

Double Jeopardy, Law Reform and the Bowraville Murders

This resource examines the case law and legislation about the legal debate on double jeopardy as it relates to the Bowraville Murders.

Tragically, the source of this legal debate arises from the unsolved murders of three Indigenous children in Bowraville, New South Wales in the early 1990s.

Protections against double jeopardy are important to the rule of law as they preserve the right to a fair trial and more broadly equality before the law.

Sometimes the community/prosecuting bodies or law enforcement form the view that a person who have been acquitted should be tried again. This usually occurs, because of new factual information, suggesting that person's involvement in the crime. But due to the double jeopardy rule they cannot be tried again.

In 2001 Lord Justice Robin Auld, summed up concerns about the double jeopardy rule in a report into a review of UK criminal courts, which included concerns about double jeopardy:

If there is compelling evidence... that an acquitted person is after all guilty of a serious offence, then, subject to stringent safeguards..., what basis in logic or justice can there be for preventing proof of that criminality? And what of the public confidence in a system that allows it to happen?

The Bowraville Cases

In late 1990 and 1991 Colleen Walker, Evelyn Greenup and Clinton 'Speedy' Duroux disappeared from the town Bowraville, on the NSW Mid North Coast.

In 1994 XX was tried and found not guilty of murdering 15 year old Clinton Speedy-Duroux.

In 2006, XX was tried and found not guilty of the murder of 4 year old Evelyn Greenup.

Under the rules of the *Evidence Act 1995 (NSW)* at the time, the two trials were required to be heard separately.

No person has been tried for the murder of Colleen Walker.

Double Jeopardy and Law Reform in NSW

In 2003, the NSW Government released the *Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW)* which sought to change the rule on double jeopardy. This Bill was intended to amend the Criminal Appeal Act 1912 (NSW) to allow a person to be retried for an offence if there was "fresh and compelling evidence of guilt." The government's Bill was debated in NSW Parliament committees, and discussed at federal level, but was ultimately not passed.

In 2006, the government tried again, by introducing the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006*, which was an attempt to amend the *Crimes (Appeal and Review) Act 2001 (NSW)*. These amendments were substantially the same as those floated back in 2003. This was passed by Parliament, which amended the *Crimes (Appeal and Review) Act 2001*.

The Bowraville murders were mentioned by a number of parliamentarians during the debate.

Principally, the amended *Crimes (Appeal and Review) Act 2001 ("CARA")* now provides in section 100, that:

(1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence if satisfied that:

- (a) there is fresh and compelling evidence against the acquitted person in relation to the offence, and**
- (b) in all the circumstances it is in the interests of justice for the order to be made.**

The meaning of the words "fresh" and "compelling" are defined in section 102 of the Act.

(2) 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.**

Section 102(3) of CARA provides that:

(3) 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 2015, the Honourable James Wood AO QC, former NSW Supreme Court justice and former chairman of the NSW Law Reform Commission, was asked to prepare a report on whether section 102 of the Act, which defines "fresh" and "compelling" evidence, should be amended. Mr Wood concluded that it should not be, because of concerns that the amendments would significantly undermine protections against double jeopardy.

After Mr Wood handed down his report, David Shoebridge, the Greens member of the NSW Legislative Council, introduced the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015*, which would have amended the *Crimes (Appeal and Review) Act 2001* to allow previously inadmissible, but now admissible, evidence to count as "fresh" evidence. This Bill failed to pass in the NSW Parliament.

This means that any cases the prosecution seeks to argue should be an exception to the double jeopardy rule, must still be dealt with under sections 100 and 102 of the *Crimes (Appeal and Review) Act 2001 (NSW)*.

The Application for a Retrial in NSW

The Aboriginal Community of Bowraville has long pushed for XX to be re-tried for the murders of Evelyn Greenup and Clinton Speedy-Duroux and to be tried for the murder of Colleen Walker. The rule on double jeopardy has been a legal hurdle to these cases proceeding.

In 2016, in the wake of ongoing changes to the *Evidence Act 1995 (NSW)* regarding the nature of evidence that is admissible at trial, NSW Attorney-General Gabrielle Upton announced she would make an application for the retrial of XX for the murders of Clinton 'Speedy' Duroux and Evelyn Greenup as well as a trial of XX for the murder of Colleen Walker. The Attorney General applied to have all three trials heard together and for the evidence in one to be evidence in the others.

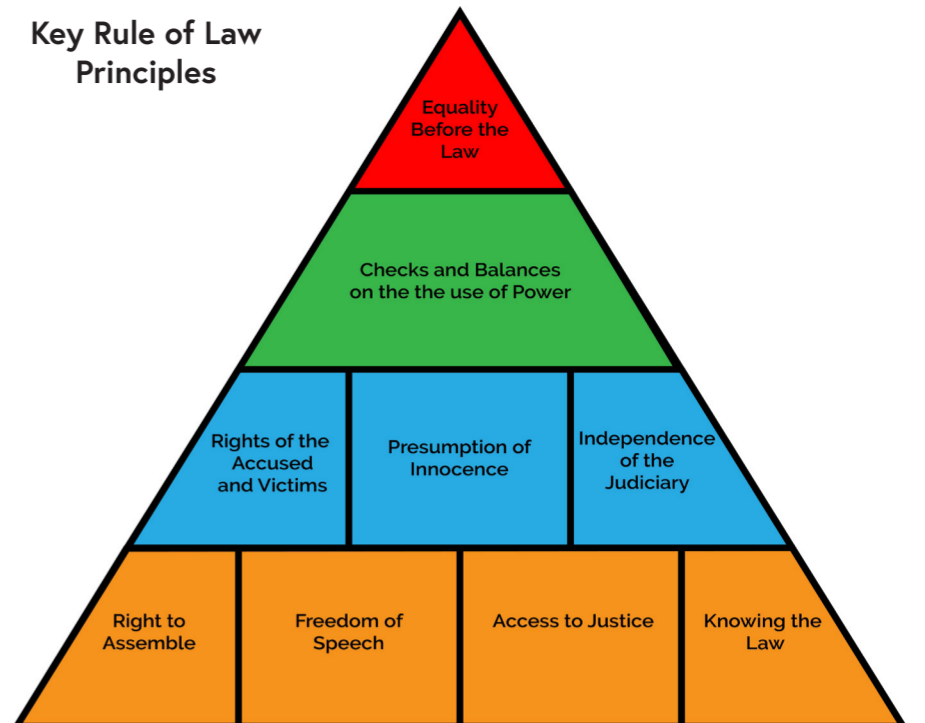
The application by the Attorney General was made on the basis that:

If the evidence in relation each of the three murders was considered by a jury at a single trial, that evidence, which allegedly showed that there were similarities in the circumstances of each murder, would indicate that each of the children was murdered by the respondent. *Attorney General for New South Wales v XX [2018] NSWCCA 198 [Headnote]*

Double Jeopardy

'Double jeopardy' is found in legal systems around the world, including in Australia, England and the United States.

The double jeopardy rule exists to prevent a person from being sent to trial again, if they have already been found not guilty on the facts of that case.



The 2018 Court of Criminal Appeal Decision

On 13 September 2018, the NSW Court of Criminal Appeal handed down their decision in the application made by the Attorney General of NSW for a new trial of XX. That case was *Attorney General for New South Wales v XX [2018] NSWCCA 198* ("the Judgment"). In the Judgment the Court considered the question of fresh and compelling evidence.

The most important evidence that the Attorney General alleged was 'fresh' was in relation to the murder of Colleen Walker, most of which had not been admitted into evidence in either of the earlier trials. The Attorney General said this evidence was also 'compelling', because it established similarities between each of the murders in a way that would not have been possible with only the evidence from the two other murders. [Headnote]

Specifically, the evidence put before the Court by the Attorney General as being 'fresh' and 'compelling', because it had not previously been admitted into evidence, was:

The alleged similarities in the factual circumstances between the death of Evelyn Greenup and Clinton Speedy-Duroux. This evidence was put before the Court by the prosecution in the 1994 trial of XX for the murder of Clinton Speedy-Duroux. However, those facts were not accepted as evidence in the 1994 trial, because of the rules regarding admissible evidence at that time.

Further "fresh" allegations the police had uncovered over the years, included:

- (a) evidence of two delivery drivers who claim they saw a white man, matching XXs description, standing over an Aboriginal teenager who was lying on the road outside Bowraville the morning Clinton disappeared.
- (b) evidence from the case of Colleen Walker, because it was not relied upon or admitted in either the Speedy or Greenup trials. It was compelling because it was evidence of coincidence.
- (c) evidence from four informers that XX had made admissions to them in relation to the offences.
- (d) evidence from other persons that the respondent had made admissions to them about possibly being involved in the murders and/or location of bodies.

In the Judgment, the Court considered whether it was appropriate for the above alleged facts to be allowed as "fresh" and "compelling" evidence in any retrial of XX for the murders of Clinton 'Speedy' Duroux and Evelyn Greenup, as well as a trial of XX for the murder of Colleen Walker, on the basis that the three trials would all be heard together.

The Court noted that it was required, under s 105(7) of CARA, to decide if there was fresh evidence in relation to each of the offences separately.

'Fresh' and 'Compelling' Evidence

The first test of whether evidence is 'fresh' is whether it has been 'adduced'. Section 102 (2)(a) of CARA says that evidence is fresh if it was not 'adduced' in the proceedings, in which the person was acquitted. In his application, the Attorney General argued that, as specific factual information had not been admitted into evidence in the trial of XX for the murders of Evelyn Greenup and Clinton Speedy, it had not been adduced.

There is little guidance from previous cases on what the word 'adduced' means in section 102(2), and whether it includes evidence that has been put before the court (tendered) or evidence admitted in the trial.

After considering case law in Australia and England, the Second Reading speech in the NSW Parliament, as well as the report of the Honourable James Wood AO QC, the Court decided that the word 'adduced' meant tendered, not admitted into evidence [247]. The Court then considered the second test about whether the evidence could have been tendered in the previous proceedings, if reasonable diligence had been used [225].

The second test in 102(2)(b) CARA considers whether evidence could have been adduced but wasn't, due to a lack of reasonable diligence by prosecutors.

This means the prosecution cannot say that evidence is 'fresh', simply because of poor investigation or decisions made not to adduce that evidence in a previous case. The Court noted that evidence will not be considered fresh just because there is a change in the rules of evidence [225], [243] and [265]. The test is whether it was available to be adduced. To the same extent, if evidence had previously been inadmissible, it does not automatically mean it cannot now be fresh evidence.

Section 102(3) looks at whether evidence is compelling. This requires the prosecution to prove that the 'fresh' evidence is 'reliable', 'substantial' and 'probative'.

The Court found that each element of s 102 must be proved, that is that the evidence is both fresh and compelling [171] and [176]. That meant that if either of those elements could not be proved, the application would fail. The court found that the evidence was not fresh and that was sufficient under s 102 for the application to fail, without need for detailed consideration of whether the evidence was 'compelling'.

"The argument focused critically on the unique strength of a case in which all three cases would be considered together, with evidence in relation to each murder being admissible as coincidence evidence in relation to each other murder" [264].

The Attorney General summarised the evidence as showing that;

each of the children were murdered; they were murdered by the same person; and that person was XX

The Court's Decision

The court found that the applicant needed to show that their evidence was fresh in relation to the offence, for which the person had previously been acquitted. It found it could not consider the evidence together as a whole. That evidence had to be fresh in relation to each one of the two acquittals [265]

The Court found that the 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) of CARA [256]. The Court refused the application for a retrial in the Evelyn Greenup matter [261].

In relation to the application for a retrial for the murder of Clinton Speedy, the court found that the Attorney General did not sufficiently argue that case [267]. There were no submissions made by either party as to whether the 'fresh' evidence was sufficient for a retrial of XX for the murder of Clinton Speedy, without a retrial for the murder of Evelyn Greenup. As the argument had not been put by the Attorney General, the Court could not decide on it.

XX has been charged with the murder of Colleen Walker. However, as the Attorney General has announced that he is appealing the decision of the Court of Criminal Appeal to the High Court. The High Court did not grant special leave and there will be no further appeals.

Student Activities

Activity 1 - Law Reform Statements

Evaluate the below statements offered by the following leading figures in the Double Jeopardy law reform debate:

a The President of the Law Society of NSW, Robert Benjamin, launched the Law Society's Law and Order Policy Statement on 20 February 2003. One of the Statement's recommendations was:

As to the Double Jeopardy Rule, it should be noted that it preserves finality of justice for people acquitted of crimes, ensures that the best possible case is prepared by police and prosecution, and avoids continued persecution of individuals. It should not be changed without proper debate and consultation, outside of the heat of an election campaign...

b Former Prime Minister Howard said the following:

... justice was not served by "demented, dogmatic adherence" to legal principles simply because those principles had been around a long time..."I am very much in favour of changing things that don't work, and this rule doesn't work. I'm not in favour of totally throwing it out...but it does seem to me that this particular case [R v Carroll] is just horrific...

c Dr Mirko Bagaric, School of Law, Deakin University evaluated the arguments for and against the double jeopardy principle and concluded it is necessary to recognise exceptions to it:

...like all rights or protections which are properly enjoyed by citizens it [the double jeopardy rule] has its limits. It is fanciful to think that any right is so paramount that there cannot be circumstances in which it should yield to other interests. This is particularly so in relation to merely procedural rights. There are strong countervailing interests which weigh against the principle of double jeopardy. In relation to nearly all circumstances in which this rule applies a contrary good is punishing wrongdoers...[I]n some instances other countervailing interests also weigh against the application of the principle. An example is the principle that no person should benefit from his or her own wrongdoing.

Activity 2 - Discussion Questions

1. What is law reform?
2. Why do we have law reform?
3. What triggers a law reform matter?
4. What are the processes of law reform?
5. How does law reform shape future laws?
6. What is double jeopardy?
7. What is the principle of double jeopardy?
8. Who would be interested in law reform around double jeopardy? Why?

Read and analyse The 2018 Court of Criminal Appeal Decision above.

Discuss the facts and legal arguments of the Bowraville cases.

9. How do you balance the rights of the defendant and the administration of justice?
10. How has the state used its power?
11. What has been the impact on the families of the victims?
12. What was the role of police in the case?
13. How does the presumption of innocence impact on a double jeopardy case?
14. Evaluate the court's decision using legal thinking?
15. Do you think that there needs to be further law reform of the Double Jeopardy laws.

Activity 3 - Write a Submission

1. Complete a Law Reform Inquiry scaffold for a current law reform issue being examined by an Australian Law Reform Commission
2. Write a short submission to the Law Reform Commission using the 'How to Write a Submission Guide' -- Teacher to determine length of submission - Suggested length 1-2 pages
3. Submit the submission to the Commission and track its progress

Law Reform Elements	Arguments For Law Reform	Arguments Against Law Reform
Moral Influences <ul style="list-style-type: none"> • Parents/family • Religious beliefs • Cultural heritage • Education • Peers 		
Social/Cultural Influences <ul style="list-style-type: none"> • Changing Social norms • Discrimination • Indigenous Rights • Multiculturalism 		
Role of Law enforcement <ul style="list-style-type: none"> • Investigations • Discretion 		
Political Influences <ul style="list-style-type: none"> • Use of power by the State to change law • Role of Media • Policy Change 		
Economic Influences <ul style="list-style-type: none"> • Business • Lobby Groups 		
Role of Technology		
Legal Principles <ul style="list-style-type: none"> • Current legislation • Rule of Law Principles 		

HOW TO WRITE A SUBMISSION

WHAT PREPARATION DO I NEED TO DO?

Read up on any available information about the new or existing government policy. Government agencies will usually provide a consultation or discussion paper when announcing a proposed policy or law reform initiative, which will often contain useful links to other reference materials for you to read up on.

Research the law reform issues that are being addressed in your submission. Use the scaffold to plan your submission.

Take the time to map out your response and be clear about those aspects of the government's policy/law/proposed law that you agree or disagree with, and any recommendations that you may have.

TIPS FOR WRITING AN EFFECTIVE SUBMISSION

An effective submission has the following:

An introduction about yourself name and details, education, expertise

Name of the Enquiry

Relevant Terms of Reference - these can used as headings in your submission

Whether you want your submission made public

Your submission should be concise and clear. It is helpful to number paragraphs

Keep your sentences short and to the point and your language professional, polite, and as objective as possible. This will ensure that your submission retains credibility, and that your audience treats your submission seriously.

WHAT SHOULD I INCLUDE IN MY SUBMISSION?

An opening paragraph that establishes why this enquiry is relevant to you (ie I am a young person and this law reform will affect me in the following ways ... and relates to the TOR)

Use headings to ensure that your submission is structured and flows logically, as well as to assist the reader in following your argument. It may be effective if the structure of your headings follows the terms of reference.

Properly reference all materials that you use to support your argument.

State your key concerns, why these issues affect you or why you otherwise feel passionately about them.

Provide legal recommendations on the law reform proposal. Recommendations can include changing the law or keeping it the same

Back up your argument with examples including research where applicable. The more support materials you use, the stronger and more persuasive your argument will be.

WHAT SHOULD YOU NOT INCLUDE IN YOUR SUBMISSION?

It is not necessary to write an essay.

Do not delve into information that you do not know about. It is perfectly acceptable for you to leave out any points, or terms of reference that you are not comfortable addressing.

Be sure to maintain a professional and moderate tone.