Government of **Western Australia**
Department of **Justice**
Strategic Reform

Statutory Review of Part 5A of the *Criminal Appeals Act 2004* (WA)

Final Report

October 2021

Contents

1 Executive Summary

This report fulfils the requirement of section 52 of the *Criminal Appeals Act 2004* (WA) **(the Act)**, which requires that a review of Part 5A (the double jeopardy provisions) be conducted as soon as practicable five years after the provisions come into operation.[1]

There is a long-standing common law principle preventing a person from being placed in double jeopardy, which is that a person cannot be prosecuted and retried for criminal conduct following a previous trial and acquittal for the same conduct.

Part 5A of the Act was introduced by the *Criminal Appeals Amendment (Double Jeopardy) Act 2012* (WA) **(the Amendment Act)** to create three exceptions permitting a subsequent trial of an acquitted accused:

1. The Court of Appeal can grant leave to charge an acquitted accused with a serious offence (an indictable offence with a penalty of 14 years or more), where there is fresh and compelling evidence against the acquitted accused in relation to the new charge.
2. The Court of Appeal can grant leave to charge an acquitted accused with a serious offence where the acquittal in the initial trial was tainted (for example, because the accused interfered with a witness).
3. The Court of Appeal can grant leave to charge an acquitted accused with an administration of justice offence (for example bribery or interfering with a witness) allegedly committed in connection with the initial trial.

This Review considers whether the double jeopardy provisions are operating as intended based on consultation with key stakeholders. Data received from State Directors of Public Prosecutions show there has been minimal use of double jeopardy provisions throughout Australia, including in Western Australia **(WA)**.

The Review is not able to conclusively determine that the double jeopardy provisions are operating as intended given the lack of applications made under Part 5A of the Act, but stakeholder feedback is broadly supportive of the provisions. Stakeholders did provide comments and suggestions for amendment in relation to the operation of certain provisions but the Review finds that no legislative change or further review is needed at this time.

Findings:

1. Investigative powers as stipulated in section 46C of the Act appear to be operating as intended.
2. In the absence of applications for leave to charge an acquitted accused person, it is not possible to reach a definitive finding on the operation of the provisions governing the process.
3. Stakeholder feedback suggests that the minimal use of the double jeopardy provisions is due to the proper administration of justice generally, rather than due to limitations in the legislation.
4. In the absence of applications for leave to charge an acquitted accused person it is not possible to resolve whether differences in the WA definitions of fresh and compelling evidence, as set out in section 46I of the Act, affect the utility of the provisions.

[1] *Criminal Appeals Act 2004* (WA) s52.

5. The desirability of consistency between the definitions of fresh and compelling evidence as contained in section 46I of the Act, and the definitions of fresh and compelling evidence in the proposed Part 3A of the Act (Criminal Appeals Amendment Bill 2021 (WA)), may need to be considered when the operation of the proposed Part 3A of the Act is known.

2 Background

2.1 Double jeopardy law reform in Australia

There is a long-standing common law principle preventing a person from being placed in double jeopardy, which is that a person cannot be prosecuted and retried for criminal conduct following a previous trial and acquittal for the same conduct.

In WA, the principle is codified in section 17 of *The Criminal Code* (WA) and provides that:

> "*It is a defence to any charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment or prosecution notice on which he might have been convicted of the offence with which he is charged, or has already been convicted or acquitted of an offence of which he might be convicted upon the indictment or prosecution notice on which he is charged."*

The High Court decision in *R v Carroll*[2] in 2002 generated considerable public pressure to reform the law on double jeopardy. In 1985, Carroll was convicted of wilful murder of a seventeen-month-old child but was later acquitted on appeal in the Queensland Supreme Court. New dental evidence emerged which cast doubt on the acquittal. Carroll was charged with perjury. The prosecutor alleged Carroll had lied in the initial trial when testifying that he did not kill the victim. Carroll was found guilty of perjury in a trial by jury, but the result was overturned by the Queensland Court of Appeal. The High Court upheld the decision of the Queensland Court of Appeal that the charge of perjury against Carroll and his subsequent trial was an abuse of process. The charge of perjury could not be used to undermine or challenge the common law principle against double jeopardy.

Public concern about the decision in *R v Carroll* and other high-profile Australian and international cases prompted a review of existing double jeopardy laws across Australian jurisdictions by the Council of Australian Governments **(COAG)**. On 13 April 2007, COAG formally agreed to reform the double jeopardy principle. The official communique stated:

> *"That jurisdictions will implement the recommendations of the Double Jeopardy Law Reform COAG Working Group on double jeopardy law reform, prosecution appeals against acquittals, and prosecution appeals against sentence, noting that the scope of reforms will vary amongst jurisdictions reflecting differences in the particular structure of each jurisdiction's criminal law."* [3]

A Double Jeopardy Law Reform: Model Agreed by COAG **(The COAG Model)** was released alongside the official communique. The COAG Model recommended exceptions to the principle of double jeopardy and appropriate safeguards protecting an acquitted accused from harassment by the state. The recommendations were agreed to by all states except Victoria and the Australian Capital Territory who reserved their positions.

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[2] [2002] HCA 55.
[3] Council of Australian Governments' Meeting, Communique, 13 April 2007. <https://webarchive.nla.gov.au/awa/20070830052604/http://www.coag.gov.au/meetings/130407/index.htm>.

Subsequent legislation implementing double jeopardy reform was not uniform across Australian jurisdictions. The then Acting Solicitor General informed the Uniform Legislation and Statutes Review Committee scrutinising the *Criminal Appeals Amendment (Double Jeopardy) Bill 2011* (WA) **(the Amendment Bill)** that the COAG Model did not include legislative text and it was left to each jurisdiction to engage its own drafting approach in translating the principles.[4] A comparison of the legislative provisions in each state and territory is contained in **Appendix 1**.

2.2 Western Australia's response to double jeopardy law reform

The Amendment Bill was introduced into Parliament on 8 September 2011. In his second reading speech for the Amendment Bill in the Legislative Assembly, the then Attorney General outlined the rationale for the double jeopardy law reforms, stating:

> *"There will sometimes be cases in which, notwithstanding the diligence of police and prosecutors, not all the evidence will be available at the time an accused is charged and tried. It may be that the evidence was deliberately concealed from them, or it may be that advances in forensic technology subsequently reveal new evidence or permit new conclusions to be drawn from the available evidence. In such cases, there may well be grounds to bring the accused back to trial. In fact, not to do so risks perpetrating a major injustice by allowing an offender to walk free even when there is compelling evidence of his or her guilt. Such circumstances can cause public disquiet and can bring the criminal law and the criminal justice system into disrepute as facilitating an offender who is escaping—rather than being brought to—justice. There are other cases in which an acquittal may be obtained by subverting the trial by threatening witnesses, by tampering with the jury or through the perjury of witnesses. Where such cases come to light the rule against double jeopardy can defeat the interests of justice. It is for these reasons that the government is proposing measured reforms to the double jeopardy rule by creating exceptions framed with precision and containing appropriate safeguards."* [5]

The then Attorney General noted that provisions in the Amendment Bill generally followed the COAG Model but also considered Part 10 of the *Criminal Justice Act 2003* (UK).[6] The amendments came into effect on 26 September 2012.

2.3 Use of double jeopardy exception provisions in Australia

All jurisdictions in Australia, except the Northern Territory, have enacted legislation to create exceptions to the common law principle of double jeopardy, but there has been very limited use of the provisions throughout Australia.

Data was collected from State Directors of Public Prosecutions **(DPP)** regarding the number of investigations authorised to proceed to reinvestigate an acquitted accused person, and the number of applications made to appellate courts to retry or charge an acquitted accused (Table 1).

[4] Standing Committee on Uniform Legislation and Statutes Review, WA Legislative Council, *The Criminal Appeals Amendment (Double Jeopardy) Bill 2011*, *Report 66* (2011), p5.
[5] *Hansard* (WA), Legislative Assembly, 28 February 2012, p367c.
[6] Ibid.

Table 1. Number of investigations and applications made in each State

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Number of investigations authorised to proceed for the investigation of an acquitted person	No response received.	1	NA	1	1	0	1	2
Number of applications made to the relevant Appellate Court for leave to retry an acquitted person	No response received.	1	NA	1	0	0	0	0

2.4 Applications for a retrial of an acquitted accused in Australia

There are two known applications for leave to order the retrial of an acquitted accused person in Australia; one by the Attorney General of NSW, and the other by the DPP Queensland.

2.4.1 New South Wales

The Attorney General of NSW made an application for the retrial of an acquitted accused person for the murders of two teenagers. The purpose of the application was to enable the retrial of the person for those same offences, and for the murder of a third child, at a single trial on the same indictment. In September 2018, the NSW Court of Appeal held that it was not satisfied there was fresh and compelling evidence against the respondent, and it was not satisfied that granting an order for retrial would be in the interests of justice.[7] An application for special leave to appeal to the High Court of Australia was filed, but the application was refused by the High Court on 22 March 2019. The High Court could find no error with the NSW Court of Appeal's decision that the evidence in question was not fresh within the meaning of the NSW legislation.[8]

2.4.2 Queensland

On 13 August 2018, the Queensland DPP applied to the Queensland Court of Appeal for a retrial of a person previously acquitted of murder. The DPP asserted that advances in DNA technology provided evidence that strengthened the link from the person to the murder of a woman in 1987.

The matter was heard on 6-8 August 2019 and judgment delivered on 3 December 2019. The Court of Appeal refused the application because the evidence which formed the basis for the application did not reach the threshold set out in s 678B of *The Criminal Code* (Qld). The Court of Appeal concluded that while the evidence fell within the definition of fresh in s 678D(2) of the *Criminal Code* (Qld), it did not satisfy s 678D(3)(c), which is that the evidence must be highly probative of the case against the acquitted person.[9]

[7] *Attorney General for New South Wales v XX* [2018] NSWCCA 198.
[8] *Attorney General for New South Wales v XX* [2019] HCA Trans 052 (22 March 2019).
[9] *Director of Public Prosecutions v TAL* [2019] QCA 279, 9.

3 This Review

3.1 Statutory review requirements

Section 52 of the Act stipulates that the Attorney General must:

- carry out a review of the operation of Part 5A of the Act as soon as practicable after the expiration of five years from the commencement of that part of the Act; and
- prepare a report based on the review and table the report before each House of Parliament within 18 months of the expiration of five years from the commencement of Part 5A of the Act.[10]

3.2 Terms of reference

The Department of Justice has conducted the statutory review of Part 5A of the Act **(the Review)** on behalf of the Attorney General. The approved terms of reference for the review are as follows:

- whether the investigative powers available in section 46C of the Act are operating as intended;
- whether the process to apply to the Court of Appeal for leave to charge an acquitted accused with a new charge as per section 46E is operating as intended;
- whether advice received to date regarding the minimal use of the above sections is due to the proper administration of justice for offences generally, or whether limitations in the legislation prevent them from being used further;
- whether the difference in the WA definitions of 'fresh and compelling' evidence (as contained in section 46I), compared to those adopted in the COAG Model and other jurisdictions, has had any effect on the utility of the provisions; and
- whether the WA definitions should be made consistent with those contained in the COAG Model and/or other jurisdictions.

3.3 Governance

The Review was overseen by the Department of Justice's Evaluation and Review Steering Committee (ERSC). The role of ERSC was to endorse the Review Plan and the Final Report, to monitor progress at key milestones, and to submit the Review Plan and Final Report to the Director General for the approval of the Attorney General.

3.4 Consultation

The Department of Justice conducted a targeted consultation with stakeholders to seek their views on the operation of Part 5A of the Act. A discussion paper was provided to stakeholders to assist in making their submissions.

The following stakeholders provided submissions to the Review:

- The Solicitor General;
- The Law Society of Western Australia;
- The Commissioner for Children and Young People;
- Legal Aid WA;

[10] *Criminal Appeals Act 2004* (WA) s52.

- The Director of Public Prosecutions;
- Western Australia Police Force;
- The Commissioner for Victims of Crime; and
- The WA Bar Association.

The Court of Appeal, Children's Court and District Court responded but declined to provide formal submissions. The submissions greatly assisted in conducting the Review, and submissions directly quoted in this report are done so with the permission of the author.

3.5 Overview of Part 5A of the Act

Part 5A of the Act contains the sections on prosecuting an acquitted accused. Section 46B defines the term acquitted accused and also provides that it does not matter if the acquittal occurred before or after the commencement of Part 5A.[11] It is unusual for provisions of an Act to apply retrospectively but the section is consistent with item 28 of the COAG Model, which has been adopted by all other Australian jurisdictions with double jeopardy provisions. The provisions may also apply to acquittals handed down in other Australian jurisdictions.[12]

3.5.1 Acquitted accused

The term 'acquitted accused' is defined in section 46B(1) of the Act. A person is an acquitted accused if the person, in this State or elsewhere:

> (a) is tried on a charge (*charge A*) of a serious offence (*offence A*); and
> (b) at the trial (*trial A*), or on appeal from a conviction in trial A, is acquitted, other than on account of unsoundness of mind, of —
> (i) charge A; and
> (ii) any other offence of which, on charge A, the acquitted accused might have been convicted instead of offence A.

The Review notes that the Court of Appeal has considered the definition of 'acquitted accused' in a recent decision and confirmed that a person who pleaded guilty to a serious offence has still been 'tried on a charge', and is therefore capable of falling within the definition.[13]

3.5.2 Criminal investigation of an acquitted accused

Section 46C(2) provides a general prohibition on investigations by a law enforcement officer into whether an acquitted accused may have committed a relevant offence.

A relevant offence is defined as a serious offence, or an administration of justice (AOJ) offence, a charge of which may be subject to:

> (a) a defence under *The Criminal Code* section 17 on the ground that the accused has been acquitted as described in that section, other than on account of unsoundness of mind; or

[11] *Criminal Appeals Act 2004* (WA) s46B(2).
[12] *Criminal Appeals Act 2004* (WA) ss46B(1), 46H.
[13] *Re Section 46L of the Criminal Appeals Act 2004 (WA); Ex Parte Commissioner of Police* [2020] WASCA 210 at [138].

(b) a requirement at law to permanently stay it because it would be an abuse of process.

There are two exceptions to the general prohibition contained in section 46C(2):

(a) where an authorised officer has authorised the investigation in writing;
(b) where the law enforcement officer believes on reasonable grounds that the investigation needs to be done urgently in order to prevent it from being substantially and irrevocably prejudiced, and it is not reasonably practicable in the circumstances to obtain an authorised officer's authorisation before doing the investigation.

An authorised officer is defined to mean the Attorney General, the Solicitor-General, the State Solicitor, the DPP or the Commonwealth DPP.[14]

If the law enforcement officer begins an investigation without authorisation they must, as soon as practicable, inform an authorised officer of the grounds for acting under that provision and the action that has been taken. The investigation of the relevant offence must not continue unless an authorised officer, in writing, has authorised the investigation.[15]

An authorised officer must not authorise an investigation unless:

(a) they are satisfied that a charge of the offence would not be subject to a defence under section 17 of *The Criminal Code* or a requirement at law to permanently stay it because it would be an abuse of process;[16] or
(b) the officer is satisfied that there is, or that an investigation is likely to obtain, evidence to justify making an application under Part 5A of the Act for leave to charge the acquitted accused person with the relevant offence and it is in the public interest to investigate the relevant offence.[17]

3.5.3 Charges against acquitted accused that need leave

Section 46D provides that:

A person cannot charge an acquitted accused with any of these charges without the leave of the Court of Appeal given under this Part —

(a) a charge of serious offence the details of which are the same or substantially the same as those in charge A;
(b) a charge of some other serious offence of which, at trial A, the acquitted accused might have been convicted instead of offence A;
(c) a charge of an AOJ offence allegedly committed in or in connection with trial A.

Section 46E sets out the requirements for applying for leave to charge an acquitted accused with the new charge. Section 46F sets out the process for applying for leave and section 46G sets out the requirements for hearing leave applications.

[14] *Criminal Appeals Act 2004* (WA) s46A(1).
[15] *Criminal Appeals Act 2004* (WA) s46C(3).
[16] *Criminal Appeals Act 2004* (WA) s46C(4).
[17] Ibid.

3.5.4 Deciding leave applications

Section 46H prescribes grounds the Court of Appeal must consider when deciding applications for leave to charge an acquitted accused with an offence. The Act sets out three grounds on which leave may be granted.

Fresh and compelling evidence

The first ground applies in relation to serious offences under WA law; defined in the Act as indictable offences which carry a statutory penalty of life imprisonment or imprisonment for 14 years or more.

Specifically, section 46H provides that if there is fresh and compelling evidence against an acquitted accused, and the Court is satisfied on the balance of probabilities that it is in the interests of justice to do so, the Court of Appeal may give leave to charge an acquitted accused with:

(a) a new charge of a serious offence (the details of which are the same or substantially the same as those in the initial trial); or
(b) a charge of some other serious offence (of which the acquitted accused might have been convicted at the initial trial).[18]

Fresh and compelling evidence is defined in section 46I of the Act.

Tainted acquittal

Section 46H also provides that if an acquittal in an earlier trial is a tainted acquittal within the meaning given in section 46J, and the Court of Appeal is satisfied on the balance of probabilities that it is in the interests of justice to do so, the Court of Appeal may give leave to charge an acquitted accused with:

(a) a new charge of a serious offence; or
(b) a charge of some other serious offence.[19]

As defined in section 46J of the Act, a tainted acquittal occurs when the acquitted accused or another person has been convicted of an AOJ offence in connection with the initial trial and, but for this offence, it is more likely than not the acquitted accused would have been found guilty, or found not guilty of the offence due to unsoundness of mind. AOJ offences are listed in section 46A(2) and include bribery; interference with a witness, juror or judicial officer; perversion or conspiracy to pervert the course of justice; and perjury.

AOJ offence

The third ground is set out in section 46H(3). It provides that the Court of Appeal can also grant leave for an application to charge an acquitted accused with an AOJ offence in connection with the initial trial – as opposed to a serious offence – if the Court is satisfied on the balance of probabilities that charging the acquitted accused with the AOJ offence is in the interests of justice. The matters to be considered when having regard to the interests of justice are set out in section 46K.

[18] *Criminal Appeals Act 2004* (WA) ss46H(2)(c)(i), 46(H)(2)(d).
[19] *Criminal Appeals Act 2004* (WA) ss46H(2)(c)(ii), 46(H)(2)(d).

Section 46M sets out the effect of the Court of Appeal granting leave to apply a new charge to the acquitted accused and the requirements for the subsequent prosecution.

3.5.5 Restrictions on publicity

Section 46L details the restrictions on publicity of investigations or applications for leave to charge an acquitted accused person.

The Review notes that the Court of Appeal recently considered these provisions in *Re Section 46L of the Criminal Appeals Act 2004 (WA); Ex Parte Commissioner of Police.*[20] The Court discussed the meaning of the term 'publish' and found that it refers to making known any of the information of the kind described in section 46L to:

(a) any person who does not have a legitimate interest in receiving the information in connection with an investigation, an authorisation, an application, a hearing or the laying of a new charge under Part 5A;
(b) any person who does not have a legitimate interest in knowing the information in connection with:
    (i) a new charge that has been laid under Part 5A; or
    (ii) criminal proceedings pursuant to the new charge; or
(c) any person whose knowledge of the information is not reasonably necessary to enable the person to exercise a right, to exercise a power, to discharge a duty, to carry out a function or to perform a role in connection with any matter arising under or consequent upon the operation of Part 5A generally or in a particular case.[21]

4 Issues and Findings

4.1 Operation of investigative powers in section 46C

The WA DPP confirmed that her position had authorised two investigations in accordance with section 46C. The WA Police state they have also been involved in two investigations.

The majority of stakeholders who commented on the powers of authorisation observed that they were appropriate and held important safeguards to protect acquitted accused persons. The DPP stated that when she has been asked to authorise an investigation, she has exercised her powers in accordance with the Act.[22] The DPP did not raise any concerns with the operation of powers of authorisation.

The current Solicitor General suggested that the test that is applied by an authorised officer when considering whether an investigation should be authorised may be of an unrealistically high standard. The authorised officer needs to be satisfied that there is, or an investigation is likely to obtain, evidence to justify making an application under Part 5A of the Act for leave to charge the acquitted accused with the relevant offence.[23]

[20] [2020] WASCA 210.
[21] *Re Section 46L of the Criminal Appeals Act 2004 (WA); Ex Parte Commissioner of Police* [2020] WASCA 210 at [178]
[22] Director of Public Prosecutions submission, 28 November 2018.
[23] *Criminal Appeals Act 2004* (WA) s46C(4).

The Solicitor General was of the view that an investigation is *'a process of gathering evidence, and the outcome of that process generally cannot be predicted with any certainty or probability until it is completed.'*[24]

The Solicitor General also submitted:

> *"I would suggest adopting a test of 'reasonable prospects' instead of likelihood. Such a test would mean that an authorised officer would need to be satisfied that there were proper and objectively reasonable grounds for pursuing a further investigation, but would not need to be satisfied about the likelihood of the outcome of that investigation prior to it having occurred."* [25]

WA Police submitted that the investigative powers in section 46C appear to be operating as intended.[26] Other stakeholders were generally of the opinion that investigative powers, and powers of authorisation, were operating as intended, and that the current thresholds were appropriate.

Given that neither WA Police nor the DPP have raised concerns with the current thresholds for commencing an investigation of an acquitted accused, the Review concludes that any legislative change to lower the threshold for authorising an investigation into an acquitted accused is not required at the present time.

Finding 1

Investigative powers as stipulated in section 46C of the Act appear to be operating as intended.

4.2 Operation of the application process for leave to charge an acquitted accused person

The process for making a leave application to the Court of Appeal to charge an acquitted accused person is outlined in section 46E of the Act. The three grounds for seeking leave as prescribed in section 46H are described in section 3.5.3 above.

Stakeholders noted that it was impossible to comment on the operation of the grounds or the processes to charge an acquitted accused because there have not been any applications made to the Court of Appeal in WA. The Review concludes that without data it is not possible to make a finding on the operation or utility of the provisions governing the process for leave to charge an acquitted accused person.

[24] Solicitor General submission, 11 December 2018.
[25] Ibid.
[26] Western Australia Police Force submission, 31 December 2018.

Finding 2

In the absence of applications for leave to charge an acquitted accused person, it is not possible to reach a definitive finding on the operation of the provisions governing the process.

4.3 Possible explanations for the minimal use of the provisions

As there have been no applications made to the Court of Appeal in WA by an authorised officer, stakeholders were asked to comment on possible explanations for the minimal use of the provisions. Stakeholders generally described the provisions as appropriate, suggesting that the limited use of the provisions was due to the proper administration of justice generally.

In its recent judgment on an application for leave to order a retrial of an acquitted accused, the Queensland Court of Appeal commented:

> *"The stringency is there because the legislature has recognised that, while circumstances might arise that justify a second trial, and while advances in techniques of proof will give rise to new forms of proof that satisfy the strict statutory requirements, a retrial of an acquitted person is an extraordinary proceeding."*[27]

Finding 3

Stakeholder feedback suggests that the minimal use of the double jeopardy provisions is due to the proper administration of justice generally, rather than due to the limitations in the legislation.

4.4 Impact of the differences in definition of fresh and compelling evidence on the utility of the provisions?

The definition of fresh and compelling evidence is set out in section 46I of the Act:

> *(1) For the purpose 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.*

[27] *Director of Public Prosecutions v TAL* [2019] QCA 279, 17.

In their submissions, some stakeholders noted that the definition of fresh and compelling evidence contained in section 46I of the Act is potentially wider than other jurisdictions and the COAG Model's definition. The differences contained in the WA definition are outlined below; but it will not be possible to determine if those differences impact on the utility of the provisions until an application for leave, made under Part 5A of the Act, is determined in the Court of Appeal.

4.4.1 The definition of fresh

The COAG Model definition of fresh is:

> *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.*

The COAG Model definition was adopted in Victoria, New South Wales, Queensland, Tasmania and South Australia. The Australian Capital Territory adopted a slightly different approach by substituting the word 'tendered' for 'adduced'.[28]

The definition of 'adduced' was considered in *Attorney General for New South Wales v XX*[29] and was held to have its usual meaning of to 'put before the Court'. In that matter, the evidence in question was not considered to meet the threshold of 'fresh' evidence because it could have been put before the Court in the original trial, despite being inadmissible at the time. A change in the rules to later allow the evidence to be admitted was immaterial.

Sections 46I1(a) and 46I1(b) of the Act introduce two elements into the definition of 'fresh'.[30] Legal Aid WA submitted that section 46I(1)(b) is arguably wider than the COAG Model. Legal Aid WA also noted the wording suggests that a change in evidentiary rules could be sufficient for an application.[31] A submission by the Law Society NSW to the Review of s 102 of the *Crimes (Appeal and Review) Act 2001* (NSW) to clarify the definition of 'adduced' compared the WA definition of fresh as contained in section 46I. The submission considered the WA definition may introduce contention on whether the prosecutor was correct in their decision not to tender evidence on the basis that it would be inadmissible.[32]

4.4.2 The definition of compelling

The COAG Model definition of compelling is:

> *Evidence is compelling if it is reliable, substantial, and highly probative of the case against the acquitted accused (in the context of the issues in dispute in the original proceedings).*

[28] *Supreme Court Act 1933* (ACT) s68K(1).
[29] [2018] NSWCCA 198.
[30] *Criminal Appeals Act 2004* (WA) ss 46I(1)(a)&(b).
[31] Legal Aid WA submission, 20 December 2018.
[32] Law Society NSW submission to the Review of the operation of section 102 of the *Crimes (Appeal and Review Act 2001* (NSW) www.lawsociety.com.au

Legal Aid WA submitted that the definition of compelling evidence in section 46I(2) of the Act, excluding the words 'reliable' and 'substantial', arguably makes it easier for an application to succeed.[33]

The Queensland Court of Appeal considered the definition of 'compelling' in *Director of Public Prosecutions v TAL.*[34] The Queensland statute adopts the same definition as contained in the COAG Model. The decision in that case turned on whether the evidence was highly probative of the case against the acquitted accused. However, the Court also noted: *'If evidence is reliable and, in the context of the issues in dispute at the trial, also highly probative of the case against the acquitted person, it is difficult to see what it means to say that the evidence must also be "substantial".'*[35]

4.4.3 Admissibility

The WA definitions differ from the COAG Model in that, rather than evidence not being precluded from being fresh and compelling merely because it was inadmissible in the earlier proceedings against an acquitted person, it is irrelevant whether the evidence was considered inadmissible in the initial trial.[36] Legal Aid WA submitted that the WA provisions are arguably wider than the COAG Model.[37]

In her submission, the DPP referred to a review conducted by the Hon James Wood AO QC, of section 102 of the *Crimes (Appeal and Review) Act 2001* (NSW), and the NSW Court of Appeal in *Attorney General for New South Wales v XX*; both of which determined the definition of fresh evidence did not include evidence that was inadmissible at the time of trial A.[38] An application for special leave to appeal to the High Court was refused.[39] In refusing leave, Kiefel CJ and Bell and Gageler JJ could find no reason to doubt the correctness of the Court of Criminal Appeal.

The DPP went on to note that the differences in the WA legislation may permit an application to be made as a result in the change of law which makes evidence inadmissible in trial A admissible in a later trial.[40]

Finding 4

In the absence of applications for leave to charge an acquitted accused made to the Court of Appeal it is not possible to resolve whether differences in the WA definitions of fresh and compelling evidence, as set out in section 46I of the Act, affect the utility of the provisions.

[33] Ibid.
[34] [2019] QCA 279.
[35] Ibid, at [33].
[36] *Criminal Appeals Act 2004* (WA) s46I.
[37] Legal Aid WA submission, 20 December 2018.
[38] Director of Public Prosecutions submission, 28 November 2018; citing New South Wales, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001 (NSW): To clarify the definition of "adduced"* (2015).
[39] *Attorney-General for New South Wales v XX* [2019] HCA Trans 052.
[40] Director of Public Prosecutions submission, 28 November 2018.

4.5 Modifying the definitions contained in section 46I of the Act in line with the COAG Model and other jurisdictions

In the absence of applications made under Part 5A of the Act to determine whether the WA provisions operate differently to the other jurisdictions, the Review is not able to resolve whether the definitions contained in section 46I should be made consistent with the COAG Model and other jurisdictions. The differences between the principles in the COAG Model and provisions in the Act were considered in the Standing Committee on Uniform Legislation and Statutes Review of the Bill in 2011. The report contained no references to the differences in the definitions of fresh and compelling evidence as stated in section 46I of the Act.

However, in her submission, the DPP noted that it was important to have consistency of approach within the Act itself.[41] The DPP was referring to the Criminal Appeals Amendment Bill 2019 (WA) **(the 2019 Bill)**, which was introduced into Parliament on 20 February 2019. The 2019 Bill lapsed when Parliament was prorogued and the Criminal Appeals Amendment Bill 2021 (WA) **(the 2021 Bill)** was subsequently introduced on 11 August 2021. The 2021 Bill sets out in the proposed Part 3A of the Act the conditions under which an offender convicted of an offence on indictment may bring a second or subsequent appeal against conviction to the Court of Appeal.

The 2021 Bill inserts definitions relating to evidence in section 35D. The grounds for granting a second or subsequent appeal against conviction are set out in proposed section 35F. The terminology within the proposed Part 3A of the 2021 Bill is noticeably different to that contained in Part 5A of the Act.

At the time of writing, the proposed section 35D states:

> *(1) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is **fresh** —*
>
> *(a) if, despite the exercise of reasonable diligence, the evidence was not and could not have been tendered at the trial of the offence or any previous appeal; or*
>
> *(b) if —*
>
> *(i) the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal; and*
>
> *(ii) the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender.*
>
> *(2) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is **new** if the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal.*
>
> *(3) Despite subsection (2), evidence is not new evidence if it is fresh evidence under subsection (1)(b).*
>
> *(4) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is **compelling** if it is highly probative in the context of the issues in dispute at the trial of the offence.*

[41] Ibid.

The definition of compelling is the same in Part 5A and the proposed Part 3A of the Act. The proposed section 35D distinguishes between fresh and new evidence, expressly considers the role of counsel error, and also uses the word tendered in place of adduced. The Review notes though that Part 5A and the proposed Part 3A of the Act were drafted for different purposes. The difference in terminology may therefore be appropriate.

Once the operation of the proposed Part 3A of the Act is known, giving consideration to modifying the definitions of fresh and compelling evidence in section 46I may be warranted. It will be a matter of policy to decide whether to make the definitions consistent within the Act.

Finding 5

The desirability of consistency between the definitions of fresh and compelling evidence as contained in section 46I of the Act and the definitions of fresh and compelling evidence in the proposed Part 3A of the Act (Criminal Appeals Amendment Bill 2021 (WA)) may need to be considered when the operation of the proposed Part 3A is known.

4.6 Other matters raised by stakeholders

4.6.1 Impact of protracted criminal proceedings

The Commissioner for Children and Young People noted the importance of considering the impact of protracted proceedings on children and young people, both as victims of crime and as offenders. The Commissioner noted the trauma associated with drawn out criminal proceedings for victims of sexual assault, but also noted the need for balance with bringing perpetrators to justice.[42]

4.6.2 Consideration of victims' views

The Office of the Commissioner for Victims of Crime submitted that the views of victims should be considered by the authorised officer when authorising investigations, as well as the Court of Appeal when considering leave applications. The Office of the Commissioner for Victims of Crime noted that victims who underwent a traumatic cross-examination in the initial trial, or perhaps where an extended period of time has elapsed since the initial trial, may not wish to be subject to another judicial process.[43]

Given that no applications for appeal have been lodged under Part 5A, it is difficult to assess whether these concerns warrant legislative change at this stage. Instead, the Review recommends that the impact on victims be taken into account in any subsequent review of the operation of Part 5A.

5 Conclusion

Stakeholders noted the importance of having a high threshold for an authorised officer to authorise an investigation into an acquitted person to avoid harassment of acquitted

[42] Commissioner for Children and Young People submission, 13 December 2018.
[43] Commissioner for Victims of Crime submission, 14 January 2019.

people by the state, a position which is reflected in the relatively low number of authorised investigations in WA and other Australian jurisdictions.

Stakeholders generally commented that it is not possible to determine whether the double jeopardy provisions are operating as intended because there have not been any applications to the Court of Appeal in WA. Without commentary from decisions in the Court of Appeal it is also not possible to determine whether the differences in the WA provisions affect their utility or whether they should be made consistent with the COAG Model or other jurisdictions.

Most stakeholders did not support amendments to Part 5A of the Act. Taking into consideration the submissions and the very limited data on the operation of the provisions, the Review concludes that no amendment or further review of Part 5A of the Act is needed at this time. When the operation of the proposed Part 3A of the Act is known, it may be desirable to consider modifying the definitions of fresh and compelling evidence in section 46I.

Appendix A – Jurisdictional comparison of the double jeopardy provisions in Australia

Jurisdiction	Offences to which the Act applies	Grounds for ordering a retrial/granting leave to charge (statutory exceptions to principle of double jeopardy)	Number of applications allowed for retrial	Time limit on applications	Time limits on progressing prosecution
NSW *Crimes (Appeal and Review) Act 2001* Part 8, Division 2. Commenced 2006	**s 98** • Murder or any other offence punishable by imprisonment for life (life sentence offence) • Offences punishable by imprisonment for life or for a period of 15 years or more (15 years or more sentence offence)	**s 100, s 101** The Court can make an order for retrial where there is fresh and compelling evidence in relation to a life sentence offence, and the Court is satisfied it is in the interests of justice to make the order. The Court can make an order for retrial where there is a tainted acquittal in relation to 15 years or more offence, and the Court is satisfied it is in the interests of justice to make the order.	**s 105, s 106(4)** 1 application, except for an application for a further retrial of a person acquitted in a retrial if the acquittal in the retrial was tainted. No further application can be made for a particular acquittal if an order for a retrial has been set aside.	**s 105** 28 days after individual has been charged, or a warrant for their arrest for the related offence has been issued. The Court of Criminal Appeal may extend the period for good cause.	**s 106** An indictment for the retrial must be presented within 2 months (unless the Court of Criminal Appeal grants leave)
QLD *Criminal Code Act 1899* Chapter 68 Commenced 2007	**s 678, s 678B(1)** • Murder • An offence punishable by imprisonment for life or for a period of 25 years or more (25-year offence)	**ss 678B-678C** The Court can make an order for retrial where there is fresh and compelling evidence in relation to an offence of murder and in all the circumstances it is in the interests of justice for the order to be made. The Court can make an order for retrial where there is a tainted acquittal in relation to a 25-year offence and in all the circumstances it is in the interests	**ss 678G-678H** 1 application except in the circumstances of a tainted acquittal resulting from a retrial under Chapter 68. No further application can be made for a particular acquittal if an order for a retrial has been set aside.	**s 678G** 28 days after individual has been charged, or a warrant for their arrest for the related offence has been issued. The Court of Appeal may extend the period for good cause.	**s 678H** An indictment for the retrial must be presented 2 months (unless the Court of Appeal grants leave).

Jurisdiction	Offences to which the Act applies	Grounds for ordering a retrial/granting leave to charge (statutory exceptions to principle of double jeopardy)	Number of applications allowed for retrial	Time limit on applications	Time limits on progressing prosecution
		of justice for the order to be made.			
WA *Criminal Appeals Act 2004* Part 5A Commenced 2012	**s 46A(1)** • Indictable offence the statutory penalty for which is life imprisonment, or imprisonment for 14 years or more (Serious offence) • Administration of justice offences (AOJ offence)	**s 46 H** The Court of Appeal may make an order to charge an acquitted person where there is fresh and compelling evidence against the acquitted person. The Court of Appeal needs to be satisfied on the balance of probabilities that charging the acquitted accused with the new charge is in the interests of justice. The Court of Appeal may make an order to charge an acquitted person where there has been a tainted acquittal. The Court of Appeal needs to be satisfied on the balance of probabilities that charging the acquitted accused with the new charge is in the interests of justice.	**s 46E** An application cannot be made if the acquitted in trial A of the acquitted accused occurred on a charge for which leave had been granted under Part 5A and that leave was given because the Court of Appeal was satisfied that fresh and compelling evidence existed against the acquitted accused in relation to the charge.	**s 46K** When considering if the application for leave to charge an acquitted accused is in the interests of justice, the Court of Appeal is to have regard to whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with application.	**s 46M** 2 months (unless the Court of Appeal grants a longer period).
SA *Criminal Procedure Act 1921* Part 6. Commenced 2017	**s 141** **Category A offence** • Murder • Manslaughter or attempted manslaughter • Aggravated rape • Aggravated robbery	**ss 146-148** The Court may make an order for retrial where there is fresh and compelling evidence in the circumstances of a Category A offence against the acquitted person in relation to the offence and in the circumstances, it is	**s 147** 1 application except in the circumstances of a tainted acquittal resulting from a retrial under Part 6.	**ss 146-148** 28 days after individual has been charged, or a warrant for their arrest for the related offence has been issued.	**ss 146-148** 2 months (unless the Full Court grants a longer period)

Jurisdiction	Offences to which the Act applies	Grounds for ordering a retrial/granting leave to charge (statutory exceptions to principle of double jeopardy)	Number of applications allowed for retrial	Time limit on applications	Time limits on progressing prosecution
	• Trafficking in a commercial quantity, or large commercial quantity, of a controlled drug • Manufacturing a commercial quantity, or large commercial quantity, of a controlled drug • Selling a commercial quantity, or large commercial quantity, of a controlled precursor • A substantially similar offence against a previous enactment or the law of another jurisdiction corresponding to an offence referred to in a preceding paragraph; Any other offence punishable by imprisonment for life or at least 15 years. Administration of justice offences.	likely that the new trial would be fair. The Court may make an order for retrial where there is a tainted acquittal if the Court is satisfied the acquittal was tainted, and in the circumstances, it is likely that the new trial would be fair. The Court may make an order for trial of an administration of justice crime if the Court is satisfied there is fresh evidence against the acquitted person in relation to the administration of justice offence. The Full Court must be satisfied that a trial would be fair.			
TAS *Criminal Code Act 1924* Chapter XLIV Commenced 2008	**s 390** • Administration of justice crime **Serious Crime - Appendix D** • Sexual intercourse with young person under the age of 17 years • Maintaining sexual relationship with young person under the age of 17 years • Procuring unlawful sexual intercourse with person under the age of 17 years • Sexual intercourse with person with mental impairment • Involving person under age of 18 years in production of child exploitation material • Producing child exploitation material	**ss 392-394** The Court of Appeal can make an order for retrial where there is fresh and compelling evidence in relation to a very serious crime and it is in the interests of justice to make the order The Court may make an order for retrial where there is a tainted acquittal in relation to a serious crime and it is in the interests of justice to make the order. The Court may make an order for trial of an administration of justice crime where there is fresh	**ss 397AB-397AD** 1 application except in the circumstances of a tainted acquittal resulting from a retrial under Chapter XLIV. No further applications can be made for a particular acquittal if an order for a retrial has been set aside.	**s 397A, s 397AC** 28 days after individual has been charged, or a warrant for their arrest for the related offence has been issued. The Court may extend the period for good cause.	**s 397AB, s 397AD** 2 months unless with leave of the Court for a longer period

Jurisdiction	Offences to which the Act applies	Grounds for ordering a retrial/granting leave to charge (statutory exceptions to principle of double jeopardy)	Number of applications allowed for retrial	Time limit on applications	Time limits on progressing prosecution
	• Distributing child exploitation material • Incest • Murder • Manslaughter • Being accessory after the fact to murder • Causing death of child before birth • Committing an unlawful act intended to cause grievous bodily harm • Persistent family violence • Wounding or causing grievous bodily harm • Performing female genital mutilation • Setting man-traps or allowing to remain set • Rape • Kidnapping • Armed robbery • Aggravated armed robbery • Aggravated burglary • Arson • Unlawfully setting fire to vegetation • Procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business • Receiving a fee or reward that a person knows is derived, directly or indirectly, from sexual services provided by a child in a sexual services business **Very serious crime – s158, 159, 185 and 240(4), or a crime under Part 2 of the Misuse of Drugs Act 2001** • Murder • Manslaughter • Rape • Aggravated armed robbery	evidence and it is in the interests of justice to make the order.			

Jurisdiction	Offences to which the Act applies	Grounds for ordering a retrial/granting leave to charge (statutory exceptions to principle of double jeopardy)	Number of applications allowed for retrial	Time limit on applications	Time limits on progressing prosecution
VIC *Criminal Procedure Act 2009* Chapter 7A Commenced 2011	**ss 327L-327N** **s 327L** • An offence was punishable by level 4 imprisonment (15 years maximum) or more **s 327M(2)** • Murder • Murder contrary to section 3A of the Crimes Act 1958 (unintentional killing in the course or furtherance of a crime of violence) • Conspiracy to commit murder • Incitement to commit murder • Attempting to commit murder • Manslaughter • Child homicide • Arson causing death • Trafficking in a drug or drugs of dependence—large commercial quantity • Cultivation of narcotic plants—large commercial quantity • Rape, compelling sexual penetration or armed robbery if the offence is committed in circumstances where—torture (being the deliberate and systematic infliction over a period of time of severe pain on the victim) was involved in the commission of the offence; or the offender caused really serious injury to the victim; or the offender threatened to cause death or really serious injury to the victim. **s 327N** • Administration of justice offence	**ss 327L-327N** The Court of Appeal may make an order for retrial if there was tainted acquittal where the offence at time it was alleged to be committed was punishable by level 4 imprisonment, the acquittal was tainted and it is likely that a new trial for that offence would be fair. **s 327M** The Court of Appeal can make an order for retrial if it is in relation to offence referred to in s 327M(2), any circumstances referred to in subsection (2) in respect of the offence were present in the commission of the offence, there is fresh and compelling evidence against the person against the person in relation to the offence and it is likely that a new trial for that offence would be fair. **s 327N** The Court of Appeal can make an order for retrial in relation to a person who has been acquitted of an offence if the court is satisfied that at the time the offence is alleged to have been committed, the offence was an indictable offence, there is fresh	**s 327H, s 327J** An application based on fresh and compelling evidence cannot be made in relation to an acquittal resulting from a new trial authorised under this chapter. The DPP may make an application to the Court of Appeal under s 327H only once in relation to a particular acquittal.	**s 327K** If the DPP fails to make an application under section 327H within 28 days after filing a direct indictment under section 327F, or any extension of that period granted under section 327I, the DPP must discontinue the prosecution (in accordance with Part 5.4) within 14 days after the expiry of the 28 days or the extension (as the case requires)..	NA

Jurisdiction	Offences to which the Act applies	Grounds for ordering a retrial/granting leave to charge (statutory exceptions to principle of double jeopardy)	Number of applications allowed for retrial	Time limit on applications	Time limits on progressing prosecution
	• Administration of justice offences.	evidence against the acquitted person of the commission of an administration of justice offence in relation to the previous acquittal, and it is likely that a trial for the administration of justice offence would be fair.			
ACT *Supreme Court Act 1933* Part 8AA Commenced 2016	**s 68I** • An offence punishable by imprisonment for life (category A offence) • Punishable by imprisonment for life or imprisonment for 15 years or longer (Category B offence) • Administration of justice offences	**ss 68M-68O** The Court may make an order for retrial if there is fresh and compelling evidence in the circumstances of a Category A offence and it is in the interests of justice to make the order. The Court may make an order for retrial if there was a tainted acquittal in the circumstance of a Category B offence and it is in the interests of justice to make the order. The Court can make an order for trial for administration of justice offences where there is fresh evidence against the acquitted person, the evidence is relevant to the administration of justice offence and it is in the interests of justice for the order to be made**.**	**s 68R, s 68U** 1 application. For an acquittal that happens in a retrial ordered under this part, no further application may be made under s 68M in relation to the acquittal but a further application may be made under s 68N (tainted acquittal). No further applications can be made for a particular acquittal if an order for a retrial is set aside.	**s 68Q** 28 days after individual has been charged, or a warrant for their arrest for the related offence has been issued. The court may extend this period.	**ss 68U-68V** 2 months, however the Court may give leave to present the indictment after the end of the indictment period if it is satisfied that the prosecutor has acted reasonably expeditiously to present the indictment and that presenting the indictment will not cause an injustice to the person.

Note: Northern Territory does not currently have legislation regarding exceptions to double jeopardy in force.