

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

Name: Professor Luke McNamara and Mr Brian Whelan, Centre for
Crime, Law and Justice, Faculty of Law, University of New South
Wales

Date Received: 29 June 2019



29 June 2019

The Hon Niall Blair
Chair, Standing Committee on Law and Justice
NSW Parliament

By email: law@parliament.nsw.gov.au

Dear Mr Blair

Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019

Thank you for the opportunity to make a submission to the Standing Committee on Law and Justice with respect to its inquiry into the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019*.

This submission is written by members of the Centre for Crime, Law and Justice, at the Faculty of Law, University of New South Wales. The views expressed in this submission are the views of the undersigned individuals.

Introduction and Overview

In 2006¹ the NSW Parliament adjusted the parameters of double jeopardy immunity by contemplating retrial after acquittal in certain circumstances: namely, where there is ‘fresh and compelling’ evidence; and in the case of a ‘tainted acquittal’.² Only one application to the NSWCCA for retrial after an acquittal is possible.

The *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019* (‘the Bill’) proposes further expansion of the retrial after acquittal opportunity in two respects: i) a wider definition of ‘fresh’ evidence that takes account of changes in the laws governing the admissibility of evidence; and ii) provision for more than one application for retrial after acquittal in ‘exceptional circumstances’.

It is evident that the driver for the Bill’s introduction is the demonstrated failure³ of the existing legislative regime (ie the provisions introduced in 2006) to produce a post-acquittal retrial in relation to the deaths of Clinton Speedy-Dureaux and Evelyn Greenup, and an associated prosecution in relation to the death of Colleen Walker (‘the Bowraville murders’).

¹ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW).

² *Crimes (Appeal and Review) Act 2001* (NSW), Pt 8, Div 2.

³ *Attorney General (New South Wales) v XX* [2018] NSWCCA 198.

Our respectful submission is that the Bill is not the solution to the problems illustrated by the Bowraville murders. In support of this submission we offer three observations:

- 1) the proposed bill does not effectively address failures of the justice system in responding to criminal violence against Aboriginal and Torres Strait Islander victims and communities;
- 2) the proposed amendments seek to expand the conception of ‘fresh’ evidence by allowing that changes to evidence law can retrospectively effect this characterisation, while leaving intact the ‘exercise of reasonable diligence’ restriction under s 102(2)(b) of the *Crimes (Appeal and Review) Act 2001* (NSW); and
- 3) the proposed relaxation of the current provisions protecting against double jeopardy is an instance of introducing a law of general application in response to discrete instances of apparent injustice, and that this approach to law-making is imprudent, with the capacity to diminish the integrity of the NSW criminal justice system. It poses a risk to the principle of finality and the presumption of innocence, increases the potential for targeting of certain individuals, and may produce unintended effects.

Failures of the Justice System to Address Criminal Violence Against Aboriginal Persons

We have great sympathy for the affected families and community who understandably believe that the criminal justice system has failed them. We are acutely aware that these failures resonate loudly as instances of a larger problem: too often the perpetrators of criminal violence against Aboriginal persons in NSW have avoided punishment.

Since the early 1990s there has been a proliferation of strategies and policies designed to reduce over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system and to improve criminal justice agency responses. We recognise the good work undertaken by police officers on a daily basis, often in difficult and dangerous circumstances, and also recognise that NSW police have undertaken significant reforms to culture, policy and practice to improve relationships with Aboriginal and Torres Strait Islander communities.

Notwithstanding those measures, many Aboriginal and Torres Strait Islander people continue to report having negative policing experiences, and holding negative attitudes about the criminal justice system. It is clear that those perceptions have strong historical antecedents and that there is evidence that the criminal punishment is applied disproportionately against Aboriginal and Torres Strait Islander people.⁴ What is less commonly appreciated is that many Indigenous communities also suffer from ‘under-criminalisation’. A 2010 Australian Institute of Criminology (AIC) study suggested up to 90% of violence against Aboriginal and Torres Strait Islander women goes unreported to police.⁵ The reasons are complex, and include under-policing, and a history of conflict between police and Indigenous communities.⁶

⁴ Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report No 133 (2018) 11.51.

⁵ Matthew Willis, ‘Non-Disclosure of Violence in Australian Indigenous Communities’ (January 2011) Vol 405 *Trends and Issues in Crime and Criminal Justice*, 4–10.

⁶ *Ibid.*

This is often compounded by subsequent inadequacies in investigation and prosecution. Such failures to exercise reasonable standards of diligence in investigation and prosecution after the sexual assault and death of an Aboriginal woman were made apparent in the recent case of *R v Attwater and Maris*,⁷ where evidentiary and prosecutorial issues resulted in delayed justice for the victim's family.⁸ Psychological research also shows that victims and their families may experience persistent or renewed stress and trauma through repeated or extended exposure to the criminal justice system.⁹

Poor relations influence how often Aboriginal and Torres Strait Islander communities interact with police and how they respond in interactions with police. Further, poor police relations may undermine investigations and subsequent prosecutions.¹⁰ The perception of poor police practices needs to be addressed in order to improve relationships between police and Aboriginal and Torres Strait Islander communities. In 2018, the Australian Law Reform Commission recommended that police practices and procedures be reviewed by governments so that the law is applied equally and without discrimination with respect to Aboriginal and Torres Strait Islander communities, offenders and victims. The ALRC also recommended that police complaints handling mechanisms be reviewed, particularly addressing the perception by Aboriginal and Torres Strait Islander people that their complaints are not taken seriously.¹¹

It is respectfully submitted that the Bill is not the best solution to the complex problems that exist. There should be a continued focus on addressing systemic problems in the operation of the criminal justice system¹² that too often produce injustices for Aboriginal and Torres Strait Islander individuals, families and communities. We recommend that criminal justice reforms continue to focus on reductions in the rate of violence against Aboriginal and Torres Strait Islander people and improving criminal justice agency responses when it does occur.

Fresh evidence and reasonable diligence

The Bowraville murders further highlight the ramifications of underlying inadequacies in respect of police investigation and prosecution - a matter acknowledged by the NSW Police Force.¹³

⁷ *R v Attwater; R v Maris* [2017] NSWSC 1710 (8 December 2017).

⁸ See, eg, Australian Associated Press, 'Lynette Daley's family says DPP should resign over delay in justice' *The Guardian* (online) 8 November 2017 <<https://www.theguardian.com/australia-news/2017/nov/08/lynette-daleys-family-says-dpp-should-resign-over-delay-in-justice>>.

⁹ Denise Lievore, *Non-reporting and hidden recording of sexual assault: an international literature review* (Canberra: Australian Institute of Criminology, 2003). <<https://aic.gov.au/publications/archive/non-reporting-and-hidden-recording-of-sexual-assault>>.

¹⁰ See, eg, Victoria Police, *Victoria Police Blue Paper: A Vision for Victoria Police in 2025* (2014) 10; Attorney-General's Department (Cth), *National Youth Policing Model* (2010).

¹¹ Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report No 133 (2018) 14.5.

¹² Thalia Anthony and Penny Crofts, 'Limits and Prospects of Criminal Law Reform - Past, Present, Future - Guest Editors' Introduction' (2016) 6(3) *International Journal for Crime, Justice and Social Democracy* 1, 4.

¹³ Brooke Boney, 'Bowraville murders: NSW police chief says victims' families were let down' *ABC News* (online) 11 August 2016 <<https://www.abc.net.au/news/2016-08-11/andrew-scipione-apologises-to-families-of-bowraville-children/7721492>>.

These are problems that will not be fixed through retrospective relaxation of the rule against double jeopardy. In *Attorney General (New South Wales) v XX* the Court of Criminal Appeal found that evidence from the Colleen Walker matter was available prior to the trial for the murder of Evelyn Greenup. It was therefore not fresh and thus failed the test under s 102(2)(a) of the *Crimes (Appeal and Review) Act 2001* (NSW).¹⁴ Informant evidence and other admissions had also been available.¹⁵ None of this evidence was found to be ‘fresh’. The only evidence that had not been available prior to the trial of XX for Evelyn Greenup’s murder, was in relation to statement allegedly made by XX to a journalist in 2016. The Court found that this evidence was not ‘highly probative’ as required by s 102(3)(c). It was merely a denial of guilt and unlikely to be admissible in any retrial. The Court also rule that the assessment of whether evidence was ‘fresh’ had to be made separately in relation to each of the two acquittals, rather than by considering the cases together.¹⁶

A further important constraint on whether can be considered ‘fresh’ is the ‘reasonable diligence’ limb in s 102(2)(b) To be ‘fresh’ it must be the case that the evidence ‘could not have been adduced in those proceedings with the exercise of reasonable diligence’.¹⁷ This means that the prosecution cannot assert that evidence is ‘fresh’, if the failure to adduce it at the original trial was the result of poor investigations conducted or decisions made.

The current ‘fresh and compelling’ evidence regime has been deliberately designed as a very narrow window of opportunity for retrial after acquittal. It is not intended to be commensurate with all the factors that may produce what are sometimes referred to as ‘unmeritorious acquittals’ – recognising that to attempt to do so, would come at too great a cost in terms of the presumption of innocence and the principle of finality. Rather than relying on changes in evidence law (and admissibility) as the mechanism for widening the parameters of the ‘fresh and compelling’ exception to the immunity against re-prosecution after acquittal, we submit that greater emphasis should be placed on forward-looking and proactive reforms to law and practice to minimise the risk of unmeritorious acquittals in the first place.

The Risk of Introducing Rules of General Application in Response to Discrete Instances of Injustice

Relaxation of the current provisions protecting against double jeopardy raises two further problems which can diminish the integrity of the criminal justice system:

- (i) law reform that erodes fundamental protections with retrospective effect should not be used to target particular individuals in either a real or perceived sense; and
- (ii) rules of general application in response to discrete instances of injustice should be treated with a high level of caution to ensure unforeseen consequences are avoided.

¹⁴ *Attorney General (New South Wales) v XX* [2018] NSWCCA 198, 256.

¹⁵ *Attorney General (New South Wales) v XX* [2018] NSWCCA 198, 257.

¹⁶ *Attorney General (New South Wales) v XX* [2018] NSWCCA 198, 267.

¹⁷ *Crimes (Appeal and Review) Act 2001* (NSW), s 102 (2)(b).

Erosion of fundamental protections and principles

The rule against double jeopardy has a long common law history, is reflected in international human rights law¹⁸ and is an important part of the contemporary criminal law of New South Wales.¹⁹ It limits the exposure of individuals to criminal prosecution, and potential punishment, by providing that once acquitted, a person is immune from further prosecution for the same alleged crime. In its absolute form, the rule against double jeopardy tolerates the risk (and cost) that a person who is ‘in fact’ guilty may be found not guilty and evade sanction. This outcome (an ‘unmeritorious acquittal’) is tolerated because of a determination to respect the presumption of innocence and the principle of finality.

The Bill proposes an extension to the existing exception to the rule against double jeopardy as it applies to acquitted persons. The Bill would confer new powers on the Director of Public Prosecutions to bring applications for retrial against persons acquitted where previously inadmissible evidence is retrospectively deemed admissible – and, therefore ‘fresh’. Taking into account that there have been major evidentiary changes over time, particularly to the hearsay rule exceptions, the Bill would produce the most extensive erosion of double jeopardy protection in any Australian jurisdiction.²⁰

The moral case for acting to remedy injustice – such as the failure to convict and prosecute those responsible for murders – is very strong. However, major changes to criminal law and procedure should not be so heavily oriented towards achieving the conviction of one individual. Ad hominem laws are recognised to be inconsistent with the rule of law.²¹ In the present instance, there is a risk that the – designed, as it is, to address three discrete instances of injustice – will have the effect of further abrogating the rule against double jeopardy generally, in a manner that is contrary to the principle of finality and the presumption of innocence.

Unknown Consequences

The Hon Ron Sackville AO QC has observed: ‘There are always pressures...tending towards the introduction of new laws... New laws are as capable of creating injustice as the old.’²² Scholars have commented that new criminal laws – whether they create new offences, provide for higher penalties, or diminish due process protections – are often not a justifiable or effective answer to what are often complex problems.²³ Julia Quilter has provided a powerful recent example of how the challenge of being responsive to community fears and concerns can be mishandled in response to the tragedy of alcohol-related fatalities. The creation of a new form of homicide law for ‘one punch’ fatalities failed to take account of the fact that such conduct was already prosecuted and punished as manslaughter, and has had unintended consequences.²⁴

¹⁸ International Covenant on Civil and Political Rights, Article 14(7); see Jill Hunter, ‘The development of the rule against double jeopardy’ (1984) 5 *The Journal of Legal History* 1;

¹⁹ See generally, L McNamara, *Human Rights Controversies: The Impact of Legal Form* (Routledge-Cavendish, 2007), Ch 2 ‘Rolling back an established human right: “Reforming” the rule against double jeopardy’.

²⁰ The Hon James Wood AO QC, Submission to the Attorney General and Minister for Justice, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001* (NSW) to clarify the definition of “adduced”, September 2015, 6.20.

²¹ *Kable v DPP (NSW)* (1996) 189 CLR 51.

²² Ronald Sackville, ‘Law and Justice: Do They Meet? Some Personal Reflections’ (2014) 37(3) *UNSW Law Journal* 1142.

²³ Luke McNamara et al, ‘Theorising criminalisation: The Value of a Modalities Approach’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91-121.

²⁴ Julia Quilter, ‘Criminalisation of alcohol-fuelled violence: one-punch laws’ in Thomas Crofts & Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) pp 82-104.



Whether or not the amendments proposed by the Bill were effective in facilitating the conviction of the person responsible for the Bowraville murders, it is difficult to assess what the longer-term ongoing effects of the larger 'window' for retrial after acquittal would be. It is possible that the wider opportunity to seek retrials after acquittals might be deployed in the future against individuals, or in circumstances, where the characterisation of the original acquittal as 'unmeritorious' may be much more contested. An unintended future effect of the Bill could be that particular individuals are targeted for ongoing investigation after acquittal, producing a different type of injustice than the specific injustices at which this Bill is addressed.

We would be happy to provide further elaboration on issues raised in this submission, or assist the Standing Committee on Law and Justice in any other way.

Yours sincerely

Professor Luke McNamara
Co-Director, Centre for Crime, Law and Justice

Brian Whelan
Intern, Centre for Crime, Law and Justice