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

LEGAL AID NSW SUBMISSION TO THE WOOD REVIEW

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Overview

Legal Aid NSW considers that the current retrial after acquittal provisions in Part 8 Division 2 of the Act, requiring 'fresh and compelling evidence', achieve the policy purpose for which they were introduced. We favour retention of section 102 in its current form. Any of the possible amendments being considered by the Review would fundamentally change the operation of double jeopardy provisions in New South Wales and undermine the finality of acquittals for life sentence offences. Defining 'adduced' to mean 'admitted' would lead to a shift in emphasis from responding to new evidence which is truly fresh and compelling, to a focus on the rules of evidence. This would be contrary to the purpose of the legislation.

Legal Aid NSW welcomes the opportunity to make a submission to the Wood Review of the *Crimes (Appeal and Review) Act 2001*. For further information please contact Alec Curnick on 9219 5909 or at alex.curnick@legalaid.nsw.gov.au.

Background to the introduction of section 102

Following a lengthy period of consultation conducted by the Model Criminal Code Officers Committee of the Standing Committee of Attorney Generals, a double jeopardy law reform model was agreed by the Council of Australian Governments (COAG).[1] The 2006 amendments inserting Part 8 into the Act implemented that model in New South Wales.

The purpose of the 2006 double jeopardy reforms and COAG model was to allow retrials in a very limited number of situations, including where new evidence had come to light, such as DNA evidence, which was not available at the original trial despite the diligence of the prosecuting agencies.[2]

[1] ACT and Victoria reserved their position on the reforms.
[2] See *Crimes (Appeal and Review) Act 2001* (NSW) s 107.

Prior to the 2006 legislation, the Court of Criminal Appeal had already established that an evidentiary ruling by a trial judge which effectively excludes the entire Crown case can be appealed pursuant to section 5F(2) of *Criminal Appeal Act 1912.* In 2003 section 5F was amended to insert subsection (3A) which allows the Crown to appeal against a ruling on the admissibility of evidence which substantially weakens the Crown case.

The Second Reading Speech introducing section 5F(3), made it clear that the amendment was directed at addressing the problem of accused persons being acquitted as a result of evidence being wrongly excluded:

> If an acquittal results from an erroneous evidentiary ruling, the Crown has no avenue of appeal against the acquittal. The Crown should therefore be able to test the correctness of such a ruling made during the trial, so that an accused may not derive the benefit of an acquittal secured as a result of an erroneous evidentiary ruling.
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> It is not desirable that criminal trials be unnecessarily disrupted for the purpose of appealing evidentiary rulings. It is therefore anticipated that the Crown would exercise this new appeal power only sparingly.[3]

Legal Aid NSW considers that section 102 as currently drafted achieves the policy objectives of the 2006 double jeopardy reforms, and implements the double jeopardy law reform model agreed by COAG including the 'fresh and compelling evidence' required for a retrial after acquittal. With the right already available to the Crown to appeal against the exclusion of evidence, there was no suggestion that Part 8 should allow a retrial where a person was acquitted because of wrongly excluded evidence.

(a) The legal or other ramifications of defining adduced as 'admitted', particularly on the finality of prosecutions

Where there is 'fresh and compelling evidence' the Court of Criminal Appeal may order a retrial pursuant to section 100. Section 102(2) provides that evidence is fresh if it was not, and could not have been, 'adduced' in the original proceedings.

While the word 'adduced' is not defined, it is clear from other legislation that it does not mean 'admitted'. It has been held to mean 'tendered' when used in the *Evidence Act 1995* (NSW): *R v Zhang* (2005) 227 ALR 311 at [38] and [125]. Similarly, from the context and legislative intent, we are of the view that it means 'tendered' or 'given' when used in section 102.

If the word 'adduced' is understood to mean 'tendered', a retrial will only be available if there is compelling evidence which could not have been available to the prosecution with the exercise of reasonable diligence. If the evidence was available, it could have been adduced, that is 'tendered' or 'given', in the proceedings, even if it would not be admitted under the rules of evidence. This interpretation meets the objectives of the legislation in providing for a retrial only when there is evidence that was not available at the first trial.

[3] Second Reading Speech, NSW Council Hansard (20 November 2003), *Crimes Legislation Further Amendment Bill 2003,* available: http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/a77ac6cc71113914ca256de300077c71

If the word 'adduced' is defined to mean 'admitted', the intention of the legislation would be subverted. Evidence may be available but inadmissible in proceedings due to the rules of evidence in force at the time of the trial. If 'adduced' is defined to mean 'admitted', that evidence could constitute 'fresh evidence' under section 102 when the only change since the original trial is to the rules of evidence such that the inadmissible evidence would be admissible in a retrial.

Section 102(4) provides that evidence is not precluded from being fresh evidence merely because it would have been inadmissible in the earlier proceedings. It is clear from this provision that there was no intention that, pursuant to section 102(2), evidence is fresh evidence merely because it was inadmissible in the earlier proceedings and is now admissible. If fresh evidence as defined in section 102(2) did include newly admissible evidence, subsection (4) would have no purpose.

To define 'adduced' to mean 'admitted' in section 102(2) would mean that any initial acquittal for a 'life sentence offence' could not be considered final, as any change to the laws of evidence relevant to the issues at trial, either as a result of an appellate decision or legislative amendment, could ground an application for a retrial by the prosecution.

Such an amendment would fundamentally change the operation of Part 8, undermining the principle of finality of acquittals as it currently finds expression in the limited exceptions to the operation of the double jeopardy principle in New South Wales. It would also represent a fundamental shift away from the policy objectives which underscored the introduction of the double jeopardy reforms.

Legal Aid NSW considers that where evidentiary rulings during the course of trial are to be contested by the prosecution, the prosecution should appeal under section 5F. The proposed amendment would have the undesirable effect of allowing a prosecutor to make an application for a retrial based on an adverse evidentiary ruling when they have failed to seek review of that ruling using the more appropriate and cost effective process provided by section 5F.

If section 102(2) was amended as proposed, it is likely that we would see repeated campaigns calling for legislative change in response to unfavourable evidentiary rulings in trials for very serious offences.

(b) The matters considered by the English courts under the equivalent UK legislation

The New South Wales double jeopardy provisions were modelled, in part, on the equivalent UK provisions.[4] Section 78 of the *Criminal Justice Act 2003* (UK) provides for a retrial if there is 'new and compelling evidence'. Evidence is 'new' if 'it was not adduced in the proceedings in which the person was acquitted'. Significantly, the definition of 'new' evidence does not include evidence that could not have been adduced with the exercise reasonable diligence. Instead the issue of whether the evidence could have been adduced but for a failure to act with due diligence is considered as part of determining whether it is in the interests of justice for a retrial to be ordered (section 79). The test of whether evidence is 'new' in section 78 is easier than the section 102 test of whether evidence is 'fresh': under section 78 evidence is new if it *was not* adduced; under section 102 evidence is fresh only if it *could not be* adduced.

[4] See *Criminal Justice Act 2003* (UK), Ch 4, Pt 10.

The English and Wales Court of Appeal considered the meaning of the word 'adduced' in section 78(2) in *R v B.*[5] *R v B* concerned an application for a retrial where critical DNA evidence had been wrongly ruled inadmissible in the original trial, resulting in an acquittal when no evidence was offered by the prosecution. The Court ruled that the wrongly excluded evidence was 'new evidence':

> 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. For present purposes, therefore, all the DNA evidence, whether available at trial or emerging from further investigation of the relevant material, constitutes new evidence.[6]

The Court held that the DNA evidence was 'new evidence' as it had not been adduced. The Court did not hold that 'adduced' meant admitted' but in fact distinguished 'adduced' from 'admitted: 'adduced in or brought forward for consideration as admissible evidence'. It is worth noting that under the UK legislation 'new evidence' does not include evidence that 'could not be adduced' but only evidence that 'was not adduced.'

Under section 102 the DNA evidence in *R v B* would not be fresh evidence as it was available and could have been tendered at the trial. It is clear that evidence may be 'new' evidence under the UK legislation, but not be 'fresh' evidence under section 102. However, even in the UK, in most cases where the evidence was available at the time of the original trial, it is likely that a retrial would not be granted as the 'interests of justice' requirements in section 79 would not be met. This case was an unusual situation of wrongly excluded evidence, where there was no right of appeal against the trial judge's ruling. Such a situation would not arise in New South Wales as the prosecution could seek appellate review under section 5F.

Since section 78 was introduced in 2003, the Court of Appeal has granted at least 13 applications for retrial on the grounds that there is 'new and compelling' evidence.[7] It is not clear, however, that any applications for retrial have been granted on the sole basis that the law governing the admissibility of evidence has changed since the original trial.[8] Indeed, the majority of applications relate to DNA evidence.[9] Having regard to the matters set out above, Legal Aid NSW is of the view that the matters considered by the English courts are of no assistance in interpreting or evaluating section 102(2).

[5] [2012] EWCA Crim 414.
[6] *R v B* [2012] EWCA Crim 414, [10].
[7] See Marilyn McMahon, 'Retrials of persons acquitted of indictable offences in England and Australia', (2014) 38 Crim LJ 59, 173-176, in particular the table set out at 174; c.f. Standing Committee on Law and Justice (November 2011), *The family response to the murders in Bowraville*, Report 66, Parliament of New South Wales, [6.18].
[8] See discussion in McMahon, above n7, 173-176.
[9] Ibid, 175.

(c) 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)

The wording of the definition of fresh evidence in section 46I of the Criminal Appeals Act 2004 differs significantly from that used in section 102(2). On its face section 46I introduces a greater degree of uncertainty and complexity than section 102. Section 46I has not been judicially considered. A possible interpretation of section 46I is that evidence that is ruled inadmissible in the earlier trial may constitute fresh evidence for the purposes of section 46I.

Section 46I is not consistent with the double jeopardy law reform model agreed by the COAG in 2006. The Western Australian double jeopardy provisions in Part 5A of the *Criminal Appeal Act 2004* differ significantly from the schemes adopted in New South Wales and the UK. It is not clear form the Second Reading speech to the *Criminal Appeals Amendment (Double Jeopardy) Bill 2011* (WA), nor the report of the Western Australian Standing Committee on Uniform Legislation and Statutes concerning the bill,[10] why Western Australia chose to adopt the terminology used in section 46I.

Legal Aid NSW does not consider that section 46I achieves the policy purposes of the COAG reform model and 2006 double jeopardy reforms. There is no reason to prefer the language of section 46I to that in section 102. Legal Aid NSW considers there is no merit in replacing section 102 with section 46I.

(d) The merit of expressly broadening the scope of the provision to enable a retrial where a change in the law renders evidence admissible at a later date

Legal Aid NSW would oppose any amendment to section 102 to enable a retrial where a change in the law renders evidence admissible at a later date. As stated above, Legal Aid NSW considers that such an amendment would fundamentally undermine the principle of finality of verdicts of acquittal and the policy purposes underpinning the introduction of Part 8.

Legal Aid NSW considers that a possibility of a retrial following a change in the laws of evidence would encourage pressure on the legislature to amend the rules of evidence following an evidentiary ruling that affects the strength of the prosecution case in trials for a serious indictable offences. This would have the effect of changing the focus of the double jeopardy provisions from 'fresh evidence' to issues of admissibility; undermining the operation of section 5F appeals; and politicising the trial process.

[10] See Standing Committee on Uniform Legislation and Statutes (November 2011), *Report 66: The Criminal Appeals Amendments (Double Jeopardy) Bill 2011* Available: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3814003c4d362dace5abbaf84825793c0007e4e7/$file/4003+-+1+nov+2011.pdf (last accessed 12/8/2015).