive" to change the law of evidence adding, "...the danger of rushed and poorly considered changes to the law of evidence is obvious".¹⁷ On this point, Young Lawyers expressed concern that an amendment to s 102 of CARA would result in an "Evidence Act that has been constantly subjected to piecemeal amendments that a fair minded person may presume were made for reasons other than for the fair and efficient conduct of trials".¹⁸
- 5.16 The ODPP noted that expressly broadening the scope of the provision to enable a retrial where a change in the law renders the evidence admissible at a later date offends the legal principles against *ex post facto* criminal law, indicating that a change in evidence law after trial could amount to "inventing law to fit the facts after they have become known".¹⁹

The WA provision is not helpful

- 5.17 There was general agreement that the proposal to replace the NSW provision with the WA equivalent is "highly problematic"²⁰ and it was not supported.²¹ Reasons for this include:
- It is inconsistent with the model agreed by COAG, and differs considerably from the approach taken by NSW and England and Wales.²²
 - The WA provision is untested, so there is no directive as to its meaning, or obvious explanation as to why it differs from that in place in the other states.
 - If it is eventually interpreted to mean that evidence adduced but not admitted can be "fresh" evidence then, the Law Society argued, the same issues about poor argument and assessing of evidence as raised above [5.5] could apply.²³

14. The Law Society of NSW, *Submission 06*, 3.

15. NSW Public Defenders, *Submission 04*, 5.

16. Legal Aid NSW, *Submission 02*, 3, 5.

17. NSW Bar Association, *Submission 05*, 2.

18. NSW Young Lawyers, *Submission 07*, 6.

19. Citing *Polyukhovich v The Commonwealth* (1991) 72 CLR 501.

20. The Law Society of NSW, *Submission 06*, 4;

21. NSW Public Defenders, *Submission 04*, 6; Legal Aid NSW, *Submission 02*, 5; NSW Young Lawyers, *Submission 07*, 5.

22. Legal Aid NSW, *Submission 02*, 5.

23. The Law Society of NSW, *Submission 06*, 4.

5. Stakeholder Views

The legislative framework in England and Wales prohibits meaningful comparison

- 5.18 Stakeholders agreed that the English authorities are not instructive. They have a different legislative framework (including the use of the term “new” and the lack of an interlocutory appeal provision). This, it was suggested, influenced the court’s finding in *R v B*.²⁴

Existing legislation provides a proper balance

- 5.19 The majority of stakeholders agreed that the principles and protections provided by the doctrine of double jeopardy should not be further eroded by legislation. The NSW Bar Association stressed the importance of double jeopardy, stating that it “prevents harassment of an accused by multiple prosecutions, promotes certainty and finality in the law and judicial proceedings, and efficiency in the investigation and prosecution of crime”.²⁵ In the view of the Bar Association, the double jeopardy exceptions in CARA had struck an appropriate balance between the rights of the victim and the accused.²⁶ The ODPP agreed that the existing provision “strikes the appropriate balance between the principles of finality and the discovery of fresh evidence that would materially impact on the outcome of criminal proceedings”.²⁷
- 5.20 While continuing to oppose Part 8 of CARA, the Law Society considered that s 102, as currently drafted, “fully addresses the object of the legislation and should not be amended”.²⁸ In its current form the provision allows for the possibility of a retrial where there is compelling, fresh material, such as newly discovered DNA evidence.²⁹ Legal Aid NSW agreed that the current retrial after acquittal provisions achieve the policy purpose for which they were introduced. Legal Aid observed that understanding “adduced” to mean “tendered” properly adopts the intention of Parliament. It means that a retrial will only be available if there is compelling evidence which could not have been available to the prosecution with the exercise of due diligence. If it was available at the time of trial, it could have been adduced even if it was not admitted. This “meets the objective of the legislation in providing for a retrial only when there is evidence that was not available at the first trial. If the word ‘adduced’ is defined to mean ‘admitted’, the intention of the legislation would be subverted”.³⁰
- 5.21 Section 102 takes its place as part of a broader legislative regime. The ODPP drew attention to the operation of s 5F of the *Criminal Appeal Act 1912* (NSW), which, in

24. *R v B* [2012] EWCA Crim 414; Office of the Director of Public Prosecutions, *Submission 01*, 4; The Law Society of NSW, *Submission 06*, 4; NSW Public Defenders, *Submission 04*, 6; Legal Aid NSW, *Submission 02*, 4; NSW Young Lawyers, *Submission 07*, 5.

25. NSW Public Defenders, *Submission 04*, 1.

26. NSW Bar Association, *Submission 05*, 1.

27. Office of the Director of Public Prosecutions, *Submission 01*, 1.

28. The Law Society of NSW, *Submission 06*, 2; The NSW Public Defenders spoke in similar terms and noted that “Section 102 addresses the full object and purpose of the amending Act and needs no further amendment”: NSW Public Defenders, *Submission 04*, 4; Legal Aid NSW, *Submission 02*, 1.

29. The Law Society of NSW, *Submission 06*, 5; See also Legal Aid NSW, *Submission 02*, 1.

30. Legal Aid NSW, *Submission 02*, 2, 3.

the view of the ODPP and Legal Aid, already provides for an adequate avenue to appeal unfavourable rulings on evidential admissibility prior to trial. The operation of s 5F is unproblematic and consistent with the principles of finality and double jeopardy.³¹ Legal Aid NSW noted that, as the Crown already has the right to appeal against the exclusion of evidence under s 5F, there was never any intention that s 102 should allow a retrial where a person was acquitted because of wrongly excluded evidence³² - s 5F should be the avenue used in these circumstances.³³

- 5.22 It is also the view of the Chief Judge of the District Court of NSW that in circumstances where important evidence has not been admitted by the court, the Crown should use s 5F and not rely upon an application for retrial.³⁴

Other considerations

- **Amendment as proposed would provide rights to the prosecution not available to the accused:** The Law Society of NSW and the NSW Bar Association noted that any amendment to affect a retrial based on a change in law is inconsistent with defendants' rights at this time: In an appeal against conviction, a convicted person is not able to rely upon a change in the law following trial to overturn the conviction.³⁵
- **The current NSW provision provides for consistency of laws between States:** The NSW provision is consistent with COAG model, and the ODPP noted that, as a general proposition, it supported consistency of laws between the States.³⁶ The inconsistency of the WA provision from the COAG model and other states was cited by the Law Society of NSW as one reason not to adopt it.³⁷
- **Section 102 of CARA requires clarification to prevent alternative interpretations:** The Commonwealth DPP advised that they are generally supportive of amendments to legislation that remove any perceived uncertainty in the operation of such legislation. The Chief Judge of the District Court was of the view that the word "adduced" should be defined in s 102 so as to explicitly include evidence that was sought to be admitted.³⁸

Reasons put forward in support of amendment

- 5.23 Two stakeholders have indicated support for the amendments under review: the NSW Police Force (NSWPF) and Allens, the law firm that represented the families of the Bowraville victims in the hearings of the Standing Committee on Law and

31. Office of the Director of Public Prosecutions, *Submission 01*, 3

32. Legal Aid NSW, *Submission 02*, 2.

33. Legal Aid NSW, *Submission 02*, 3.

34. Submission, Chief Judge of the District Court, 1.

35. The Law Society of NSW, *Submission 06*, 3

36. Office of the Director of Public Prosecutions, *Submission 01*, 1.

37. The Law Society of NSW, *Submission 06*, 4; The NSW Public Defenders also raised the potential of any amendment to impact upon conviction appeals.

38. The Commonwealth Director of Public Prosecutions, *Submission 11*, 1; Chief Judge of the District Court, *Submission 08*, 1.

5. Stakeholder Views

Justice. It is the view of both groups that clarifying the definition would increase access to justice without resulting in any undue use of the provision.

5.24 The NSWPF strongly supported an amendment to replace or define “adduced” as “admitted”. The NSWPF advised that it intends to seek a retrial on the Bowraville murders to hear the three alleged murders together, on the strength of tendency and coincidence evidence.³⁹ The NSWPF submitted that the court should be able to consider and determine whether police acted with reasonable diligence at the time of the initial investigation, with reference to linguistic and cultural differences, different benchmarks for similar fact evidence, and the changing understanding of the nature of the case drawn from a long investigative period. This aspect of the submission did not identify a reason for amendment of s 102. Rather it focused on the reasonable diligence issue which would arise for consideration if s 102 was amended.

5.25 Further, it is the view of the NSWPF that amendment would:

- **Increase clarity:** the term “admitted” is readily defined and understood, and understanding “adduced” as “admitted” would give effect to Parliament’s intention when introducing the provision – that being to remove barriers to retrial in certain circumstances.⁴⁰
- **Not open the floodgates:** the provision “provides more than adequate safeguards to prevent such an influx”, including the requirement that evidence be fresh and compelling and that a retrial be in the interests of justice.
- **Apply to only a few matters:** the provision would continue to apply only to life sentence matters, including murder, aggravated sexual assault in company; sexual assault of a child under 10 years; and certain commercial quantity prohibited drug and plant offences.

5.26 Allens proposed that s 102 be amended to include the following definition:

For the purposes of this section, evidence is adduced when it is admitted into evidence.

5.27 This would contain the definition to s 102 of CARA, where it would operate to permit evidence that was previously inadmissible to become admissible (“fresh”) at a later time due to a change in the law of evidence. It could also permit untendered but available evidence to be “fresh” in some circumstances.⁴¹

5.28 Allens, like the NSWPF (and in direct contrast to Legal Aid NSW and others) contended that this would accurately reflect the intention of Parliament: it appropriately widens the ability, in extraordinary circumstances, for the courts to reconsider a serious offence.⁴²

5.29 In the view of Allens, this definition would not create an influx of matters. Matters will remain constrained because the rules of evidence rarely change, so finality of

39. NSW Police Force, *Submission 09*, 2.

40. NSW Police Force, *Submission 09*, 1.

41. Allens, *Submission 10*, 1.

42. Allens, *Submission 10*, 2.

prosecution would not be affected; and the legislation provides other safeguards, particularly the requirement of reasonable diligence. Allens noted:

Given the existence of these safeguards, it is difficult to see how defining adduced as "admitted" in s 102 of the CARA could significantly expand the circumstances in which a retrial can be ordered.⁴³

5.30 In support of the notion that, in this context, adduced is "admitted", Allens referred to the Court of Appeal cases of England and Wales *R v B* [2012] and *R v H* [2014].⁴⁴

43. Allens, *Submission 10*, 2.

44. *R v B* [2012] EWCA Crim 414 ; *R v H* [2014] EWCA Crim 1816; Allens, *Submission 10*, 2-3.

6. Conclusions

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- 6.1 Section 102 of the *Crimes (Appeal and Review) Act 2001 (NSW) (CARA)* currently prescribes that any evidence readily available or adduced at the time of trial cannot be considered “fresh” evidence for the purposes of an application to quash the acquittal. This definition of “fresh” aligns with its operation under the common law and in conviction appeals.
- 6.2 This review has been asked to assess the ramifications of widening the reach of s 102 through redefining the term “adduced” to expressly mean “admitted” or by explicitly broadening the provision to enable an application to quash an acquittal where a change in law renders evidence that was previously available but inadmissible to now be admissible.
- 6.3 The impetus to amend the provision has come from the set of circumstances specific to the Bowraville prosecutions, but any amendment will have broader implications. As I understand it, an amendment could clear the way for an application to quash an acquittal in three scenarios, namely where:
- (1) The court wrongly rejects admissible evidence and as a consequence the accused is acquitted.
 - (2) The prosecution had evidence that was available but chose not to tender it because it was assumed not to be of probative value or to be inadmissible, and the accused is acquitted. The significance of this evidence changes, and/or it later becomes admissible through a change in the law.
 - (3) Evidence is tendered to the court; the court correctly rejects it as inadmissible in the light of the current law. The accused is acquitted. The evidence becomes admissible at a later date as a result of a change in the law.
- 6.4 Under CARA, an application to quash the acquittal would be rejected in all three scenarios, except where new forensic technology applied to the previously available evidence reveals some significant fact that was previously unknown (for example, through retrieving DNA from a crime scene exhibit such as clothing). The existing provisions that permit an interlocutory appeal to be brought against any incorrect decision or ruling on the admissibility of evidence where the decision or ruling eliminates or substantially weakens the prosecution’s case is applicable to scenario

one.¹ Accordingly, the following discussion focuses on the consequences for scenarios two and three.

Option 1: Whether “adduced” in s 102 of CARA should be replaced by the word “admitted” or defined as “admitted”

- 6.5 For the reasons previously stated, I am satisfied that it was a deliberate choice when the legislation was introduced to confine fresh evidence to evidence arising through recent developments such as a post-acquittal confession, newly-discovered DNA evidence, or the emergence of an eyewitness whose existence was previously unknown. This corresponds with the selection of the word “adduced”, the natural meaning of which extends to evidence that was tendered or proffered to the court.
- 6.6 To redefine “adduced” as “admitted” or to replace it with the word “admitted” would require statutory amendment to s 102.
- 6.7 An amendment of this type (option 1) could enliven an application under s 102 in relation to the second and third of the three scenarios mentioned above:
- (2) The prosecution had evidence that was available but chose not to tender it because it was assumed not to be of probative value or to be inadmissible, and the accused is acquitted. The significance of this evidence changes, and/or it later becomes admissible through a change in the law.

As the evidence was not adduced by the prosecution (and hence not admitted by the court), it could be categorised as “fresh” evidence on an application to quash the acquittal thereby allowing the court to order a retrial, so long as it was shown that the prosecution acted with reasonable diligence.

- (3) Evidence is tendered to the court; the court rightly rejects it and deems it inadmissible. The accused is acquitted. The evidence becomes admissible at a later date as a result of a change in law.

As the evidence was not admitted by the court, the evidence could be categorised as “fresh” evidence on an application to quash the acquittal and order a retrial.

- 6.8 This does not mean a retrial will be ordered. There are further criteria that must be fulfilled: the offence type must attract a life sentence;² the evidence must be compelling;³ and it must be in the interests of justice to quash the acquittal.⁴ Nonetheless, stakeholders have raised serious concerns about widening the threshold of the fresh and compelling double jeopardy statutory exception. Undoubtedly, an amendment to this effect will expand the category of case that can come within the exception, and prevent some defendants (and victims) in life sentence offences from experiencing closure following an acquittal.

1. *Criminal Appeal Act 1912* (NSW) s 5F(3A), see para [2.14].

2. *Crimes (Appeal and Review) Act 2001* (NSW) s 100(1).

3. *Crimes (Appeal and Review) Act 2001* (NSW) s 100(1)(a), s 102(3).

4. *Crimes (Appeal and Review) Act 2001* (NSW) s 100(1)(b).

6. Conclusions

- 6.9 Stakeholders in support of this amendment point to the protections that the further criteria offer and the experience of England and Wales to highlight the low likelihood that an influx of applications to quash acquittals will follow the amendment.
- 6.10 Reviewing a provision that has not been used or judicially considered is a difficult task. The experience of England and Wales has limited application to NSW. In particular, it is noted that *R v B* was not concerned with the situation where previously inadmissible evidence was relied on in support of a retrial application. Rather the evidence in that case was previously admissible and its erroneous rejection denied the prosecution of a trial according to the then existing laws. I agree with stakeholders that the legislative framework and nuances of the English jurisdiction – particularly the lack of a right of interlocutory appeal where crucial evidence is rejected by the court – has diminished the usefulness for this review of the judgments of the Court of Appeal.
- 6.11 To review s 102 of CARA, I return to pure statutory interpretation and the adoption of first principles. In my view, widening the reach of the provision through amendment of the expression “adduced” would further encroach on the rule against double jeopardy, with the potential to negatively impact upon the finality of prosecutions and the authority of the courts.
- 6.12 It should not be overlooked that in a retrial the defendant could suffer from a forensic disadvantage resulting from the way in which it had conducted the first trial in its then knowledge of the prosecution case. This could impact on the application of a fair trial. Moreover, if a case is reopened many years later, evidence may have been lost or contaminated and witnesses may be unavailable. The full impact of that may not be apparent at the time when the s 102 application is determined. If that impact only became obvious during a retrial, it may become difficult - if not impossible - for any potential unfairness to the accused to be addressed. A stay of proceedings mid trial would risk further uncertainty and potentially undermine confidence in the administration of justice.

Conclusion

- 6.13 “Fresh” is well understood in the common law to mean evidence that was not previously available, and that could not have been tendered to the court at trial. “Adduced” in s 102 reflects this understanding. I am not convinced that there is any benefit to changing the definition, and I am alert to the disadvantages. On balance, I cannot recommend that s 102 of CARA be amended in accordance with option 1.
- 6.14 Having regard to the consensus that “adduced” means “tendered” or “proffered in evidence”, I do not consider that there is any need for it to be further defined.

Option 2: Whether “fresh” evidence in s 102 should expressly extend to evidence that was previously inadmissible but made admissible due to a later change in law

- 6.15 Commentators, unrelated to this review, have put forward arguments for and against option 2. These are outlined in the table below. The key argument against

the option is that it would open the possibility for a change in admissibility/evidence law to be brought about to address a specific case, most notably one where there was a degree of publicity and an unpopular acquittal.

Table 6.1: Arguments for and against option 2

Commentator	Arguments FOR permitting evidence previously inadmissible made admissible by a change in law to be "fresh" evidence	Arguments AGAINST permitting evidence previously inadmissible made admissible by a change in law to be "fresh" evidence
Scottish Law Commission, <i>Report on Double Jeopardy</i> , Report 218 (2009) [5.17] ⁵	The inadmissibility of a certain type of evidence supplies the clearest possible reason for the prosecution's failure to lead that evidence at the original trial, removing any suggestion that the prosecution acted without due diligence, or in an improper attempt to manipulate the trial process, by withholding that evidence.	Allowing 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.
<p>Law Commission of England and Wales, <i>Double Jeopardy: A Consultation Paper</i>, No 156 (1999) [5.47] (argument for)</p> <p>Law Commission of England and Wales, <i>Double Jeopardy and Prosecution Appeals</i>, Report 267 (2001) [4.94] (argument against)</p>	It is possible that evidence may become available ... that was inadmissible at the time of the first trial, and the law has changed to make it admissible. For example, a hearsay statement implicating the defendant, previously inadmissible under the rule against hearsay, might become admissible following a relaxation of that rule. In such a case there could obviously be no criticism of the prosecution's failure to adduce the evidence in the first trial. The situation is analogous to one where, at the time of the first trial the prosecution was aware of the existence of strong evidence, but was unable to find it; and in that case the exception for new evidence would clearly apply.	The law may be changed in order to secure a second trial. ... anyone arguing for a change in the law of evidence would be bound to point to the examples of cases in which the change would have been effective to secure a conviction; if the argument was successful and the law was changed, the 'example' case could be reopened.
Mr David Shoebridge, MP, Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015, Second Reading speech.	It will increase access to justice and the existing safeguards of the statute will prevent over or miss use.	

6.16 As noted earlier, I am firmly of the view that s 102(4) conveys a clear legislative intention that focuses its application only in relation to the admissibility at a retrial of newly emerged evidence. It seeks to do no more than to allow its admission at a new trial even though it may not have been admissible at the earlier trial, had it then been known.

6.17 There is little doubt that the proposed option 2 could operate to expand the category of evidence that could be considered "fresh". For the purposes of s 102, a "change in law" could encompass a judicial change in approach to a common law principle;⁶

5. The legislation that followed the Scottish Law Commission report explicitly disallowed evidence under the proposition from being "new" evidence: *Double Jeopardy Act 2011* (Scotland) s 4.

6. The terms of reference to this review refer specifically to a "change in law". I note that the Crimes (Appeal and Review) Amendment Bill (2015) introduced by MP Shoebridge has clarified this to be a "substantive legislative change in the laws of evidence" 4 June 2015 [1426].

6. Conclusions

an amendment to the *Evidence Act 1995* (NSW) or a judicial reinterpretation any provision of the Act.

- 6.18 Stakeholders have reflected the concerns of commentators by suggesting that a “change in law” amendment could incorporate evidence whose admissibility status was affected by the introduction of the *Evidence Act* in 1995. This has particular relevance in relation to the Bowraville cases, on the basis that the introduction in 1995 of the tendency and coincidence provisions of the *Evidence Act 1995* (NSW) could render the evidence deemed inadmissible under “similar fact” principles to be used in a retrial. However, such an amendment could have a much wider reach. For example, changes to evidentiary laws that extend the use to which a particular category of evidence can be put (e.g. complaint in cases of sexual assault), or to the rules of hearsay, could inadvertently produce “fresh” evidence for the purposes of s 102. I highlight just some possibilities below.

Table 6.2: Changes to the rules of evidence which may render previously inadmissible evidence admissible under the proposal.⁷

Admissibility rules affected by the introduction of legislation	Examples
<p>Changes to the scope of the hearsay rule and its exceptions</p> <p>The hearsay rule under s 59(1) of the <i>Evidence Act 1995</i> (NSW) only extends to intentional assertions by the maker of the representation. This means that an unintended implied assertion is not hearsay. This position contrasts with the common law position that existed prior to the <i>Evidence Act 1995</i> where such implied assertions were excluded.⁸</p>	<p>In the case of <i>Walton v R</i> the High Court held that evidence that a child answered the telephone by saying “Hello Daddy” was hearsay and therefore inadmissible as evidence of the identity of the caller. Under s 59(1), this evidence would generally not be defined as hearsay when used to prove the identity of the caller, because it is unlikely the child intended to assert the identity of the caller.⁹</p> <p>In <i>R v Clark</i> Heydon JA commented that s 72 (now s 66A), which provides an exception to the hearsay rule for evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person’s health, feelings, sensations, intention, knowledge or state of mind, was “significantly wider than the equivalent common law rules”. Evidence that the deceased (murder victim) had said to a witness that she intended to damage the appellant’s property and harass him it was a contemporaneous representation about the deceased’s intention and therefore the hearsay rule did not apply.¹⁰</p> <p>On Heydon JA’s view it may be that evidence that was previously inadmissible as hearsay under the common law rules about statements concerning the maker’s contemporaneous state of mind or emotion and <i>res gestae</i> may be admissible under s 66A of the <i>Evidence Act 1995</i> (NSW).</p>

7. I am grateful for the assistance of Ronan Casey for researching these examples.

8. *Wright v Doe* (1837) 7 Ad. & El. 313, 112 ER 488; *Walton v R* (1989) 166 CLR 283; *R v Clark* [2001] NSWCCA 494, 123 A Crim R 506.

9. Australian Law Reform Commission, *Uniform Evidence Law*, Report 102 (2005) [7.21].

10. *R v Clark* [2001] NSWCCA 494 [158].

Admissibility rules affected by the introduction of legislation	Examples
<p>Exceptions to the hearsay and opinion rules in relation to evidence of Aboriginal and Torres Strait Islander traditional laws and customs.</p> <p>The <i>Evidence Amendment Act 2007</i> (NSW) introduced exceptions to the hearsay and opinion rules in relation to evidence of Aboriginal and Torres Strait Islander traditional laws and customs. Under s 78A a member of an Aboriginal or Torres Strait Islander Group should not have to prove that he or she has specialised knowledge based on training, study or experience before being able to give opinion evidence about the traditional law or custom of his or her own group. Similarly, s 72 provides that the hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.</p>	<p>In recommending these exceptions the Australian Law Reform Commission (ALRC) noted that evidence of Aboriginal and Torres Strait Islander traditional laws and customs may be relevant to criminal law defences, including consent, duress, provocation and honest claim of right.</p> <p>For example, in <i>R v Judson</i>, a 1995 West Australian District Court case, the defence in a sexual assault case relied on evidence showing the conduct of the accused was consistent with the relevant traditional laws and customs in order to prove the complainant had consented or that the defendants held an honest belief she had consented. In <i>Lofy v R</i> [1999] NTSC 73, the Supreme Court of the Northern Territory held that it was proper to inform the jury that the conduct of the complainant constituted a grave breach of traditional laws and customs when assessing the gravity of provocation.¹¹</p>
<p>Admissibility of coincidence evidence.</p> <p>Under s 98 – s 101 of the <i>Evidence Act 1995</i> (NSW) coincidence evidence is admissible if notice has been given (unless the court has dispensed with the notice requirement or it is adduced to explain or contradict coincidence evidence adduced by another party), the evidence has significant probative value and the probative value of the evidence outweighs any prejudicial effect it may have on the defendant.</p>	<p>Under the common law coincidence evidence was only admissible if it 'possessed sufficient probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculcation of the accused in the offence charged'.¹²</p> <p>In <i>R v Ellis</i> the NSW Court of Criminal Appeal considered whether the common law test should be applied in determining the admissibility of tendency and coincidence evidence and held that only the less demanding test in s 101(2) should be applied.¹³ In declining special leave to appeal the decision the High Court indicated that it agreed with the decision of the Court of Criminal Appeal.¹⁴</p>

11. Australian Law Reform Commission t, *Evidence* (2005) [19.17], [19.18]

12. *Hoch v R* (1988) 165 CLR 292, 294; *Pfennig v R* (1995) 182 CLR 461, 481

13. *R v Ellis* (2003) 58 NSWLR 700 [2003] NSWCCA 319.

14. *Ellis v R* [2004] HCASL 488 (1 December 2004).

6. Conclusions

Admissibility rules affected by the introduction of legislation	Examples
<p>Changes to the test of competence under s 13 of the Evidence Act 1995 (NSW)</p> <p>The <i>Evidence Amendment Act 2007</i> (NSW) revised the general test of competence that witnesses must satisfy in order to give evidence.</p>	<p>Under the new general test for competence a person is not competent to give evidence if they do not have the capacity to understand a question about a fact or do not have the capacity to give an answer that can be understood to a question about a fact and that incapacity cannot be overcome. If the person is competent and has the capacity to understand that they are under an obligation to give truthful evidence they are competent to give sworn evidence, and if not they may give unsworn evidence. Even if the general test of competence is not satisfied in relation to one fact, the witness may be competent to give evidence about other facts, and a person who is not competent to give sworn evidence about a fact may provide unsworn evidence about that fact.</p> <p>As the then Parliamentary Secretary the Hon. Penny Sharpe noted in the second reading speech for the Bill, the purpose of the revised test is to "enhance participation of witnesses and to ensure that relevant information is before the court".¹⁵</p> <p>As a result, the court may hear evidence that would previously have been inadmissible as a consequence of the witness' lack of competence.</p>
<p>Clarification that expert evidence may include specialised knowledge of child development and child behaviour</p> <p>The <i>Evidence Amendment Act 2007</i> amended s 79 and inserted s 108C of the <i>Evidence Act 1995</i> (NSW) to clarify that a reference to 'specialised knowledge' in s 79(1) includes a reference to specialised knowledge of child development and child behaviour including specialised knowledge of the impact of sexual abuse on children and child behaviour during and following the abuse.</p>	<p>Expert opinion evidence on the development and behaviour of children can be relevant to a range of matters including the credibility of a child witness.</p> <p>The ALRC recommended that s 79 should be amended in this way in order to overcome the reluctance for the courts to admit expert evidence on child development and behaviour. A recent example of a case where expert evidence about the development and behaviour of children who have been victims of sexual offences was admitted is Victorian case of <i>MA v R</i> (equivalent provisions under the <i>Evidence Act</i> (Vic)).</p>
<p>Vulnerable witness provisions. Evidence by way of pre-recorded interview admissible.</p> <p>Under the <i>Criminal Procedure Act 1986</i> (NSW) electronically recorded interviews made by investigating officials with a witness who is a vulnerable person may be admitted into evidence as part of the person's evidence-in-chief, provided the accused is given notice and a reasonable opportunity to listen to/view the recording. The <i>Criminal Procedure Amendment (Vulnerable Persons) Act 2007</i> repealed the <i>Evidence (Children) Act 1997</i> and extended the scope of the provisions to cover persons with an intellectual impairment.</p>	<p>Prior to the enactment of these provisions in 1997 in relation to children and their extension in 2007, this type of recorded evidence may have been inadmissible.</p> <p>In addition, vulnerable persons may give evidence by closed circuit television in proceedings in which it is alleged that a person has committed a personal assault offence (which includes an offence under part 3 of the <i>Crimes Act 1900</i>).¹⁶</p>

15. NSW, Parliamentary Debates, Legislative Council, 24 October 2007, 3201.

16. Australian Law Reform Commission, *Evidence Report 102* (2005).

- 6.19 An amendment to this effect could also extend to evidence that was available but excluded by reason of restrictions on the admissibility of evidence gathered through certain surveillance or police interrogation techniques, or by reason of discretionary or other exclusions under s 135 of the *Evidence Act 1995*, if those restrictions or provisions were later relaxed by statutory amendment.
- 6.20 I also accept the legitimacy of stakeholders' concerns in relation to the possibility that Parliament may become pressured to amend the *Evidence Act 1995* to "correct" a high profile matter in which the defendant was acquitted. This could affect the independence of the judiciary and result in piecemeal legislation, diminishing the efficacy of the *Evidence Act 1995*. It could also undermine confidence in the system for the administration of justice if it was perceived that the goal posts could be moved to accommodate individual cases.
- 6.21 The perception of finality would also be affected by an amendment of this type. A person acquitted of a life sentence offence may forever remain attentive to any changes in evidence law that may impact upon his or her case. In this situation, victims may also find it difficult to heal and move on.

Conclusion

- 6.22 I am alert to the Bowraville situation and the potential impact that an amendment in accordance with option 2 may have on considering an application for a retrial under s 102. However, the term "fresh" was carefully considered and intentionally inserted into the provision because of its restrictions. An amendment would have ramifications beyond Bowraville, as it potentially paves the way to revive a number of acquittals where similar fact evidence was rejected. Accordingly, I cannot recommend that s 102 of CARA be amended in accordance with option 2.

Option 3: Whether the WA provision should be adopted by NSW

- 6.23 The double jeopardy statutory exception in WA provision remains a mystery. Stakeholders caution against adopting it because it is untested, and inconsistent with the COAG model and the approach taken in NSW. It is precisely due to the inconsistency that I have been directed to review it, but I am unable to make any sense of the reasons for the different construction or attempt to guess how the provision may be judicially considered.

Conclusion

- 6.24 For the reasons noted, I do not support the proposal to repeal s 102 of CARA and replace it with s46I of CAA (WA). I agree with stakeholders. Harmony across jurisdictions is desirable. The WA provision has an uncertain reach and, if there was to be a change, this option would be less clear than the other options and would risk giving rise to more uncertainty.

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Summary

- 6.25 There is strong opposition to amendment. As noted in the submissions summarised in Chapter 5 - which I consider to be persuasive - it is difficult to estimate the potential reach of amendment in the terms of options 1, 2 or 3. The disadvantages of amendment are clear, and include:
- Further encroaching on the rule against double jeopardy.
 - Departing from a carefully considered statutory exception to double jeopardy, confined to tainted acquittals and the introduction of fresh evidence.
 - The uncertainty of the reach of any of the proposed amendments to the statute.
 - Disrupting the harmony across statutes in the majority of jurisdictions.
 - Providing a channel for the legislature to change the law in response to an acquittal in a specific case (which could also fall foul of the concerns about retrospective application of legislation in relation to criminal cases).
 - Providing an option for some life sentence matters, where the accused was acquitted prior to the introduction of *the Evidence Act 1995* (NSW), to be re-tried more than 15 years after acquittal.
- 6.26 In my view, the damage to the principle of finality of prosecutions, and the uncertainty it would create outweighs its potential to aid justice. Accordingly, I am unable to recommend any amendment to s 102 of CARA at this time. I do, however, see value in Government conducting another review of the provision at some future date, giving time for applications under the provision to have been heard in NSW and other Australian jurisdictions.

Appendix A: SS 97, s98 and s101 of the *Evidence Act 1995* (NSW)

97 The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note. The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note. One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note. Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

99 Requirements for notices ...

...

100 Court may dispense with notice requirements

...

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

Appendix B: dictionary definition of terms

Category	Source	Term	Meaning
Ordinary meaning	The Shorter Oxford Dictionary (5 th ed)	Adduce	Bring forward for consideration; cite as proof or instance.
		Admit	Let in, permit (a person etc) entrance or access (to or into a place, office or position, class etc).
	The Macquarie Dictionary	Adduce	To bring forward in argument; cite as pertinent or conclusive: to adduce reasons.
		Admit	<ol style="list-style-type: none"> 1. to allow to enter; grant or afford entrance to: to admit a student to university 2. to give right or means of entrance to 3. to permit; allow 4. to permit to exercise a certain function or privilege: to admit a lawyer to the bar 5. to allow as valid: to admit his right of entry....
Legal meaning	Austrian Law Dictionary (2 nd Ed)	Adduce	To bring something forward as evidence in court, including oral evidence of witnesses, documentary evidence, or other forms such as a demonstration, experiment or inspection. Counsel adduces oral evidence from witnesses through examination and produces documentary evidence by showing it to a witness for identification; counsel then tenders it to the court; witnesses give oral evidence and identify documents.
		Admit	The court admits into evidence the documentary evidence or physical evidence that is tendered to the court; it is admitted if it is admissible and not admitted if it is inadmissible. Oral evidence is adduced ...
	The CCH Macquarie Dictionary of Law	Adduce	No entry
		Admissible evidence	Evidence which may be adduced in court. See also rules of evidence.
		Rules of evidence	...The admissibility of evidence is a question of law which the judge decides removing the jury while he/she hears the evidence in dispute to see if it may be used in the case.
	Encyclopaedic Australian Legal Dictionary	Adduce	To tender; bring forward; to seek to have admitted as evidence anything that a party seeks to rely on to prove to disprove an element of the case.
		Adducing evidence	Leading information and statements in a court to prove or disprove a fact in issue. Evidence is adduced in three forms: oral testimony of a witness, documentary evidence and real evidence. Only evidence relevant to a proceeding and complying with the other rules of evidence is admissible in a proceeding ...
		Admissible evidence	Evidence received or capable of being received by a court or tribunal of fact for the purpose of proving a fact in issue, and not subject to exclusion.

Appendix C: jurisdictional comparison

Jurisdiction	Applicable legislation	Commencement date and commentary
AUSTRALIAN JURISDICTIONS		
New South Wales	<p>Crimes (Appeal and Review) Act 2009, Division 2 Retrial after acquittal for very serious offences</p> <p>s 100 Court of Criminal Appeal may order retrial – fresh and compelling evidence ...</p> <p>s 102 Fresh and compelling evidence – meaning</p> <p>(1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.</p> <p>(2) Evidence is fresh if:</p> <p>(a) it was not adduced in the proceedings in which the person was acquitted, and</p> <p>(b) it could not have been adduced in those proceedings with the exercise of reasonable diligence</p> <p>...</p> <p>(4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in earlier proceedings against the acquitted person.</p>	Commenced 2006
Queensland	<p>Criminal Code 1899, Ch 68: Exceptions to double jeopardy rules</p> <p>678B Court may order retrial for murder—fresh and compelling evidence ...</p> <p>678D Fresh and compelling evidence—meaning</p> <p>(1) This section applies for the purpose of deciding under this chapter whether there is fresh and compelling evidence against an acquitted person in relation to the offence of murder.</p> <p>(2) Evidence is <i>fresh</i> if—</p> <p>(a) it was not adduced in the proceedings in which the person was acquitted; and</p> <p>(b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.</p> <p>(3) Evidence is <i>compelling</i> if—</p> <p>(a) it is reliable; and</p> <p>(b) it is substantial; and</p> <p>(c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.</p> <p>(4) Evidence that would be admissible on a retrial under this chapter is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.</p>	Commenced 2007
South Australia	<p>Criminal Law Consolidation Act 1935, Part 10: Limitations on rules relating to double jeopardy</p> <p>332—Meaning of fresh and compelling evidence</p>	Commenced 2008

Jurisdiction	Applicable legislation	Commencement date and commentary
	<p>(1) For the purposes of this Part, evidence relating to an offence of which a person is acquitted is—</p> <p>(a) fresh if—</p> <p>(i) it was not adduced at the trial of the offence; and</p> <p>(ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and</p> <p>(b) compelling if—</p> <p>(i) it is reliable; and</p> <p>(ii) it is substantial; and</p> <p>(iii) it is highly probative in the context of the issues in dispute at the trial of the offence.</p> <p>(2) Evidence that would be admissible on a retrial under this Part is not precluded from being fresh or compelling just because it would not have been admissible in the earlier trial of the offence resulting in the relevant acquittal.</p>	
Tasmania	<p>Criminal Code Act 1924, Ch XLIV: Exceptions to double jeopardy rules</p> <p>393. Court may order retrial for a very serious crime – fresh and compelling evidence ...</p> <p>395. Fresh and compelling evidence – meaning</p> <p>(1) This section applies for the purpose of deciding under this Chapter whether there is fresh and compelling evidence against an acquitted person in relation to a very serious crime.</p> <p>(2) Evidence is "fresh" if –</p> <p>(a) it was not adduced in the proceedings in which the person was acquitted; and</p> <p>(b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.</p> <p>(3) Evidence is "compelling" if –</p> <p>(a) it is reliable; and</p> <p>(b) it is substantial; and</p> <p>(c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.</p> <p>(4) Evidence that would be admissible on a retrial under this Chapter is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person</p>	Commenced 2008
Victoria	<p>Criminal Procedure Act 2009, Ch 7A Limitations on rules relating to double jeopardy</p> <p>327H DPP may apply to Court of Appeal ...</p> <p>327C Meaning of fresh and compelling evidence</p> <p>(1) For the purposes of this Chapter, evidence relating to an offence of which a person is acquitted is—</p> <p>(a) fresh if—</p> <p>(i) it was not adduced at the trial of the offence; and</p> <p>(ii) it could not, even with the exercise of reasonable diligence,</p>	Commenced 2011

Appendix C

Jurisdiction	Applicable legislation	Commencement date and commentary
	<p>have been adduced at the trial; and</p> <p>(b) compelling if—</p> <p>(i) it is reliable; and</p> <p>(ii) it is substantial; and</p> <p>(iii) it is highly probative in the context of the issues in dispute at the trial of the offence.</p> <p>(2) Evidence that would be admissible on a new trial under this Chapter is not precluded from being fresh or compelling only because it would not have been admissible in the earlier trial of the offence that resulted in the acquittal.</p>	
Western Australia	<p>Criminal Appeals Act 2004, Part 5A: Prosecuting acquitted accused</p> <p>46I . Meaning of fresh and compelling evidence</p> <p>(1) For the purposes of section 46H, evidence is fresh in relation to the new charge if —</p> <p>(a) despite the exercise of reasonable diligence by those who investigated offence A, it was not and could not have been made available to the prosecutor in trial A; or</p> <p>(b) it was available to the prosecutor in trial A but was not and could not have been adduced in it.</p> <p>(2) For the purposes of section 46H, evidence is compelling in relation to the new charge if, in the context of the issues in dispute in trial A, it is highly probative of the new charge.</p> <p>(3) For the purposes of this section, it is irrelevant whether the evidence being considered by the Court of Appeal would have been admissible in trial A against the acquitted accused</p>	<p>Commenced 2012</p> <p>Note: WA is the only Australian jurisdiction to diverge from the COAG model regarding the definition of "fresh".</p>
INTERNATIONAL JURISDICTIONS		
United Kingdom	<p>Criminal Justice Act 2003 (England and Wales), Part 10: Retrial for Serious Offences</p> <p>s 78:</p> <p>(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.</p> <p>(2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related)</p> <p>...</p> <p>(5) for the purposes of this section, it is irrelevant whether any evidence would have admissible in earlier proceedings against the acquitted person.</p>	Commenced 2005
Scotland	<p>Double Jeopardy (Scotland) Act 2011</p> <p>4 New evidence</p> <p>(1) A person who, on indictment in the High Court (the "original indictment"), has been acquitted of an offence (the "original offence") may, if the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anewfor—</p> <p>(a) the original offence, .</p> <p>(b) an offence mentioned in subsection (2) (a "relevant offence"). .</p>	<p>This provision notes:</p> <p>(4) For the purposes of subsection (3)(a), evidence which was not admissible at the trial in respect of the original offence but which is admissible at the time the court considers the application under subsection (3)(b) is not new evidence.</p>

Jurisdiction	Applicable legislation	Commencement date and commentary
	<p>(2) A relevant offence is—</p> <p>(a) an offence (other than the original offence) of which it would have been competent to convict the person on the original indictment, or</p> <p>(b) an offence which—</p> <p>(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment, and</p> <p>(ii) is an aggravated way of committing the original offence.</p> <p>(3) The conditions are that—</p> <p>(a) there is new evidence that the person committed the original offence or a relevant offence, and</p> <p>(b) the High Court, on the application of the Lord Advocate, has—</p> <p>(i) set aside the acquittal, and</p> <p>(ii) granted authority to bring a new prosecution in the High Court.</p> <p>(4) For the purposes of subsection (3)(a), evidence which was not admissible at the trial in respect of the original offence but which is admissible at the time the court considers the application under subsection (3)(b) is not new evidence.</p> <p>(5) Only one application may be made under subsection (3)(b) to set aside the acquittal of an original offence.</p> <p>(6) But an application may not be made to set aside the acquittal of an original offence if the person was charged with, and prosecuted a new for, that offence by virtue of this section.</p> <p>(7) The court may set aside the acquittal only if satisfied that—</p> <p>(a) the case against the person is strengthened substantially by the new evidence,</p> <p>(b) the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence,</p> <p>(c) on the new evidence and the evidence which was led at that trial, it is highly likely that a reasonable jury properly instructed would have convicted the person of—</p> <p>(i) the original offence, or</p> <p>(ii) a relevant offence, and</p> <p>(d) it is in the interests of justice to do so</p>	
Northern Island	Criminal Procedure Act 2010 Ch 2.	
New Zealand	<p>s 154: Order for retrial may be granted by Court of Appeal if new and compelling evidence discovered.</p> <p>152 Meaning of terms used in sections 153 and 154</p> <p>(1) ...</p> <p>(2) For the purposes of sections 153 and 154, evidence is new if—</p> <p>(a) it was not given in the proceedings that resulted in the acquittal of the acquitted person; and</p> <p>(b) it could not, with the exercise of reasonable diligence, have been given in those proceedings.</p>	<p>Note: prior to the CPA, the provision was set at s378D Crimes Act 1961.</p>

Appendix C

Jurisdiction	Applicable legislation	Commencement date and commentary
AUSTRALIAN FEDERAL MODEL STATUTES		
MCCOC proposed model (Aus)	<p>2.8.6 Fresh and compelling evidence—meaning</p> <p>(1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.</p> <p>(2) Evidence is fresh if:</p> <p>(a) it was not adduced in the proceedings in which the person was acquitted, and</p> <p>(b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.</p> <p>(3) Evidence is compelling if:</p> <p>(a) it is reliable, and</p> <p>(b) it is substantial, and</p> <p>(c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.</p> <p>(4) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.</p>	
COAG Proposed code (Aus)	<p>"Fresh and Compelling Evidence" Exception</p> <p>2. This exception should apply to acquittals for only the most serious categories of offences, including murder, manslaughter, the trafficking or manufacture of large commercial quantities of drugs, and the most aggravated forms of rape and armed robbery.</p> <p>Definitions</p> <p>3. Fresh and compelling evidence:</p> <p>a. Evidence is "fresh" if it was not adduced in the proceedings in which the person was acquitted, and it could not have been adduced in those proceedings with the exercise of reasonable diligence.</p> <p>b. Evidence is "compelling" if it is reliable, substantial, and highly probative of the case against the acquitted person (in the context of the issues in dispute in the original proceedings).</p> <p>c. Evidence is not precluded from being fresh and compelling merely because it would have been inadmissible in the earlier proceedings against an acquitted person.</p>	

Appendix D: Criminal Justice Act 2003 (England and Wales) ss75 - 79

75 Cases that may be retried.

(1) This Part applies where a person has been acquitted of a qualifying offence in proceedings—

(a) on indictment in England and Wales,

(b) on appeal against a conviction, verdict or finding in proceedings on indictment in England and Wales, or

(c) on appeal from a decision on such an appeal.

(2) A person acquitted of an offence in proceedings mentioned in subsection (1) is treated for the purposes of that subsection as also acquitted of any qualifying offence of which he could have been convicted in the proceedings because of the first-mentioned offence being charged in the indictment, except an offence—

(a) of which he has been convicted,

(b) of which he has been found not guilty by reason of insanity, or

(c) in respect of which, in proceedings where he has been found to be under a disability (as defined by section 4 of the Criminal Procedure (Insanity) Act 1964 (c. 84)), a finding has been made that he did the act or made the omission charged against him.

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

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

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

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

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

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

Application for retrial

76 Application to Court of Appeal.

- (1) A prosecutor may apply to the Court of Appeal for an order—
 - (a) quashing a person's acquittal in proceedings within section 75(1), and
 - (b) ordering him to be retried for the qualifying offence.
- (2) A prosecutor may apply to the Court of Appeal, in the case of a person acquitted elsewhere than in the United Kingdom, for—
 - (a) a determination whether the acquittal is a bar to the person being tried in England and Wales for the qualifying offence, and
 - (b) if it is, an order that the acquittal is not to be a bar.
- (3) A prosecutor may make an application under subsection (1) or (2) only with the written consent of the Director of Public Prosecutions.
- (4) The Director of Public Prosecutions may give his consent only if satisfied that—
 - (a) there is evidence as respects which the requirements of section 78 appear to be met,
 - (b) it is in the public interest for the application to proceed, and
 - (c) any trial pursuant to an order on the application would not be inconsistent with obligations of the United Kingdom under Article 31 or 34 of the Treaty on European Union relating to the principle of *ne bis in idem*.
- (5) Not more than one application may be made under subsection (1) or (2) in relation to an acquittal.

77 Determination by Court of Appeal.

- (1) On an application under section 76(1), the Court of Appeal—
 - (a) if satisfied that the requirements of sections 78 and 79 are met, must make the order applied for;
 - (b) otherwise, must dismiss the application.
- (2) Subsections (3) and (4) apply to an application under section 76(2).
- (3) Where the Court of Appeal determines that the acquittal is a bar to the person being tried for the qualifying offence, the court—
 - (a) if satisfied that the requirements of sections 78 and 79 are met, must make the order applied for;
 - (b) otherwise, must make a declaration to the effect that the acquittal is a bar to the person being tried for the offence.

Appendix C

(4) Where the Court of Appeal determines that the acquittal is not a bar to the person being tried for the qualifying offence, it must make a declaration to that effect.

78 New and compelling evidence.

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

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

(3) Evidence is compelling if—

(a) it is reliable,

(b) it is substantial, and

(c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.

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

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

79 Interests of justice.

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

(2) That question is to be determined having regard in particular to—

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

(b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;

(c) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition;

(d) whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.

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

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

Appendix E: Reproduction of Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015

Introduced by Mr David Shoebridge, MLC

First print



New South Wales

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Crimes (Appeal and Review) Act 2001* to extend an exception to the rule against double jeopardy in relation to an acquitted person where previously inadmissible evidence becomes admissible.

The Bill provides that, when the Director of Public Prosecutions applies to the Court of Criminal Appeal for an order that an acquitted person be retried for an offence punishable by life imprisonment, evidence against the acquitted person is to be considered fresh (for the purpose of determining whether it is "fresh and compelling" in the sense required for a retrial) if it was inadmissible in the proceedings in which the person was acquitted and, as a result of a substantive legislative change in the law of evidence since the acquittal, it would now be admissible if the acquitted person were to be retried.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Crimes (Appeal and Review) Act 2001 No 120

Schedule 1 [1] gives effect to the object described in the Overview above. Schedule 1 [2] makes a consequential amendment.

b2014-136-18.007

Schedule 1 [3] extends the application of the provision inserted by Schedule 1 [1] to a person acquitted before the commencement of the proposed Act.

Schedule 1	Amendment of Crimes (Appeal and Review) Act 2001 No 120	1
		2
[1]	Section 102 Fresh and compelling evidence—meaning	3
	Insert after section 102 (2):	4
	(2A) Evidence is also <i>fresh</i> if:	5
	(a) it was inadmissible in the proceedings in which the person was acquitted, and	6
		7
	(b) as a result of a substantive legislative change in the law of evidence since the acquittal, it would now be admissible if the acquitted person were to be retried.	8
		9
		10
[2]	Section 102 (4)	11
	Omit the subsection.	12
[3]	Schedule 1 Savings, transitional and other provisions	13
	Insert at the end of the Schedule with appropriate Part and clause numbering:	14
Part	Provision consequent on enactment of Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2015	15
		16
		17
	Application of amendment	18
	Section 102 (2A), as inserted by the <i>Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2015</i> , extends to a person acquitted before the commencement of that Act.	19
		20
		21

