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9 April 2015

The Hon. David Shoebridge
Member of the Legislative Council
Parliament House
Macquarie St, Sydney NSW 2000.

Dear Minister Shoebridge,

RE: THE CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2015 (the **Bill**).

Thank you for the opportunity to respond to the Bill.

As you know, Jumbunna Indigenous House of Learning, Research Unit ("**Jumbunna**") has worked with the families of the deceased and the Bowraville community for a number of years now, providing general advocacy work, additional legal research on a range of issues, support for the community's advocacy strategies and producing a documentary film.

We were pleased to provide written submissions and oral evidence to the Law and Justice Committee's Inquiry, and we made a number of recommendations within those submissions.

Endorsement

We endorse the Bill and believe that it enacts Recommendation 8 of the Committee's Report, *The Family Response to the Murders in Bowraville*. Whilst the Bill will not remove all of the obstacles in getting the cases into court, it addresses some of those issues and, importantly, clarifies the Parliament's intentions as to the circumstances in which an acquitted accused may be retried for serious crimes.

Broader Impacts of the Bill

We believe the broader impacts of the Bill on the Criminal Justice System will be limited. The concerns regarding 'floodgates' that have been raised over time are not supported by the evidence we have. The 'double jeopardy' provisions as they currently stand have existed in NSW since 2009 and there have been no applications made under s.100 to date. Similar provisions exist in other states and no applications to the Court have been made to date in those jurisdictions either. In our submission, the lack of applications in Australia demonstrates that these provisions are likely to be relied upon on only in rare cases.

Indeed, given the lack of direction from Courts as to the proper interpretation of s.100, and the fact that, as this case shows, legal minds differ as to the proper interpretation of that section, it is not likely that clarifying the meaning of the section to reflect Parliament's intentions will have any impact on the number of applications brought.

As noted by Mr Scot MacDonald during the presentation of the report:

> "*the double jeopardy changes made in 2009 [sic] have not opened the floodgates to retrials. I do not think the clarifying amendments that we have asked the Government to consider will risk running unwanted charges or rebalancing rights under the law*".[1]

Moreover, evidence from the United Kingdom, where the definition accords with that proposed in the Bill, does not support a fear of floodgates.

What research that has been conducted in the United Kingdom demonstrates that in that jurisdiction where such appeals have been available for over 10 years only 13 applications had been brought as at 31 December 2013. Whilst the greatest number of applications were made on the basis of DNA evidence, three of those cases related to similar fact/tendency evidence. Of those cases, two resulted ultimately in a conviction, with the third unknown. [2]

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[1] New South Wales, *Parliamentary Debates,* Legislative Council, 6 November 2014, 2216 (Scot MacDonald).

[2] Marilyn McMahon, 'Retrials of persons acquitted of indictable offences in England and Australia: Exceptions to the rule against double jeopardy', (2014) 38 Crim LJ 159, 174.

The second observation we would make is that there is a need to clarify the meaning of the provision. There has not been an interpretation of the provision in Australia, however the inquiry into the Bowraville murders has demonstrated the variety of interpretations that are available. In our view it is preferable that the Parliament clarify their intention as to the interpretation to be given to the provision rather than leaving it to the discretion of the DPP or the Attorney General, who have demonstrated different views.

In our submission, the proposed Bill meets the aim of one of the substantive issues underlying Recommendation 8 by addressing the impact of changing evidential laws on retrials and does so in an appropriate and limited manner, especially given the context in which such applications occur.

In so doing, the proposed Bill clarifies for the legal profession, Police, Prosecutors, Courts and victims of crime, the circumstances in which the NSW Parliament believes an aquitted accused should be re-tried.

Further Comments

As noted by the Hon. David Clarke on the occasion of the tabling of the Report, this experience has been a '23-year roller-coaster ride of emotions and disappointment within the legal system'.[3] We are concerned that should this Bill not pass the Parliament, in order to ensure that the families of the victims and the Bowraville community do not experience again the disappointment of a legal system unable to provide justice, some other pathway for the family to receive justice should be laid out for them by the NSW Parliament.

Yours Sincerely,

Craig D Longman
Snr Researcher, JIHL (Research)

Prof. Larissa Behrendt
Director, JIHL (Research)

[3] New South Wales, *Parliamentary Debates,* Legislative Council, 6 November 2014, 2209 (David Clarke).