

Crimes (Appeal and Review)
Amendment (Double
Jeopardy) Bill 2019

Legal Aid NSW submission to the
NSW Legislative Council's Law
and Justice Committee

July 2019

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and short matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

Legal Aid NSW provides civil law services to some of the most disadvantaged and vulnerable members of our society. Currently we have over 150 civil lawyers

who provide advice across all areas of civil law.

The Civil Law practice provides legal advice, minor assistance, duty and casework services to people through the Central Sydney office and 13 regional offices. Its Human Rights Group specialises in the areas of human rights, discrimination, false imprisonment and judicial review.

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the NSW Legislative Council Law and Justice Committee's Inquiry into the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 (NSW) (the Bill).

The rule against double jeopardy provides finality in criminal proceedings. Finality is important, not only to the accused, but to witnesses and others impacted by repeated criminal proceedings. Finality also has a wider social value which demonstrates a commitment to democratic values and the rule of law.

Legal Aid NSW acknowledges the deep distress that is felt by victims of crime and their families when they believe a person has been wrongly acquitted. We acknowledge, in particular, the pain and frustration of the families of the Bowraville victims. We acknowledge the finding of this Committee that there were numerous, systemic failings of the criminal justice system in responding to these murders; in particular, the manner in which the original police investigation was undertaken.¹

However, caution needs to be exercised in responding to a single case with law reform that makes significant inroads into well-established legal principles; may have a widespread impact; and may lead to significant injustice to those acquitted of crimes.

Legal Aid NSW opposes the Bill for a number of reasons:

- it weakens the rule against double jeopardy
- it has retrospective effect
- the scope of the Bill is too wide and unclear
- it undermines the rule of law
- key aspects of the Bill have already been considered and rejected by a previous review, and
- it may lead to complexity and court delays.

Our detailed response is as follows.

The rule against double jeopardy

The rule against double jeopardy is a “fundamental freedom” and an essential part of natural justice.² The rule against double jeopardy is a basic principle recognised in international law. Article 14(7) of the *International Covenant on Civil and Political Rights* (ICCPR) recognises the right not to be tried and punished again for an offence for which

¹ Standing Committee on Law and Justice, *The Family Response to the Murders in Bowraville*; pp xi, 23, 119, 172.

² Kiefel J in X7 at [158] in *Attorney General for New South Wales v XX* [2018] NSWCCA 198.

a person has already been finally convicted or acquitted.³ We note that Australia is a signatory to that Covenant. The Bill represents an encroachment upon a fundamental human right.

Previous reform

In 2006, the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 (NSW)* amended CARA to introduce an exception to the rule against double jeopardy in NSW. The amendment introduced section 100 which provides that the NSW Court of Criminal Appeal (CCA) may, on the application of the Director of Public Prosecutions (DPP), order that an acquitted person be retried for an offence punishable by life imprisonment if satisfied that:

- a) there is fresh and compelling evidence against the person in relation to the offence; and
- b) in all the circumstances it is in the interest of justice for the order to be made.

Section 102 of CARA defines “fresh and compelling” evidence. Evidence is ‘fresh’ if:

- a) it was not adduced in the proceedings in which the person was acquitted, and
- b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.

Evidence is ‘compelling’ if:

- a) it is reliable, and
- b) it is substantial, and
- c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.

In his Second Reading Speech, the then Premier, the Hon Morris Iemma MP, noted that the purpose of the rule against double jeopardy is:

to ensure that criminal proceedings can be brought to a conclusion, and the result in a trial can be regarded as final. It protects individuals against repeated attempts by the State to prosecute. The rule encourages police and prosecutors to be diligent and careful in their investigation and to gather as much evidence as possible against the accused. In this sense, it promotes fairness to the accused and justice for the victim and the community⁴.

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(7).

⁴ Hon Morris Iemma MP, Second Reading Speech, *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill*, Legislative Assembly, Hansard – 19 September 2006.

The current law seeks to strike an appropriate balance in relation to what is a significant alteration to the rule against double jeopardy. It provides an avenue of redress where compelling evidence has emerged after a person has been acquitted of an offence with a penalty of life imprisonment. The law requires that this evidence be both ‘fresh’ and ‘compelling’ and for a re-trial to be in the ‘interests of justice.’⁵ The combination of these requirements ensures that only strong cases proceed to retrial. Further, the exception to the rule against double jeopardy is confined to the most serious offences under NSW law; namely murder and other offences carrying a maximum penalty of life imprisonment. This was the unambiguous intention of Parliament when this law was passed.⁶

In his Second Reading Speech, the then Premier made particular reference to ‘cases where diligent police and prosecutors will still fail to find all the possible evidence’. The scenarios given included where evidence had been deliberately concealed from police and prosecutors, or developments in forensic technology reveal new evidence or new conclusions to be drawn from existing evidence.⁷

Legal Aid NSW considers that the current exception to the rule against double jeopardy provides sufficient scope to meet the above mentioned objectives, including to encourage the diligent initial investigation and prosecution of serious offences. We consider that the Bill would undermine safeguards which were intentionally established to ensure that only strong cases proceed to retrial.

[Review of section 102](#)

In 2015, after the current law had been in force for almost a decade, the Honourable James Wood AO QC conducted a review of section 102 of CARA (the Review). Among other things, the Review considered a proposal to expressly broaden the scope of the provision to enable a retrial where a substantive change in law renders evidence admissible that had not been admissible in the earlier trial. After detailed consideration, the Review concluded that the term “fresh” was carefully considered and intentionally inserted into the provisions because of its restrictions.⁸ The Review did not recommend this option for reform or any amendment to section 102 of CARA.⁹

Of note, the Review did not consider the new clause 105. Clause 105(1AA) of the Bill allows for a second retrial application in *exceptional circumstances*. Clause 105(1AB) goes on to define exceptional circumstances as including *any substantive legislative change to this Division made since the previous application*. This proposed amendment

⁵ Hon Morris Iemma MP, Second Reading Speech Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill. Legislative Assembly, Hansard – 19 September 2006.

⁶ Ibid.

⁷ Ibid.

⁸ The Honourable James Wood AO QC, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001 (NSW)*, 2015; pp 67.

⁹ Ibid.

was not a part of the Bill that was introduced in 2015.¹⁰ The likely effect of this clause has not been considered by any review, whether in Australia or the United Kingdom, and is of significant concern as it permits second retrial applications. We note that the United Kingdom legislation specifically prohibits multiple applications.¹¹

The catalyst for reform – the case of XX

There has only been one matter in which a court considered the exception to the rule against double jeopardy. The matter of *Attorney General for New South Wales v XX*¹² was an application to retry XX for two counts of murder of which he was previously acquitted. The application was refused on the basis that the bulk of the evidence did not meet the definition of ‘fresh’ evidence, because it was evidence that was available at the time of at least one of the trials. This was notwithstanding that the evidence may have been considered inadmissible at the time of trial; that issue was not determined.

Section 102 of CARA contemplates evidence which is genuinely ‘fresh’. That definition is consistent with the common understanding of the word ‘fresh’. In a subsequent application for special leave to appeal to the High Court, the High Court accepted the NSW Court of Criminal Appeal’s interpretation of the provision and refused leave.¹³

The Bill proposes that the definition of the word ‘fresh’ be extended to evidence which was available at the time of the original trial, but is now rendered admissible by a change in the law. This is a significant departure from the current definition of ‘fresh’ evidence.

Concerns with the Bill

The Bill undermines the rule of law

In our view, the effect of the combined operation of clauses 102(2A) and 105(1)(AA), along with the retrospective application of the Bill, is of great concern. Taken together, these provisions undermine the rule of law and could result in proceedings that would bring the administration of justice into disrepute. We detail our concerns as follows.

Retrospective effect

Clause 102(2B) of the Bill extends the application of clause 102(2A) to a person acquitted before the commencement of that clause. Legal Aid NSW opposes this retrospective application.

¹⁰ Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015, Legislative Council, 4 June 2015; <https://www.parliament.nsw.gov.au/bills/Pages/Profiles/crimes-appeal-and-review-amendment-double-jeopar.aspx>.

¹¹ Section 76(5) of the *Criminal Justice Act 2003 (UK)*.

¹² *Attorney General for New South Wales v XX* [2018] NSWCCA 198.

¹³ *Attorney General for New South Wales v XX* [2019] HCA 052.

A fundamental feature of both the rule of law in Australian society and under international human rights principles is that criminal laws should operate prospectively. Retrospective laws are not consistent with the rule of law principle that the law should be public, prospective and capable of being known by those who are subject to it.¹⁴ As a result of such principles, legislation with retrospective operation should be rare and accompanied by proper justification.

Repeated applications to retry an acquitted person

The proposed amendment to section 105 of CARA is aimed at allowing a second application for the retrial of XX. The objective of the Bill is made clear in the Second Reading Speech which references the intent to pave the way for a retrial where the three Bowraville murders are tried together.¹⁵ The provisions in the Bill also evidence an intention to enable the retrial of XX:

- Clause 102(2A) allows for evidence which was inadmissible when the accused was acquitted, to now be considered ‘fresh’ for the purposes of section 102 of CARA. This provision targets evidentiary hurdles that were faced in the prosecution of XX in leading coincidence evidence, which were examined at length by the CCA.
- Clause 105(1AA) then allows for a second re-trial application in *exceptional circumstances*. This amends current section 105(1) of CARA which provides that *not more than one application for the retrial of an acquitted person may be made under this Division in relation to an acquittal*. The ability for the State to make a second application is necessary to enable the retrial of XX.

Clause 105(1AB) defines exceptional circumstances as including *any substantive legislative change to this Division made since the previous application*. If enacted, the Bill itself would constitute a ‘substantive legislative change’ to Division 2, Part 8 of CARA. This would enable the State to attempt to prosecute XX a third time, and to effectively re-litigate the recent High Court decision in this matter.

The limited nature of the current exceptions to the rule against double jeopardy, including the limit of one application to re-try an acquitted person, protects individuals against repeated attempts by the State (with its considerable resources) to prosecute them. The Bill would remove that important protection. Tailoring a law to enable such repeated attempts to prosecute an individual arguably brings the administration of justice into disrepute.

The proposed new provisions are not clear

The rule of law requires that the law is clear and certain. The Bill proposes various provisions which are both unclear and uncertain. The Bill proposes that evidence be

¹⁴ T Bingham, ‘The Rule of Law’ (2008) 1 *Judicial Studies Institute Journal* 121, 124.

¹⁵ Hon David Shoebridge MLC, Second Reading Speech, Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019, Legislative Council Hansard – 30 May 2019.

considered fresh if a ‘substantive legislative change’ in the law of evidence since the acquittal would now make that evidence admissible.¹⁶ The term ‘substantive’ is not defined in the Bill. The law of evidence is rapidly evolving. Each change to legislation will bring the possibility that a new cohort of acquitted individuals may face retrial.

For example, changes to the law of tendency and coincidence evidence could mean that a number of defendants who were acquitted of sexual assault offences that carry a penalty of life imprisonment may be liable to applications for retrial. The ‘substantive legislative change’ in the law could include either the introduction of the tendency and coincidence legislative provisions in 1995.¹⁷ Alternatively, it could include the proposed changes to tendency and coincidence law in relation to child sexual assault that were recently announced by the NSW Attorney General.¹⁸ The Bill could make a significant number of individuals susceptible to retrial.

In his Review, the Honourable James Wood AO QC, considered whether ‘fresh’ evidence in section 102 of CARA should expressly extend to evidence that was previously inadmissible but made admissible due to a later change in law.¹⁹ The table at 6.2 of the Review’s report gives examples of changes to the law of evidence which may render previously inadmissible evidence admissible under the proposal, therefore opening up the possibility of a retrial.²⁰ All of the examples could qualify as substantive legislative change in the law of evidence within the meaning of clause 102(2A) of the Bill.

Clause 102(2A) of the Bill applies to evidence that was inadmissible in the proceedings in which the person was acquitted. However, it does not make it clear whether the evidence needed to have been *ruled* to be inadmissible in the original proceedings. As currently drafted, it is possible that it could cover evidence that was not even tendered because the prosecution understood it to be inadmissible (with or without agreement from the defence).

Clause 105(1AA) allows for second applications for retrial if there are exceptional circumstances. Exceptional circumstances includes substantial changes to Division 2 of CARA, and is not restrictively defined. Thus it includes, but is not limited to, the insertion of clause 102(2A). This opens up the possibility of second applications for retrial on the basis of exceptional circumstances in circumstances that are broader than covered by clause 102(2A) of the Bill.

The lack of clarity and certainty contained in the Bill further undermines the rule of law. The values which the rule against double jeopardy serves are so fundamental to the

¹⁶ Clause 102(2A) of the Bill.

¹⁷ The introduction in 1995 of the tendency and coincide provisions, ss 98 – 101 of the *Evidence Act 1995* (NSW).

¹⁸ Department of Justice, Ministerial media released: Evidence Law Reform, 28 June 2019 <https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/evidence-law-reform.aspx>

¹⁹ The Honourable James Wood AO QC, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001* (NSW), 2015; pp 62.

²⁰ The Honourable James Wood AO QC, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001* (NSW), 2015; pp 64.

fairness of our criminal justice system that any exceptions to the rule must be framed with great precision.²¹

The range of offences with a life penalty has increased

The number of offences which carry a maximum penalty of life imprisonment has increased since the double jeopardy provisions were introduced in 2006. This includes aggravated sexual assault in company,²² sexual assault against a child under 10,²³ and persistent child sexual abuse.²⁴ This expands the potential impact of the proposed Bill. It is also possible that the offences captured by the double jeopardy provisions could expand in the future, through the introduction of new offences and increases to existing penalties.

The Bill would add significant complexity and time to re-trial applications

In a practical sense, an application under clause 102(2A) would be a complex and extremely laborious application to determine. Under clause 102(2A)(a), the court must first determine that evidence would have been inadmissible at the previous trial, applying the law that existed at the time of trial. Taking XX as an example, the court would deal with this question for two trials for murder, which were held a decade apart. The court would have to find that the evidence was inadmissible under the law as it stood in 1994, and then under the law operating in 2005-6.

The court would then be required to consider whether the evidence ‘would now be admissible’ as required by clause 102(2A)(b). The proposed amendment would require the Court to essentially conduct a voir dire to determine the admissibility of the proposed evidence.

Evidence may be ruled to be inadmissible for a wide range of reasons. These can include findings made after a voir dire, which may have involved questioning of witnesses. An assessment of whether evidence would now be admissible and ‘fresh’ within the meaning of clause 102(2A) would likely involve extensive arguments and reference to transcripts of the original proceedings.

Depending on the volume of evidence, such a process would take a substantial amount of the court’s time. As per section 106(5) of CARA, the finding of the CCA cannot be relied upon by the Crown on any retrial. This means that if an application made under these provisions were successful, the voir dire would need to be conducted afresh in the court of retrial.

²¹ Acting Justice Jane Matthews, *Advice to the Attorney General: Safeguards in Relation to Proposed Double Jeopardy Legislation*, 2003,

https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_publications/lpclrd_reports.aspx, 5.

²² Section 61JA of the *Crimes Act 1900* (NSW).

²³ Section 66A of the *Crimes Act 1900* (NSW).

²⁴ Section 66EA of the *Crimes Act 1900* (NSW).

This Bill may have an unintended impact on pre-trial determinations

Given these practical implications of the Bill, it is conceivable that a prosecutor in a trial for an offence punishable by life imprisonment may seek a pre-trial ruling on all available evidence, even when they fully expect it will be ruled inadmissible, to protect their position in a future ruling under clause 102(2A). Such an approach would hamper sensible and appropriate negotiations between the parties about evidence. It could also extend the length of trials in the District and Supreme Courts, which are already overburdened.

We suggest that the Inquiry consider the number of trials before the District Court for supply of a large commercial quantity of prohibited drug and sexual assault offences which carry maximum penalties of life imprisonment. Given that it cannot be known what changes might occur in the law to make evidence admissible in the future, it may be considered prudent for a prosecutor to seek a ruling in such cases, for each piece of inadmissible evidence. The potential cost to the criminal justice system could be significant.

This Bill could result in pressure for legislative change

Legal Aid NSW is concerned that the Bill may encourage pressure on the legislature to amend the rules of evidence following evidentiary rulings which are unfavourable for the prosecution case in matters which involve offences punishable by life imprisonment. This conclusion was also reached by Honourable James Wood AO QC, when considering a similar proposal to amend section 102 of CARA.²⁵

This may have the effect of changing the focus of the double jeopardy provisions from 'fresh evidence' to issues of admissibility. This may have the effect of undermining appeals under section 5F of the *Criminal Appeal Act 1912 (NSW)* and politicising the trial process.

²⁵ The Honourable James Wood AO QC, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001 (NSW)*, 2015; p 67.