

Submission
No 25

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

Organisation: Jumbunna Institute for Indigenous Education and Research
Date Received: 22 July 2019

22 July 2019

Merrin Thompson
Standing Committee on Law and Justice Committee
Legislative Council
NSW Parliament
By Email: lawandjustice@parliament.nsw.gov.au

Dear Committee Members,

RE: SUBMISSION TO THE INQUIRY INTO THE CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2019.

Thank you for the opportunity to respond to the Committee's inquiry into the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019* (the **Bill**).

The Jumbunna Institute of Indigenous Education and Research, Research Unit ("Jumbunna") is located within the University of Technology Sydney and undertakes research and advocacy on legal and policy issues of importance to First Nations people, their families and their communities. Our team have worked with the families of the Bowraville murder victims for almost a decade and have previously participated as witnesses before this Committee in its Inquiry into the *Families Response to the Murders in Bowraville*.

We have considered the views submitted to the Committee's inquiry by the families of the Bowraville murder families in considering our response, balancing the principles and rule of law with the need to provide justice for victims of crime.

Overview

1. Jumbunna supports the amendment of Division 2 of the *Crimes (Appeal and Review) 2001* (NSW) (**the Act**) to allow for an application to be made on the basis of evidence that was not admitted before the trial court. Whilst we endorse the aims of the Bill in principle, for the reasons set out below in our submission the preferable course is to amend the Act as follows:
 - 1.1. Amend the definition of 'fresh' in section 102(2) to replace the word 'adduced' with the word 'admitted' so that section 102(2) would now read:

(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.

- 1.2. Multiple applications should be allowed under Part 8, either on the basis proposed in the Bill or, in the alternative, by removing a limitation on the number of applications that can be made but providing that no accused can be retried more than once under the FCE.

Introduction

2. The Jumbunna team have worked with the families of Clinton Speedy-Duroux, Evelyn Greenup and Colleen Craig-Walker for over a decade (**Bowraville Families**). The Committee will be familiar with this case (the **Bowraville Case**) from its previous inquiry into the *Families Response to the Murders in Bowraville* (the **Previous Inquiry**).
3. Our submissions in relation to the appropriate amendment of the Act are informed by our experience of the decades of frustration experienced by the Bowraville Families as they have attempted to obtain justice for the murders of their children.
4. In addition to general support, our staff have worked with the Bowraville Families and New South Wales Police in relation to the interpretation of Division 2 of the Act and our submissions are likewise informed by our experience applying the Act. The Bowraville Case was the only case to ever found an application to the NSW Court of Criminal Appeal¹ and so is informative for the current Inquiry.
5. While we understand that legislation should not look like it is crafted to simply remedy the problems in any single case, we recognise that the pathway leading to the current proposed amendment is one shaped by the experience with the families in the Bowraville murders. We strongly believe that their views and opinions need to be a privileged voice in any deliberation about the most appropriate way forward.
6. To this end, we have adopted an approach that gives power to the perspectives of the Bowraville families who are not legally represented and are not able to put forward legal arguments to underpin their strongly held views about what justice should look like in this case.
7. We also, however, are deeply respectful of the role of Parliament in a circumstance such as this, to find a way to ensure the fairness and integrity of the law and legal processes but to also ensure that its application results in fairness and, to the best of its ability, to deliver justice,

¹ *Attorney General for New South Wales v XX* [2018] NSWCCA 198 (**AG v XX**).

particularly to those parts of the community who are the most marginalised and disadvantaged, the parts of the community who have the greatest obstacles in accessing justice. Aristotle said that “law is reason free from passion” but the parliament should not be free from compassion.

8. To this end, we argue below support of a proposal that mirrors the legislative approach in the United Kingdom, existing legislation that was not crafted with a specific case in mind but provides a solid precedent from which to craft an amendment to the legislation.

The Current Law

9. Currently sections 100, 102, and 105 of the Act provide for the Attorney-General or DPP to make an application to the Court of Criminal Appeal for an order setting aside an acquittal where it is satisfied that there is ‘fresh and compelling’ evidence against the acquitted person and in all the circumstances the Court is satisfied that it is in the interests of justice to do so (the Fresh and Compelling Evidence Exception (**FCE**)).
10. The Act makes it clear that an order will only be made in circumstances where the Court of Criminal Appeal is satisfied that a fair retrial is likely.²
11. The FCE applies only to a ‘life sentence offence’ defined to mean offences of ‘murder or any offence punishable by imprisonment for life’.³ A note to the Act identifies the following offences that met that definition at the time the Act was enacted; Murder;⁴ Aggravated Sexual Assault in Company;⁵ and offences relating to commercial quantities of prohibited plants.⁶
12. Evidence is defined in section 102(2) of the Act as ‘**fresh**’ where:
 - (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.
13. There is no definition of ‘adduced’ in the Act. In *AG v XX*, the Court of Criminal Appeal held that ‘adduced’ means ‘tendered’ or ‘brought forward’⁷ and that therefore fresh evidence means evidence that was not available at the time of the trial in which the Accused was acquitted.

² s 104 of the Act.

³ s 98 of the Act.

⁴ *Crimes Act 1900* (NSW) s 19A.

⁵ *Crimes Act 1900* (NSW) s 61JA(1).

⁶ *Drug Misuse and Trafficking Act 1985* (NSW) ss 23(2), 24(2), 25(2), 25(2A), 26, 27, and 28.

⁷ *AG v XX*, [225].

14. The fresh evidence relied upon must also be **compelling**, which is defined as being evidence that is ‘reliable, substantial and highly probative for the purpose of s 100(1)’.⁸
15. For evidence to be **reliable** it must be ‘sufficiently trustworthy or accurate such that it provides the Court with a sound basis, when considered together with other evidence as necessary, for drawing conclusions.’⁹
16. It has been held that the requirement of ‘**Substantial**’ is a qualitative, not quantitative notion and denotes evidence of substance, meriting ‘being accorded weight as part of the consideration of the issue to which it relates.’¹⁰
17. Finally, fresh evidence must be **highly probative**. In its discussion paper, the Model Criminal Code Officers’ Committee (MCCOC) refers to evidence that is ‘both reliable and sufficiently compelling to call into question the safety of the previous acquittal’.¹¹ This accords with the approach of the Director of Public Prosecutions in the United Kingdom as summarised in the decision of *R v A*¹²: that cases should only proceed where a conviction is highly probable and any acquittal by a jury at a subsequent trial would appear to be perverse. That position was characterised by the Court as ‘entirely appropriate, and consistent with the relevant legislative framework, and reflects a proper appreciation of the continuing (but not absolute) importance of finality in the criminal justice process.’¹³ In our submission, the ‘highly probative’ threshold is likely to be interpreted in Australia in a similar way, requiring that fresh evidence be such that a conviction is highly probable and any acquittal by a jury at a subsequent trial would appear to be perverse.
18. There is anecdotal evidence that such a standard is at play in the United Kingdom where the majority of judgments addressing such exceptions have been considered. Amongst the 9 UK decisions cited in *Attorney General v XX*, of the five cases we could identify an outcome for (*R v Dobson*,¹⁴ *R v Dunlop*,¹⁵ *R v H*,¹⁶ *R v MH*,¹⁷ and *R v Weston*¹⁸), all resulted in convictions (though one involved convictions on eight counts out of a total of eighteen).

⁸ *AG v XX* at [174] (Bathurst CJ, Hoeben CJ and McCallum J) citing the definition in section 102(3) of the Act.

⁹ *R v Keogh (No 2)* [2014] SASCFC 136 at [105] (Gray, Sulan and Nicholson JJ).

¹⁰ *Keogh v R (No 2)*, [106] (Gray, Sulan and Nicholson JJ).

¹¹ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Discussion Paper—Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals, November 2003, p 75.

¹² [2009] 1 WLR 1947

¹³ *R v A (Andrews)* [2009] 1 WLR 1947 at [1955] (Lord Judge CJ, Swift and Cranston JJ).

¹⁴ [2011] EWCA Crim 1255

¹⁵ [2007] 1 WLR 1657

¹⁶ [2014] EWCA Crim 1816

¹⁷ [2015] EWCA Crim 585

¹⁸ [2010] EWCA Crim 1576

Interests of Justice

19. Even where evidence is fresh and compelling, an order is only to be made setting aside an acquittal where that order is ‘in the interests of justice’ pursuant to section 100 (1) (b) of the Act.
20. Section 104 is the only provision in the Act that addresses the test of interests of justice and represents a powerful protection against the concern that multiple prosecutions could result in innocent persons being convicted or the abuse of power by police or prosecution. That section makes clear that an order setting aside an acquittal will not be in the interests of justice unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances, having regard to (but not exclusively to);
 - 20.1. the length of time since the acquitted person allegedly committed the offence, and
 - 20.2. 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’.
21. *R v Catt*¹⁹ sets out a number of considerations, *inter alia*, which the Court held were relevant in that particular case. The case arose in the related context of whether to order a retrial following a successful appeal against conviction. In our submission, the following factors which were among those identified by the Court will also be relevant considerations in determining where the interests of justice lie in an application under the FCE;
 - 21.1. the seriousness and criminality of the offending
 - 21.2. the strength of the body of evidence relied upon by the Crown;
 - 21.3. the public interest in ensuring those committing serious offences are charged and convicted;
 - 21.4. the degree of public recognition of the case through media coverage, noting in particular whether the case had ‘achieved a wide coverage in the media’ and that it was important in that case to demonstrate to the public that ‘despite all the problems of a flawed police investigation, the substance of the charges will be determined and that seemingly serious criminal conduct will be investigated and the alleged perpetrators brought to trial’; and
 - 21.5. the worry and expense to the accused.²⁰

¹⁹ [2005] NSWCCA 279.

²⁰ *Regina v Catt* [2005] NSWCCA 279 at 384 (Smart AJ).

22. In *R v Keogh (No 2)*²¹, the South Australian Court of Criminal Appeal noted that the phrase ‘in the interests of justice’ is of wide import, but ultimately linked it to the merits of the application.²² In our submission, this would include consideration of the purposes underlying the double jeopardy values such as abuse of process, the risk of conviction of an innocent person, the principle of finality and the threshold for compelling evidence.
23. Finally, we note that the current law prohibits the making of more than one application for the retrial of an acquitted person under the Division 2 of Part 8.²³

Background to the Bill

24. Double jeopardy has been characterised as a rule that ‘protects a criminal defendant by limiting the power of the state to bring prosecutions’²⁴ and has been referred to by the High Court as a ‘value’ that underpins the criminal law.²⁵
25. The purposes of the value of double jeopardy have been expressed in various ways. The Hon. Wood AO QC refers to four purposes served by the value which we have summarised as follows:²⁶
 - 25.1. It promotes the legitimacy of the courts by presuming a final verdict reached after a fair trial as factually correct and morally authoritative, also referred to as the “incontrovertibility of verdicts”;²⁷
 - 25.2. It protects individuals from harassment by the state by acting as a restraint over the abuse of executive power and government oppression by limiting the exercise of the prosecutors’ power (including over political prosecutions);
 - 25.3. It promotes the efficient and effective investigation and prosecution of offences by limiting Police and prosecutors to one opportunity to convict an offender, so they appropriately and proportionally marshal resources; and
 - 25.4. It protects the finality of prosecutions, noting that finality of prosecutions has historically been prioritised over the need for conviction.²⁸

²¹ [2014] SASCFC 136.

²² *R v Keogh (No 2)*, [116].

²³ ss 105(1) and (1A) of the Act.

²⁴ Marilyn 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 at 159.

²⁵ *Bui v DPP (Cth)* 2012 244 CLR 638.

²⁶ Hon James Wood, AO QC, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001* (NSW) (2015), page 16 -17, at [2.4] (the **Wood Report**).

²⁷ Citing M Edgely, “Truth or Justice: double Jeopardy Reform for Queensland: Rights in Jeopardy” (2007) 7 Queensland University of Technology Law and Justice Journal 108.

²⁸ *R v Carroll* [2002] HCA 55; 213 CLR 635 [22].

26. However, as noted by the High Court in *R v Carroll*, 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.²⁹
27. In 2006 the Parliament determined by the passage of Part 8 of the Act (which included the FCE) that the above concerns were properly balanced by creating limited exceptions to the double jeopardy principles as reflected in the current law.
28. Subsequently, as the result of substantial lobbying by the Bowraville Families and community generally, this Committee established the Previous Inquiry. The Committee reported on that inquiry in its report titled *The family response to the murders in Bowraville*³⁰ (**the Previous Report**). The Previous Report noted there was uncertainty in the current law over the meaning of ‘adduced’, including questions as to whether the meaning of ‘fresh’ evidence in the Act should be interpreted in line with the common law distinction between ‘fresh’ and ‘new’. This directed attention to whether the double jeopardy protections should cover evidence that was discovered, or could reasonably have been discovered, by investigating police or prosecutors or, alternatively, evidence that was, or could have been, admitted against an accused. The Previous Report also contained a number of recommendations, including Recommendation 8 which proposed that the NSW Government review section 102 of the *Crimes (Appeal and Review) Act 2001* to clarify the definition of ‘adduced’.
29. Prior to that review being completed, the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015* (NSW) (**the 2015 Bill**) was tabled by the NSW Greens. That Bill was in similar terms to the current Bill, except that it did not include a provision to allow for a second application to be made in exceptional circumstances.
30. Following the tabling of the 2015 Bill, the recommended review into s 102 was conducted by the Hon. James Wood AO QC resulting in the Wood Report. The Wood Report concluded that the law, as it stood in 2015, did not contemplate an interpretation of ‘fresh’ that would ‘enable a retrial where a change of the law renders previously inadmissible evidence admissible at a later date’. The Author also advised against any amendment to section 102 at the time, though he said
- ‘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’.³¹
31. On 5 May 2016, the NSW Legislative Council considered the 2015 Bill. Both the Government and the Opposition voted against it. The Bowraville families were present in the Legislative Council the day that that Amendment was voted down. During the discussion of the 2015 Bill, the Bowraville case was referred to extensively in the second reading speeches and it is clear

²⁹ *R v Carroll*, 644 at [23].

³⁰ Standing Committee on Law and Justice, NSW Legislative Council, *The family response to the murders in Bowraville* (2014).

³¹ Wood Report, page viii.

that the Parliament was aware that the amendments would impact on the outcome of that case. Nonetheless, the parliament did not take the opportunity in 2015 to amend the law to reflect its understanding of the law as encapsulated in its later submissions in *AG v XX*. As noted by Professor Hamer during an interview discussing *AG v XX*;³²

‘In fact this difficulty with the legislation had been recognised prior to this application and the New South Wales Government did consider amending the legislation so that freshly admissible evidence would be viewed as fresh and retrials could be set aside on that basis but the Government chose not to go ahead with that. The problem was recognised, it's unfortunate that it wasn't fixed.’

32. Following the failure of the Bill and a request from NSW Police, the (then) Attorney General, Gabrielle Upton brought an application under sections 100, 102 and 105 seeking to re-try the suspect in the Bowraville murders. That application was filed in December 2016, approximately 8 months after the NSW Parliament determined not to amend the Act.
33. It took almost a year for the case to come on for hearing and the Court of Criminal Appeal heard arguments from the parties during the last week of November and first week of December 2017. The Bowraville Families were present throughout the hearing of the Application. The Crown, who was the Applicant in that matter, in broad terms submitted;

‘that “adduced” meant “admitted”, so that fresh evidence would extend to evidence which had not been admitted in the earlier proceedings and could not have been admitted in those proceedings with reasonable diligence.’³³

We note that the proposed Bill seeks to amend the Act consistently with this submission.

34. It took almost a year for the Court of Criminal Appeal to hand down its decision with the Court dismissing the application on 13 September 2018, the 28th anniversary of the disappearance of Colleen Walker.
35. On 20 September 2018, current NSW Attorney General Mark Speakman announced that the NSW Government would seek special leave to appeal to the High Court against the CCA Judgment.³⁴
36. The special leave application was dismissed by the High Court on 26 March 2019 with the Court finding no error in the CCA’s determination that evidence that was available to a party is ‘available’ for the purposes of s100 and 102.

³² ‘What evidence is admissible?’, The Law Report (ABC Radio National, 18 September 2018, from 14:36) <<https://www.abc.net.au/radionational/programs/lawreport/2018-09-18/10254558>>

³³ *AG v XX*, [174].

³⁴ Mark Speakman, Attorney General (Press Statement, 20 September 2018)

<https://www.justice.nsw.gov.au/Documents/Media%20Releases/2018/attorney-general-of-nsw-v-xx-high-court.pdf>

37. It has been almost 30 years that the Bowraville Families have sought justice for their community, through two trials, two inquests, two inquiries, multiple applications to Attorneys General and court proceedings in the highest criminal courts in New South Wales and Australia. Throughout this time, the Bowraville Families have had to struggle to gain any traction with the representatives of the New South Wales legal system. As noted by David Shoebridge during the second reading speech for the Bill, it took many years for the NSW Parliament to even engage with the Bowraville Families;³⁵

‘None of the families has got over the murder of their children. No family ever would, if they lost a child, a sister, a brother, an auntie, a nephew, a cousin, an uncle. They continue to come here to demand justice. As I speak, people are gathering outside and I know that there is pain all across the State. The families came to the Parliament in 2011 and, in fact, they did not get in. They came in 2012 and it was the same. In 2013 they came and it was the first time that we let them in. That is when members of this House first joined together and said, "We will look into this," and set up the inquiry into the family response to the murders in Bowraville. I credit the House at the time for listening and letting the families in. They came back again in 2014 when the inquiry delivered its report. They came back in 2015, in 2016, in 2017 and in 2018. They are back again today in 2019 and they are demanding the very same thing: that we collectively act to give them a fair chance at getting justice’.³⁶

THE PROPOSED AMENDMENTS

38. The Proposed Amendments contemplate a retrospective amendment to the current threshold for what will constitute ‘fresh’ evidence and the introduction of a second application under FCE where there are exceptional circumstances.
39. Below we address the impact of the amendments in advancing the interests of justice and the punishment of those who commit criminal offences.
40. Later in these submissions we address the specific respective amendments and address their impact on the values underlying double jeopardy.

Interests of Victims and the Interests of Justice

41. The most compelling argument for any qualification of the double jeopardy principles is the need to bring criminal offenders to justice as, in part, recognition of the damage such offending does to society and victims. As the High Court said in *R v Carroll* cited above;

³⁵ Second Reading Speech, Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019, 30 May 2019 (The Hon. David Shoebridge).

³⁶ Second Reading Speech, Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019, 30 May 2019 (The Hon. David Shoebridge).

At the very root of the criminal law system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it. It follows that those who are guilty of a crime for which they are to be held responsible should, in the absence of reason to the contrary, be prosecuted to conviction and suffer just punishment.

42. In our submission, the interests of justice include the importance of achieving factually correct verdicts in very serious cases and the interests of victims in seeing an offender brought to justice and having their experience vindicated.

43. As was said by the (then) chair of this Committee during the reading speeches on the tabling of the Previous Report,³⁷

‘A killer whose crimes constitute evil at its very darkest and most depraved is still free. Justice demands that the killer of these three children, whose lives were brutally cut short before they had even really begun, should be brought to account’

...

The committee found that the impact on the families and their community, which it was also required to report on, of the past 20 years of dashed hopes and expectations has been one of absolute devastation. In simple terms, the key to this elusive justice being obtained is that the hearing of the evidence in all three murders be considered at the same time and in the same court. This will, it is anticipated, then lead directly to the one who is the perpetrator of these terrible crimes. Let there be no doubt that this is the issue that goes to the heart and soul of what this inquiry is really all about.’

44. The evidence provided to the Previous Inquiry speaks eloquently to the pain that has been caused by the murders;

‘I hope that the Committee can see that the emotion today is as raw as it was 23 years ago. Because this will never end for us; it will never end for my aunty and it will never end for any of our family.³⁸...’

‘It’s something my family and I have had to live with for 24 long years and we are still fighting. The pain is like something that has been taken away from you, a piece of your heart, a piece of you. The pain is always there inside of you, you just find ways to deal with it but it never goes away.’³⁹

³⁷ NSW, Parliamentary Debates, Legislative Council, 6 November 2014, 2208 (David Clarke).

³⁸ The Previous Report, p. 93 (Karen Kelly).

³⁹ The Previous Report, p. 97 (Misty Kelly).

45. The present Committee has also heard first-hand the significant trauma that the deaths have caused for the families and communities, a trauma that continues and is ongoing;

‘The families of Evelyn, Colleen and Clinton have experienced immense pain and grief as a result of the murder of their children which has not lessened over the last 28 years since the children’s murders...I have been using the term ‘chronic collective grief’ to describe the community-wide pain these families have been experiencing. The pain is still so raw, all it takes is for one kid to go missing and the whole community goes into a total panic. It’s happened in the past where someone’s gone missing and, no one’s been able to track them down for a week. They’ve been okay, but they didn’t tell anyone where they were and the whole community was in an absolute panic. So it’s right there on the surface, it doesn’t take much to spark people off emotionally. It wears them down. It knocks people around. And you only have to start talking about it and you realise it’s there. It’s right there. Even though this happened nearly 30 years ago, it’s still raw.’⁴⁰

46. Our experience working with the Bowraville families over the last 10 years has demonstrated that where offenders are not brought to justice, an erosion of faith in the criminal justice system becomes pronounced and there is prolific evidence of this loss of faith within the Bowraville Families and community. On the delivery of the judgment by the Court of Criminal Appeal last year Marbuck Duroux, the nephew of Clinton Speedy said;

‘It’s something we’ve sort of always seen coming which is sad but that’s the judicial system, especially for blackfellas, I suppose.’⁴¹

47. Evelyn Greenup’s auntie Penny Stadhams has described that loss of faith:

‘We feel as though the legal system has failed us. We did not understand that one word could have such an effect on a case, and be the reason the man that killed our kids is still free. He is living his life to the fullest, while our family is still suffering. If this happened to a white family, someone would already be locked away for these crimes, yet the man who did this to our family is able to change his name, start another family and move on with his life. Without this man being locked away, our family does not feel safe. We are always worried about what he might do, especially when there has been a trial or news about the murders in the papers.’⁴²

48. Our experience with the Bowraville murders has also highlighted a unique aspect of the case that impacts upon the faith that a victim community has in the criminal justice system, namely

⁴⁰ Barry Toohey, Submission to the Parliamentary Inquiry, 2 July 2019.

⁴¹ NITV News, ‘Bowraville Decision: Families ‘devastated’ as court decides against retrial’, NITV (online), 13 September 2018 < <https://www.sbs.com.au/nitv/nitv-news/article/2018/09/13/bowraville-decision-families-devastated-court-decides-against-retrial>>

⁴² Penny Stadhams, draft submission to the Parliamentary Inquiry provided to Jumbunna and dated 1 July 2019.

its capacity to address the consequences of explicit racism in the institutions tasked with the investigation and prosecution of crimes.

49. As has previously been noted, one of the critical events behind the United Kingdom's double jeopardy exception was the racially-motivated murder of Stephen Lawrence and the flawed investigation which followed.⁴³ Lawrence was stabbed by five white youths at a bus stop, but police did not consider the attack to be racially motivated. An inquiry into the case concluded that the handling of the case by the Metropolitan Police Service and the Crown Prosecutors Office was 'institutionally racist', noting '[m]ere incompetence cannot of itself account for the whole catalogue of failures, mistakes, misjudgements, and lack of direction and control which bedevilled the Stephen Lawrence investigation.'⁴⁴ The review identified failings similar to those in the Bowraville case; investigating Police were 'grossly insensitive and unsympathetic'⁴⁵ to the victim's family, applied stereotypes of criminality towards the victim and witness Duwayne Brooks (another young black British man) and characterised them as 'irate and aggressive' (and treated Brooks as a suspect rather than a traumatised victim and witness).⁴⁶ The inquiry also noted a lack of urgency and commitment in some areas of the investigation.⁴⁷
50. The Previous Report sets out the flaws of the initial police investigation in the Bowraville Case, including that each of the families of the Bowraville children were treated with indifference or scepticism by Police when they initially reported their children missing.⁴⁸ Police did not initially believe that Muriel or Rebecca were the mothers of their daughters, and it took police three months before they took Muriel's statement.⁴⁹ Like the Lawrence case, New South Wales Police also reacted on assumptions of criminality of Aboriginal people, suggesting to Evelyn's family that they had sold their child to the Accused's family. Following the third disappearance, the Child Mistreatment Unit based in Coffs Harbour was assigned to the case, instead of trained homicide detectives, as the Bowraville police suspected the families were complicit in the disappearances.⁵⁰ As noted in the Previous Report, there was also a lack of urgency and commitment in the investigation. Police failed to treat the disappearances as possible homicides, suggesting the children had 'gone walkabout'. Witness statements read as though led by Police with limited detail. Police failed to properly investigate alleged sightings of Evelyn around the town and establish properly when she disappeared, resulting in a failure to set up a crime scene until 7 years after her disappearance. In the investigation into Clinton's murder it took ten days for the investigative team to seize

⁴³ Wood Report, p18, Table 2.1 at [2.8].

⁴⁴ The Macpherson Report, at [6.44].

⁴⁵ The Macpherson Report, at [12.45]

⁴⁶ The Macpherson Report at [5.12]

⁴⁷ The Macpherson Report at [6.45].

⁴⁸ The Previous Report, p. 15.

⁴⁹ The Previous Report, p. 16.

⁵⁰ The Previous Report, p. 21.

the person of interest's caravan and have it examined for evidence, first allowing him to remove personal items from the caravan.⁵¹

51. Nor was it just the police investigation that demonstrated the impact of systemic discrimination. Community members reported being unsupported by Prosecutors in the trials of Clinton and Evelyn, with no information provided to them about the court processes. Counsel for the Crown failed to seek directions for the jury regarding risks of gratuitous concurrence and community have consistently reported feeling that it was their lifestyle on trial rather than the accused.⁵²
52. Other issues with the way the police treated the families include the fact that the media was briefed before the families about important issues, and Police neglected to tell Clinton's family that additional remains had been located a year after the initial discovery of his body.⁵³
53. In our submission, there should be a mechanism in the law for redress for victims of crime where initial investigations and trials are flawed not as a result of mistake, negligence or tactics but the systemic discrimination within such processes.
54. Whilst we recognise the danger implicit in expanding the definition of fresh to capture such cases, in our submission that danger is ameliorated by the protections embedded as part of the 'interests of justice' test. A court would properly be able to examine the circumstances of the initial trial and investigations to determine how any failings arose.
55. The contrary position appears to us to strike critically at the legitimacy of the criminal justice system in New South Wales. In circumstances where Aboriginal and Torres Strait Islander persons continue to be disadvantaged at every level of the criminal justice system, the current law should embed the capacity at least to remedy investigations and trials in which the accused was acquitted not because of an impartial process but because of racism in the police or prosecutors who had the conduct of the matter.

An expanded definition of 'fresh'

56. With regard to the 'fresh and compelling' evidence exception, the Bill proposes an amendment to the definition of 'fresh' to insert two new sections, 2A and 2B, in the following terms:

(2A) Evidence is also fresh if:

- (a) it was inadmissible in the proceedings in which the person was acquitted, and

⁵¹ The Previous Report, p. 25.

⁵² The Previous Report, p. 56.

⁵³ The Previous Report, p. 27.

- (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.

(2B) Subsection (2A) extends to a person acquitted before the commencement of that subsection.

- 57. In our submission, an amendment that expands the definition of fresh should be legislated.
- 58. As it currently stands, after more than a decade of the amendment currently being in force, there has not been a single successful application under the law, and only one application ever brought to the court. Prima Facie, this demonstrates that, to the extent to which the amendment of the law was intended to reflect a rebalancing of the rights of the accused with the state, it has failed to do so.
- 59. Moreover, the Bowraville case is instructive in that it reflects the fact that the law, as it currently stands, protects the acquitted accused predominately because of the timing and order in which the various trials were run in that matter, rather than out of a principle of policy. As is made clear in the content of the Previous Report, the inability to properly prosecute this case arises not from any innate concern today with an interests of justice issue or concern over the reliability of the evidence, but as a result of the order of prior trials conducted before any exception to double jeopardy existed in New South Wales.
- 60. The stark reality is that the law as it currently stands has not allowed a jury to examine a body of evidence that, in the submission of the community and the NSW Police, represents a strong circumstantial case that an acquitted accused was in fact guilty of serial murder done in the context of a pattern of sexual assaults perpetrated against young women.
- 61. In *AG v XX*, the Court of Criminal Appeal held that, because at the very least the evidence in relation to Colleen Walker-Craig's death was available to be tendered prior to the Greenup trial, it could not be fresh for that trial. As the crown had run its case on the basis that the probative value of the evidence was only compelling if all three murders could be run together, the Court dismissed the application on that basis.
- 62. The Court did not consider at all the question of whether the totality of the evidence in relation to all three murders was compelling, or whether it was in the interests of justice to set aside the acquittals.
- 63. In our submission, such a standard brings the criminal justice system into disrepute such that the citizens of New South Wales would lose faith in the system. As noted by (then) Member for Manly, Mr David Barr, MP, during the debate over the Act in the Legislative Assembly;

‘People have confidence in the justice system if they can see that justice is, in fact, done. When it can be demonstrated that someone has got off a serious criminal rap, people do not have confidence in the justice system...Murder is final for the victims,

their families and their loved ones. Once a person has been to trial and been acquitted, if there is evidence that was not adduced at trial or evidence is subsequently forthcoming that clearly indicates that the person was guilty, then finality must be seen in terms of the application of justice in those circumstances. If that does not happen, the average person in the street would consider that justice has not been done'.⁵⁴

64. An amendment such as that proposed also has the effect that it recognises that procedural and evidence standards change over time as the community and profession alter their views about what evidence is reliable enough to be placed before a jury, a position we say is akin to developments in scientific techniques. As noted by Professor Hamer of the University of Sydney;

‘I think it would have been appropriate for the exceptions to be extended a bit more widely so that freshly admissible evidence is considered fresh. I think there is an analogy between freshly admissible evidence and fresh, for example fresh forensic evidence, you know fresh DNA evidence resulting from developments in forensic science. If the development of evidence law, if the point of it is to allow more relevant probative evidence before a court then I think there is an analogy you know, freshly admissible is a bit like evidence that’s freshly available due to developments in forensic science so I think it is appropriate for this kind of evidence to come in.’⁵⁵

65. In the Bowraville case, as is clear in the Previous Report, a second investigation was more effective because the officers involved evolved their investigation techniques to address racist assumptions. Likewise, the legal profession continues to develop training aimed at addressing unconscious biases based on gender and race.⁵⁶ All of these improvements have the capacity to produce new and better evidence in relation to prior offending and, in our view, evidence that so arises should be treated in the same manner as evidence that arises as a result of scientific developments. Whilst this argument was not addressed in *AG v XX*, in our submission the reliance on common law interpretations of ‘fresh’ evidence make it unlikely such evolutions would be recognised under the current law.

66. The proposed amendment also has attraction in that it is a limited expansion of the exceptions that apply to the general principle of double jeopardy, and it brings the current law into line with the Government’s understanding of the effect of the provisions when they were passed (as indicated by their submissions in *AG v XX*).

67. We do have one concern with the proposed amendments however, which is that they could create further uncertainty in the law.

⁵⁴ New South Wales, Parliamentary Debates, Legislative Assembly, 19 September 2006, 11:51AM (The Hon. David Barr)

⁵⁵ ‘What evidence is admissible?’, The Law Report (ABC Radio National, 18 September 2018, from 15:05)

<https://www.abc.net.au/radionational/programs/lawreport/2018-09-18/10254558>

⁵⁶ For example - <https://www.lawcouncil.asn.au/media/media-releases/unconscious-bias-training-now-available-to-all-australian-lawyers>.

68. A court interpreting this test might find ambiguity in how it should approach the question of whether evidence ‘was inadmissible’ in the proceedings. Given the Court of Criminal Appeals finding that the principle of legality applies (albeit to a limited extent) to the Act,⁵⁷ it is unclear how a Court would approach the question of determining whether a piece of evidence was admissible at the time of the trial in which the acquittal was won. It is at least possible that a Court will require that evidence be tendered and ruled inadmissible before considering evidence could reach this standard. This could create a scenario where prosecutors were inclined to attempt to bring forth every piece of evidence they held in a brief in order to protect against the possibility of a change in evidence law in the future.
69. In addition, the ‘law of evidence’ is not defined, and could presumably include amendments to Acts other than the *Evidence Act 1995* (NSW) (for example provisions under the *Criminal Procedure Act 1986* (NSW) that deal with the compellability of spouses, admissions by suspects or the taking of sensitive evidence).⁵⁸
70. Finally, under the proposed amendment, a Court would need to determine whether a change to the law of evidence constituted a ‘substantive’ change, however there is little guidance in the provision as to how to determine whether a change would meet that standard.
71. In our view, the combination of these uncertainties makes it possible the amendments could lead to an unintended expansion of categories of cases that could fall under the exceptions.

An Alternative Proposal

72. An alternative approach to the proposed Bill is the amendment of the Act to substitute ‘adduced’ with ‘admitted’. Whilst broader, in our submission, this approach is to be preferred for a number of reasons.
73. Firstly, such an amendment respects the jury verdict but recognises that any jury verdict is delivered on the basis of admissible evidence only.
74. Secondly, such an amendment brings the Bill into line with the United Kingdom jurisprudence and, on the face of it, the New Zealand legislation.⁵⁹ Whilst such a change would put the New

⁵⁷ *AG v XX*, [148].

⁵⁸ *Criminal Procedure Act 1986* (NSW), s279, s281 and Part 2A respectively.

⁵⁹ In New Zealand, the ‘fresh and compelling’ evidence exceptions are contained in s 154 of the *Criminal Procedure Act 2011* which empowers the Court of Appeal to order an acquitted person to be re-tried for a specified serious offence if the Court of Appeal was satisfied that there was ‘new and compelling’ evidence and a further trial was in the interests of justice. ‘New’ evidence is defined in the same terms as in the New South Wales legislation, except that the word ‘adduced’ is replaced by ‘given’. The use of the word ‘given’ is, in our submission, more akin to the evidence being admitted than adduced. Therefore, evidence that was available but was not in fact admitted, would fall within the definition of that provision. The text of those provisions then accords with the interpretation given to the provisions in the United Kingdom. There has been one application considered by a New Zealand Court under these provisions, that of

South Wales legislation at odds with the language in other Australian jurisdictions, it is not clear to what extent it would practically create inconsistency given that we have been unable to identify any cases in other Australian jurisdictions that have considered the meaning of ‘fresh’ within the context of appeals against acquittal.

75. Another argument in favour of this approach is that the Court would retain the capacity to protect the rights of the acquitted Accused, because of the requirement that an order be in the ‘interests of justice’. Any negligence, laziness, indifference or corruption in the police investigation would properly be a consideration in whether an order would be in the interests of justice. Moreover, the fact that the test for interests of justice is a broad one would enable the Court of Criminal Appeal to draw upon the jurisprudence that has outlined the values underlying the principle of double jeopardy to identify the relevant reasons, in a particular case, why the setting aside of an acquittal would or would not be in the interests of justice.
76. Ultimately our preference for this amendment arises from the fact that it represents, in our view, a common-sense approach. If evidence has never been presented to a jury, *prima facie* an application should not be prohibited from being made on the basis of that evidence, and the Court can then look to the question of reliability, changes in evidence law and all of the protections that the double jeopardy principles are intended to serve within the criteria of interests of justice. If there were any concern that the values underlying double jeopardy were not captured within the interests of justice test, those values could be distilled and inserted explicitly as a non-exhaustive list in section 104.
77. We recognise that any of the proposed amendments will increase the number of cases that the exceptions apply to, however there is little evidence they will lead to an influx of applications for retrials. Certainly the provisions would apply to more cases, yet the experience in the United Kingdom where the proposed test has been enacted for over a decade is that there has not been an influx of cases that have threatened the principles of double jeopardy. As noted in the Wood Report;

‘In England and Wales – where the cognate legislation covers over 50 offences - there were only 13 applications to quash an acquittal under that legislation between 2006 and 2014. 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” or evidence that had previously (incorrectly) been ruled inadmissible. This has not appeared to have any significant bearing on the number of applications before the court.’⁶⁰

Solicitor-General v C [2017] NZCA 380, however there was no contest that the evidence was ‘new’ and so the Court was not required to consider this question explicitly.

⁶⁰ Wood Report, page 42, [4.11]. One case arose after those considered in the Wood Report, that of *R v MH*.⁶⁰ In that case, the Crown made a successful application on the basis of DNA testing of evidence gathered at the time of the initial investigation. That testing could have been done at the time but was not. The Court held the evidence was new as it had not been adduced against the accused in their trial.

78. In New Zealand only one case has been brought in the 11 years since the provision's enactment.
79. The evidence from those jurisdictions that use the broader test does not bear out a fear that amendment will create a risk 'floodgates'. In that regard, we endorse the following observations of Professor Hamer:

'I think the risk of oppression by the prosecutor going for retrial's time and time again I think that a bit of a furphy I don't think there is such a risk so this legislation has been in place around Australia for 10 years now this is the first serious application that has been made to my knowledge. In the UK there's double jeopardy exceptions which have been in place for 15 years, there's only been about a dozen cases. So to broaden the exceptions to double jeopardy slightly more, I don't think that would be a grave concern and in fact the UK legislation, it would have recognised this kind of evidence, freshly admissible evidence, to be fresh evidence.'⁶¹

Retrospectivity

80. It is not clear that the proposed amendments would offend against the presumption against retrospectivity, though we acknowledge there is complexity in this issue.
81. The presumption against retrospective operation in the criminal law arises because such laws are considered to offend the rule of law in that they seek to criminalise conduct that was not unlawful at the time it was engaged in. As Toohey J said in *Polyukovich*,⁶²

All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.

82. In this case, the retrospective operation of the amending Bill, or the alteration of the word 'adduced' to 'admitted' doesn't serve to criminalise conduct retrospectively. The crimes the subject of the initial acquittal would, by necessity, be the same crimes sought to be retried and the substantive criminal law applicable at the time of the acquittal would still apply on any retrial. In considering the question of the retrospectivity of a law, courts have traditionally drawn a distinction between retrospective laws affecting substantive criminal law and procedural laws, noting 'a person who commits a crime does not have the right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial'.⁶³

⁶¹ *What evidence is admissible?*, The Law Report (ABC Radio National, 18 September 2018, from 15:47) <https://www.abc.net.au/radionational/programs/lawreport/2018-09-18/10254558>

⁶² *Polyukovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).

⁶³ *Rodway v R* (1990) 92 ALR 385, 389 at [19].

83. Even if the proposed amendments would be found to offend against that principle, in *Polyukovich v Commonwealth* HCA 32 (1991) the High Court held that Australian legislatures have the capacity to pass criminal laws with retrospective operation provided they use explicit and clear language, such as is proposed by the Bill.

A second application pursuant to section 105.

84. The second substantive amendment the Bill proposes is to allow for a second application to be made under the Division (which includes the FCE) in exceptional circumstances.

85. Exceptional circumstances have not been defined in the Bill or the Act, however the Bill establishes that ‘exceptional circumstances’ are taken to include ‘any substantive legislative change to this Division made since the previous application’.

86. Australian Courts have considered the meaning of “exceptional circumstances” in a variety of contexts. These decisions note that what will amount to exceptional circumstances is inherently incapable of being exhaustively stated,⁶⁴ however the Full Court of the Federal Court has cited with approval a passage from the English case of *R v Kelly* which stated that;

‘To be exceptional, a circumstance... cannot be one that is regularly, or routinely, or normally encountered.’⁶⁵

87. Adopting this approach to the interpretation of exceptional circumstances in section 105(1AA) of the Bill, in our submission exceptional circumstances creates a high standard. Given that there has been only one application in 13 years, it is unlikely that the provision would apply to many cases and the impact upon the double jeopardy principle would be limited.

88. In our submission, the proposed amendment is acceptable in that it proposes a narrow extension to the current right of the Crown to bring an application under Part 8 of the Act.

89. An alternative to this approach would be to remove the limitation on the number of applications that can be brought under the Act, but insert a limitation on the number of times a person can face retrial as a result of any successful application to a single retrial. In our submission on a reading of the entirety of the Act, this approach may be more consistent with the Act overall in that it prioritises the sanctity of a jury verdict.

90. The Act sets up different legislative schemes for acquittals given on a verdict by a jury and acquittals from either a judge alone trial or a directed verdict.

⁶⁴ *Plaintiff M174/2016 v Minister for Immigration and Broder Protection and Another* (2018) 353 ALR 600, 30.

⁶⁵ *R v Kelly* [2000] QB 198 CA, 208 (Lord Bingham).

91. Division 2, which applies to jury acquittals, imposes a higher threshold to be met by the Crown by limiting the number of applications that can be made⁶⁶ and imposing a requirement that an order be in the interests of justice.⁶⁷
92. In contrast, Division 3, which applies in relation to acquittals from judge alone trials and directed verdicts, has no requirement that orders be in the interests of justice nor limits the number of applications that can be made to set aside such an acquittal. Indeed, in the case of *R v PL*⁶⁸ the Accused was acquitted by directed verdict on charges of Murder and manslaughter. An application under s107 was successful and the Accused was retried for manslaughter and acquitted. Subsequently a second application under s107 was successful setting aside that acquittal and the Accused was retried and convicted of manslaughter.⁶⁹
93. There is no difference in the protections afforded to an Accused from an acquittal resulting from a jury verdict or an acquittal as contemplated by Division 3, nor, often will there be a substantial difference in the risk or stress experienced, or resources demanded, in the conduct of the defence given than in many criminal trials the defence may not open its case.
94. Presumably the distinction between the divisions reflects the traditional ‘sanctity’ accorded a jury decision.⁷⁰ If that is the case, then in our submission an alternative approach that attached significance to the jury verdict may more suitably fit with the overall scheme of the legislation, namely to remove any limitation on applications under the FCE, but to provide that an Accused can only face one retrial under that exception, with a subsequent jury verdict a complete bar to any further prosecution.

Conclusion

95. In our submission the current law requires amendment if the criminal legal system is to retain the faith of victims of crime and serve its fundamental purpose, the conviction and punishment of those who commit serious crime.
96. If the amendments we propose are adopted, the law would change so as to provide that the following preconditions were met before an application under the FCE could succeed;
- 96.1. The FCE would only be available in relation to the most serious offences;
- 96.2. The Crown could only rely for the application on evidence that had not been considered by the jury which acquitted the accused;

⁶⁶ s 105 of the Act.

⁶⁷ s 104 of the Act.

⁶⁸ (2009) 199 A Crim R 199.

⁶⁹ *R v PL* [2012] NSWCCA 31.

⁷⁰ Marilyn 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 at 165.

- 96.3. To be compelling, the evidence relied upon, along with other admissible evidence, would have to be highly probative, meaning that a conviction on a retrial was likely such that a jury verdict on the retrial would appear to be perverse;
- 96.4. An application could only succeed where the Court of Criminal Appeal was satisfied a fair retrial was likely; and
- 96.5. Whilst multiple applications under the FCE could be brought, following a retrial on any successful application, no further attempts to set aside that acquittal would be allowed.
97. In our submission that amended position, though expanding the exceptions under double jeopardy, represents an appropriate balance between protections for Accused and the interests of justice.
98. If that position is not endorsed by the Committee, we endorse the even more limited expansion proposed by the Bill.

Recommendations

99. The word ‘adduced’ should be replaced with ‘admitted’ in section 102(2) of the Act;
100. Section 102 should have a subsection inserted that extends the above change to any person acquitted prior to the introduction of the amendments; and
101. The appropriate limitation should be on the number of times an Accused can be re-tried under the provisions, not on the number of applications that can be made.

Yours Sincerely,

Prof. Larissa Behrendt
Director, Jumbunna IHL (Research)

Craig D. Longman
Snr. Researcher, Jumbunna IHL (Research)