Standing Committee on Law and Justice

The family response to the murders in Bowraville

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Terms of reference

1. That the Standing Committee on Law and Justice inquire into and report on the family response to the murders in Bowraville of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux and in particular, give the families the opportunity to appear before the committee and detail the impact the murders of these children have had on them and their community.

   The terms of reference were referred by the Legislative Council on 26 November 2013.[1]

[1] *Minutes*, Legislative Council, 26 November 2013, pp 2261-2262.

Committee membership

The Hon David Clarke MLC	**Liberal Party**	*Chair*
The Hon Peter Primrose MLC	**Australian Labor Party**	*Deputy Chair*
The Hon Catherine Cusack MLC[2]	**Liberal Party**	
Mr Scot MacDonald MLC	**Liberal Party**	
The Hon Sarah Mitchell MLC	**The Nationals**	
The Hon Shaoquett Moselmane MLC	**Australian Labor Party**	
Mr David Shoebridge MLC	**The Greens**	

[2] Member participated for the duration of the inquiry.

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Chair's foreword

This inquiry has been particularly unique in character, canvassing complex issues that have required participants to share memories and experiences that are acutely painful to them. I extend my sincere thanks to the family members of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux, and other individuals who have assisted the committee in this way. The committee is grateful for their trust and cooperation, upon which our inquiry has depended.

Throughout our deliberations, the committee has gained an insight into the rollercoaster ride of emotions experienced by the families following the children's disappearances 23 years ago: their pain and frustration during the initial investigation and subsequent criminal trial were followed by feelings of optimism brought about by the second investigation, which were then dashed after the second trial. Significant amendments to the double jeopardy legislation brought fresh hopes that the families may achieve justice, but once again these hopes were shattered when three consecutive applications for a retrial were refused. In spite of this journey, the families' tenacity and determination to achieve justice for Colleen, Evelyn and Clinton has not wavered.

While it was clear to the committee that the families sought only justice, the terms of reference for this inquiry established clear parameters within which the committee could carry out its deliberations. We have done the very best we can within these parameters to formulate findings and recommendations within the terms of reference imposed.

Given the sensitive issues canvassed during this inquiry, the committee is also pleased to have successfully navigated the consideration of these matters in a spirit of cohesion and reported its observations and recommendations with consensus. The inquiry demonstrated members' ability to work together towards an important goal.

The committee has made a number of recommendations that address improvements to the NSW Police Force's policies and procedures; enhanced access to Aboriginal Witness Assistance Services; implementation of Aboriginal cultural awareness training for legal practitioners, members of Parliament and parliamentary staff; the judiciary's use of jury directions regarding cultural and linguistic factors; the provision of funding for mental health support and culturally specific counselling services for the families and their communities; the establishment of a working group to examine the adequacy of mental health services in the towns of Bowraville and Tenterfield; and funding assistance to assist the beautification and maintenance of memorials dedicated to the children.

The committee has also recommended that the NSW Government review s 102 of the *Crimes (Appeal and Review) Act 2001* to clarify the definition of 'adduced', and recommended that the merits of any new application for a retrial of the Bowraville murders be considered by an independent assessor, such as a retired senior judge, or senior prosecutor from another jurisdiction. We hope this will bring the families one step closer to their ultimate aim, justice.

Finally, the committee has formally acknowledged the pain and suffering experienced by the families of the three children over the past 23 years, which, in our view, has been significantly and unnecessarily contributed to by the failings identified in its report.

I once again extend my sincere thanks to all those who have participated in this inquiry. I would also like to thank my colleagues for their thoughtful contributions and collaborative approach to our deliberations. On their behalf I thank Teresa McMichael, Jenelle Moore, Christine Nguyen and Angeline Chung of the committee secretariat for their professional support during this inquiry.

The Hon David Clarke MLC
Committee Chair

Summary of recommendations

Recommendation 8 **80**

That the NSW Government review section 102 of the *Crimes (Appeal and Review) Act 2001* to clarify the definition of 'adduced', and in doing so consider:

- the legal or other ramifications of defining adduced as 'admitted', particularly on the finality of prosecutions
- the matters considered by the English courts under the equivalent UK legislation
- the merit of replacing section 102 of the *Crimes (Appeal and Review) Act 2001* with the provisions in section 461 of the *Criminal Appeals Act 2004* (WA), and
- the merit of expressly broadening the scope of the provision to enable a retrial where a change in the law renders evidence admissible at a later date.

The report of this review should be tabled in the NSW Legislative Council as soon as practicable.

Recommendation 9 **89**

That the NSW Government ensure that, should any new application for a retrial of the Bowraville murders be submitted to the NSW Director of Public Prosecutions or Attorney General, the merits of the application be considered by an independent assessor, such as a retired senior judge or senior prosecutor from another jurisdiction.

Recommendation 10 **109**

That the NSW Government ensure that funding for the mental health worker position for the Bowraville community is made permanently available.

Recommendation 11 **109**

That the NSW Government ensure that the second mental health worker position for the Bowraville community be filled as a matter of priority, and that the families of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux be involved in the selection process.

Recommendation 12 **110**

That the Minister for Health, Minister for Mental Health and Minister for Family and Community Services establish a working group to examine the adequacy of Aboriginal medical and mental health services in Bowraville and Tenterfield, in consultation with the communities, and report back with a plan to address any deficits. The working group should give particular consideration to the reinstatement of a permanent Aboriginal health clinic on the Bowraville Mission.

Recommendation 13 **110**

That the NSW Government fund the Red Dust Healing Program to make it available to family members of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux. The program should be provided in both the Bowraville and Tenterfield regions.

Recommendation 14 **111**

That the NSW Government fund the Nambucca Youth Services Centre to provide outreach services, particularly Aboriginal youth services, in Bowraville.

Recommendation 15 **111**

That the NSW Government provide funding to:

- beautify and maintain the memorial dedicated to Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux in Bowraville
- beautify and maintain the Clinton Speedy Memorial Park in Tenterfield, and
- erect a memorial to Colleen Walker-Craig in Sawtell.

The beautification or establishment of these memorials should be undertaken in consultation with the families of the three children.

Preface

Between September 1990 and January 1991, Colleen Walker-Craig, aged 16, Evelyn Greenup, aged 4, and Clinton Speedy-Duroux, aged 16, went missing from the same street in the small township of Bowraville. In early 1991, the bodies of Evelyn Greenup and Clinton Speedy-Duroux were found in bushland along the Congarinni Road on the outskirts of the town. Clothing belonging to Colleen Walker-Craig was also found in the Nambucca River running through the same area of bushland, however Colleen's body has never been found.

To provide context to the themes discussed in this report, the key events relating to the Bowraville murders can be summarised as follows.

- Although three children disappeared, only two bodies have been found.
- Only one Person of Interest has been identified in connection to the cases. That person was tried separately for the murders associated with the two bodies found yet acquitted on both counts.
- The evidence relating to all three murders has never been considered together by a court.
- No one has been convicted for the murder of the three children – a killer is walking free.

Although the committee received detailed evidence in regard to the disappearances and murders, many of these details have been covered in articles and television documentaries and therefore have not been reproduced in this report.

In evidence to the committee, Jumbunna Indigenous House of Learning described the events and decisions surrounding the Bowraville murder investigations, trials and attempts for a retrial under the 2006 double jeopardy laws as a 'perfect storm' that have worked together to frustrate attempts for a successful prosecution for the murders of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux. Jumbunna stated that:

> … the case is exceptional in that, at all turns, a series of decisions, intentional and unintentional, well-meaning and considered in some cases, ill-considered and indifferent in others, have had negative consequences for the prospects of [a successful prosecution]. Indeed, if one had intentionally set out (we do not for a moment suggest this was the case) to deny effective justice as contemplated by our political and legal system to a discrete community, they could not have done a better job.[3]

The committee is hopeful that this report will go some way to explaining the 'perfect storm' of events that has characterised the families' experiences of the past 23 years and instigate a legal debate that may bring the families one step closer to their ultimate aim – justice.

[3] Submission no. 27, Jumbunna Indigenous House of Learning, p 32.

Chapter 1 Introduction

This chapter provides background to the inquiry, an overview of the inquiry process and an outline of the report structure.

Background to the inquiry

1.1 The inquiry was established on 26 November 2013 to inquire into and report on the family response to the murders in Bowraville of three Aboriginal children: Colleen Walker-Craig, Evelyn Greenup, and Clinton Speedy-Duroux.

1.2 This inquiry was established to give the children's families the opportunity to appear before the committee and detail the impact the murders of the three children and subsequent related events have had on them and their community.

1.3 The full terms of reference are reproduced on page iv.

Conduct of the inquiry

1.4 This inquiry was particularly unique in character. The terms of reference required the committee to report on the family impact of a series of murders that affected a small and tightly knit community in many different ways. It quickly became apparent that at the heart of the community's concern was a desire for justice, specifically for the cases to be retried together before the courts.

1.5 The committee notes at the outset that it is not the committee's role to investigate or comment on the allegations made or the veracity of those allegations. Equally, while the committee has the capacity to independently review the evidence before it and make subsequent recommendations, the committee does not have the capacity to make representations on the families' behalf in their pursuit of justice. However, the inquiry has provided an opportunity for the families and their community to tell their stories and to recommend avenues for change and redress.

1.6 In preparation for the inquiry, the committee sought training in Aboriginal cultural awareness from Dr Diana Eades, a sociolinguist from the University of New England who specialises in Aboriginal English. The workshop canvassed the differences between Aboriginal English and other forms of English, the role of culture and traditional languages in current communication patterns for Aboriginal people in New South Wales and techniques for facilitating an environment in which inquiry participants could freely and fully tell their story. The committee considered the training to be particularly beneficial and is grateful to Dr Eades for her assistance.

Submissions

1.7 A media release announcing the inquiry and a call for submissions was sent to all media outlets in New South Wales in November 2013. The committee then wrote to each of the

victims' families to invite them to contribute to the inquiry. The closing date for submissions was Friday 28 February 2014.

1.8 The committee received 30 submissions and four supplementary submissions from both family and friends of the three victims, as well as the NSW Police, community support workers, legal representatives and the NSW Government. A list of submission authors is published at Appendix 1.

Site visit to Bowraville

1.9 Prior to the commencement of hearings, the committee conducted a site visit to Bowraville on Monday 31 March 2014. The committee first met with Detective Inspector Gary Jubelin, Detective Sergeant Jerry Bowden, State Crime Command Analyst Bianca Comina and Ms Leonie Duroux for a briefing on the circumstances surrounding the three murders and the subsequent investigations, prosecutions and applications to request a retrial of the accused.

1.10 The committee then met with family members of the three children over afternoon tea to discuss the inquiry process in an informal atmosphere. The committee is grateful to the families for their willingness to meet in this way.

Public hearings

1.11 The committee subsequently held two public hearings: the first at Nambucca Shire Council Chambers in Macksville on 1 May 2014, and the second in Sydney on 12 May 2014.

1.12 The transcript of proceedings for each hearing is available on the committee's website www.parliament.nsw.gov.au/lawandjustice.

Private roundtable hearing

1.13 On 2 May 2014 the committee held a private, roundtable hearing at Nambucca Shire Council Chambers in Macksville with members of the three families. Each individual family group met separately with the committee to discuss their experiences.

Consultation on draft recommendations

1.14 On 29 August 2014 the committee travelled back to Bowraville to meet with representatives from the families of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux to discuss some potential recommendations the committee could make to provide better support and services to the families and their communities, and to acknowledge the pain and suffering they have experienced over the past 23 years. A list of these family members is provided at Appendix 2.

1.15 The committee again thanks these family members for taking the time to meet with the committee, for some of whom it was the third time.

1.16 In the week following the committee's final visit to Bowraville, the committee was informed of the passing of Ms Elaine Walker on 5 September 2014. Ms Walker, known as 'Aunty Elaine' to the Bowraville community, was aunt to Colleen Walker-Craig and a respected elder within the Bowraville Aboriginal community.

1.17 The committee would like to take this opportunity to acknowledge the contribution that Aunty Elaine made to this inquiry and thank her for her warm welcomes to country during the committee's visits to Bowraville. The committee is deeply appreciative of the time that Aunty Elaine spent with us, both during her formal evidence alongside her family, and during the informal discussions she held with members prior to and following the hearing process. Aunty Elaine's quiet dignity, strength and evident love for her family and her community made a strong impression on the committee and our staff. We extend our sincere condolences to both Aunty Elaine's immediate family and the wider Bowraville community.

Structure of the report

1.18 Chapter 2 provides a timeline of the key events of the Bowraville case following the disappearances and murders of the three children.

1.19 Chapter 3 discusses the original police investigation into the three murders, and the subsequent reinvestigation of the case by Strike Force ANCUD from 1996.

1.20 Chapter 4 considers the criminal trials for the murders of Clinton Speedy-Duroux and Evelyn Greenup and the 2004 coronial inquest into the deaths of Evelyn Greenup and Colleen Walker-Craig. The chapter also discusses the families' experiences of the trial process.

1.21 Chapter 5 provides an overview of the application of the double jeopardy principle in New South Wales and the context for the legislative changes made in 2006.

1.22 Chapter 6 discusses the process of the three applications made to the Director of Public Prosecutions and Attorneys General for a retrial, and the families' experience of that process.

1.23 Chapter 7 examines the impact that the murders have had on the families, and observations made by others who have been involved in the families' experiences over the past 23 years.

1.24 Chapter 8 provides the committee's concluding remarks.

WARNING: Aboriginal and Torres Strait Islander readers are advised that the following section of this report contains images of deceased persons.

Colleen Walker-Craig

Colleen Walker Craig was 16 at the time she went missing. Colleen was widely reported as a vibrant and well-liked girl, brimming with promise. Colleen's family told the committee that she was 'a very caring, loving child'. As the second eldest, Colleen would help her mother with her other siblings, particularly her brother, who was in a wheelchair and had special needs due to a medical condition.

Colleen's mother, Muriel Craig, recalled that Colleen was very kind, but also had a 'strong character and would let people know if she didn't think what they had said or done was right'. At the time of her disappearance, Colleen wanted to be a pre-school teacher and had completed her work experience and a certificate in preparation.

Muriel remembers kissing her daughter goodbye in the days before she left to travel to Bowraville to visit family. Colleen's family told the committee that they had always been very close, and Muriel recalled that she and Colleen had 'a special bond'. The family was adamant that Colleen would never go anywhere without letting her mother know where she was.

Evelyn Greenup

Evelyn Greenup was 4 years old at the time she went missing. Evelyn's family told the committee that she was a particularly beautiful child with blue eyes and light brown curls, 'like a miniature Shirley Temple'.

Evelyn loved to play with her cousins and siblings and enjoyed visiting her aunties. Evelyn's family told the committee that 'she never went anywhere on her own because she was too shy and was always reluctant to leave her family's side. When the family went for walks, Evelyn would grip tight to an adult's hand and was frightened of people she did not know.' Her family told the committee that she was a shy, sweet, gentle little girl who loved nature and 'smiled all the time'.

Evelyn's aunt, Clarice Greenup, recalled that when Evelyn's father told her that he had named his daughter 'Evelyn Clarice', 'I just stood there and cried'.

Evelyn was her mother's first born and she had two younger brothers, Aaron and Aidan. Evelyn's mother told the committee that Evelyn and Aaron, who was three at the time Evelyn went missing, 'were very close and did a lot of things together such as play together outside, sleep together, play dress ups, play with shoes and enjoy each other's company, just two little children having fun as brother and sister'.

Clinton Speedy-Duroux

Clinton Speedy-Duroux, or 'Bubby' as he was affectionately referred to, was 16 at the time he went missing and had only recently moved from Tenterfield to live with his father in Bowraville. Clinton's mother told the committee that he was a 'Deadly' dresser who took particular pride in his shoes.

Clinton's family all spoke of his love for art, music and dancing. His favourite singer was Michael Jackson and he would dress and dance just like him – his aunt, Helen Duroux, recalled that when Clinton was on the dance floor, all eyes were on him.

Clinton was a good-looking, popular boy and his family spoke of his warm, generous spirit. Clinton is particularly remembered for the kindness he displayed to little children. His aunt, Ronella Jerome, recalled that 'one of my main memories of Bubby, when he was a little boy he always had a trail of kids behind him, and if he was not pushing the pram, he was finding a kid to go play with ... He was like the Pied Piper ...'. Donald Binge, Clinton's cousin, shared a similar recollection from the weekends they spent together: 'He was really good with kids, always pulling up and saying hello to the little ones, never would ride or walk past them, he would always pull up and say hello'. For Donald, Clinton was 'a good inspiration, kind of like a role model to me'.

Clinton loved football and when he played for the under 16's grand final he scored two tries and won the game for the team. Clinton's brother, Troy Duroux, said that his best memory of his brother was going to footy and watching each other from the sidelines. Clinton's family told the committee that Clinton was a 'happy go lucky boy' who was 'loved and respected for the person he was. He was loved by everyone. There wasn't a bad side of him at all.'

This information has been taken from: Submission no. 18, Muriel Craig (Snr), p 1; Evidence, Muriel Crag (Snr), 2 May 2014, p 19; Evidence, Muriel Craig (Jnr), 2 May 2014, p 23; Submission no. 17a, Rebecca Stadhams, p1; Evidence, Rebecca Stadhams, 2 May 2014, p 35; Evidence, Michelle Jarrett, 2 May 2014, p 40; Evidence, Clarice Greenup, 2 May 2014, p 13; Submission no. 25, June Speedy, p 1; Submission no. 10, Thomas Duroux, p 1; Submission no. 6, Troy Duroux, p 1; Evidence, Troy Duroux and June Speedy, 2 May 2014, p 66-67; Evidence, Ronella Jerome, 2 May 2014, p 2.

Photos used with permission of the families.

Bowraville

Bowraville is a small country town on the mid north coast of New South Wales located approximately 17 kilometres from Nambucca Heads and approximately halfway between Sydney and Brisbane. The 2011 census recorded the total population of Bowraville as 1,090, 24 per cent of whom were Aboriginal.[4] The Gumbaynggirr people are the traditional owners of the Nambucca Valley and the surrounding area.

Many members of the Aboriginal community live on a small Aboriginal housing estate known as the Bowraville Aboriginal Mission, or the 'Mission', on the southern edge of the township.[5] The Mission was the scene of many of the events connected to the disappearance and murders of Colleen, Evelyn and Clinton.

The committee received evidence that Bowraville has a long history of racial tension and segregation. The Bowraville township had been specifically targeted by Aboriginal and other activists, led by Charles Perkins, during the 'Freedom Bus' protest ride in 1965, a bus tour through New South Wales by university students protesting discrimination against Aboriginal people in small town Australia. At the time, the local Aboriginal community was excluded from certain parts of the town and segregated in public areas such as the picture theatre, the town pubs and the RSL, the local school and even the hospital, in which Aboriginal women were not allowed to give birth.[6]

The committee heard that although some progress had been made in the years since the protest rides, at the time of the children's murders a clear racial divide still remained in the town.[7] As an example, in 1991, there still remained a white pub and a black pub in Bowraville.[8] As one witness observed, 'the racism in the community was palpable in those days. It is still there today but a lot of people do not see it still. But then you could not miss it, it was that strong.'[9]

This racial backdrop has permeated many of the themes that have characterised the committee's inquiry. These themes and their implications will be discussed further in the following chapters.

4 Australian Bureau of Statistics, 2011 Census of Population and Housing.

5 Attachment to Submission no. 19, Allens, p 1.

6 Submission no. 27, Attachment F, Jumbunna Indigenous House of Learning, p 7/13.

7 Submission no. 20, NSW Police Force, p 4; Evidence, Lana Kelly, 2 May 2014, p 53;

8 Submission no. 27, Attachment F, Jumbunna Indigenous House of Learning, p 1/13.

9 Submission no. 28, Janette Blainey, p 55.

Chapter 2 Timeline of events

This chapter provides an overview of the events leading to the disappearances of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux, the initial investigation by police, the identification of a Person of Interest and subsequent criminal proceedings. The chapter then summarises the process by which police and the families have made submissions to the Director of Public Prosecutions and Attorneys General to request an application for the retrial of the accused for the three murders.

The events and decisions below are examined in detail throughout the report.

The disappearances

2.1 On 13 September 1990, Colleen Walker, aged 16, disappeared. She was last seen alive walking away from a group of people following a party on the outskirts of the Bowraville township at the Mission.[10]

2.2 On 3 October 1990, Evelyn Greenup, aged 4, disappeared following a party at her grandmother's house, also located on the Mission, where she lived with her grandmother, mother and two siblings. Evelyn was last seen asleep in a room with her mother and siblings. When her mother awoke the next day, Evelyn was gone.[11]

2.3 Several months later, on 31 January 1991, Clinton Speedy-Duroux, aged 16, went missing following another party in the area. He was last seen at a caravan owned by one of the party attendees.[12]

2.4 On 4 February 1991, a local man was interviewed by detectives in relation to Clinton's disappearance and identified as the primary Person of Interest (POI).[13]

Remains of the victims are found and the POI is charged

2.5 On 18 February 1991, the remains of Clinton Speedy-Duroux were found in bushland by two local men who were looking for logs along Congarinni Road, approximately seven kilometres from the Bowraville township.[14]

2.6 On 8 April 1991, the POI was interviewed again by police and charged with Clinton's murder.[15]

2.7 Between 17 and 20 April 1991, clothing worn by Colleen Walker-Craig at the time of her disappearance was found by fishermen in the Nambucca River at the southern end of

10 Submission no. 27, Jumbunna Indigenous House of Learning, p 8.

11 Submission no. 27, Jumbunna Indigenous House of Learning, p 9-10.

12 Submission no. 27, Jumbunna Indigenous House of Learning, p 10.

13 Submission no. 27, Jumbunna Indigenous House of Learning, p 11.

14 Submission no. 27, Jumbunna Indigenous House of Learning, p 11.

15 Submission no. 20, NSW Police Force, p26; Submission no. 27, Jumbunna Indigenous House of Learning, p 12.

Congarinni Road. The clothes were weighed down in bags containing heavy rocks.[16] Colleen's body has never been found.

2.8 One week later, on 27 April 1991, the skeletal remains of Evelyn Greenup were also found in bushland along Congarinni Road, during a search conducted by State Emergency Service volunteers.[17]

2.9 On 16 October 1991, the POI was charged with the murder of Evelyn Greenup.[18]

First coronial inquest: Evelyn Greenup

2.10 On 13 November 1991, the State Coroner commenced an inquest into Evelyn's death. The Coroner determined that a court could be satisfied of the date of her death being between 4 October 1990 and 27 April 1991, the cause of which was unknown but a significant head injury was present. As an individual had been charged with her murder, the inquest was terminated.[19]

Second coronial inquest: Colleen Walker

2.11 On 30 November 1991, the State Coroner commenced an inquest into Colleen's death and subsequently adjourned the inquest the following day.[20] The inquest was reopened on 29 September 1993 and the Coroner gave an open finding that Colleen Walker was deceased.[21]

First prosecution: Clinton Speedy-Duroux

2.12 In 1993, the NSW Office of the Director of Public Prosecutions (DPP) sought to prosecute the POI in a single trial containing two indictments relating to both Evelyn and Clinton. However, during the pre-trial process, the indictments were separated by order of Justice Badgery-Parker of the Supreme Court.[22]

2.13 As a result of the trial judge's decision, 'similar fact' evidence (that is, evidence demonstrating similarities between the deaths) relating to Evelyn's murder became inadmissible in Clinton's trial and the trial was concluded without any mention of the disappearance and killing of either Evelyn or Colleen.[23]

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16 Submission no. 20, NSW Police Force, p26; Submission no. 27, Jumbunna Indigenous House of Learning, p 12.

17 Submission no. 19, Attachment 1, Allens, p 9.

18 Submission no. 20, NSW Police Force, p26.

19 Submission no. 27, Attachment B: Transcript of inquest into the deaths of Evelyn Clarice Greenup and Colleen Anne Walker, New South Wales Coroner's Court, Bellingen, Jumbunna Indigenous House of Learning, p 5.

20 The committee did not receive evidence as to why the inquest was terminated.

21 Submission no. 19, Attachment 1, Allens, p 9.

22 Submission no. 27, Jumbunna Indigenous House of Learning, pp 15-16.

23 Submission no. 27, Jumbunna Indigenous House of Learning, pp 15-16.

2.14 On 18 February 1994, the trial for the murder of Clinton Speedy-Duroux concluded. The jury returned a verdict of 'not guilty' and the POI was acquitted.[24]

2.15 Following the acquittal of the POI for Clinton's murder, the DPP withdrew, or 'no-billed', the charges against the POI for the murder of Evelyn Greenup, preventing the case from proceeding to trial.[25] The reason for this decision, along with the reasons for all the decisions raised in this chapter, will be examined throughout this report.

Second coronial inquest is re-opened: Colleen Walker

2.16 Following the conclusion of the trial for Clinton's murder, the inquest into the death of Colleen Walker was re-opened for new evidence on 2 November 1994. No new evidence was introduced and the Coroner delivered an open finding and terminated the inquest.[26]

Introduction of the *Evidence Act 1995*

2.17 In 1995, two years after the decision of Justice Badgery-Parker to separate the trials of Clinton and Evelyn, the *Evidence Act 1995* came into force. The Act substantially amended the test for 'similar fact' evidence by introducing a new legal test for 'tendency and coincidence' evidence. The practical effect of this amendment was that much of the evidence that had been deemed inadmissible for the purposes of Clinton's trial would now be deemed admissible under the new 'tendency and coincidence' rules.[27]

Strike force ANCUD is formed

2.18 Following the acquittal of the POI for Clinton's murder, the two cases did not proceed any further until late 1996, when the NSW Commissioner of Police, Mr Peter Ryan, and Assistant Commissioner, Mr Clive Small, travelled to Bowraville to meet with the families. In December 1996, Commissioner Ryan established 'Strike Force ANCUD' to reinvestigate the three murders.[28]

2.19 While the Strike Force investigated all possibilities, it was soon determined that the murders and disappearance were most likely linked. The POI previously identified once again became the focus of the investigation.[29]

Evidence from the reinvestigation is sent to DPP for review and assessment

2.20 In March 1998, Strike Force ANCUD forwarded a brief of the evidence collected as a result of the reinvestigation to the DPP for review and assessment. Twelve months later, the DPP

24 Submission no. 19, Attachment 1, Allens, p 10.

25 Submission no. 20, NSW Police Force, p 27.

26 Submission no. 19, Attachment 1, Allens, p 9.

27 Submission no. 19, Allens, p 3.

28 Submission no. 20, NSW Police Force, p 27.

29 Submission no. 20, NSW Police Force, pp 10-11.

notified Strike Force officers that a charge against the POI for the disposal of Clinton's body would be unsustainable, as was an ex-officio[30] indictment for Evelyn's murder.[31]

Joint coronial inquest: Colleen Walker and Evelyn Greenup

2.21 On 9 February 2004, the State Coroner reopened the inquests into the death of Evelyn Greenup and suspected death of Colleen Walker.[32] To date, this is the only official proceeding in which the substantial tendency and coincidence evidence uncovered by police during both investigations has been tendered for independent consideration and in which evidence relating to all three disappearances has been heard together.[33]

2.22 The Coroner handed down his findings in September 2004. In relation to Evelyn Greenup, the Coroner terminated her inquest pursuant to s 19 of the *Coroners Act 1980*, being satisfied that there was evidence capable of satisfying a reasonable jury, properly instructed, of her murder, and there was a reasonable prospect that the jury would convict a known person of her murder.[34]

2.23 In relation to Colleen, the Coroner determined that she had died of a homicide but that the murderer could not be identified on the evidence presented.[35] However, the Coroner went on to note that, like the investigating police, he was of the opinion that the circumstances surrounding the three deaths had strikingly similar characteristics and the coincidence and tendency evidence presented suggested that the POI had been involved in Colleen's disappearance.[36]

Second prosecution: Evelyn Greenup

2.24 On 25 May 2005, following receipt of a submission of evidence from Strike Force ANCUD, the DPP filed an ex-officio indictment against the POI to stand trial for the murder of Evelyn Greenup. The trial commenced on 6 February 2006.[37]

2.25 Although the new tendency and coincidence rules were much broader than those operating under the previous 'similar fact' test at common law operating at the time of Clinton's trial, the new rules still prevented certain evidence regarding the POI's previous behaviour from

30 An ex-officio indictment is where a criminal matter is sent directly to a higher court and committal proceedings are not necessary.

31 Submission no. 19, Attachment 1, Allens, p 10.

32 Submission no. 19, Attachment 1, Allens, p 10.

33 Submission no. 27, Jumbunna Indigenous House of Learning, p 5.

34 Submission no. 27, Attachment B: Transcript of inquest into the deaths of Evelyn Clarice Greenup and Colleen Anne Walker, New South Wales Coroner's Court, Bellingen, Jumbunna Indigenous House of Learning, pp 22-23.

35 Submission no. 27, Attachment B: Transcript of inquest into the deaths of Evelyn Clarice Greenup and Colleen Anne Walker, New South Wales Coroner's Court, Bellingen, Jumbunna Indigenous House of Learning, pp 27-28.

36 Submission no. 20, NSW Police Force, pp 19-20.

37 Submission no. 20, NSW Police Force, p 28.

being admitted for the consideration of the court.[38] Evidence relating to Clinton's murder was also inadmissible due to the application of the double jeopardy laws, discussed below.[39]

2.26 On 3 March 2006, the POI was acquitted of Evelyn's murder.[40] As the POI had now been acquitted of both murders, under the 'double jeopardy' laws at the time, no further proceedings could be taken against the POI for either crime. The rule against double jeopardy refers to the common law principle that a person who has previously been either acquitted or convicted of an offence cannot be prosecuted or punished for the same crime.[41]

2.27 The effect of this was that, even if a case went to trial in the event that new evidence came to light proving Colleen's murder, the prosecution would be unable to tender evidence relating to the deaths of Clinton or Evelyn in support of the case against the POI for the murder of Colleen.[42]

Campaign for changes to the double jeopardy laws

2.28 Following the second acquittal, the families began to actively campaign for changes to the double jeopardy laws and met with politicians and senior bureaucrats to advocate for change.[43]

Amendments to double jeopardy laws passed

2.29 On 17 October 2006, the Parliament of New South Wales passed the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006. The bill inserted a new Part 8 into the *Crimes (Appeal and Review) Act 2001* to make provision for the retrial of an accused person in certain circumstances. Of relevance to the Bowraville case, the Act now includes provision for an acquitted person to be retried for a serious crime (the definition of which includes murder) where there is 'fresh' and 'compelling' evidence. The double jeopardy amendments had the effect of potentially opening a new path for the prosecution of the POI for, at least, the murders of Clinton and Evelyn.

NSW Police Force requests DPP to make application for a retrial

2.30 In February 2007, Strike Force ANCUD forwarded a submission on behalf of the NSW Police Force to the DPP to seek a direction as to the sufficiency of certain fresh and compelling evidence to warrant an application for a retrial of the POI for the murders of Clinton and Evelyn, and an ex-officio indictment for the murder of Colleen.[44]

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38 Submission no. 27, Jumbunna Indigenous House of Learning, p 21.

39 Submission no. 27, Jumbunna Indigenous House of Learning, p 22.

40 Submission no. 20, NSW Police Force, p 28.

41 Johns, R. "Double Jeopardy", *NSW Parliamentary Library Research Service*, Briefing Paper No. 16/03, August 2003, pp 5-6.

42 Submission no. 27, Jumbunna Indigenous House of Learning, p 22.

43 Submission no. 27, Attachment F, Jumbunna Indigenous House of Learning, p 12/13.

44 Submission no. 20, NSW Police Force, p 28.

2.31 On 4 June 2007, the then DPP, Mr Nicholas Cowdery, advised the NSW Police Force that, in his opinion, the evidence outlined in their submission was not sufficiently 'fresh' and 'compelling' to support an application.[45]

Families seek independent legal advice

2.32 In 2008, the Public Interest Law Clearing House (PILCH), acting for the families on a pro-bono basis, sought the independent legal advice of a senior criminal law barrister, Mr Chris Barry SC, as to the merits of an application for a retrial. Mr Barry stated that, based on information contained in an affidavit prepared by Detective Inspector Jubelin summarising the evidence, there was sufficient material to justify an application to the Court of Criminal Appeal for the retrial of the POI for the murder of Clinton and Evelyn and an ex-officio indictment for the murder of Colleen. Mr Barry further expressed the view that there would be a reasonable prospect that a jury would convict the POI.[46]

Application made to Attorney General Hatzistergos for a retrial

2.33 In August 2009, PILCH referred the matter to Allens law firm (then trading as Allens Arthur Robinson) who, also acting on a pro-bono basis, prepared an application to the then Attorney General John Hatzistergos MLC requesting that he exercise his powers under s 115 of the *Crimes (Appeal and Review) Act*[47] to apply to the Court of Criminal Appeal for an order that the POI be re-tried for the murders of Clinton and Evelyn and for an ex-officio indictment for the murder of Colleen.[48]

2.34 The application was forwarded to the Attorney General in February 2010. On 22 October 2010, the Attorney General rejected the application.

Application made to Attorney General Smith for a retrial

2.35 In the months leading up to and after the 2011 State Election, the newly elected Attorney General, the Hon Greg Smith MP, publicly undertook to revisit the application to reopen the case.[49]

2.36 In June 2011, Allens made another submission on behalf of the families, this time to request Attorney General Smith to exercise his powers to apply to the Court of Criminal Appeal for a retrial.[50]

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45 Submission no. 27, Jumbunna Indigenous House of Learning, p 24.

46 Submission no. 20, NSW Police Force, p 29.

47 Section 115 of the Act makes provision for the Attorney General to exercise the functions of the Director of Public Prosecutions.

48 Submission no. 20, NSW Police, p 29; Submission no. 7, Leonie Duroux, p 6.

49 Whitmount, D. "New A-G to reconsider Bowraville murders", *ABC News*, 4 April 2011, http://www.abc.net.au/news/2011-04-04/new-a-g-to-reconsider-bowraville-murders/2630296; Fife-Yeomans, J. "New hope in murder cases", The *Daily Telegraph*, 17 December 2012, http://www.dailytelegraph.com.au/news/nsw/new-hope-in-murder-cases/story-e6freuzi-1226537908949.

2.37 In November 2011, a petition in support of the application signed by members of Aboriginal communities throughout New South Wales was tabled in the Legislative Assembly.[51] The same day, family and friends of the three children gathered in front of Parliament House to rally in support of the application.[52]

2.38 On 8 February 2013, one year and eight months after the second application had been made, Attorney General Smith rejected the application.

Duroux family meet with Attorney General Smith

2.39 On 14 March 2013, families of the murdered children organised a large rally to march to Parliament House to protest the lack of justice and their treatment by successive governments and the legal system more generally.[53]

2.40 In April 2013, then Attorney General Greg Smith met with Leonie Duroux, Thomas Duroux and Jasmin Speedy to discuss his refusal to refer the matter to the Court of Criminal Appeal.[54]

Committee inquiry established

2.41 In November 2013, the families of the three children again marched outside Parliament House to protest the failure to secure a conviction for the murders of the three children.[55]

2.42 The same month, the NSW Legislative Council agreed to terms of reference requiring this committee, the Standing Committee on Law and Justice, to inquire into and report on the family impacts of the Bowraville murders.

50 Submission no. 20, NSW Police, p 30.

51 *Votes*, Legislative Assembly, 25 November 2011, p 500.

52 Submission no. 20, NSW Police, p 30.

53 Submission no. 7, Leonie Duroux, p 7.

54 Submission no. 7, Leonie Duroux, p 7; Submission no. 27, Jumbunna Indigenous House of Learning, p 28.

55 Submission no. 7, Leonie Duroux, p 7.

Chapter 3 The investigations

> Having worked on this matter since 1996 I feel that I am well placed to say that the families have been let down by the justice system. Given the situation that the families found themselves in it would be reasonable for them to assume that the authorities would provide a suitable response to a serial killer preying on the community – as any community would. Unfortunately that was not provided. Issues have impacted on this investigation. It is very nice for society to say that all victims are treated equally. Unfortunately in this situation I do not think that is entirely correct.[56]
>
> — *Detective Inspector Gary Jubelin, NSW Police Force*

Much of the evidence received by the committee spoke to the inadequacies of the original investigation into the three murders and the manner in which this negatively impacted both the course of the investigation, the quality of the evidence gathered, the subsequent criminal trials and the experiences of the family and community members who gave evidence to police. In contrast, the committee also received evidence that demonstrated the stark difference between the initial investigation and the second investigation undertaken by Strike Force ANCUD from 2006. This chapter examines these issues in detail.

Police response to the disappearances

3.1 Colleen, Evelyn and Clinton disappeared over a period of less than five months between 13 September 1990 and 1 February 1991. All three families spoke of being met with indifference or scepticism when they reported their children missing to police following the initial disappearances, and in each case the families undertook the chief burden of searching for the missing children themselves.

Colleen

3.2 Colleen Walker-Craig was the first victim to go missing. At the time of her disappearance Colleen's mother, Muriel Craig (Snr), lived in Sawtell, approximately 50 kilometres from Bowraville. Muriel informed the committee that after hearing of Colleen's disappearance, she travelled to Bowraville to report her missing. When Muriel attempted to report Colleen's disappearance at the Bowraville Police Station, the local officers responded by questioning whether Colleen was indeed her daughter, as Colleen had fairer coloured skin.[57] They then went on to suggest that perhaps Colleen had just gone 'walkabout':

> When I went to the police station on the Monday I had a photo and because Colleen was fairer than me the police was questioning me. They asked me was she my daughter. They said, 'She don't look Aboriginal to us.' There were two policemen in the station at that time and that is what they said to me. I said, 'I wouldn't be silly enough to come in here and report her missing, I am not that stupid.' But this is how I was treated by the police at that time.[58]

56 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 2.

57 Evidence, Muriel Craig Snr, 2 May 2014, pp 19-20.

58 Evidence, Muriel Craig Snr, 2 May 2014, pp 19-20.

3.3 Ms Craig's recollection was reiterated by her daughter, Rose Griffin:

> On that day we went to the police station and they just turned around and said to mum and myself, 'Oh, did she go walkabout?' That was their reaction. We thought they were supposed to be there to help us and we didn't get the help.[59]

3.4 Ms Craig advised the committee that it took several months for police to take her statement regarding her daughter's disappearance and, even then, the police were seldom in contact. The onus for the search for Colleen was subsequently left to her family:

> I thought they would actually take … a statement from me or something but he didn't even do any of that. I just left the photo there and walked out. I mean that was the law, what was I going to do? I just went and after that they did not take Colleen's missing very seriously, not until later when the other two went missing. Even when Clinton went missing I don't think they took it that seriously, it was more when Evelyn went missing ... the only time they ever contacted me was when a highway patrol came up. I was up on the Mission and a highway patrol car came and said that they had found Colleen and that she was on a bus. Apparently they said it was a nun named Colleen Walker who was on the bus. They really never contacted me. We had no contact at all. It was like mainly me and family members who went looking around and asking people at the party where she was and what had happened to her, who had seen her last. It wasn't until—I couldn't even tell you when. I don't know.[60]

3.5 Rose Griffin recalled that it took three months for police to take her mother's statement:

> Mum's official statement was taken at Sawtell Police Station three months later and, you know, they didn't take the statement in Bowraville that day. Three months down the track they took a statement from her about Colleen being missing.[61]

3.6 Following Colleen's disappearance, Muriel moved Colleen's brother and sisters to Bowraville to continue the search for her daughter.[62] Although Colleen's body has never been found, her family continues to search for her remains to this day.[63]

Evelyn

3.7 Several weeks later, when Evelyn Greenup disappeared, her family experienced a similar reaction to Colleen's family when they sought to report the disappearance to police.

3.8 During the afternoon and into the evening after Evelyn's family first became aware she had gone missing, Evelyn's mother, Rebecca Stadhams, began searching for Evelyn around the Mission with her family and other community members. Rebecca told the committee that when she and her sister, Michelle Jarrett, went to the police station to report Evelyn missing, the police officer on duty responded with disinterest and told them to come back another time as he was about to go home for the day:

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59 Evidence, Rose Griffin, 2 May 2014, p 20.

60 Evidence, Muriel Craig Snr, 2 May 2014, pp 21.

61 Evidence, Rose Griffin, 2 May 2014, p 21.

62 Evidence, Muriel Craig Snr, 2 May 2014, p 20.

63 Evidence, Muriel Craig Jnr, 2 May 2014, p 24.

> I felt really angry with the Officer as he told my sister (Michelle) that he could not do anything about my daughter as he was the only one at the station and he was at the end of his shift and on his way home. He did not even take our statement. So we started looking ourselves for her. That Police officer wouldn't believe us that she was missing.[64]

3.9 Michelle gave similar evidence to the committee regarding their conversation with the police officer that afternoon:

> When I got down to the police station ... there was one gentleman there and he asked me what I wanted. I told him I wanted to report my niece missing, and I had the photo of her. He basically said, "What do you want me to do? I am the only one here. I am just about to go home". I said I want to report her missing, she is four years old. This is like 7.30 pm or 8 o'clock at night by the time I got there … He was more interested in getting home as he was the only one there. I just happened to catch him walking out the door.[65]

3.10 Michelle stated that although police took the missing persons report in the following days, they did little to locate Evelyn, leaving the search for Evelyn to her family.[66]

3.11 As with Colleen's family, police questioned whether Evelyn was indeed Rebecca's daughter and suggested she may have just gone 'walkabout':

> **Ms MICHELLE JARRETT:** … When they did come and see you they said, when they looked at the photo, they looked at Rebecca and said, 'Is she your daughter?' because they looked at us. Because she has fair skin and blue eyes—
>
> **Ms REBECCA STADHAMS:** And blonde-brown hair.
>
> **Ms MICHELLE JARRETT:** Yes, like a miniature Shirley Temple, you know, this could not be our kid, basically was what they were saying to us. They just said, 'Oh, she went walkabout', you know. We kept telling them, 'No, she does not do that. She is quite shy. She never went anywhere. She was always within eye distance.' If you had seen her brother Aaron, he was a year younger, you saw her. The two were never apart. They were just always together.
>
> **Ms REBECCA STADHAMS:** They never done anything until about six weeks later when they started interviewing people.[67]

3.12 Jumbunna Indigenous House of Learning told the committee that a police officer involved in the investigation has since stated publically that police initially suspected the Aboriginal community, specifically the children's families, of being complicit in the children's disappearances.[68] This was supported by evidence from Rebecca, who told the committee that some officers suggested the family had 'sold' Evelyn and interrogated Rebecca's mother regarding payments made into her bank account:

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64 Submission no. 17a, Rebecca Stadhams, p 2.

65 Evidence, Michelle Stadhams, 2 May 2014, p 39.

66 Evidence, Michelle Jarrett, 2 May 2014, p 40.

67 Evidence, Michelle Jarrett and Rebecca Stadhams, 2 May 2014, p 40.

68 Submission no. 27, Attachment F, Jumbunna Indigenous House of Learning, p 3/13.

> … I was really confused with why the Police were not looking for her and why they kept telling me that she was still around. The Police kept telling me that my mother and I sold her and I was so disgusted in the thought of what they were saying this about me and my mother. My mother received a back payment from Veterans Affairs as my father was a Vietnam Veteran and the Police asked my mother where she got the money from. Mum was entitled to a widow's war pension from the department. My daughter was missing and it seemed like they just didn't want to help find her.[69]

3.13 Later, when police did identify the Person of Interest (POI), they quizzed the Stadhams family as to whether they had sent Evelyn to the POI's family, having learnt that the Stadhams' had family in Queensland that shared the same surname as the POI.[70] Michelle Jarrett told the committee:

> When we reported Evelyn's disappearance to the police, they kept asking us where she was. They thought we had sent her up to Queensland. They just wouldn't listen to us when we said she had disappeared. I don't understand why they didn't believe us.[71]

3.14 Throughout this period of investigation, Evelyn's family continued searching, posting flyers and ringing friends and family around the area, but were unable to locate her.[72]

Clinton

3.15 Clinton Speedy-Duroux was the last of the three children to go missing. Clinton was last seen alive at the caravan where the POI resided. The committee received evidence that when Clinton had arrived at the caravan with his girlfriend and the POI, he had removed his shoes. The following morning, when his girlfriend awoke in the caravan she saw that he was not there but his shoes still were. Clinton's girlfriend took his shoes home to his father, Thomas Duroux.[73]

3.16 The family told the committee that upon seeing Clinton's shoes they immediately became alarmed because he never went anywhere without wearing them, even to the bathroom.[74] Ronella Jerome, Clinton's aunt, complained that when the family tried to explain the relevance of this point to police, it 'just did not seem to be enough for the police … [to] do something about it'.[75]

3.17 Clinton's family said they received very limited police assistance when he disappeared and once again, the burden for the search was principally shouldered by his family. Thomas Duroux, Clinton's father, reflected on the days following Clinton's initial disappearance:

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69 Submission no. 17a, Rebecca Stadhams, p 2; Evidence, Rebecca Stadhams and Michelle Jarrett, 2 May 2014, pp 40-41.

70 Evidence, Michelle Jarrett, 2 May 2014, p 40.

71 Submission no. 13, Michelle Jarrett, p 1.

72 Evidence, Michelle Jarrett, Lesley Stadhams and Penny Stadhams, 2 May 2014, p 39; Barbara Davis-Greenup, 2 May 2014, p 12.

73 Evidence, Thomas Duroux, Helen Duroux and Ronella Duroux, 2 May 2014, p 6.

74 Evidence, Helen Duroux, Leonie Duroux, Ronella Jerome, 2 May 2014, p 6.

75 Evidence, Ronella Jerome, 2 May 2014, p 6.

> **Mr THOMAS DUROUX:** ... Early one morning after he went missing I rang the police to see if they could do anything, and they said not for 24 hours anyway, so I decided to go looking myself and see if I could find him anywhere ... I walked all over town because I did not have a car, I did not have a licence, so I walked up to where we were the night before and they said, 'No, he went down to the caravan', so I went down there and there was only one person in that caravan and he was asleep, and he told the police that he was at work, and I walked around to the club and pubs and everywhere, just looking around to see if anyone had seen anyone and no-one had seen him, so I went back home and waited and waited, and I still got nothing from the police. They came up the next day after I rang again ... to see if they could do anything and help me in any way, and they just said, 'We'll keep an eye out for him', and stuff like that. Somewhere along the line the liaison officer from Coffs Harbour came down and we just started walking around the streets and around everywhere, looking all over town.
>
> **Mr SCOT MacDONALD:** Just one liaison officer?
>
> **Mr THOMAS DUROUX:** Yes, one liaison officer, and we just went everywhere, all over town to places that we thought he might have been to or went to, but he did not know many people, he was only just there for a week or so, and we could not find him, so there was not much else we could do, but this was early in the piece.[76]

3.18 Ronella Jerome also told the committee about her experiences with the police in the days and weeks following Clinton's disappearance:

> I remember the call that I got from Thomas to tell me that Bubby had not come home. I was living at Wallamumbi at the time and I had a home phone and I used it – I used it to the max. I rang the Coffs Harbour police, I rang the Bowraville police, I was ringing around everywhere down this way to see what sort of help they were trying to do to get our nephew back home. I was just met with nothing. There was no anything – no commitment, no promises, nothing. There was not anything that I got back from the police. I left messages, but I did not get any phone calls back. Not one … Then it was three weeks before it seemed like anything was going to be done for our boy, and yet in the meantime Colleen and Evelyn, it just did not seem like anything was still being done for those two girls too.[77]

3.19 Clinton's family said that they were rarely kept informed of developments and they were not aware of the nature of any investigations being undertaken.[78]

The initial police investigation

3.20 Much of the evidence received by the committee suggested that the inadequacies of and difficulties encountered by the initial investigation into the three murders have impacted the legal and other proceedings that have since followed in the journey to obtain justice for Colleen, Evelyn and Clinton. The following section examines the wide range of issues concerning the initial investigation that were raised during the inquiry.

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76 Evidence, Thomas Duroux, 2 May 2014, p 5.

77 Evidence, Ronella Jerome, 2 May 2014, p 5.

78 Evidence, Thomas Duroux and Ronella Jerome, 2 May 2014, p 7.

Relationship between police and the Aboriginal community

3.21 Detective Inspector Jubelin and members of the families told the committee that the relationship between police and the Bowraville Aboriginal community worked to the severe detriment of the initial investigation.

3.22 Detective Inspector Jubelin, lead investigator on Strike Force ANCUD, noted that crucial evidence omitted from statements given by witnesses during the initial investigation, and subsequently uncovered during the reinvestigation, demonstrated how this issue had permeated the original investigation. For example, the committee heard that several Aboriginal witnesses chose not to share crucial tendency and coincidence evidence with the police during the initial investigation as they did not feel that they would not be believed.[79] In the most extreme instance, a witness chose not to inform police that the POI had made admissions to him concerning the burying of bodies. In the words of the witness, 'I did not think I could tell police about this information because [the POI] was white and I was Aboriginal with a drinking problem and they would never believe me'.[80]

3.23 Many family members expressed a firm belief that, had the children been white, the investigation would have been taken more seriously:

> I don't think the police who investigated Clinton's death cared. They didn't care because he was black. If they had done their job and investigated properly at the time, we would not have to keep fighting for justice. We see other kids go missing and their disappearances are taken seriously. The fact the police thought our kids had gone walkabout shows the prejudice that they had about our case.[81]

> The police didn't do their job investigating. Clinton's case would have been strengthened if more effort had been put into finding evidence and we believe it wouldn't have taken this long if these were three white children. We see when young white children go missing and there is deep community concern and official attention and we notice that the same effort wasn't made for our children. If the murderer had have been black and the children white, he would be behind bars now.[82]

3.24 Detective Inspector Jubelin similarly expressed the view that the victims' Aboriginality was central to the lacklustre response of the police:

> The families told me right from the start in 1997 that people did not care because they are Aboriginal. I naively thought they were wrong, but I 100 per cent support what they say.[83]

3.25 The impact of the victims' Aboriginality on the case is discussed further in chapter 7.

3.26 While family members advised that relations between the two groups have improved since then, the committee heard that the relationship between the Bowraville Aboriginal community

79 Submission no. 20, NSW Police Force, p 5.

80 Submission no. 20, NSW Police Force, pp 5-6.

81 Submission no. 22, Delphine Charles, p 2.

82 Submission no. 25, June Speedy, p 2.

83 Evidence, Detective Inspector Gary Jubelin, 2 May 2014, p 6.

and the local police is still affected by the events of the past. This was illustrated by Michelle Jarrett and Penny Stadhams:

> I think they try, but they will never come up to the standard that [Detective Inspector Jubelin] is. There is always underlying suspicion—you know, 'What do you want?' and, 'Are you going to believe me?' That is always in the back of my mind when I tell something to the police or when they come to me for something: 'Are you going to believe me? You did not believe me before when I have told you something important. Why believe me now?'[84]

> Today, if there is an incident at the Aboriginal Mission, it is also a slow response; that same one. It is still happening. There is still that cycle where there is no urgency, and there have been deaths on the Mission. There is a lot of violence, drugs and alcohol on the Mission and it is more or less, 'Okay, we'll wait. Let's give it 30 minutes or an hour or two hours and then we'll go up'. Before then, anything could happen. People have died on the Mission because of violence and because the police do not show up. They do not show up because they are an Aboriginal community.[85]

Disbelief and disinterest

3.27 The committee heard that following the third disappearance, police assigned the Child Mistreatment Unit based in Coffs Harbour to the case, as local Bowraville police suspected the children's families and the Aboriginal community of being complicit in the three disappearances.[86] Michelle Jarrett contended that had the police taken Colleen's disappearance more seriously, Evelyn and Clinton may still be with them:

> I don't understand why the police who were brought in were child welfare experts. Police who knew what they were doing and knew what to ask would have made a difference ... If the police had have listened to Colleen's family, Evelyn and Clinton might still be with us. The police should be held accountable for something in all of this because if they had done this properly in the first place, we wouldn't be sitting here all these years later.[87]

3.28 Helen Duroux recalled the frustration and anger that the community felt during the initial investigation when local police did not take the disappearances seriously and pointed blame at the community:

> In 1991 the first march for justice was held in Bowraville against the police inaction in regard to this case. Frustration, anger and great [sorrow] was spilling out of everyone involved. Bob Moore, the senior inspector of the day told us then we had to be onside and working together. But even then he was investigating 'us' because they thought we had done something to our own children ... Much of the original investigation was very much a botched, trumped up affair. It was made to look to the Aboriginal community, that they, the police were actually doing something about the murders of our three black kids. Local police refused to link the similarities between the cases. Instead, they were treating the children as missing persons. At the onset of the

84 Evidence, Michelle Jarrett, 2 May 2014, p 45.

85 Evidence, Penny Stadhams, 2 May 2014, p 46.

86 Submission no. 27, Attachment F, Jumbunna Indigenous House of Learning, p 3/13.

87 Submission no. 13, Michelle Jarrett, p 1.

> investigation, the community was being investigated as to their role in the disappearance of our kids.[88]

3.29 Elaine Walker similarly recalled her anger following the police response, and her feelings after hearing the suggestion that the children had gone 'walkabout':

> The police did not take things seriously at first. They said they thought the children had gone 'walkabout'. It was really sad for me to hear that attitude and to see that they weren't taking [Colleen's] disappearance seriously ... We grew up being taught that the law was a protector, but when the police didn't want to come and find our children I got very angry because we were looking for answers. What has the law done? What has it done for our family?[89]

3.30 Detective Inspector Jubelin also discussed the negative impact that the assumption that Evelyn had just gone 'walkabout' had had on the quality of the investigation and the objectivity with which evidence was assessed:

> The child has gone walkabout – I cringe when I hear that and the families have told me that time and again. The sighting of a four-year-old child walking around the township of Bowraville ... unsupervised, and the police, when taking statements, believed that was possible that potentially she went walkabout. I can say for a fact that if I am heading up a murder investigation now and the families told me that a four-year-old child is a clingy child and would not wander off on their own – as the families did on this occasion – I would accept that as fact. I do not like talking race all the time, but, unfortunately, there are some misinterpretations because of that.[90]

Inexperience of officer in charge

3.31 As noted at paragraph 3.27, as the police suspected the families were involved in the disappearances, following the third disappearance, the Child Mistreatment Unit was assigned to the case, led by Detective Sergeant Alan Williams. When Clinton's body was discovered soon after, Detective Sergeant Williams was asked to head the subsequent homicide investigation, with assistance provided by local detectives and various detectives from the North Region Major Crime Squad. Detective Sergeant Williams had no prior homicide experience.[91]

3.32 While it was made clear to the committee that Detective Sergeant Williams cared about the case and led the investigation to the best of his abilities in difficult circumstances,[92] Detective Inspector Jubelin nevertheless considered that Detective Williams' lack of homicide expertise had worked to the detriment of the initial investigation:

> It appears the magnitude of the situation unfolding in the Bowraville Community between September 1990 and February 1991 was not fully appreciated by police in the initial stages. It is clear looking back on the evidence available now that there was a

88 Submission no. 24, Helen Duroux, p 1.

89 Submission no. 11, Elaine Walker, p 1.

90 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 6.

91 Submission no. 20, NSW Police Force, p 2.

92 Submission no. 20, NSW Police Force, p 8.

> serial killer targeting the children of Bowraville. The disappearance of three local children within a short time frame of each other, together with circumstances in which they disappeared, should have perhaps led police to this conclusion and resulted in a more suitably qualified officer appointed to run the investigation. The Officer in Charge of the investigation had no homicide experience. This lack of experience appears to have had a detrimental impact on the quality of the investigation and led to investigative opportunities being missed.[93]

3.33 In a *Four Corners* program that aired on ABC Television in November 2011, Detective Sergeant Williams, now retired, acknowledged that he did not have the necessary expertise to run the investigation and questioned why he was put in charge. In hindsight, Detective Sergeant Williams said that the homicide squad should have been assigned to the case.[94]

3.34 Detective Inspector Jubelin expressed the view that it was not only the victims' families but also Detective Sergeant Williams who were let down by the NSW Police hierarchy, which failed to recognise the seriousness and complexity of the murders and failed to resource the investigation with a suitably experienced and qualified officer in charge.[95] Detective Inspector Jubelin stated:

> ... I bring it back to the detective sergeant. Again, it is not a personal criticism. It is easy to sit here and judge work that was done 20 years ago, but a detective sergeant with no homicide experience was leading a serial killer investigation. I have been doing homicide for 20 years and I learn every day I come to work. You cannot expect someone with that limited experience to run an investigation into a serial killer.[96]

Issues specific to each investigation

3.35 In addition to the general lack of expertise of the officer placed in charge of the investigation, the committee heard that specific issues also impacted the quality of the investigation into each individual disappearance and homicide, which in turn had a detrimental impact on the subsequent murder trials.

The Colleen Walker investigation

3.36 Detective Inspector Jubelin noted that because Colleen was the first of the three children to disappear, police were dealing with the matter in isolation. Police did not recognise the disappearance as a potential homicide and this ultimately led to crucial evidence being lost in relation to her last known movements. While the evidence was eventually obtained during the 1997 reinvestigation, the quality of the information had diminished due to the passage of time.[97]

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93 Submission no. 20, NSW Police Force, p 4.

94 Submission no. 27, Attachment F, Jumbunna Indigenous House of Learning, p 5/13.

95 Submission no. 20, NSW Police Force, p 9.

96 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 6.

97 Submission no. 20, NSW Police Force, p 6.

The Evelyn Greenup investigation

3.37 Evidence provided to the committee indicated that the most critical aspect of the investigation into Evelyn's disappearance was the time at which she was last seen in the Bowraville township. Although Evelyn went missing from her grandmother's house in the very early hours of the morning of 4 October 1990, police identified several witnesses who claimed to have seen her later in the day in local stores or at the local swimming hole in the company of family members.[98] According to Detective Inspector Jubelin, these statements had limited attention to detail and more effort could have been made to corroborate the information they contained. He noted that some of the statements provided by younger witnesses read as though they were led by police, consistent with the police's assumption that Evelyn had been sighted in town later in the day.[99]

3.38 The committee received evidence that when the statements were taken, police had suggested the particular date that witnesses had seen Evelyn, to which the witnesses had simply answered 'yes'.[100] Dr Diana Eades, a sociolinguist with the University of New England, advised the committee that this was an example of a tendency amongst Aboriginal people to use 'gratuitous concurrence' in interviews, in which the interviewee answers 'yes' to a question (or 'no' to a negative question), regardless of whether or not they actually agree with the question, or even understand it.[101] Gratuitous concurrence is discussed further in chapter 4.

3.39 When Strike Force investigators reinterviewed the same witnesses in later years, the witnesses were unable to say with any certainty when they had last seen Evelyn and, in some cases, admitted that they had never been sure.[102] Police also discovered that the family members allegedly seen in Evelyn's company had been returned to their Children's Home in Grafton the day prior to Evelyn's disappearance, suggesting that witnesses had likely recalled seeing Evelyn on 3 October rather than 4 October.[103]

3.40 The committee heard that this confusion had several negative flow on effects. Firstly, as the original investigative team had not determined the exact site from which Evelyn disappeared, no crime scene was established or forensic tests carried out on Evelyn's grandmother's home until some seven years later, when the matter was reinvestigated.[104] Secondly, the poor quality of the statements taken in regard to Evelyn's disappearance also worked against the Crown case against the POI when similar fact evidence was sought to be tendered in Clinton's trial in 1994 and Evelyn's trial in 2006. The statements resulted in witnesses being publicly cross-examined and discredited during both trials, leading the witnesses, many of whom were members of or close to the families of the three victims, to feel as though they were the ones on trial, rather than the accused.[105] These issues will be discussed further in chapter 4.

98 Submission no. 27, Attachment B, Jumbunna Indigenous House of Learning, p 14-16.

99 Submission no. 20, NSW Police Force, p 7.

100 Submission no. 27, Attachment B, Jumbunna Indigenous House of Learning, p 14-16.

101 Submission no. 14, Dr Diana Eades, p 7.

102 Submission no. 27, Attachment B, Jumbunna Indigenous House of Learning, p 14-16.

103 Submission no. 27, Attachment B, Jumbunna Indigenous House of Learning, p 14-6.

104 Submission no. 20, NSW Police Force, p 7.

105 Submission no. 20, NSW Police Force, p 7.

The Clinton Speedy-Duroux investigation

3.41 Detective Inspector Jubelin advised that two particular issues stood out in relation to the quality of the original investigation into Clinton's disappearance.

3.42 Firstly, the lack of detail in statements, particularly in regard to the interview with the lead suspect, severely impacted on the investigation. As was the case in Evelyn's disappearances, police gathered evidence that suggested Clinton had been seen sometime after leaving the POI's caravan, information that was later discredited both during the criminal trial and during the subsequent reinvestigation of the case by Strikeforce ANCUD. Detective Inspector Jubelin advised that identification processes regarding the alleged sightings of Clinton also were not what would be considered best practice by today's standards.[106] As was the case for Evelyn's trial, the misidentification severely impeded the investigation and subsequent criminal proceedings. Indeed, the police counsel assisting the Coroner during the 2004 inquest into Colleen and Evelyn's deaths observed that:

> It appears that the primary reason why the charges against [the POI] for the murders of Clinton Speedie [sic] and Evelyn Greenup were not successful appears to be as a result of several alleged sightings of each deceased some time after the Crown alleged that they had been murdered.[107]

3.43 Several witnesses also criticised the manner in which the investigative team managed the seizure and analysis of evidence.[108] In his interview with *Four Corners*, the transcript of which was tendered as evidence to the committee, Detective Sergeant Williams acknowledged that it had taken his team 10 days to seize the POI's caravan and have it examined for evidence. The investigative team also allowed the POI to remove a set of barbells from the caravan before it was analysed.[109] Forensics later suggested that the same barbells may have been the weapon used in Clinton's murder.[110]

3.44 Leonie Duroux, Clinton's sister-in-law, spoke of her reaction upon reading transcripts of the subsequent court proceedings, which suggested that police had allowed the POI to remove personal belongings due to a concern that the local Aboriginal community might 'trash' the POI's caravan, and which showed that they did not question the POI as to why he chose to take only the barbells:

> One of the things that stands out for me – I have actually read the court transcripts from Clinton's trial twice. The fact that [name omitted]'s weights were given back to him, the fact that he was asked what he wanted out of the caravan, 'We are going to take the caravan because the Aboriginals might burn it, might trash it or something, and we need to do testing on it, what do you want out of it?'… I think the words were, 'Just me weights.' And they did not question him at the trial to say, 'You lived in that caravan, why did you not want your underwear or your toothbrush or your clothes'?[111]

106 Submission no. 20, NSW Police Force, p 7.

107 Submission no. 27, Attachment B, Jumbunna Indigenous House of Learning, p 6.

108 Evidence, Leonie Duroux, Helen Duroux and Ronella Jerome, 2 May 2014, p 3.

109 Submission no. 27, Attachment F, Jumbunna Indigenous House of Learning, p 5/13.

110 Submission no. 27, Attachment F, Jumbunna Indigenous House of Learning, p 5/13.

111 Evidence, Leonie Duroux, 2 May 2014, p 3.

3.45 Another issue specific to Clinton's investigation was crucial evidence referred to as the 'Norco Corner evidence'. This is considered separately below.

Norco Corner evidence

3.46 The committee was informed that the 'Norco Corner evidence' was not fully explored during the initial investigation in 1991.

3.47 In the hours following the time that Clinton was last seen alive, two truck drivers turned around a sharp stretch of road known locally as 'Norco Corner' and saw a man standing over an unconscious, Aboriginal teenage boy, lying near a parked vehicle. The boy was not wearing any shoes (as noted at paragraph 3.15, Clinton's shoes were found left at the POI's caravan after he went missing). The truck drivers stopped to ask if the man needed help but the man declined, saying that he was trying to get the boy off the road and had already called police.[112] Detective Inspector Jubelin explained to the committee the relevance of this evidence:

> I would describe it as strong circumstantial identification evidence in that the description of the car matched the description of the car that the person of interest was seen leaving in, the description of the male standing over the body matched the description of the person of interest, and the description of the unconscious Aboriginal male matched the description of Clinton Speedy, and it was in very close proximity to where he was last seen alive.[113]

3.48 Although the truck drivers reported this evidence to uniformed police and a running sheet was completed detailing the information provided by the witnesses, formal statements were never taken from the two truck drivers and the information was not made available to prosecutors when the POI was first tried for Clinton's murder in 1994.[114] When Strike Force ANCUD came across the evidence in 2006 and investigated the matter further, it was determined that the Norco Corner evidence could at its strongest be considered good circumstantial identification evidence which would strengthen the case against the POI for Clinton's murder.[115]

Media briefed before families

3.49 An issue raised by all three families was that when their children's remains or effects were found, they were given little forewarning by the police before the media broadcast the discoveries on local television and radio. In the case of Clinton's family, his aunt Helen Duroux was asked to call around to the other family members to advise of the news before the 11 o'clock broadcast.[116]

3.50 Evelyn's family spoke of a particularly distressing experience. They told the committee that when Evelyn's remains were found, the police informed Michelle, Evelyn's aunt who was

112 Submission no. 27, Jumbunna Indigenous House of Learning, pp 10-11.

113 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 9.

114 Submission no. 20, NSW Police Force, p 8.

115 Submission no. 20, NSW Police Force, p 8.

116 Evidence, Ronella Jerome, 2 May 2014, p 7.

living at Bowraville at the time, and asked Michelle to travel to where Evelyn's mother Rebecca was staying in Coffs Harbour, some 60 minutes away, to advise Rebecca before she heard about it on the evening news. In other words, the media had been briefed before Evelyn's mother:

> **Ms REBECCA STADHAMS:** My sister, Michelle, came there about 10 minutes before it came on the news. I told the police where I was living and if they found out any information to come straight to me and tell me, which they didn't. It was about 10 minutes—I was lying in the room; my sister, Michelle, came straight to the house where I was staying. I was looking at her and she was crying. I said, 'What's wrong?' She said, 'They have just found Evelyn's remains.' So I went and got in the car and drove straight down to Bowraville and I found all my aunties waiting there for me. I ended up having a—they had to take me to the hospital because they had to give me something to calm me down. Why didn't the police come and tell me first? Everybody else knew but I didn't. It was 10 minutes before the news come on and that would have been so shocking for me to see it on the news. They should have come to me first and told me first that they found her, but they didn't.
>
> **Ms MICHELLE JARRETT:** The police come around to [my] home ... I just found out that they had found my niece so I had to drive to Coffs Harbour to get Rebecca and tell her. The police told me that the media already knew and they wanted me to tell her before she saw the news.
>
> **The Hon. SARAH MITCHELL:** Was it the local police that came to you?
>
> **Ms MICHELLE JARRETT:** The detectives, yes.
>
> …
>
> **Mr DAVID SHOEBRIDGE:** As you were driving you were thinking that you had to beat the 6 o'clock news bulletin?
>
> **Ms MICHELLE JARRETT:** Yes.
>
> **Ms REBECCA STADHAMS:** That would have been even worse for me to see it on the news not knowing. When my sister turned up at that front door it spun me right out.[117]

Additional remains belonging to Clinton

3.51 Clinton's family also informed the committee that 12 years after his death, they learnt that two additional bones belonging to Clinton had been located 12 months after the initial discovery of his body. The family only found out this information when the autopsy report was conveyed to the family by accident.[118] When they asked why they had not been advised earlier, they were told by police that family had been informed, yet later told by the Coroner's Court

[117] Evidence, Rebecca Stadhams and Michelle Jarrett, 2 May 2014, pp 36-37.

[118] Submission no. 7, Leonie Duroux, p 2.

that it was not common practice for families to be told of such finds.[119] The family stated that they were never advised of the findings.[120]

3.52 Leonie Duroux informed the committee that in Aboriginal culture, the burial of a body that is not whole is a matter of extreme significance and sensitivity.[121]

The reinvestigation: Strike Force ANCUD

3.53 Following the acquittal of the POI for Clinton's murder, the community held angry demonstrations in Bowraville to express their frustration and concern. Following meetings with the community, on 6 January 1997 then Commissioner of Police, Peter Ryan, established Strike Force ANCUD to reinvestigate the three murders.[122] The Strike Force comprised of investigators from Homicide, Major Crime and North Region Local Area Commands, together with a number of analysts.[123]

3.54 The Strike Force was primarily led by Detective Inspector Jubelin, who was attached to the Strike Force since its inception and assumed command of the investigation in 1996. Since that time, Detective Inspector Jubelin has been involved in every aspect of the investigation.[124]

3.55 Detective Inspector Jubelin advised the committee that the first stage of the reinvestigation involved locating, collating and assessing the information and evidence gathered during the original investigation. The second stage involved detectives interviewing witnesses not previously identified and re-interviewing witnesses whose previous interviews needed to be clarified and expanded upon. Particular attention was also paid to confirming or eliminating reported sightings of the missing children in order to clearly establish where they were last seen.[125] Detective Inspector Jubelin emphasised that a main POI was identified, but not to the exclusion of exploring evidence or lines of inquiries in relation to any other possible persons of interest. However, obvious similarities between the disappearances quickly emerged and it was therefore determined that the murders and disappearances were most likely linked.[126]

3.56 The families of the three children, community workers and others who have assisted the families during the years since the murders unanimously agreed that the reinvestigation by Strike Force ANCUD was the key turning point for the Bowraville case, both in terms of the evidence revealed and, most significantly, the improvement in communication, cooperation and trust between Bowraville's Aboriginal community and the police investigative team.[127] The factors that contributed to these improvements are discussed below.

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119 Submission no. 7, Leonie Duroux, p 2.

120 Evidence, Leonie Duroux, 2 May 2014, p 61.

121 Evidence, Leonie Duroux, 2 May 2014, p 61.

122 Submission no. 19, Attachment, Allens, p 10.

123 Submission no. 20, NSW Police Force, p 10.

124 Submission no. 20, NSW Police Force, p 2.

125 Submission no. 20, NSW Police Force, p 10.

126 Submission no. 20, NSW Police Force, pp 10-11.

127 Submission no. 27, Jumbunna Indigenous House of Learning, p 51; Evidence, Leonie Duroux, 2 May p 10; Evidence, Barbara Davis-Greenup, 2 May 2014, p 14; Evidence, Muriel Craig (Snr), 2 May 2014, p 23; Evidence, Paula Craig, 2 May 2014, p 30; Evidence, Elaine Walker, 2 May 2014,

Improved relationships between police and Aboriginal community

3.57 Detective Inspector Jubelin advised the committee that a number of factors worked together to improve the relationship between police and the Bowraville Aboriginal community.

3.58 Firstly, the Commissioner of Police took the time to visit Bowraville. Detective Inspector Jubelin noted that it was a positive step that the Commissioner took the time to visit Bowraville and listen to the concerns and grievances of the families following the acquittal of the POI for Clinton's murder in 1994, as his presence demonstrated to the community that their plight was important to police.[128]

3.59 Related to this, local police were not allocated to the reinvestigation. The Strike Force team comprised of only specialist investigators sourced from outside the immediate Bowraville community. This ensured that the community knew that the team's sole focus was on the investigation, left local officers free to tend to day-to-day policing duties, and assisted the investigative team and the community to work together from a somewhat 'blank slate'.[129]

3.60 The investigators also sought training in cultural awareness and sensitivity at the beginning of the investigation. Detective Inspector Jubelin informed the committee that, from the outset, the Strike Force team acknowledged that the relationship between the Aboriginal community and police was strained and that it was important that police approached the reinvestigation with cultural awareness and sensitivity.[130] When Strike Force ANCUD was first formed, time was taken to educate the members of the team about the cultural issues they were likely to encounter. This significantly assisted investigators in their dealings with witnesses and the community. As a result of this training, investigators were comfortable working with the community.[131]

3.61 Individual personalities of the police officers involved also played a significant role in building a trusting working relationship with the Aboriginal community. The committee heard that community members could readily identify those police who were uncomfortable in the community or judgemental. In Detective Inspector Jubelin's words, 'we acknowledged that there were problems and we tried to heal that by creating trust'.[132]

3.62 Detective Inspector Jubelin also stated that investigators on the Strike Force made the effort to take time with witnesses, as they quickly realised that they would have to discard traditional interview techniques in their contact with community members. Officers learnt early in the reinvestigation the importance of interviewing witnesses in an environment which they did not find threatening and of taking time whilst interviewing witnesses, allowing them to feel comfortable in the officers' presence. The committee heard that this was often achieved by simply sitting down and chatting with the witness, so that the witness could learn a little bit about the police officer as a person. While this technique often took longer than more

p 54; Evidence, Lesley Stadhams and Michelle Jarrett, 2 May 2014, p 50; Evidence, Dr Tracey Westerman, 12 May 2014, p 18, Evidence, Professor Larissa Behrendt, 12 May 2014, p 2.

128 Submission no. 20, NSW Police Force, p 12; Evidence, Barbara Greenup-Davis, 2 May 2014, p 16.

129 Submission no. 20, NSW Police Force, p 13.

130 Submission no. 20, NSW Police Force, p 12.

131 Submission no. 20, NSW Police Force, p 12.

132 Evidence, Detective Inspector Gary Jubelin, p 4.

formulaic interview techniques, it was found to be a very effective way of obtaining the necessary information.[133]

3.63 To achieve these outcomes, police were required to change their mindset and their timeframes. Officers learnt early in the investigation that it was difficult to make appointments with witnesses and they were somewhat frustrated when these appointments were not kept. The community would often laugh at their frustrations.[134] However, Detective Inspector Jubelin advised that when he and his officers began to see the humour in the situation at their own expense, accepting that they had given the perception of being 'uptight city detectives', it was appreciated by the community, who in turn helped the officers by explaining that life in their community operated to 'Koori Time' and that, if they were patient, they would soon meet with all of their witnesses.[135]

3.64 Related to this, officers endeavoured to not take insults and abuse personally. Officers understood that the community was angry and that abuse directed towards them was not personal, but rather the response of a disadvantaged group of people who were angry at events which had occurred in the past and at what the police represented to them. Detective Inspector Jubelin advised the committee that when the community saw that the officers understood where the anger was coming from, relationships improved and defused numerous volatile situations. As a result, a healthy respect grew between the two groups.[136]

3.65 Finally, Detective Inspector Jubelin said he felt that the community understood that officers in the reinvestigation had genuine empathy for their situation and were doing everything in their power to help them in their efforts for justice. This has been further demonstrated by the officers' ongoing actions and the fact that they have always endeavoured to make themselves available to the families and the community whenever they need to discuss something or simply vent their frustration.[137]

3.66 These sentiments were supported by many of the family members who participated in the inquiry, who stated that Detective Inspector Gary Jubelin and his team had displayed a commitment to the case and to the families that they had never previously experienced.[138] Leonie Duroux observed that Detective Jubelin 'has worked really hard to gain the trust of the community and he has mended a lot of bridges between the New South Wales police and the community'.[139] This point was further highlighted by Michelle Jarrett:

> This is how much time Gary has taken out for our families. One time when he was on holidays and just going through town he stopped to see how we were going. That is the kind of man he is. Gary goes beyond his job… It means a lot to us he does that.

133 Submission no. 20, NSW Police Force, p 14.

134 Submission no. 20, NSW Police Force, p 14.

135 Submission no. 20, NSW Police Force, p 14.

136 Submission no. 20, NSW Police Force, p 15.

137 Submission no. 20, NSW Police Force, p 15.

138 Evidence, 2 May 2014, Ronella Jerome, p 8, 10; Evidence, 2 May 2014, Leonie Duroux, p 10; Evidence, 2 May 2014, Barbara Greenup-Davis, p 14; Evidence, 2 May 2014, Muriel Craig Snr, p 23; Evidence, 2 May 2014, Paula Craig, p 30; Evidence, 2 May 2014, Penny Stadhams, p 41; Evidence, 2 May 2014, Michelle Jarrett, p 42; Evidence, 2 May 2014, Lesley Stadhams, p 50; Evidence, 2 May 2014, Elaine Walker, p 54.

139 Evidence, Leonie Duroux, 2 May 2014, p 62.

> We can ring him up any time and anything we ring about is not trivial or silly. We might think it is dumb but he listens to it [in] earnest and takes it to heart.[140]

3.67 Similarly, staff from Jumbunna Indigenous House of Learning, who have worked closely with the Bowraville community in support of their applications for the cases to be retried, remarked that in their experience, 'it would not be saying too much to say that the relationship between Strike Force ANCUD officers and the victims' families in this case is nothing short of extraordinary in the Australian context'.[141]

3.68 Detective Inspector Jubelin commented that this is nothing more than any community should expect from police in a similar situation, however, he recognised that the community was not accustomed to having police support them in such a manner.[142]

Appropriate experience, expertise and information management

3.69 Other factors that contributed to the effectiveness of the reinvestigation were the expertise of the lead investigative officers, the provision of expert advice regarding Aboriginal communication, and improved management systems.

3.70 In regard to the expertise of the lead investigative officers, Detective Inspector Jubelin advised the committee that the original officer placed in charge of the reinvestigation, Detective Inspector Rod Lynch, was an experienced detective who worked in a senior role on the Ivan Milat murder investigation, so was ably qualified for the task and gave the reinvestigation a purposeful direction from the start. This direction, combined with the homicide experience of Strike Force members, allowed them to focus on the crucial elements of the case.[143]

3.71 In regard to Aboriginal communication, Detective Inspector Jubelin advised that despite having gained the respect and trust of the community, police were nevertheless confronted with communication difficulties when interviewing witnesses. This included the way in which questions were put to witnesses and the manner in which witnesses responded to questions.[144] Therefore, in addition to the initial training around cultural sensitivity undertaken by the team at the beginning of the investigation, Detective Jubelin subsequently sought out the advice of Dr Diana Eades, a cultural linguistics expert based at the University of New England.[145] Dr Eades prepared a report which was tendered prior to the commencement of the trial for Evelyn's murder in 2006, which provided some clarity to the communication issues the officers had identified.[146]

3.72 As to the information management system, at the time of the reinvestigation an improved information management system known as T.I.M.S provided officers with a more efficient

140 Evidence, Michelle Jarrett, p 50.

141 Submission no. 27, Jumbunna Indigenous House of Learning, p 51.

142 Submission no. 20, NSW Police Force, p 15.

143 Submission no. 20, NSW Police Force, p 12.

144 Evidence, Detective Inspector Jubelin, 1 May 2014, p 4.

145 The expert evidence of Dr Eades will be discussed further in the next chapter.

146 Submission no. 20, NSW Police Force, p 16.

method of recording and cross checking information. The committee heard that this greatly assisted officers conducting a complex investigation involving three murders.[147]

Lessons from the reinvestigation

3.73 The evidence received by the committee highlighted a number of lessons that can be taken from the investigation. Some of these have already been incorporated into police training and procedures.

Adequate resourcing of suspicious deaths and homicides

3.74 Detective Inspector Jubelin advised that the NSW Police Force now has systems in place to prevent officers without sufficient experience from being appointed to lead a murder investigation, as occurred in the initial Bowraville investigation. Since the early 1990s there have been a number of changes made to the process for allocating officers to homicide investigations, changes initially driven by the recommendations of state coroners. Under the protocol now in place, the Homicide Squad initially assumes accountability for all homicide and suspicious death investigations across the state. The Homicide Squad then either maintains the lead or, following a thorough assessment of the investigation, can allocate the lead to another unit. The other unit is required to report to the Homicide Squad, which has the authority to reconsider the leadership of the investigation at any stage.[148]

Aboriginal Cultural Awareness training

3.75 The NSW Police Force currently conducts cultural awareness training on a two-tiered basis. The first tier course is provided to all cadets at the NSW Police Academy and comprises of information including, among other things, cultural topics and issues, Stolen Generations and the Apology, identifying Aboriginal persons, and the Royal Commission into Aboriginal Deaths in Custody.[149]

3.76 The second tier course is delivered to all NSW Police Force staff, regardless of rank, in the 41 Local Area Commands identified in the Aboriginal Strategic Direction 2012-2017. This course provides police in those area commands with specific information relating to their local Aboriginal community. The training is delivered over a full day by an Aboriginal Lecturer and, where available, local Aboriginal Community Liaison Officers. Specialist commands such as the Child Abuse Squad and the Transport Command have also sought out the training.[150] This course addresses topics including local Aboriginal history, historical to current issues, engaging the local Aboriginal community, and local organisations, workers and programs.[151]

147 Submission no. 20, NSW Police Force, p 13.

148 Submission no. 20, NSW Police Force, p 9.

149 Answers to questions on notice, Detective Inspector Gary Jubelin, NSW Police Force, 28 May 2014, p 1.

150 Answers to questions on notice, Detective Inspector Gary Jubelin, p 2.

151 Answers to questions on notice, Detective Inspector Gary Jubelin, p 2.

3.77 While these programs have been an important step towards ensuring that police officers have the appropriate skills and awareness to liaise effectively and respectfully with Aboriginal people, inquiry participants suggested that the training could be further improved[152] with a view to moving away from ad hoc or sporadic training opportunities to creating a 'culture of cultural competence' within the NSW Police Force more generally.[153]

3.78 Detective Inspector Jubelin expressed the view that with strong leadership, this kind of cultural change can be led from the top:

> ... We have to change the culture of policing. I have found that police officers are good followers. We like serving an apprenticeship under the person who leads us. So from a leadership point of view or from an experience point of view, it is important that we get the message across that [racial prejudice] is just not right. I share with what you say and I understand what you say about one day's training. It does not really mean a great deal. I am not talking about the training of police, I am talking about training generally. You can sit there and watch a Powerpoint presentation, but it does not capture it … Making decisions based on race, culture – whether it is Indigenous or another culture – is something that we need to follow up on.[154]

3.79 Detective Inspector Jubelin added that having had the opportunity to put in writing the various lessons learned from the Bowraville investigation for the purposes of the current committee inquiry, particularly in regard to investigative and communication techniques specific to investigations involving Aboriginal communities, he had approached his senior management to suggest that the material be used as a training package, most likely in the form of a case study. He advised that management had been supportive of the suggestion and are in the process of considering the manner in which the material could be delivered and the officer level at which the training could be targeted.[155]

3.80 Dr Tracy Westerman of Indigenous Psychological Services suggested that it would be beneficial for the NSW Police Force to review their Aboriginal cultural awareness training programs, ideally through an internal analysis of needs from staff that have regular contact with Aboriginal people. According to Dr Westerman, this would ensure that training was practically relevant to day to day realities of policing and would also increase the likelihood of the training being accessed by officers.[156]

3.81 Dr Westerman noted that she had not specifically reviewed the NSW Police Force's programs, policies or procedures, however, she recommended that in keeping with 'best cultural practice' as determined by Australian and international research:

- Aboriginal cultural awareness training be embedded within a specific program area within the organisation and prioritised based on evident need – for example, for officers who are stationed in areas with high levels of contact with Aboriginal people

152 Submission no. 26, Indigenous Psychological Services, p 30; Evidence, Detective Inspector Jubelin, 1 May 2014, p 6; Evidence, Dr Eades, 1 May 2014, p 17.

153 Submission no. 26, Indigenous Psychological Services, p 30; Evidence, Detective Inspector Jubelin, 1 May 2014, p 6.

154 Evidence, Detective Inspector Jubelin, 1 May 2014, p 6.

155 Evidence, Detective Inspector Jubelin, p 4.

156 Submission no. 26, Indigenous Psychological Services, p 30.

- the mandatory content of training have a specific and measurable focus on Aboriginal English and Communication Styles and how this impacts on gathering evidence from witnesses and other associated information
- beyond training workshops, a review of general policing procedures be undertaken to ensure that procedures are consistent with best cultural practice and that police receive appropriate guidance during complex investigations that involve Aboriginal victims and witnesses, particularly in investigations concerning homicides and serious assaults.[157]

3.82 Michelle Stadhams also suggested that it would be beneficial for police who work in smaller regional communities, particularly those with a large Aboriginal population, to be allocated to the town for longer periods of time to ensure continuity and the opportunity to develop good working relationships.[158] Alternatively, if that was not possible, she suggested that new officers should take the time to make connections with the community before they meet locals in their official capacity during a call out:

> I feel, especially in smaller communities … we just break in the coppers after we have had them for a year or two. We break them in, we get to know them and, you know, they know who's who and what's what, and then you go and change them on us. Then we have to break in a new lot. It would be good if they could come to the community or to the elders or something. It is not that hard in this valley to do that, to take the time out and say, 'This is this family', and have a yarn with them, just to meet them....[159]

Committee comment

3.83 Much of the evidence received in this chapter relates to the inadequacies of the initial police investigation of the disappearances of the three children, the treatment of the children's families and the local Aboriginal community, and concerns that shortcomings with the initial investigation may have comprised proceedings in subsequent criminal trials and the families' pursuit for justice today. The committee acknowledges the deep pain and frustration this has caused the families.

3.84 The committee concurs with the view of Detective Inspector Jubelin that the decision to allocate an officer inexperienced in the complexities of homicide investigations to the Bowraville cases let down the families of the three victims. While the exact ramifications of this decision will never be known, there can be little doubt that the initial investigation was critically flawed.

3.85 The committee notes that the reinvestigation of the murders undertaken by Detective Inspector Jubelin and Strike Force ANCUD marked a turning point for the children's families and for the progress of the case. The committee commends the work of Detective Jubelin and his team who have built a trusting and productive relationship with the local community that stands in stark contrast to the tensions of the past.

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157 Submission no. 26, Indigenous Psychological Services, pp 30-31.

158 Evidence, Michelle Stadhams, 2 May 2014, p 48.

159 Evidence, Michelle Stadhams, 2 May 2014, p 48.

3.86 The committee notes that there are two key lessons that can be learned from the reinvestigation. The first is about adequate resourcing of suspicious deaths and homicides. We acknowledge that systems have been implemented in the NSW Police Force to ensure this occurs.

3.87 The second lesson is about cultural awareness. While we acknowledge that the NSW Police Force provides Aboriginal Cultural Awareness training, we note the comment from inquiry participants that this training could be improved with a view to creating a 'culture of competence' within the NSW Police Force, and agree that this is a goal that police should strive towards.

3.88 We also note the recommendations from Dr Westerman regarding the need to ensure that police programs, policies and procedures meet 'best cultural practice'. The committee agrees that these are important considerations and therefore recommends that the NSW Police Force review its policies, procedures and training programs that relate to Aboriginal people, and update them where necessary to ensure they are consistent with best cultural practice. This should be done in consultation with Aboriginal people and those with relevant expertise, such as Detective Inspector Jubelin, Dr Diana Eades and Dr Tracey Westerman.

Recommendation 1

That the NSW Police Force review all of its policies, procedures and training programs that relate to Aboriginal people, and update them where necessary to ensure they are consistent with best cultural practice. This should be done in consultation with Aboriginal people and those with relevant expertise, such as Detective Inspector Jubelin, Dr Diana Eades and Dr Tracey Westerman.

3.89 Finally, we note that Detective Inspector Jubelin has proposed new course content based on the Bowraville experience that highlights investigative and communication techniques specific to investigations involving Aboriginal communities. We believe there is merit in this suggestion and acknowledge that senior management within the NSW Police Force are considering how the content can be utilised in training. We recommend that this course content be progressed, and that transcripts of public evidence from this inquiry be included as part of any case study developed regarding the murders in Bowraville.

Recommendation 2

That the NSW Police Force develop a case study detailing the various lessons learned from the Bowraville investigation and incorporate it into the mandatory course content for Aboriginal cultural awareness training. The case study should include relevant excerpts from the transcripts of public evidence from this inquiry.

Chapter 4 Trials and coronial inquest

As outlined in chapter 2, the Bowraville murders have been the subject of two criminal trials – the first for the murder of Clinton Speedy-Duroux in 1994, and the second for the murder of Evelyn Greenup in 2006. The same Person of Interest (POI) was prosecuted at both trials yet acquitted of the murders. Significantly, evidence tying the three murders together has never been considered by a court.

However, in 2004, the evidence relating to all three murders was considered during a coronial inquest which found that the circumstances surrounding the disappearances and murders of the three children had strikingly similar characteristics which suggest that the POI was involved in each. The families contend that this finding demonstrates that if evidence regarding all three cases was considered by a court, the case would likely result in a conviction for the three murders.

This chapter examines the circumstances leading to the two criminal trials and the 2004 coronial inquest. The chapter also discusses the various ways in which the families' experiences of the criminal justice system have served to 're-victimise' them at each stage of the process, which has been a common theme throughout this inquiry.

Separation of trials for the murders of Clinton and Evelyn

4.1 As noted in chapter 2, in 1993, the NSW Office of the Director of Public Prosecutions (DPP) sought to prosecute the POI in a single trial containing two indictments relating to both Clinton Speedy-Duroux and Evelyn Greenup.[160] However, legal representatives for the POI sought an order for the two counts to be tried separately, arguing that evidence in respect of either offence was not admissible in respect of the other, and that the accused would be seriously and unfairly prejudiced by a joint trial.[161]

4.2 On 25 August 1993, Justice Badgery-Parker ruled that the Crown's application for joint trials of the matters be refused and that various items of similar fact evidence be excluded from the trial relating to Evelyn Greenup's murder.[162]

4.3 As a result of this decision, evidence demonstrating the similarities between the two murders and linking the POI to each case – known then as 'similar fact evidence' – was not tendered before the court. Clinton's trial, for which there was the strongest evidence, was run first. The trial was conducted without any mention of the disappearance or murder of either Evelyn or Colleen.[163]

160 Submission no. 27, Jumbunna Indigenous House of Learning, p 15.

161 Submission no. 19, Attachment 1, Allens, p 9.

162 Submission no. 27, Jumbunna Indigenous House of Learning, pp 15-16.

163 Submission no. 27, Jumbunna Indigenous House of Learning, p 15-16.

Why were the trials separated?

Prior to the introduction of the *Evidence Act 1995*, rules regarding similar fact evidence were governed by common law. The court was required to determine the extent to which the evidence in relation to Clinton's murder was admissible for the purposes of the trial for Evelyn's murder, and vice versa.[164] To this end, the court relied on case law in which the High Court considered principles of admissibility of 'propensity' and 'similar fact' evidence.[165]

The common law principles as they stood at the time provided that similar fact evidence was not admissible unless the judge concluded the evidence revealed such similarities as to give it such probative force or cogency that there was no rational view of the similar fact evidence which was consistent with innocence (the 'no rational view' test).[166]

In ruling on the question before him, Justice Badgery-Parker applied the test for similar fact evidence as it then stood and separated the trials on the basis that, in his view:

> ... there were not, then, sufficient similarities for evidence of one murder to be tendered as 'similar fact' evidence against the other.[167]

The case law at the time applied a particularly strict and narrow test for evidence which has since been substantially amended by the introduction of the *Evidence Act 1995* (discussed further at paragraphs 4.16-4.18). Jumbunna Indigenous House of Learning noted that this was particularly problematic because the unique nature of the murders, and the strong probative but circumstantial force of the evidence, is most evident in these cases when all of the evidence is heard together.[168]

The first trial: Clinton Speedy-Duroux

4.4 On 18 February 1994, the trial for the murder of Clinton Speedy-Duroux concluded. The jury returned a verdict of 'not guilty' and the POI was acquitted.[169]

4.5 According to Jumbunna Indigenous House of Learning, the 1994 trial can be characterised by a number of omissions that severely impeded the chances of a successful prosecution:

- *The lack of evidence, generally:* As noted in chapter 3, as a result of the flawed initial police investigation, large amounts of evidence were either not fully investigated or were not identified and therefore not led in the prosecution case.[170]

164 Submission no. 27, Jumbunna Indigenous House of Learning, p 15.

165 Submission no. 19, Attachment 1, Allens, p 15.

166 Submission no. 19, Attachment 1, Allens, p 15.

167 Submission no. 27, Jumbunna Indigenous House of Learning, p 15.

168 Submission no. 27, Jumbunna Indigenous House of Learning, p 15.

169 Submission no. 27, Jumbunna Indigenous House of Learning, p 16; Submission no. 7, Leonie Duroux, p 1.

170 Submission no. 27, Jumbunna Indigenous House of Learning, p 16.

- *The lack of 'similar fact' or 'tendency and coincidence' evidence demonstrating the similarities between Clinton's disappearance and death and those of Evelyn and Colleen:* This evidence was excluded as a result of the decision by Justice Badgery-Parker.[171]
- *The absence of evidence regarding alleged admissions made by the POI:* This evidence was not uncovered until 2007 during the reinvestigation.[172]
- *The absence of the Norco Corner evidence:* As noted at paragraphs 3.46 to 3.48, the Norco Corner evidence would have placed a man matching the description of the POI standing over an Aboriginal male matching Clinton's description in the hours after Clinton was last seen alive. Even though this evidence was reported to police, it was not fully investigated and not made available to the prosecutor.[173]
- *Allegations that Clinton had been sighted on the morning after which he is alleged to have been killed:* As noted in chapter 3, during the trial two witnesses claimed to have seen Clinton alive on the morning that he was alleged to have been killed,[174] however, in 2007 this evidence was refuted as a result of further investigation by Strike Force ANCUD.[175] During the 2004 inquest it was suggested that this evidence was the primary reason why the prosecution of the POI for Clinton's murder was unsuccessful.[176]
- *No jury directions were given in relation to the evidence of Aboriginal witnesses:* This was not unusual at the time the trial was conducted,[177] however, the impacts of the omission are discussed later in this chapter.

4.6 Jumbunna stated that the cumulative effect of these factors was that the POI was acquitted without having to face significant probative evidence. Further, the acquittal then ensured that the POI would not have to face that evidence when it later became available for the second trial in 2006 due to the 'double jeopardy' principle.[178]

The family's experience of Clinton's trial

4.7 The Duroux family told the committee about their shock on hearing the 'not guilty' verdict at the conclusion of Clinton's trial, which resulted in Clinton's grandmother, Lavinia, fainting.[179] The family had previously been under the impression that police had identified what in their mind was considerable evidence linking the POI to the scene of the crime and, in turn, they had assumed that the POI was going to be found guilty.[180]

171 Submission no. 27, Jumbunna Indigenous House of Learning, p 16.

172 Submission no. 27, Jumbunna Indigenous House of Learning, p 16.

173 Submission no. 27, Jumbunna Indigenous House of Learning, p 16.

174 Submission no. 27, Jumbunna Indigenous House of Learning, p 7.

175 Submission no. 27, Jumbunna Indigenous House of Learning, p 16.

176 Submission no. 27, Attachment B: Transcript of inquest into the deaths of Evelyn Clarice Greenup and Colleen Anne Walker, New South Wales Coroner's Court, Bellingen, Jumbunna Indigenous House of Learning, p 6.

177 Submission no. 27, Jumbunna Indigenous House of Learning, p 7.

178 Submission no. 27, Jumbunna Indigenous House of Learning, p 16.

179 Submission no. 10, Thomas Duroux, p 1; Submission no. 7, Leonie Duroux, p 1.

180 Submission no. 7, Leonie Duroux, p 1.

4.8 Family members informed the committee that they did not have access to court support officers and were left to make sense of the proceedings as best they could.[181] Thomas Duroux told the committee that the confusion and sense of injustice caused by the acquittal remains today:

> I thought we would get justice at the first trial. There was other evidence that wasn't put before the court that we know about now so it is very hard to understand why the case was run the way it was. And it is very hard for us to understand, with the evidence we do know, why the verdict was 'not guilty'.[182]

4.9 The Duroux family told the committee that the shock of the acquittal was then further exacerbated by their treatment on leaving the courthouse. First, when Thomas removed his shirt to wipe his mother's face, the police suspected that he was about to cause trouble:

> My mum attended the trial. She fainted when the verdict was read out. I took my shirt off for her to wipe her face and the police thought that I was going to be a danger, even though I was only trying to console her. The 'not guilty' verdict was a disappointment for the whole family. It was tough.[183]

4.10 Soon after, media descended upon the family to demand a response to the verdict. The family, none of whom were ready for such an onslaught and had no media liaison officer, tried to manage the media barrage as best they could. Leonie Duroux shared her recollection of the events that day:

> During Clinton's trial in 1994, there was no media liaison. As mentioned previously we went down for the verdict and it is something that will stay with me for the rest of my life. The media was everywhere. June Speedy, Clinton's mother, came out of that trial in shock to have a tv camera shoved in her face and being asked the question 'Do you think you will ever get over it' (or words to that affect) ..... June is a very quiet shy woman and was already in shock and found it very hard to answer. They then turned to Troy his youngest brother who was 16 at the time and he was left to give a statement to the media. He was so traumatised that he does not remember giving this interview. We were ushered into a room with high windows and looked up to see the journalists had climbed up to get to the windows with their cameras and get footage of the grieving family. There was no sensitivity or respect shown to the family. I believe that there was a media unit attached to NSW Police at this time however it did not appear that it was utilised for this trial.[184]

4.11 Thomas Duroux and June Speedy, Clinton's mother, concurred with Leonie's recollection of the events that day.[185] Thomas expressed anger that police media support were not made available to the family to help them manage a situation that they were unprepared for, at a time when they were very vulnerable.[186]

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181 Evidence, June Speedy, 2 May 2014, pp 63-64; Submission no. 10, Thomas Duroux, p 1.

182 Submission no. 10, Thomas Duroux, p 1.

183 Submission no. 10, Thomas Duroux, p 1.

184 Submission no. 7, Leonie Duroux, p 4.

185 Submission no. 10, Thomas Duroux, p 1; Submission no. 25, June Speedy, p 2.

186 Submission no. 10, Thomas Duroux, p 1; Submission no. 25, June Speedy, p 2.

4.12 In contrast, following the inquest into Colleen and Evelyn's deaths in 2004, Kylie Keogh from Police Media Liaison was made available to assist the families. Leonie Duroux observed that the difference in the family's treatment by the media once Ms Keogh was involved was 'astounding and made an extremely big difference'.[187]

Withdrawal of charges for the murder of Evelyn Greenup

4.13 Following the acquittal of the POI for Clinton's murder, the DPP withdrew, or 'no-billed', the charges against the POI for the murder of Evelyn Greenup.[188]

4.14 Jumbunna Indigenous House of Learning outlined what they considered to be the likely reasons for this decision. They stated that the strongest case from an evidentiary perspective at that point was Clinton's. In Evelyn's case, the Crown would have been unable to lead tendency evidence regarding the similar circumstances surrounding the two deaths because the double jeopardy principle would have excluded evidence relating to Clinton's death.[189] Jumbunna also suggested that the DPP would have been reluctant to use evidence relating to Colleen's murder because, at the time of Clinton's acquittal, the Coroner had not yet made a finding that Colleen had been murdered (this occurred in 2004). The evidence concerning Colleen was therefore likely to be excluded.[190]

4.15 As a result, if a conviction could not be obtained in Clinton's matter, it would be unlikely that a conviction could be obtained in Evelyn's matter run alone, and any attempt to run Evelyn and Colleen's matters together would likely have failed.[191]

4.16 In 1995, two years after the decision of Justice Badgery-Parker to split Clinton's and Evelyn's trials, the *Evidence Act 1995* came into force in New South Wales. Sections 97 and 98 of the Act introduced significant legislative changes to evidentiary provisions relating to what can be called the 'tendency rule' and the 'coincidence rule', replacing the previous provisions regarding 'similar fact evidence'.[192]

4.17 The Act rejected the 'no rational view' test that previously operated under common law and replaced it with a discretionary balancing test, as considered in the New South Wales Supreme Court decision of *Regina v Ellis*.[193]

4.18 The law on coincidence evidence broadened again with the introduction of the *Evidence Amendment Act 2007*, which came into force in 2009, which lowered the threshold relating to similar fact evidence.[194]

187 Submission no. 7, Leonie Duroux, p 4.

188 Submission no. 20, NSW Police Force, p 27.

189 Submission no. 27, Jumbunna Indigenous House of Learning, p 17.

190 Submission no. 27, Jumbunna Indigenous House of Learning, p 17.

191 Submission no. 27, Jumbunna Indigenous House of Learning, p 17.

192 Submission no. 19, Attachment 1, Allens, p 10.

193 Submission no. 27, Jumbunna Indigenous House of Learning, p 30, citing *Regina v Ellis* [2003] 58 NSWLR 700 at [88]-[95].

194 Explanatory note, Evidence Amendment Bill 2007.

The 2004 coronial inquest

4.19 This section examines in detail the facts of the coronial inquest into the deaths of Evelyn Greenup and Colleen Walker-Craig.

Proceedings leading to the inquest

4.20 Following the acquittal of the POI for Clinton's murder, proceedings on the cases relating to Evelyn and Colleen went no further until the families' protests were recognised by Police Commissioner Ryan, who announced the formation of Strike Force ANCUD to reinvestigate the three murders.

4.21 In 1998, Strike Force ANCUD forwarded the results of the reinvestigation to the DPP. As noted in chapter 2, in 1999 the DPP determined that a charge against the POI for the disposal of Clinton's body was unsustainable, as was an ex-officio indictment for Evelyn's murder.[195] Leonie Duroux expressed concern that the DPP's assessment took 18 months, and was carried out by an officer who had been involved in the trial for Clinton's murder several years earlier.[196]

4.22 Matters were further investigated by police and a brief of evidence was prepared for consideration by the State Coroner. A decision was then made to re-open the coronial inquest[197] into the deaths of Colleen Walker and Evelyn Greenup.[198]

4.23 The joint coronial inquest was held in 2004. As noted at the beginning of this chapter, this is the only official proceeding to date in which the substantial tendency and coincidence evidence uncovered by police during both investigations has been tendered for independent consideration and in which evidence relating to all three disappearances has been heard together.[199]

The findings

4.24 The Coroner handed down his findings in September 2004. As noted in chapter 2, in the matter of Evelyn Greenup, the Coroner was satisfied that there was evidence capable of satisfying a reasonable jury, properly instructed, of her murder, and that there was a reasonable prospect that the jury would convict a known person of her murder.

4.25 In the matter of Colleen, the Coroner found that she had died as the result of a homicide. Although the Coroner stated that the evidence did not enable him to make a finding as to the

195 Submission no. 19, Attachment 1, Allens, p 10.

196 Submission no. 7, Leonie Duroux, p 5.

197 As noted in chapter 2, the inquest into Evelyn's death was terminated in 1991 when the POI was charged with her murder, and the inquest into Colleen's death was terminated in 1994 after the Coroner delivered an open finding.

198 Submission no. 27, Attachment B: Transcript of inquest into the deaths of Evelyn Clarice Greenup and Colleen Anne Walker, New South Wales Coroner's Court, Bellingen, Jumbunna Indigenous House of Learning, p 6.

199 Submission no. 27, Jumbunna Indigenous House of Learning, p 5.

nature of that homicide or the identity of the person or persons responsible, he noted that the evidence relating to Colleen's disappearance and the murders of Clinton and Evelyn raised a 'definite suspicion, even a probability' that a known person was responsible for Colleen's murder.[200]

4.26 Of particular relevance, the Coroner concluded that 'like the investigating police, I am of the opinion that the circumstances surrounding the disappearance of Colleen Walker and the murders of Evelyn Greenup and Clinton Speedie [sic] have strikingly similar characteristics. The coincidence and tendency evidence suggest that [the POI] was involved in the disappearance'.[201]

What is tendency and coincidence evidence?

Jumbunna Indigenous House of Learning advised the committee that, in the context of the trials for the Bowraville murders, tendency and coincidence evidence is evidence that would be adduced to prove either:

- that the POI had certain tendencies to act in particular ways and to have certain states of mind, and/or
- that it is improbable that the events that occurred in Bowraville occurred coincidentally and that therefore they were the act of a single person, and that that person was the POI.[202]

4.27 The Coroner then highlighted 11 points of tendency and coincidence evidence that, in his view, suggested that the POI was involved in each disappearance.[203]

The outcomes

4.28 The committee heard that the coronial inquest was a significant event for the Bowraville case because, as already noted, it was the first occasion on which evidence relating to all three murders had been heard together by an independent adjudicator, who in turn had determined that the evidence linking the three murders to the POI was significant, compelling and highly probative.[204] Detective Inspector Jubelin commented:

> Notwithstanding the evidentiary rules in the Coroners Court are different from that of a criminal trial, it is significant that the Coroner, who is the only judicial officer who has heard evidence relating to all three matters together, came back with those findings. In coming to those findings he has had an opportunity to assess the quality of the evidence and the credibility of the witnesses in a court environment.[205]

200 Submission no. 27, Attachment B: Transcript of inquest into the deaths of Evelyn Clarice Greenup and Colleen Anne Walker, New South Wales Coroner's Court, Bellingen, Jumbunna Indigenous House of Learning, p 28.

201 Submission no. 20, NSW Police Force, pp 19-20.

202 Submission no.27, Jumbunna Indigenous House of Learning, p 30.

203 Submission no. 20, NSW Police Force, pp 19-20.

204 Evidence, Detective Inspector Jubelin, 1 May 2014, p 10.

205 Submission no. 20, NSW Police Force, p 20.

4.29 The Coroner, on terminating the inquest, advised that he would forward the evidence and his recommendations to the DPP and would urge the DPP 'to look beyond the factual matrix as it relates to the murder of Evelyn Greenup and to look closely at the tendency and coincidence evidence in relation to the matters of Clinton Speedie [sic] who has already been dealt with by a jury and also Colleen Anne Walker'.[206]

The second trial: Evelyn Greenup

4.30 The committee was informed that the Coroner's findings in the inquest into Colleen and Evelyn's deaths gave the families and the police considerable hope, as not only did the Coroner make significant findings regarding the connection between the three deaths, but the families themselves had been given the opportunity to hear the evidence connecting the three cases together for the first time and they felt that the evidence, in its entirety, made a significantly compelling case.[207] In February 2005, following receipt of the Coroner's recommendations and findings, the DPP filed an ex-officio indictment against the POI for the murder of Evelyn Greenup. The trial commenced on 6 February 2006.[208]

Evidence excluded from trial

4.31 As noted in chapter 2, on 22 February 2006, the trial judge granted an application by the legal representatives acting for the POI to exclude certain tendency and coincidence evidence regarding the POI's behaviour and linking him to Clinton and Evelyn's disappearances and deaths.[209] Certain evidence relating to admissions made by the POI to prison inmates was also excluded.[210]

4.32 Only one year later, amendments were proposed to the *Evidence Act 1995* that lowered the test for coincidence evidence which, according to Jumbunna, made it more likely that the evidence ruled out by the trial judge, if led today, would be deemed admissible.[211] These amendments were subsequently passed in 2007 and came into force in 2009.[212]

Accused acquitted for the second time

4.33 On 3 March 2006, the POI was again acquitted, this time for the murder of Evelyn Greenup.[213]

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206 Submission no. 27, Attachment B: Transcript of inquest into the deaths of Evelyn Clarice Greenup and Colleen Anne Walker, New South Wales Coroner's Court, Bellingen, Jumbunna Indigenous House of Learning, p 23.

207 Evidence, Detective Inspector Jubelin, 1 May 2014, p 10.

208 Submission no. 27, Jumbunna Indigenous House of Learning, p 21.

209 Submission no. 27, Jumbunna Indigenous House of Learning, p 21.

210 Submission no. 27, Jumbunna Indigenous House of Learning, p 22.

211 Submission no. 27, Jumbunna Indigenous House of Learning, p 21.

212 *Evidence Amendment Act 2007*.

213 Submission no. 27, Jumbunna Indigenous House of Learning, p 21.

4.34 As a result of the second acquittal, much of the evidence relating to Evelyn's death, like that relating to Clinton's death, became inadmissible in any future trial for the murder of Colleen.[214]

4.35 Evidence received by the committee pointed to many factors that are believed to have contributed to the outcome of the trial. These are discussed below, together with consideration of the impacts of Evelyn's trial on the families.

Limited scope of trial

4.36 As in Clinton's trial, Evelyn's trial was limited to the single charge for her death – that is, evidence relating to Clinton and Colleen's death was not tendered before the court. There were therefore limited opportunities to lead any tendency and coincidence evidence, which included substantial amounts of evidence gathered by police during Strike Force ANCUD's reinvestigation into the three deaths.[215]

4.37 The committee heard that the limited scope of the trial also posed obstacles for witnesses, particularly those who were members of the other victims' families. This point was raised by Detective Inspector Jubelin:

> … in relation to the [trial for the] murder of young Evelyn the families were very confused as to why evidence was excluded. Before they went in the witness box they were told, 'Do not mention the fact that another child was murdered'. The families are sitting there wondering what is going on … It was very traumatic for the families … They did it with dignity but it was very frustrating for them...[216]

4.38 The same point was further illustrated by Muriel Craig Jnr, Colleen's sister, who was called to testify as to when she had last seen Evelyn during the week of her disappearance. She commented on her 'daunting' experience as a witness:

> … I was the last witness to go on the stand. It was very daunting. I could not mention Colleen's name. I could not mention any of the other children or have Colleen's name in there.[217]

Concerns regarding the prosecution

4.39 Some witnesses expressed the view that the prosecutor allocated to Evelyn's case demonstrated a somewhat lacklustre approach to both the preparation for the case and the pursuit of a conviction.

4.40 The committee was told that the prosecutor made statements to NSW Police suggesting that, prior to the trial, he had already formed the view that the prosecution would fail.[218] Detective

214 Submission no. 27, Jumbunna Indigenous House of Learning, p 22..

215 Submission no. 27, Jumbunna Indigenous House of Learning, p 60.

216 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 10.

217 Evidence, Muriel Craig (Jnr), 2 May 2014, p 30.

218 Evidence, Detective Inspector Jubelin, 1 May 2014, p 11.

Inspector Jubelin recalled the conversation for the committee, and the impression it left with him:

> ... It might have been an off-the-cuff remark but the prosecutor in charge of the matter said before the trial even started, "We are not going to win this case". From a detective's point of view that is about the most deflating opinion you could have from a prosecutor.[219]

4.41 These recollections were corroborated by similar sentiments echoed by Mr Nicholas Harrison, a former prosecutor who worked at the Office of the DPP at the time of Evelyn's trial (though did not run the trial), during a 2004 *Four Corners* program on the Bowraville murders:

> I had the view at the time that if that matter was to run to trial, it was being run as a trial because it was one of those trials that you had to run, not a trial where a conviction was, you know, would be well justified.[220]

4.42 Jumbunna Indigenous House of Learning stated that the remarks by the prosecutor had confirmed '... a pre-existing view amongst the community that the legal system had pre-judged the case and made it difficult to believe that State officers were "fighting for" justice for the community and families. Instead, some felt it demonstrated an indifference or nonchalance on the part of police and prosecutors towards the prosecution of [the POI]'.[221]

4.43 Detective Inspector Jubelin and Jumbunna also expressed concern that prosecuting Counsel had limited consultations with the investigating officers and made limited requisitions of them in preparation for the trial.[222] Detective Jubelin highlighted the contrast between his liaison with the prosecutor in this trial to that of other trials:

> I think as there are different quality police investigators there are different quality prosecutors ... When I take a brief of evidence to a prosecutor I have an expectation that that prosecutor will take it to another level. For example, requisitions, looking at it and saying "That is good, I see where you have done that but I want this tightened up and I want that tightened up"... When I do get that type of communication it makes a big difference to the prosecution of the case. I will bring you now to the trial in 2006. I was very frustrated with the lack of any requisitions. It was not a case of "Strengthen the brief here", "It is weak here or there".[223]

4.44 The committee heard that the investigating officers were only called to give evidence on one discrete issue, relating to prison informer evidence discovered during the reinvestigation.[224]

4.45 Detective Inspector Jubelin expressed the view that more effort could have been made in regard to the prosecution:

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219 Evidence, Detective Inspector Jubelin, 1 May 2014, p 11.

220 Submission no. 27, Jumbunna Indigenous House of Learning, p 63.

221 Submission no. 27, Jumbunna Indigenous House of Learning, pp 63-64.

222 Submission no. 27, Jumbunna Indigenous House of Learning, p 55; Evidence, Detective Inspector Jubelin, 1 May 2014, p 11.

223 Evidence, Detective Inspector Jubelin, 1 May 2014, p 11.

224 Submission no. 27, Jumbunna Indigenous House of Learning, p 55.

> ... I want to say this, we might have had the State's best prosecutor available and we still might not have won that trial but we will never know. With the trial run in 2006 we had someone that I felt was going through the motions and in fairness maybe that is all they are supposed to do. [But] If you do want justice in a situation like this you have to go above and beyond. I am not talking about crossing any lines, it is all lawful, it is about putting the effort in. I did not feel that effort was put in.[225]

4.46 Similar concerns were raised by Michelle Stadhams, Evelyn's aunt, who told the committee that she felt like the prosecutor was 'just going through the motions':

> They were dotting the i's and crossing the t's to make it look good… When we had [Evelyn's] trial over in Port Macquarie, they was just walking through it. They were just going though the motions, you could see it. You sit there in the background listening to them and thinking, "Why aren't you fighting harder? Why [didn't] you ask him this question? [Why] don't you call more witnesses?" When the defence was finished why didn't he get him back on the stand and ask him more questions. There was nothing like that. I [felt] like going and slapping him in the back of the head and saying, "What are you doing?"[226]

The family on trial

4.47 The families told the committee that the overall impression of Evelyn's trial was that it was the families' and community's behaviour, particularly that of Evelyn's family, that was on trial, rather than the behaviour of the individual accused of Evelyn's murder:

> Do you know what was on trial? Our lifestyle, how we live – not that man sitting in that chair. It was Rebecca and our lifestyle that was on trial.[227]

4.48 In a submission to the committee, Evelyn's mother, Rebecca, shared her memory of the trial:

> When we had Evelyn's trial I felt uncomfortable with the questions they asked me as I didn't understand them and they also kept asking me about really personal stuff. I thought the questions had nothing to do with my daughter's murder trial and they focused more on my lifestyle and not the accused who was on trial for the murder of my four year old daughter.[228]

4.49 The committee heard that this came at a particularly difficult time for Rebecca, who not only blamed herself for Evelyn's disappearance, but was also subject to blame from her family, Evelyn's father's family and the community.[229] Rebecca's sister, Penny Stadhams, recalled Rebecca's state of mind at the time:

> She was too frightened to stand in front of anyone or stand aside. Her self-esteem, she had none. She had no confidence. She was beaten and knocked down and forgotten. She was the mother, she was the person was carried this child, she was the woman

225 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 12.

226 Evidence, Michelle Stadhams, 2 May 2014, p 43.

227 Evidence, Michelle Stadhams, 2 May 2014, p 43.

228 Submission no. 17a, Rebecca Stadhams, p 2.

229 Evidence, Rebecca Stadhams, 2 May 2014, p 36.

> who gave birth to this child. She was constantly blamed. She was even bashed to the point that she really, really blamed herself for this.[230]

4.50 During the committee's visit to Macksville, the Stadhams family elaborated on their memories of the trial, particularly the treatment of Rebecca:

> **Ms REBECCA STADHAMS:** I was a bit shakey and that. At first I was confused. There were a lot of questions and that. I broke down and cried and that, yes. But the next day I got more relaxed being questioned again.
>
> **Ms MICHELLE JARRETT:** It was very frustrating to sit there listening to them ask the questions because as you can see Becca has difficulty explaining herself. So to get that across to these people so many years after Evelyn had gone missing it would have —
>
> **Ms REBECCA STADHAMS:** I was just trying not to get angry with some of the questions they were asking me. I was trying to keep calm because I did not like some of the questions.
>
> **Ms PENNY STADHAMS:** Some of the questions from — I felt as Rebecca's sister that they were making her feel, or portraying her to be an unfit mother who did not care for her child, did not look after her child, did not love her child, when she loved her children. Rebecca taught me how to be a mother.
>
> **Ms REBECCA STADHAMS:** Yes, that is right.[231]

4.51 Penny Stadhams commented that much of the questioning oriented on Rebecca's lifestyle – 'partying, alcohol, who her partners were, really personal stuff'.[232] Lesley Stadhams, another of Evelyn's aunts, said that she had to walk out of the trial: 'I said, "Is my sister on trial here? What's going on".'[233]

4.52 Michelle observed that this treatment also extended to other Aboriginal witnesses who were questioned during the trial:

> They were focused on all the witnesses being alcoholics, if they were drunk or not and how many cartons they drink. When we sit down and drink we don't count how many middies we have, like you do when you are drink driving. We don't measure it out. We just sit there, have a yarn with family and have a drink.[234]

4.53 Members of the other victims' families also stated that they too felt that the families' and community's lifestyles and parenting practices were put on trial rather than the accused.[235] Detective Inspector Jubelin commented on the effect the portrayal of the community's parenting style had on the jury:

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230 Evidence, Penny Stadhams, 2 May 2014, p 45.

231 Evidence, Rebecca Stadhams, Michelle Jarrett and Penny Stadhams, pp 38-39.

232 Evidence, Penny Stadhams, 2 May 2014, p 44.

233 Evidence, Lesley Stadhams, 2 May 2014, p 44.

234 Evidence, Michelle Jarrett, 2 May 2014, p 44.

235 Evidence, Leonie Duroux and Ronella Jerome, 2 May 2014, p 3.

> I saw it also during Evelyn's trial in 2006. There was confusion about how Evelyn was being looked after at the time she disappeared. If you were a little bit more informed, you would have understood there were a lot of aunties looking after the child, there were a lot of parents. There is a lot of love in that community. For whatever reason, that was not understood.[236]

4.54 Family members were particularly perturbed that it was not made clear that in Aboriginal communities, the community is responsible for raising their children.[237]

4.55 Dr Tracey Westerman from Indigenous Psychological Services was also present in Port Macquarie throughout Evelyn's trial. Her observations regarding the jury's perceptions of the family members echoed those made by Detective Inspector Jubelin:

> In the Bowraville trials the bereaved family were portrayed in both a racially stereotypical and inherently biased fashion. This included the portrayal of Aboriginal parenting styles as deficient relative to westernised practices and specifically that children were only allowed to wander the streets unattended for hours and often days at a time, but that the parents themselves seemed generally unconcerned with their whereabouts. As a Psychologist of Aboriginal descent and of considerable expertise on Aboriginal parenting practices, the presentation of the community in this light served a singular purpose and that was to damage the credibility of Aboriginal witnesses. Unfortunately this portrayal largely went unchallenged. The additional portrayal of chronic alcoholism and violence as being endemic also compromised the ability of the jurors to separate fact from fiction. Given also that all jurors were of non-Aboriginal descent this would have limited the cultural information that they had available to them and made it more likely that they would be distracted by the portrayal of witnesses in this way.[238]

Communication issues

4.56 The committee received evidence that difficulties in language and communication during interactions with Aboriginal and non-Aboriginal people were particularly evident during the trial for Evelyn Greenup's murder. These issues are discussed in detail at the end of this chapter in the section titled 'Aboriginal English'.

Lack of information regarding legal processes

4.57 Inquiry participants told the committee that throughout the legal proceedings, the families and community felt confused about the court's reasons for separating the trials and why the full story has never been told in a courtroom. The committee was also informed that family members have had little access to culturally appropriate legal practitioners or court liaison officers who were able to explain to the victims' families and community the nature and content of the court proceedings, even in the case of those closest to the children, such as the parents.[239] Indeed, Michelle Stadhams stated that during Evelyn's trial the families' own

236 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 6.

237 Evidence, Helen Duroux, 2 May 2014, p 2; Ronella Jerome, 2 May 2014, p 3.

238 Submission no. 26, Indigenous Psychological Services, pp 24-25.

239 Submission no. 27, Jumbunna Indigenous House of Learning, p 52; Evidence, June Speedy 2 May 2014, p 64; Lana Kelly, 2 May 2014, p 53, Michelle Jarrett, 2 May 2014, p 44; Barbara Greenup-Davis, 2 May 2014, p 14.

prosecutor came over only to briefly say hello to the Stadhams family and did not make any attempt to explain what to expect that day.[240]

4.58 During the 2006 trial, the families were fortunate to have some form of support and a point of reference in the form of people such as Dr Westerman and the Strike Force ANCUD team.[241] Nevertheless, these were not legal practitioners or court officers. Detective Inspector Jubelin recalled that the rules and complexities governing the 2006 proceedings for Evelyn's trial were confusing for the families, as noted earlier at 4.37-4.38, as witnesses were not able to mention Colleen and Clinton.[242] Detective Jubelin said that this was particularly confusing for the families after having sat through the 2004 coronial inquest process which considered the evidence covering all three cases:

> The families had the luxury of sitting through a coronial inquest in 2004 … [where] [e]vidence was called in relation to all three matters ... It was an open court, as coronial matters tend to be, and the families became fully aware of the strength of the evidence against this particular person. I am mindful of the fact that a Coroner's court, compared to a criminal court with an adversarial system, a coronial inquiry has different rules of evidence. For anyone who was there it was fairly clear what happened. [243]

4.59 In contrast, in 2006, much of that evidence was excluded. Detective Inspector Jubelin added: 'I found it difficult and I understand the court system. It was very traumatic for the families…They did it with dignity but it was very frustrating for them...'.[244]

4.60 Jumbunna Indigenous House of Learning expressed the view that the families' limited access to culturally appropriate legal practitioners or court liaison officers able to explain the nature and content of court proceedings demonstrated a 'cultural and empathetic insensitivity' to the families, as no one had attempted to explain how the evidence laws impacted the trials[245] – for example, why tendency and coincidence evidence was not admitted, and why no mention of the Clinton or Colleen was made during Evelyn's trial.

4.61 In order to overcome such issues from arising again in the future, Jumbunna suggested that it would be beneficial for the government to commit to engaging Aboriginal court liaison officers in all regions of New South Wales, with circuit officers for those areas without local courts. Jumbunna stressed that it would be vital that these officers be sufficiently resourced to enable them to advise victims of crime, and the families of victims of crime, in addition to the accused and witnesses.[246]

4.62 The committee received evidence that the NSW Office of the DPP offers a Witness Assistance Service (WAS), which provides officers to support and assist victims and witnesses in cases prosecuted by the DPP such as adult or child sexual assault, personal violence or where the victim has died. The service offers Aboriginal WAS Officer across every region in

240 Evidence, Michelle Jarrett, 2 May 2014, p 44.

241 Evidence, Michelle Jarrett and Penny Stadhams, 2 May 2014, pp 42-44.

242 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 10.

243 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 10.

244 Evidence, Detective Inspector Gary Jubelin, 1 May 2014, p 10.

245 Submission no. 27, Jumbunna Indigenous House of Learning, pp 52- 53.

246 Submission no. 27, Jumbunna Indigenous House of Learning, p 80.

New South Wales,[247] however, there are currently only two such officers in New South Wales, serving the Northern and Western regions. Aboriginal WAS officers have not been allocated to the remaining two New South Wales regions, comprising Sydney West and Sydney Metropolitan.[248]

4.63 Jumbunna also suggested that practising solicitors, judicial officers and other court officers undergo cultural awareness training, developed in consultation with the Aboriginal community, that addresses the ways in which cultural and historical factors impact on the relationship between Aboriginal people and legal institutions, and practical training in issues affecting communication.

Police response after the trial

4.64 In addition to the experience of the trial itself, family members and others present at the trial that day spoke of the further trauma experienced by the families when riot police were sent to the courthouse on the day of the verdict, filling the first two rows of the courtroom.[249] This prevented some family members of the victims from entering the courtroom to hear the verdict, such as Thomas Duroux, Clinton's father:

> In Evelyn's case, there were so many riot police there that I couldn't get in at all. I went to court every day for those two weeks of Evelyn's hearings and not one day did I get in. There was no community riot so there was no need for riot police. This gave the impression that the police thought the community was the problem, rather than the group to be supported.[250]

4.65 The families were critical of the excessive response of the police, particularly given that the families' protests over the years had been peaceful.[251] Family members were offended by the assumptions they felt this represented:

> We do not riot and carry on. They stereotyped us. Just because they might do it in Redfern don't mean we do it, it don't mean the Stadhams family do it. That was highly disrespectful.[252]

> They were specifically told they weren't needed or to go away or stay out of sight; they ignored that advice and they stayed. So the victims and the people who really needed protection from the police were the ones under suspicion because an assumption was made that if a verdict came in, they were black fellas and the were going to riot. I think they were the most dignified bunch of people I have ever seen in my life walking out of that courtroom; I will never forget it.[253]

247 Witness Assistance Service, Office of the Director of Public Prosecutions, http://www.odpp.nsw.gov.au/witness-assistance-service/about-the-was.

248 Telephone conversation between Ms Catherine Bettison Santoro, Acting Manager, Witness Assistance Service, and Principal Council Officer, 29 August 2014.

249 Submission no. 27, Jumbunna Indigenous House of Learning, p 22.

250 Submission no. 10, Thomas Duroux, p 1.

251 Evidence, Leonie Duroux and Ronella Jerome, 2 May 2014, p 4.

252 Evidence, Michelle Jarrett, 2 May 2014, p 43.

253 Evidence, Leonie Duroux, 2 May 2014, p 60.

4.66 Lana Kelly was similarly offended when riot police were deployed to Bowraville:

> When the hearing did come down to it they were worried that all these families from Bowraville were going to go back to Bowraville and would destroy the town. But all we did through our grief was support each other and meet as a family.[254]

4.67 Ronella Jerome, Clinton's aunt, told the committee that the decision to send in riot police after attempts over many years to mend the fractures between the police and the Aboriginal community served only to open old wounds again:

> There was no need for that, so again when you were talking about the police and the relationships with the police, it has disintegrated to nothing and it is very hard to try to resurrect something from the ashes and build from that.[255]

4.68 Dr Westerman was critical of the disparity between the police response during the initial investigation of the deaths and the police response at the courthouse that day and the lack of empathy she felt it demonstrated to the victims:

> As a witness to this event working for IPS at the time in the community, the psychological impacts were considerable. The pure visual presence of a significant number of fully uniformed tactical response police spoke to the issue of over policing and, more importantly, the lack of empathy ascribed to the victims as victims. In representing the police response to Bowraville this became significantly more impactful due to the effective absence of police during times of need, and consistently so in the experience of Bowraville people. The relative dollar value placed on policing the victims of crime, compared with catching the perpetrator of these crimes created more trauma for community members. Of further distress to the family members was that the tactical police group occupied most of the first two rows of the court room forcing the family members to hear the verdict in the back rows and some in standing room only. Several weeks after the verdict my team attended Bowraville for the purpose of providing debriefing for the community and families. The emotional distress of the acquittal in some instances was not able to be fully explored with some family members who felt distressed and disrespected by this event. Some of the family members also reported feeling 'robbed' of being able to 'be in the moment and take in the verdict' as a result.[256]

Committee comment

4.69 The committee acknowledges that a courtroom could be an intimidating and unwelcoming environment for anyone, particularly for Aboriginal witnesses who come to the environment with the backdrop of entrenched racial and cultural tensions within the criminal justice system. The committee is concerned that witnesses may be in a position in which they take the stand to give evidence and have not been briefed as to what to expect. Similarly, we are concerned that the families of the three children were not provided with adequate information regarding the trial or provided with a liaison officer who could provide information about the court process.

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254 Evidence, Lana Kelly, 2 May 2014, p 53.

255 Evidence, Ronella Jerome, 2 May 2014, p 4.

256 Submission no. 26, Indigenous Psychological Services, pp 17-18.

4.70 We note the suggestion from Jumbunna Indigenous House of Learning that there should be Aboriginal court liaison officers in all regions of New South Wales, with circuit officers for those areas without local courts.

4.71 The committee notes that the NSW Office of the DPP has a Witness Assistance Service (WAS), which includes Aboriginal WAS Officers, however, we also note that there are currently only two such officers in New South Wales, serving the Northern and Western regions. The committee understands that if two additional Aboriginal WAS Officers were made available to service the Sydney West and Sydney Metro regions, the WAS would be in a position to offer Aboriginal people across the state an early point of liaison when they first come into contact with the criminal justice system in their capacity as a witness and, as is often the case, also a victim. We believe that this is an important service that should be made more accessible through the provision of additional Aboriginal WAS Officers.

Recommendation 3

That the NSW Government fund two additional Aboriginal Witness Assistance Service Officer positions to service the Sydney West and Sydney Metropolitan regions of New South Wales.

4.72 The committee supports the suggestion from Jumbunna that practising solicitors, judicial officers and other court officers undergo Aboriginal cultural awareness training, developed in consultation with the Aboriginal community, that addresses the ways in which cultural and historical factors impact on the relationship between Aboriginal people and legal institutions, and practical training in issues affecting communication. Further, the committee believes that cultural awareness training could also be incorporated into other legal training and accreditation programs.

Recommendation 4

That the NSW Department of Justice consider and report on the merit of requiring lawyers who practise primarily in criminal law, as well as judicial officers and court officers, to undergo Aboriginal cultural awareness training.

Recommendation 5

That the NSW Government liaise with the Legal Profession Admission Board of New South Wales, the New South Wales Bar Association and all accredited universities offering legal training in New South Wales to request that Aboriginal cultural awareness training be included as a compulsory element in their legal training and accreditation.

4.73 As noted in chapter 1 at paragraph 1.5, in the course of this inquiry the committee sought training in Aboriginal cultural awareness prior to meeting with family members in Bowraville and gathering evidence. The committee found this training to be particularly beneficial and assisted members to engage in an open and informal dialogue with inquiry participants. The committee believes there would be merit in offering similar training to all members of Parliament and their staff.

Recommendation 6

That the NSW Government provide funding to the Parliament of New South Wales to develop a training module for members of Parliament and parliamentary staff on Aboriginal cultural awareness. The module should include resources on relevant matters such as how to interact appropriately with Aboriginal constituents, how to notify and convey information and how to take evidence at committee inquiries.

Aboriginal English

4.74 As noted at 4.56, during the course of its inquiry, the committee received evidence regarding difficulties in language and communication encountered during interactions with Aboriginal and non-Aboriginal people in the course of the two police investigations and criminal trials related to the murders in Bowraville. The issue was particularly noted in reference to the trial for Evelyn Greenup's murder.

4.75 Dr Diana Eades, a consultant sociolinguist, Adjunct Professor in the School of Behavioural, Cognitive and Social Sciences at the University of New England and a Fellow of the Australian Academy of the Humanities, assisted Strike Force ANCUD during their reinvestigation and gave evidence to the committee regarding Aboriginal ways of using English, or 'Aboriginal English'.

4.76 Aboriginal English is the term used to refer to dialects of English spoken by Aboriginal people around Australia. This English has developed over the past 200 years with influences from Aboriginal languages and cultures.[257]

4.77 According to Dr Eades, in New South Wales, Aboriginal English sounds quite like other varieties of English spoken by non-Aboriginal people, however there are some subtle differences in accent, grammar, meaning, non-verbal communication, silence and language functions which are often not recognised. When cultural and linguistic factors are overlooked, these differences can affect communication between Aboriginal and non-Aboriginal people and can sometimes cause non-Aboriginal people to draw incorrect conclusions from their discussions with Aboriginal people.[258] While many people in New South Wales have considerable 'bicultural' skills – that is, the ability to use English in an Aboriginal way in Aboriginal contexts and then switch to using standard or non-Aboriginal English in mainstream contexts – learning to become bicultural only comes after prolonged and successful interactions in the second culture, often through education, employment or participation in social groups. Dr Eades noted that many Aboriginal people in Bowraville, as in other towns, cities and rural areas of the state, have not had opportunities to develop much bicultural ability.[259]

257 Submission no. 14, Dr Diana Eades, p 5.

258 Submission no. 14, Dr Diana Eades, p 2; Submission no. 14, Appendix B, Dr Diana Eades, p 14.

259 Submission no. 14, Dr Diana Eades, p 7.

4.78 Dr Eades advised the committee that the most significant difference between Aboriginal and non-Aboriginal English relates to ways of seeking and giving information. A fundamental assumption about communication in mainstream Australian society is that asking questions is essential for finding out information, but this is a cultural assumption which is not shared with many Aboriginal societies, where important information is often sought in less direct ways. This has particular implications within the legal and criminal justice systems which centre around interactions in the form of an interview, such as in the context of a police investigation or a court trial.[260]

4.79 Dr Eades highlighted a number of key areas in which miscommunication can take place. Of particular relevance to the Bowraville investigations and trials are the following:

- *Silence:* A fundamental difference between Aboriginal and non-Aboriginal societies can be found in the manner in which silence is used and interpreted. Dr Eades advised that whereas the 'standard maximum tolerance for silence' in many western interactions is about one second, after which people feel uncomfortable and will fill the silence, in many Aboriginal societies people are brought up to feel comfortable with much longer silences in conversations and in more formal situations. In this context, silence is typically seen as positive, indicating that people are taking time to, for example, think about important matters.[261]
- *Language use:* Dr Eades observed that for many Aboriginal people, information seeking relies less on questions than in western societies. Important information is instead often sought in indirect ways, for example by sharing some knowledge on a topic and then waiting for the other person to contribute their own knowledge. Dr Eades advised the committee that a widespread assumption in Aboriginal societies is that information is shared with people in relationships where they have been opportunities to build up trust. [262]
- *Gratuitous concurrence:* A particularly problematic aspect of miscommunication can result from the Aboriginal use of gratuitous concurrence in interviews – that is, the interviewee answering 'yes' to a question (or 'no' to a negative question), regardless of whether or not they actually agree or understand (as noted in chapter 3). The interviewer might assume that 'yes' answers indicate the interviewee is agreeing with the questions, but such answers might instead be the result of the interviewee answering in the way in which the interviewer appears to want them to respond, often in the hope of bringing the interview to an end.[263]

4.80 The impacts of these areas of potential miscommunication on the 2006 trial are considered in the following sections.

260 Submission no. 14, Dr Diana Eades, p 2.

261 Submission no. 14, Dr Diana Eades, p 6.

262 Submission no. 14, Dr Diana Eades, p 6.

263 Submission no. 14, Dr Diana Eades, pp 6-7.

Aboriginal English in the 2006 trial

4.81 In February 2006, Dr Eades was asked to prepare an expert report for the court for the purposes of the trial for the murder of Evelyn Greenup. In brief, the report outlined some features of Aboriginal English and culture in Bowraville and key communication features of Aboriginal English of particular relevance to giving and seeking information. It provided suggestions to address communication differences in police interviews and courtroom hearings as well as specific information regarding possible jury directions[264] concerning Aboriginal English-speaking witnesses.[265]

4.82 Notwithstanding Dr Eades' expert advice, there were no directions given to the jury regarding the presentation of evidence from Aboriginal witnesses.[266] The committee heard that although the court had ruled that issues regarding Aboriginal English should be dealt with on a witness-by-witness basis, the prosecutor did not raise the matter again during the course of the trial after an initial application was made and rejected,[267] despite members of the community specifically raising the issue.[268] Jeanette Blainey, a close friend or 'sister' of Elaine Walker, recalled the prosecutor's dismissive response:

> In that court that people have spoken about in Port Macquarie, my sister here and I went in and spoke to the prosecutor about the problem that we saw happening with the way the witnesses were being heard, the way they were being questioned, the way the witnesses were experiencing it … [He] had such a sense in which he knew all this and he did not need anybody to tell him. I do not like thinking about it as racism but it is in a way. It is not seeing the people for who they are, the stories they are telling, the feelings they are sharing.[269]

4.83 Dr Eades took notes during the trial over the course of a day on the evidence given by and the court's interaction with four Aboriginal witnesses from the Bowraville community. In the report on her observations, tendered to the committee, Dr Eades gave examples of several specific issues that had been identified in her expert report tendered prior to the trial, which she determined had not been taken into account during the cross-examination of witnesses or in advice to the jury.[270] These issues are considered below.

Questioning techniques and gratuitous concurrence

4.84 Dr Eades' expert report to the court advised that many Aboriginal people give specific details in relational rather than quantifiable terms: that is, relating the question to social, geographical

264 Jury directions are directions that judges give to juries in the course of a criminal trial. They are designed to help jurors understand as much of the law and the issues that arise in the case as they need to make proper use of the evidence and to reach a verdict.

265 Submission no. 14, Dr Diana Eades, pp 8-9.

266 Submission no. 14, Appendix C, Dr Diana Eades, p 17; Submission no. 27, Jumbunna Indigenous House of Learning, p 64.

267 Submission no. 27, Jumbunna Indigenous House of Learning, p 68.

268 Evidence, Jeanette Blainey, 2 May 2014, p 55.

269 Evidence, Jeanette Blainey, 2 May 2014, p 55.

270 Submission no. 14, Appendix C, Dr Diana Eades, p 17.

or similar situations and events, rather than using numbers. It is therefore problematic to ask Aboriginal people to give specific information using numbers.[271]

4.85 Nevertheless, one witness was asked several questions about distances in metres, such as "Would it be 5 to 6 metres away?", to which she answered "yes". After a few such questions she then revealed that "I don't know my metres". Despite this statement, she was asked further questions about distances in metres, to which she also answered "yes". Dr Eades advised that this pattern of answers was suggestive of gratuitous concurrence.[272]

4.86 Dr Eades also gave an example where lawyers had accepted her advice to give witnesses time to answer questions and allow silences of more than one second to develop between the question and its answer. However, she noted that the jury had not been concurrently advised that this questioning technique would be used in the trial, or of the technique's cultural relevance.[273] In Dr Eades' view, given the common perception in western Anglo conversations that silence in answer to a question can mean evasion, it would have been important that the jury be advised that silence does not typically have this meaning in Aboriginal conversation, and specifically in the interchanges that took place during the trial. While Dr Eades acknowledged that the silences that were allowed for Aboriginal witnesses in this trial would have served to assist them to give their answers, she determined that these silences potentially caused uninformed jurors to assess those witnesses as being not entirely trustworthy or reliable.[274]

Juror awareness

4.87 Dr Eades pointed to several other instances where a lack of juror awareness in regard to the ways in which Aboriginal people communicate and Aboriginal lifestyle and culture may have directly impacted the jury's consideration of the evidence taken that day.

4.88 For example, Dr Eades observed the Defence Counsel's cross-examination of a witness who gave evidence that on the night in question he had come home late, so drunk that he slept in the car outside his house, rather than going inside. Dr Eades noted that the Defence Counsel used a number of expressions and presuppositions in his questions that relied on the apparently 'commonsense' understanding that to sleep overnight in your car, rather than in bed in your house, is a 'very strange thing to do' and that the witness must have had a reason other than the one he gave, which was that he was drunk and it was late.[275] However, Dr Eades advised that such presuppositions are middle-class Anglo cultural presuppositions and are not necessarily shared in overcrowded Aboriginal communities in warm climates, such as Bowraville in northern New South Wales, where there is not necessarily a permanent relationship between a particular individual and a particular bed, and it is common for people to stay in different houses for different periods of time, therefore to sleep in the car overnight would not be a particularly remarkable thing.[276]

271 Submission no. 14, Appendix C, Dr Diana Eades, p 17.

272 Submission no. 14, Appendix C, Dr Diana Eades, p 17.

273 Submission no. 14, Appendix C, Dr Diana Eades, pp 17-18.

274 Submission no. 14, Appendix C, Dr Diana Eades, pp 17-18.

275 Submission no. 14, Appendix C, Dr Diana Eades, p 18.

276 Submission no. 14, Appendix C, Dr Diana Eades, p 18.

4.89 Dr Eades also observed similar cultural presuppositions in later questions to this witness about bedroom arrangements on that particular night. In her view, jurors not familiar with the extent of movement between Aboriginal houses may have interpreted the witness's answers to such questions as indicating evasion or lack of reliability, whereas an understanding of Aboriginal cultural residential patterns could have given quite a different interpretation to such answers.[277]

Impacts for the trial

4.90 Dr Eades stated that a juror would have needed to have been informed about the Aboriginal tendency to use gratuitous concurrence in order to fairly evaluate the exchanges that took place between several witnesses and the lawyer questioning them. She further asserted that based on three decades of research on intercultural communication between Aboriginal and non-Aboriginal people in Queensland and New South Wales, as well as almost two decades of providing workshops and other training, she was confident that many, if not most, members of any jury would not be aware of gratuitous concurrence, unless it was explained to them. Without this information, Dr Eades considered it likely that a juror may wrongly evaluate the evidence of Aboriginal witnesses as unreliable.[278]

Mildren-style directions

4.91 Dr Eades informed the committee about 'Mildren directions' or 'Mildren-style directions', which are directions that assist juries assessing the evidence of Aboriginal witnesses and/or an Aboriginal accused's record of interview by drawing the jury's attention to the possibility that sociolinguistic features of an Aboriginal witness' evidence may lead to misunderstandings.[279]

4.92 Dr Eades advised that Mildren directions (which originated with Justice Dean Mildren of the Northern Territory Supreme Court) are used to some extent in several Australian jurisdictions, including the Northern Territory, Western Australia and Queensland.[280] She further noted that in New South Wales, the 'Equality Before the Law Bench Book', published by the Judicial Commission of New South Wales, highlights the importance of alerting the jury to 'relevant cultural differences' and states that this should happen 'early in the proceedings'.[281]

4.93 Dr Eades noted that in 2012 the New South Wales Law Reform Commission determined that the question of the content of directions regarding cultural factors that may be required in the New South Wales context 'should be the subject of further consideration by the Judicial Commission, involving consultation with NSW Indigenous and other communities and experts in the field of culture and linguistics of relevance to those individual communities'.[282]

277 Submission no. 14, Appendix C, Dr Diana Eades, p 18.

278 Submission no. 14, Appendix C, Dr Diana Eades, pp 17-18.

279 Answers to questions on notice, Dr Diana Eades, 27 May 2014, p 1, citing S Fryer-Smith, *Aboriginal Cultural Awareness Benchbook for Western Australian Courts*, 2nd ed., 2008, #7.4.1.

280 Answers to questions on notice, Dr Diana Eades, pp 1-2.

281 Answers to questions on notice, Dr Diana Eades, p 4.

282 Answers to questions on notice, Dr Diana Eades, p 4.

4.94 While several inquiry participants strongly argued in favour of jury directions for cases involving Aboriginal people,[283] Dr Eades and Jumbunna Indigenous House of Learning also acknowledged that arguments had been made against such directions. They referred to case law and the review undertaken by the New South Wales Law Reform Commission which have canvassed some of these arguments, including:

- whether requiring juries to assess the evidence of Aboriginal witnesses in the light of various cultural and linguistic factors would encourage juries to approach the evidence sympathetically, leading to the potential for unfairness
- how the court can determine whether someone is sufficiently 'impacted' by their experience as an Aboriginal person (and, conversely, whether that is indeed the court's role)
- whether it may be inappropriate or unnecessary to provide a generic set of directions for a particular case, and whether witnesses may find such directions demeaning
- the extent to which such directions would prolong proceedings
- concern that while certain factors may affect the evidence of Aboriginal witnesses, similar or other factors may equally affect the evidence of other communities, and the challenges that catering to the needs of all groups would impose.[284]

4.95 Nevertheless, Dr Eades insisted that there is a need to recognise that the manner in which the legal system obtains information could be improved and, to address this, it must be recognised that Aboriginal culture 'is strong and that it matters':

> I think the most important thing is the need to recognise that Aboriginal culture in New South Wales is strong and that it matters. An important part of Aboriginal culture is the way that people communicate and their use of English. If we want equal justice for all in New South Wales then it means necessarily recognising that the way in which the legal system finds out information from people and provides opportunities for people to tell their story may not always be working.[285]

Disallowable questions

4.96 The committee heard that section 41 of the *Evidence Act 1995* provides a mechanism for the court to disallow a question put to a witness in cross-examination, or to inform the witness that the question need not be answered, in certain circumstances. Both Jumbunna and Dr Eades advised that one of the categories of a 'disallowable question' is whether it is misleading or confusing. Therefore, the court already has sufficient power for the control of proceedings in relation to Aboriginal witnesses, particularly in circumstances where the court recognises that the issue of gratuitous concurrence may be influencing the evidence given. Dr Eades told

283 For example Submission no. 14, Dr Diana Eades, pp 11-12; Submission no. 26, Indigenous Psychological Services pp 24-26; Submission no. 27, Jumbunna Indigenous House of Learning, p 69; Submission no. 2, Aboriginal Catholic Ministry, p 4; Submission no. 28, Jeanette Blainey, pp 1-2.

284 Answers to questions on notice, Dr Diana Eades, pp 2-3; Submission no. 27, Jumbunna Indigenous House of Learning, pp 66-67; Submission no. 14, Dr Diana Eades, p 12; New South Wales Law Reform Commission, *Jury Directions*, Report No. 136, November 2012, pp 108-111.

285 Evidence, Dr Diana Eades, 1 May 2014, p 15.

the committee that Western Australia and the Northern Territory already use the equivalent statutory provision to stop leading questions in situations where they feel that Aboriginal witnesses are being led into gratuitous concurrence, and the same course of action would be equally available to New South Wales courts should they choose to use it.[286]

4.97 The Judicial Commission of New South Wales' *Equality before the Law Bench Book* already notes that provision is made under s 41 of the Act to prevent Aboriginal witnesses from being questioned in a manner which is misleading, confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating, repetitive, or putting a question to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or has no basis other than a stereotype.[287]

Committee comment

4.98 The committee considers that miscommunication and a lack of understanding of relevant cultural and linguistic factors have severely impacted many aspects of the investigative and judicial process regarding the Bowraville case. The evidence received has demonstrated that this has in turn not only impacted individuals' experience of these processes, but also the effectiveness of those processes in delivering just outcomes for the community.

4.99 The committee believes there is a strong case in support of Mildren-style directions. However, the committee also acknowledges that there are arguments against the use of such directions, some of which were considered in a review by the New South Wales Law Reform Commission, which suggested that directions regarding cultural factors be the subject of further consideration by the Judicial Commission, involving consultation with Indigenous and other communities and experts in the field of culture and linguistics of relevance to those individual communities.

4.100 The committee agrees with the Law Reform Commission's suggestion, and recommends that this occur.

Recommendation 7

That the Judicial Commission of New South Wales review the content of jury directions regarding cultural and linguistic factors. This should be done in consultation with Aboriginal and other communities and experts in the fields of culture and linguistics relevant to those individual communities.

4.101 The committee also supports the suggestion by Dr Eades that New South Wales follow the practice of Western Australia and the Northern Territory by utilising the powers provided by s 41 of the *Evidence Act 1995* to disallow questioning of Aboriginal witnesses in circumstances where the questioning is demonstrably leading Aboriginal witnesses into gratuitous concurrence. The committee notes that the *Equality before the Law Bench Book* makes this power clear. We encourage the judiciary to utilise this power.

286 Evidence, Dr Diana Eades, 1 May 2014, pp 16-17; Evidence, Mr Craig Longman, 12 May 2014, p 33; Submission no. 27, Jumbunna Indigenous House of Learning, pp 64-65; Appendix A, Submission no. 14, Dr Diana Eades, p 10.

287 Judicial Commission of New South Wales, Equality before the Law Bench Book, 2006, p 2305.

Chapter 5 Legislative amendments

In 2006, New South Wales introduced legislative amendments that altered the operation of the common law principle of double jeopardy for very serious offences, such as murder.

While the double jeopardy legislation was not specifically canvassed within the committee's terms of reference, the overriding theme of much of the evidence received during the inquiry relates to the hope offered by the possibility of a retrial as a result of the new legislative provisions.

For this reason, this chapter provides a brief overview of the application of the double jeopardy principle in New South Wales and the context for the legislative changes made in 2006.

Double jeopardy

5.1 The rule against double jeopardy refers to the common law principle that a person who has previously been either acquitted or convicted of an offence cannot be prosecuted or punished for the same conduct.[288]

5.2 The main rationale for the rule against double jeopardy is that it prevents the unwarranted harassment of the accused by multiple prosecutions[289] and promotes certainty and finality in the law and judicial proceedings.

The Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006

5.3 Prior to 2006, in New South Wales legislation provided only very limited exceptions to the double jeopardy rule, such as Crown appeals against allegedly inadequate sentences, interlocutory appeals, stated cases (i.e. appeals on questions of law) and trials in which the prosecution may tender similar fact evidence.[290]

5.4 These exceptions were extended in 2006 when the Parliament of New South Wales passed the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006, which inserted a new Part 8 within the *Crimes (Appeal and Review) Act 2001* (see Appendix 5) to make provision for the Court of Criminal Appeal, on the application of the DPP, to order the retrial of an individual previously acquitted in two additional specific situations:

- For a life sentence offence: where there is 'fresh' and 'compelling' evidence against the person in relation to the offence[291]
- For a sentence of 15 years or more: where the acquittal was 'tainted', being that the accused or another person has been convicted of an administration of justice offence (e.g. threatening a jury member).[292]

288 Johns, R. "Double Jeopardy", *NSW Parliamentary Library Research* Service, Briefing Paper No. 16/03, August 2003, p 1.

289 Martin L. Friedland, *Double Jeopardy*, 1969, Clarendon Press: Oxford, pp 3-4.

290 Johns, R. "Double Jeopardy", *NSW Parliamentary Library Research Service*, Briefing Paper No. 16/03, August 2003, pp 5-6.

291 Sections 100 and 102, *Crimes (Appeal and Review) Act 2001*.

5.5 For the purposes of the Bowraville case only the first situation regarding 'fresh' and 'compelling' evidence is relevant, so will be the focus of the following discussion.

5.6 It should be noted that during debate on the bill in the Legislative Assembly, the Hon Andrew Stoner MP, Member for Oxley (whose electorate encompasses the mid-north coast of New South Wales) and Leader of The Nationals, made reference to the Bowraville murders, stating the bill may give some hope to the families in their quest for justice.[293] The Hon Catherine Cusack MLC and Revd Fred Nile MLC also referred to the Bowraville murders during their contributions in the Legislative Council.[294]

Fresh and compelling evidence

5.7 Under s 102(2) of the *Crimes (Appeal and Review) Act 2001*, 'fresh' evidence is defined as that which:

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

5.8 'Compelling' evidence under s 102(3) is defined as that which:

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

5.9 Under s 102(4) of the Act, evidence that would be admissible on a retrial is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

5.10 Section 104 of the Act applies a further test as to whether it is in the 'interests of justice' for an order to be made for the retrial of the acquitted person. Under this provision:

- it is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances, and
- the Court, in making its determination, is to have regard to:
  - the length of time since the acquitted person allegedly committed the offence, and
  - 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.

5.11 It is the contention of the three families that there is 'fresh' and 'compelling' evidence sufficient to meet the criteria required for the DPP to make an application to the Court of

292 Sections 101 and 103, *Crimes (Appeal and Review) Act 2001*.

293 *Hansard,* Legislative Assembly, 27 September 2006, p 2394.

294 *Hansard*, Legislative Council, 17 October 2006, p 2628 (Fred Nile), p 2631 (Catherine Cusack).

Criminal Appeal for the retrial of the POI in relation to all three murders.[295] This will be considered in detail in chapter 6.

Background to the legislative amendment

5.12 The double jeopardy principle has long been entrenched in common law, serving to provide a finality to prosecutions under a fair and just system of law. Therefore, while the legislative amendments introduced in 2006 were purposely drafted to be narrow in their scope, they nevertheless signalled a significant shift in legal principle. For this reason, it is relevant to note the background to the introduction of the legislative amendments.

Developments in the United Kingdom

5.13 Between 1990 and 2002, a succession of reports and inquiries into aspects of the criminal justice system in the United Kingdom made numerous recommendations on the subject of double jeopardy.[296] The findings of these inquiries and reviews ultimately led to the enactment of Part 10 of the *Criminal Justice Act 2003* (UK), which created further exceptions to the application of double jeopardy and allowed retrials for specified life sentence offences where 'new and compelling' evidence emerged and where the Court of Appeal was satisfied that it would be in the public interest for the acquittal to be set aside and a new trial ordered (see Appendix 6). The significance of the term 'new' and compelling, as opposed to 'fresh' and compelling within the terms of the New South Wales Act, is discussed further below.

R v Carroll

5.14 In December 2002, the High Court's decision in *R v Carroll*[297] prompted calls for similar reform to the double jeopardy principle throughout Australia.

5.15 Raymond Carroll had been convicted of murdering Deidre Kennedy. Carroll appealed against the conviction and it was overturned on appeal. The Court of Appeal refused to order a

295 Submission no. 19, Allens, pp 1-7.

296 *The Stephen Lawrence Inquiry: Report of an inquiry by Sir William Macpherson of Cluny*, February 1991; Law Commission, *Double Jeopardy*, Consultation Paper No. 156, October 1999; Law Commission, *Prosecution Appeals Against Judges' Rulings*, Consultation Paper No. 158, June 2000; Law Commission, *Double Jeopardy and Prosecution Appeals*, Report No. 267, March 2001; United Kingdom Parliament, House of Commons, Home Affairs Committee, Third Report of the 1999-2000 Session, *The Double Jeopardy Rules*, HC 190; *A Review of the Criminal Courts of England and Wales*, by the Right Honourable Lord Justice Sir Robin Auld, September 2001; White Paper, *Justice for All,* Presented to Parliament by the Secretary of State for the Home Department, the Lord Chancellor and the Attorney General, July 2002 (Her Majesty's Stationery Office, CM 5563). For a comprehensive review of the content and findings of these reports, see Rowena Johns, *Double Jeopardy*, NSW Parliamentary Library Research Service, Briefing Paper No. 16/03.

297 (2002) 213 CLR 635.

retrial, ruling that there was insufficient evidence upon which a reasonable jury could convict.[298]

5.16 Many years later, following the emergence of new evidence linking Carroll to the murder, Carroll was prosecuted for perjury on the grounds that he gave false testimony under oath when he stated in the original trial that he did not kill Deirdre Kennedy. The jury convicted Carroll of perjury, but he again appealed and the matter proceeded to the High Court. The High Court held that perjury proceedings should have been stayed on the grounds that the second trial would controvert Carroll's acquittal for murder – to allow the case to proceed had been an abuse of process which undermined the principle of double jeopardy.[299]

5.17 In the ensuing months, the decision was widely condemned and calls for a national review were supported by a number of high-profile public figures, most notably the then Prime Minister John Howard, the State Premiers of New South Wales and Queensland, former Chief Justices Sir Harry Gibb and Sir Anthony Mason, and NSW Director of Public Prosecutions Nicholas Cowdery.[300]

Consideration by the MCCOC

5.18 In 2003, the Standing Council of Attorneys General referred the issue of double jeopardy to the Model Criminal Code Officers Committee (MCCOC) of the Standing Committee of Attorneys General for review and consideration of reforms to address any injustice flowing from a strict operation of the double jeopardy principle. The MCCOC released a discussion paper in November 2003 which commented on the New South Wales draft consultation bill (see below) that had been circulated during the period since the issue had been under MCOCC's consideration.[301] The discussion paper focused on developing protective principles that would operate in limited circumstances as a guarantee of certain procedural protections before a person who has been acquitted can be retried.[302] Due to resourcing constraints the final draft legislative model preferred by MCOCC was not finalised until several years later in 2007.[303]

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298 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Chapter 2 – Issue Estoppel, Double Jeopardy and Prosecution Against Acquittals*, November 2003, p 19.

299 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Chapter 2 – Issue Estoppel, Double Jeopardy and Prosecution Against Acquittals*, November 2003, p 19.

300 See commentary on the reaction to the *Carroll* decision in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Chapter 2 – Issue Estoppel, Double Jeopardy and Prosecution Against Acquittals*, November 2003, p 27 and Rowena Johns, *Double Jeopardy*, NSW Parliamentary Library Research Service, Briefing Paper No. 16/03, pp 15-17.

301 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Chapter 2 – Issue Estoppel, Double Jeopardy and Prosecution Against Acquittals*, November 2003, p 27

302 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Chapter 2 – Issue Estoppel, Double Jeopardy and Prosecution Against Acquittals*, November 2003, p ii.

303 Council of Australian Governments, "Double Jeopardy Law Reform: Model agreed by COAG" at http://archive.coag.gov.au/coag_meeting_outcomes/2007-04-

5.19 In their discussion on proposed models, MCOCC stressed the importance of ensuring that any legislative amendment included appropriate safeguards to prevent the possibility of abuse. In regard to 'fresh' and 'compelling' evidence, the committee discussed the distinction between 'fresh' and 'new' evidence and noted that the New South Wales draft consultation bill had adopted the higher threshold of 'fresh':

> The distinction between 'new' and 'fresh' evidence is important. In essence, 'new' evidence is simply evidence that was not presented at the original proceedings (for whatever reason). 'Fresh' evidence is evidence that is 'new' with an additional condition: it could not have been presented at the original proceedings despite competent police and/or prosecution work. The United Kingdom double jeopardy reforms have opted for the lower threshold of 'new' evidence. The Committee believes that allowing retrials for all 'new' evidence is not appropriate given the departure from long-standing legal principle being suggested with these double jeopardy reforms. The evidence should not have been available, through the exercise of due diligence, at the time of the original acquittal – this is the essence of 'fresh'. The New South Wales Consultation Draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 adopts the higher threshold of 'fresh' evidence.[304]

Draft consultation bill

5.20 In February 2003, the then Premier of New South Wales, the Hon Bob Carr MP, announced that the government intended to reform the law on double jeopardy to allow, in special cases, the retrial of a person acquitted of a criminal charge. The Premier stated that the reforms would be modelled on the Criminal Justice Bill introduced by the Blair Government in the United Kingdom.[305] The Premier also cited as reasons the High Court case of *R v Carroll*, and advances in forensic technology.[306]

5.21 The NSW Government released a draft bill for consultation in 2003.[307] Provision for retrial was contained in s 9D of the bill which, as noted by MCCOC in their discussion paper, made reference to 'fresh' and compelling evidence rather than the provision of 'new' and compelling evidence contained in the UK Act.

5.22 The draft bill was the subject of extensive consultation, including advice from Justice Jane Mathews to the Attorney General as to whether the safeguards contained in the bill adequately

13/docs/double_jeopardy_law_reforms.pdf. Note that Victoria and the ACT reserved their positions on the recommendations made.

304 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 109.

305 Rowena Johns, *Double Jeopardy*, NSW Parliamentary Library Research Service, Briefing Paper No. 16/03, p 9.

306 Rowena Johns, *Double Jeopardy*, NSW Parliamentary Library Research Service, Briefing Paper No. 16/03, p 9.

307 Consultation Draft Bill, Criminal Appeal Amendment (Double Jeopardy) Bill 2003, NSW Legislation Website, http://www.legislation.nsw.gov.au/maintop/bills.

protected individual rights.[308] As a result of the consultation process a number of changes were made and the final bill was then forwarded to parliament for consideration.

The family campaign

5.23 As noted in chapter 2, in the months leading up to the 2006 changes to the double jeopardy laws, the families also actively campaigned for changes to the legislation. This included meetings with politicians and senior bureaucrats to advocate for change.[309]

Consideration of the double jeopardy provisions since 2007

5.24 During the period in which the new double jeopardy provisions have operated, the provisions have been the subject of further legislative amendment and a statutory review. The definition of 'fresh and compelling' evidence has also been the subject of consideration by the judiciary, albeit in a context unrelated to the Bowraville case, being an application for a stay of indictment. These instances are discussed below.

2009 legislative amendments

5.25 Following initial reforms in New South Wales in 2006, the Council of Australian Governments (COAG) agreed to a series of recommendations for reform of double jeopardy law across the country.[310] The vast majority of these recommendations drew on the new framework operating in New South Wales, however several also went beyond the scope of these provisions.[311] For this reason, in 2009, New South Wales agreed to further amendments that reflected the recommendations made by COAG and provided for two additional key reforms:

- to ensure that where an acquittal has been 'tainted', the acquitted person can be tried again without interference, whether the tainted acquittal arose in the first trial or any subsequent trial
- to remove the principle of 'sentencing double jeopardy'. Contrary to previous practice, appeal courts could no longer dismiss a prosecution appeal against a sentence, or impose a less severe sentence on an appeal than the court would otherwise consider appropriate, because of any element of double jeopardy involved in the person being sentenced again.[312] In the words of the Minister during the second reading speech, the

308 Acting Justice Jane Matthews, *Safeguards in relation to proposed double jeopardy legislation*, 27 November 2003.

309 Submission no. 27, Attachment F, Jumbunna Indigenous House of Learning, p 12/13.

310 Council of Australian Governments, "Double Jeopardy Law Reform: Model agreed by COAG" at http://archive.coag.gov.au/coag_meeting_outcomes/2007-04-13/docs/double_jeopardy_law_reforms.pdf. Note that Victoria and the ACT reserved their positions on the recommendations made.

311 Second reading speech, Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2009, *Hansard*, Legislative Assembly, 2 September 2009, p 17122 (Barry Collier)

312 Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2009.

reform would ensure that appeal courts would be able to impose the sentence which fit the crime.[313]

2012 statutory review

5.26 In 2012, the Legislation, Policy and Criminal Law Review Division of the Department of Attorney General and Justice conducted a statutory review[314] of the provisions of Part 8 of the *Crimes (Appeal and Review) Act* to determine whether the policy objectives and terms of the Act remained valid and appropriate.[315] As part of the review, the department sought the input of key stakeholders and submissions were received from the Law Society of New South Wales, the DPP, the Public Defender, the Ministry for Police and Emergency Services, the Police Prosecutions Command, the NSW Council for Civil Liberties, the Australian Institute of Private Detectives and Jumbunna Indigenous House of Learning.[316]

5.27 The review identified four instances in which the provisions enacted under Part 8 had been used in New South Wales but did not specify which provision the applications related to. The review did, however, note that only one successful application had been made, being *R v PL*,[317] which related to an appeal on a question of law under s 107[318] of the Act.[319]

5.28 The review observed that the terms of the Act were largely consistent with the recommendations of the COAG Working Group and in fact provide a more limited right of appeal than was originally recommended by the working group. The review also noted that similar provisions have been adopted in most Australian jurisdictions, the United Kingdom and New Zealand.[320]

5.29 The report did not specifically discuss the definition or operation of the provisions regarding fresh and compelling evidence, however, the provision was canvassed in response to a submission that suggested that the provision be tightened to require that evidence be 'totally overwhelming' rather than 'fresh and compelling'.[321] In response to this suggestion, the review noted that the provisions adopted in New South Wales were more restrictive than those found in the UK Act, which require only that evidence be 'new' rather than 'fresh':

313 *Hansard*, Legislative Assembly, 2 September 2009, p 17122 (Barry Collier).

314 Under s 120(4) of the *Crimes (Appeal and Review) Act 2001*, a review of the provisions of Part 8 of the Act was required as soon as practicable after the period of five years after the date of adoption. The report on the outcome of that review was required to be tabled in each House of Parliament within 12 months after the end of that period.

315 Legislation, Policy and Criminal Law Review, Department of Attorney General and Justice, *Review of Part 8 of the Crimes (Appeal and Review) Act 2001*.

316 Legislation, Policy and Criminal Law Review, Department of Attorney General and Justice, *Review of Part 8 of the Crimes (Appeal and Review) Act 2001*, p 24.

317 (2009) 261 ALR 365.

318 Section 107 of the Act relates to directed jury acquittals (where a jury orders an acquittal at the direction of the trial Judge) or acquittals in trials without juries.

319 Legislation, Policy and Criminal Law Review, Department of Attorney General and Justice, *Review of Part 8 of the Crimes (Appeal and Review) Act 2001*, p 15.

320 P 13.

321 Legislation, Policy and Criminal Law Review, Department of Attorney General and Justice, *Review of Part 8 of the Crimes (Appeal and Review) Act 2001*, pp 15-16.

> It is noted that these provisions are more restrictive than those found in the UK Act which requires only that evidence be 'new' rather than 'fresh'. Under this test evidence available but not presented in the original trial due to error may be sufficient.[322]

5.30 The review also noted that in her 2003 advice, Justice Mathews had considered the test and recommended that the section use the words 'there is fresh and compelling evidence' rather than use the terminology originally proposed by MCCOC, being 'there appears to be fresh and compelling evidence'. The review confirmed that this wording recommended by Justice Mathews had been adopted in Part 8.[323]

5.31 While the review noted that there had been limited use of the new double jeopardy provisions to date, it concluded that there was no evidence to suggest that the provisions do not continue to meet the policy objectives and terms of the Act as adopted. Therefore, no amendments to the provisions were recommended.[324]

Consideration by the courts

5.32 The committee was advised that *R v Gilham*[325] is the only decision that has considered the meaning of the words 'fresh' and 'compelling' in s 102 of the *Crimes (Appeal and Review) Act*, albeit in a context unrelated to the Bowraville case, being an application for a stay of indictment. Allens advised that the presiding judge observed that the type of evidence which might trigger a retrial 'should have a very high degree of probative value and should not have been reasonably available at the time of the first trial'.[326]

Consideration in other jurisdictions

5.33 As noted at paragraph 5.25, in 2006 the COAG Working Group made a series of recommendations to adopt a national framework for the reform of double jeopardy legislation. Following from these recommendations, all Australian jurisdictions adopted the definition of 'fresh evidence' as provided under the New South Wales Act except for Western Australia,[327] which differs significantly. The *Criminal Appeals Act 2004* (WA) provides:

> **46I Meaning of fresh and compelling evidence**
>
> (1) For the purposes of section 46H, evidence is fresh in relation to the new charge if:
>
> a) despite the exercise of reasonable diligence by those who investigated offence A, it was not and could not have been made available to the prosecutor in trial A; or

322 Legislation, Policy and Criminal Law Review, Department of Attorney General and Justice, *Review of Part 8 of the Crimes (Appeal and Review) Act 2001*, p 15.

323 Legislation, Policy and Criminal Law Review, Department of Attorney General and Justice, *Review of Part 8 of the Crimes (Appeal and Review) Act 2001*, pp 15-16.

324 Legislation, Policy and Criminal Law Review, Department of Attorney General and Justice, *Review of Part 8 of the Crimes (Appeal and Review) Act* 2001, pp 22-23.

325 *R v Gilham* (2007) 190 a Crim R 303; [2007] NSWSC 231, cited in Submission no. 19, Allens , p 4.

326 Submission no. 19, Allens, p 4.

327 Answers to questions on notice, NSW Department of Justice, 25 August 2014, pp 2-3.

> b) it was available to the prosecutor in trial A but was not and could not have been adduced in it.
>
> (2) For the purposes of section 46H, evidence is compelling in relation to the new charge if, in the context of the issues in dispute in trial A, it is highly probative of the new charge.
>
> (3) For the purposes of this section, it is irrelevant whether the evidence being considered by the Court of Appeal would have been admissible in trial A against the acquitted accused.

5.34 In response to a request from the committee, the NSW Department of Justice liaised with other Australian jurisdictions and advised that none were aware of any consideration of the definition of 'fresh' evidence, or evidence 'adduced' for the purpose of being fresh under the terms of their respective Acts.[328]

Committee comment

5.35 The committee notes that there has been limited consideration of the terms of Part 8 of the *Crimes (Appeal and Review) Act* since its enactment in 2006. Equally, similar provisions adopted by other Australian jurisdictions have also been subject to limited review. The effectiveness of these provisions, and consideration of the different Western Australian provision, is considered in detail in the next chapter.

328 Answers to questions on notice, NSW Department of Justice, 25 August 2014, p 3.

Chapter 6 The applications for a retrial

Inquiry participants referred to the 'rollercoaster'[329] ride that has come to characterise the various expectations and disappointments experienced by the families throughout the course of the two criminal trials and again following the enactment of the double jeopardy legislation. In all, three applications for a retrial have been made – the first by Strike Force ANCUD to the Director of Public Prosecutions (DPP), the second by the families to former Attorney General John Hatzistergos, and the third by the families to former Attorney General Greg Smith.

This chapter discusses the process of the three applications, and the families' experience of that process.

Application to DPP

6.1 Following the enactment of the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006, Strike Force ANCUD forwarded a submission to the DPP to seek a direction as to the sufficiency of fresh and compelling evidence to warrant an application for a retrial for the murders of Clinton Speedy-Duroux and Evelyn Greenup, and an ex-officio indictment for Colleen's murder.[330]

6.2 On 4 June 2007, the then DPP, Nicholas Cowdery, advised the NSW Police Force that having considered carefully the material provided by the Strike Force, in his view there was not fresh and compelling evidence to support an application to the Court of Criminal Appeal.[331] The DPP further stated:

> Specifically, in my view the suggested tendency and coincidence evidence is not fresh, it is not compelling in the required sense and legal changes since the Speedy [sic] trial do not affect the admissibility of the evidence identified.
>
> Further, even accepting that any admissible evidence concerning the Norco Corner incident is fresh, in my view it is not compelling in the required sense.[332]

Applications to Attorneys General

6.3 Following the DPP's rejection of the application made by Strike Force ANCUD, Mr Chris Barry SC, a senior criminal law barrister, provided the families with an independent legal assessment which concluded that there was sufficient evidence to justify an application to the Court of Criminal Appeal for a retrial. Mr Barry expressed the opinion that, should the matter go to trial, there would be a reasonable prospect that a jury would convict.[333]

329 Evidence, Barbara Greenup-Davis, 2 May 2014, p 12; Paula Craig, 2 May 2014, p 25; Submission no. 29, Misty Kelly, p 1.

330 Submission no. 20, NSW Police Force, p 28.

331 Answers to questions on notice, Detective Inspector Gary Jubelin, NSW Police Force, 28 May 2014, Appendix F – partially confidential, p 1.

332 Answers to questions on notice, Detective Inspector Gary Jubelin, NSW Police Force, 28 May 2014, Appendix F – partially confidential, p 1.

333 Submission no. 20, NSW Police Force, p 29.

6.4 Between 2010 and 2013 the families, with the assistance of Allens law firm (then trading as Allens Arthur Robinson), made two submissions to request that the Attorney General use his discretion under s 115 of the *Crimes (Appeal and Review) Act*[334] to apply to the Court of Criminal Appeal for a retrial.[335] The first submission was sent to Attorney General John Hatzistergos in 2010, and the second to Attorney General Greg Smith in 2011 following a change in government. Both requests were subsequently refused.

Arguments for a retrial

6.5 Allens law firm advised the committee that the two applications made on the families' behalf were based in substantially similar terms.[336] For this reason, the committee's discussion regarding the applications made to the Attorneys General will first begin with a summary of the applications made by Allens, before moving to consideration of the two responses received.

Evidence previously deemed inadmissible is now admissible

6.6 The first element to Allens' argument was that, as a result of the introduction of the *Evidence Act 1995*, evidence with respect to the murders of all three children that had previously been deemed inadmissible is now admissible under the 'tendency rule' and the 'coincidence rule' set out in ss 97 and 98 of that Act.[337]

6.7 Allens pointed out that much of the evidence in question had previously been ruled inadmissible during the trial for the murder of Clinton Speedy-Duroux, which took place prior to the introduction of the *Evidence Act*. The decision to exclude this evidence was based on common law principles at the time which set a higher threshold for the admissibility of propensity and similar fact evidence.[338] Allens argued that, as a result of the introduction of the *Evidence Act*, that evidence is now admissible. This position was also supported by Professor Behrendt and Craig Longman from Jumbunna Indigenous House of Learning.[339]

The evidence is 'fresh' and 'compelling'

6.8 The second element to Allens' argument was that this previously inadmissible evidence constitutes 'fresh' evidence for the purposes of s 102 of the *Crimes (Appeal and Review) Act*, as it has not previously been admitted for consideration by a court.[340]

6.9 Allens argued that because the evidence was not previously admissible, it could not have been adduced in the previous trials. Mr Richard Harris, Partner, Allens stated, 'it is worth bearing in

334 Section 115 of the *Crimes (Appeal and Review) Act 2001* provides that the Attorney General may exercise any function conferred on the Director of Public Prosecutions under that Act.

335 Submission no. 19, Allens, p 2.

336 Submission no. 19, Allens, p 3.

337 Submission no. 19, Allens, p 3.

338 Submission no. 19, Allens, p 3.

339 Evidence, Mr Craig Longman, 12 May 2014, p 37; Submission no. 27, Jumbunna Indigenous House of Learning, p 30.

340 Submission no. 19, Allens, p 3.

mind that matters not accepted or admitted into evidence are for all intents and purposes irrelevant; they do not exist in the eyes of the court'.[341]

6.10 Allens also cited in support of this argument s 102(4) of the Act, which (as noted in chapter 5 at 5.9) states:

> (4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

6.11 Allens contended that the combined effect of ss102(2) and 102(4) of the *Crimes (Appeal and Review) Act* is that evidence which was not adduced in earlier proceedings solely because it was inadmissible is 'fresh' if it would be admissible in a retrial in the present day.[342] Allens asserted that the issue is, ultimately, whether evidence was adduced in the initial trial:

> The result of the introduction of the Evidence Act is that evidence relating to each of the other crimes now represents fresh and compelling evidence of the type contemplated by the Act and we say it should be sufficient to cause a retrial of those hearings and would, we think, have major bearing on the potential outcomes of those cases. The issue, therefore, is simply whether that evidence was adduced in the initial trial. That is, if it was not it should satisfy the Act and could be used to cause the Court of Criminal Appeal to order a retrial. If it was then it would not be fresh.[343]

6.12 Central to this position is the characterisation of the word 'adduced' within the context of s 102 as meaning 'admitted' into evidence – i.e. that evidence not previously 'admitted' into evidence is deemed to be 'fresh' evidence.[344]

6.13 Allens submitted the following arguments in support of this proposition:

- Neither the explanatory notes nor the second reading speech for the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006*, which inserted the double jeopardy provisions into the *Crimes (Appeal and Review) Act*, provide guidance as to the meaning of 'adduced'.[345]
- No Australian court has considered the meaning of 'adduced' under s 102 in the context of an application for a retrial.[346]
- In the absence of Australian guidance as to the meaning of 'adduced', it is instructive to consider the interpretation of the equivalent United Kingdom provision under Part 10 of the *Criminal Justice Act 2003* (UK) (see Appendix 5 for full terms). Allens suggested that in the UK context, 'new' evidence is defined 'in virtually identical terms' to the definition of 'fresh' in the New South Wales Act.[347]

341 Evidence, Mr Richard Harris, 12 May 2014, p 39.

342 Submission no. 19, Allens, p 3.

343 Evidence, Mr Richard Harris, Allens, 12 May 2014, p 39.

344 Submission no. 19, Allens, p 3.

345 Submission no. 19, Allens, p 4.

346 Submission no. 19, Allens, p 4.

347 Submission no. 19, Allens, p 4.

- Assuming that the UK definition *is* instructive in the New South Wales context, Allens suggested that the New South Wales Court of Criminal would be materially assisted in its interpretation of s 102 by the approach taken in the English case of *R v B*,[348] which took 'adduced' to mean 'admitted', and which remains the first and only decision in which the English courts have considered this issue. During that case the court found that evidence which was available at the original trial, but deemed to be inadmissible by the trial judge, had not been relevantly 'adduced' in those proceedings for the purposes of s 78(2) of the *Criminal Justice Act 2003* (UK).[349] The approach taken in *R v B* is consistent with that of the English DPP which has agreed that evidence will be treated as 'new' where it was available but deemed inadmissible at the original trial, and admissible at any retrial because of a change in the rules on admissibility since the original proceedings.[350]

6.14 Allens concluded that, in their view, in the absence of Australian case law, a court should apply *R v B* to come to the view that previously inadmissible evidence, such as that which was sought to be relied on in the Bowraville case, is 'fresh' evidence and that that proposition should find expression in the *Crimes (Appeal and Review) Act*.[351] In evidence to the committee, Allens suggested that this could be achieved by either:

- amending s 102(2)(a) of the *Crimes (Appeal and Review) Act* to replace the term 'adduced' with the term 'admitted', or
- inserting a definition that for the purposes of the double jeopardy provisions contained in Part 8 of the Act, 'adduced' means admitted into evidence in the proceedings in which the person was acquitted.[352]

6.15 In addition to the legal arguments put forward in support of their proposition, Allens also made the following observation regarding the public policy grounds that, in their view, support the construction of 'adduced' as 'admitted':

> The Families submit that any suggestion that evidence which is properly 'fresh', 'compelling' and 'highly probative' should be precluded on technical grounds is fundamentally inconsistent with community expectations of the criminal justice system.[353]

6.16 The third element to the argument put forward by Allens law firm is that the evidence in question is significantly 'compelling' to meet the criteria required under the new rule. Allens did not elaborate on this argument in their public evidence to the committee.

The floodgates argument

6.17 Allens noted that during their discussions with the Crown Advocate in 2012 (discussed later in this chapter), one of the issues raised related to whether allowing applications for retrials of

348 *R v B* [2012] EWCA Crim 14, cited in Submission no. 19, Allens, p 5.

349 *R v B* [2012] EWCA Crim 414 at [8]-[9] cited in Submission no. 19, Allens, p 5.

350 Submission no. 19, Allens, p 5.

351 Submission no. 19, Allens, p 5.

352 Evidence, Mr Richard Harris, 12 May 2014, pp 42-43.

353 Submission no. 19, Allens, pp 5-6.

acquitted persons on the basis of previously inadmissible evidence becoming admissible would lead to a 'floodgates' problem.[354] The final element to Allens' argument sought to refute this proposition, based on the following arguments:

- The requirement for 'fresh' evidence is balanced by the second threshold requirement that the evidence also be 'compelling'. In addition, evidence will only be sufficient to warrant a retrial in circumstances where it is also highly probative of the case against the acquitted.[355]
- It would be appropriate and in keeping with the purpose of the amending Act that compelling evidence that was not able to be adduced against a defendant because of admissibility issues is able to be adduced once a legislative amendment has been made which would render it admissible.[356]
- The UK Parliament specifically chose to ensure that previously inadmissible evidence could qualify as 'new' evidence (see Appendix 6 for full terms of the relevant section of the Act).[357]
- As in many instances where 'floodgates' arguments are raised, the fear does not bear scrutiny. There is no basis that interpreting 'adduced' in s 102 of the New South Wales Act to mean 'admitted' will open up a floodgate of applications. The floodgate remains protected by the requirements that not only does evidence have to be fresh and compelling, but the order for a retrial must also be 'in the interests of justice'.[358]

6.18 The experience in the UK, which has a far larger population than Australia, would suggest that the numbers of retrials of acquitted persons on the basis of previously inadmissible evidence becoming admissible are relatively limited:

> Data provided by the Crown Prosecution Service indicate that the DPP has made 13 applications to the Court of Appeal to have acquittals quashed on the basis of 'new and compelling evidence' … In nine cases the appeal was allowed, the acquittal quashed and a new trial ordered.[359]

2010 submission to Attorney General John Hatzistergos

6.19 In February 2010, Allens, on behalf of the families, submitted an application to Attorney General John Hatzistergos to request that he exercise his power under s 115 of the *Crimes (Appeal and Review) Act* to make an application for a retrial to the Court of Criminal Appeal.

6.20 On 22 October 2010, the Attorney General provided his response. Mr Hatzistergos advised that to inform his response he had requested a thorough review by the Crown Advocate of the matters submitted in the families application and had sought the views of the Solicitor

354 Submission no. 19, Allens, p 6.

355 Submission no. 19, Allens, p 6.

356 Submission no. 19, Allens, p 6.

357 Submission no. 19, Allens, pp 6-7.

358 Submission no. 19, Allens, p 6.

359 Marilyn McMahon, 'Retrials of persons acquitted of indictable offences in England and Australia' (2014) 38 Crim LJ 159 at 173-174.

General and the DPP. Mr Hatzistergos also confirmed that he had read the material submitted by the families, including transcripts and reports.[360]

6.21 Mr Hatzistergos stated that he did not consider the evidence to be sufficiently probative, and indicated that the evidence may be prejudicial to the Person of Interest (POI):

> The *Evidence Act* requires that both tendency and coincidence evidence must have 'significant probative value'. Even if the evidence can be said to have that value (and I am not satisfied, for reasons set out below, that it has), there is a further, restrictive test under section 101(2) if the *Evidence Act* which does not allow the use of such evidence against a defendant unless the probative value of the evidence 'substantially outweighs' any prejudicial effect it may have on the defendant.[361]

6.22 Mr Hatzistergos then went on to challenge the points of tendency and coincidence evidence raised by Allens in support of their application. Mr Hatzistergos ultimately concluded that 'while there may be similarities and connections in the evidence, I am unable to agree that these are striking and establish a conclusive nexus with [the POI].[362]

2011 submission to Attorney General Greg Smith

6.23 Following from the March 2011 periodic State Election, a change of government occurred. In view of public undertakings given by the newly elected Attorney General, the Hon Greg Smith MP, to revisit the application to reopen the Bowraville cases,[363] in June 2011 Allens, on behalf of the families, submitted another application.[364] The application was similar in substance to the application made to Attorney General Hatzistergos, but also addressed each of the points of evidence refuted by Mr Hatzistergos. The application argued that the Attorney General had incorrectly applied the previous common law test used by Justice Badgery-Parker, now outdated, when examining the probative value of the evidence.[365]

6.24 In evidence to the committee, the NSW Government advised that following receipt of advice from the then Acting Crown Advocate David Arnott SC on the matters addressed in the families' submission, Attorney General Smith wrote to the Minister for Police to ask for further information regarding the original police investigation.[366] Detective Inspector Jubelin's comments on this process can be found later in this chapter at 6.74.

6.25 In early 2012, following correspondence from the Minister for Police, the Attorney General then sought the advice of the new Crown Advocate, Ms Natalie Adams SC. The committee

360 Submission no. 19, Allens, Attachment 2 – partially confidential, p 1.

361 Submission no. 19, Allens, Attachment 2 – partially confidential, p 3.

362 Submission no. 19, Allens, Attachment 2 – partially confidential, pp 2-3.

363 Whitmount, D. "New A-G to reconsider Bowraville murders", *ABC News*, 4 April 2011, http://www.abc.net.au/news/2011-04-04/new-a-g-to-reconsider-bowraville-murders/2630296; Fife-Yeomans, J. "New hope in murder cases", The *Daily Telegraph*, 17 December 2012, http://www.dailytelegraph.com.au/news/nsw/new-hope-in-murder-cases/story-e6freuzi-1226537908949; Submission no. 7, Leonie Duroux, p 6.

364 Submission no .19, Allens, p 2; Submission no. 27, Jumbunna Indigenous House of Learning, p 27.

365 Submission no. 19, Allens, Attachment 1 – partially confidential, p 38.

366 Submission no. 23, NSW Government, p 2.

was advised that Ms Adams was extensively briefed by the Department of Attorney General and Justice and worked on the matter over several months with a team of lawyers from the Crown Solicitor's Office and Counsel assisting, Ms Joanna Davidson.[367] The committee was also advised that during the period in which Ms Adams and her team reviewed the merits of the application, the government legal team:

- met with Detective Inspector Jubelin on three occasions to explain their preliminary views and their particular concern to identify relevantly 'fresh' evidence
- travelled to Bowraville to meet with members of the community on one occasion
- met with Professor Larissa Behrendt and Mr Craig Longman of Jumbunna Indigenous House of Learning on two occasions, during which Jumbunna provided a document setting out their views concerning the potential for a retrial of the POI
- received a second document from Jumbunna addressing additional evidence known as the 'prison informer evidence' and the 'Norco Corner evidence', and the likely outcomes of an application for a retrial.[368]

6.26 Allens noted that they had also been consulted by the legal team during this period and had a 'useful engagement' with the officers concerned.[369]

6.27 On 8 February 2013, Attorney General Smith wrote to Allens to advise them that he had rejected their application. In doing so, Mr Smith noted that in considering the application he had had particular regard to the meaning of 'adduced' in s 102(2) of the Act, in response to the submission made by Allens (see paragraphs 6.12-6.16).[370] Mr Smith expressed the view that even if the court accepted that the word 'adduced' meant 'admitted', there remained significant issues with the reliability of the evidence:

> After careful consideration, I have formed the view that the Court of Criminal Appeal is unlikely to accept that the word 'adduced' means 'admitted', though I acknowledge the existence of one case in the UK supporting this proposition.
>
> Even if the Court of Criminal Appeal accepted that 'adduced' means 'admitted', I consider that there are also significant issues impacting on the reliability of evidence (an aspect of the definition of 'compelling' in section 102(3)), relating to inconsistencies in witness' evidence, the effect of the effluxion of time on memory, issues of credit in circumstances where numerous witnesses had consumed alcohol, the possibility that evidence in the two decades since the murders has been contaminated and the fact that juries in previous trials have rejected evidence of many of the witnesses whose evidence is crucial on a number of points.[371]

6.28 In April 2013, Mr Smith met with Leonie Duroux, Thomas Duroux and Jasmin Speedy to discuss his decision. The NSW Government advised the committee that during this meeting the Attorney General discussed with the family the reason why he believed the evidentiary burdens could not be overcome and why he did not believe the evidence was 'fresh and

367 Submission no. 23, NSW Government, p 3.

368 Submission no. 23, NSW Government, p 3.

369 Evidence, Allens, 12 May 2014, p 40.

370 Submission no. 19, Allens, Attachment 4 – partially confidential, p 2.

371 Submission no. 19, Allens, Attachment 4 – partially confidential, pp 2-3.

compelling'. Mr Smith further stated that, if the Court of Criminal Appeal ultimately determined not to retry the POI, any further opportunity to have the POI retried in the event new evidence arose or the POI confessed would be lost.[372]

Committee comment

6.29 It is clear to the committee that the legal arguments in regard to the admissibility of evidence for a retrial are incredibly complex.

6.30 The key issue is whether there is sufficiently fresh and compelling evidence for a retrial, which comes down to the definition of adduced. There is currently no definition of 'adduced' in the *Crimes (Appeal and Review) Act 2001*. The committees notes that the comments of the DPP and Attorneys General suggest that they consider that evidence not previously 'adduced' must not have been previously 'available'. Allens law firm, on the other hand, argue that the term 'adduced' should be taken to mean evidence 'admitted'. In support of this, Allens note that this is the interpretation that has been applied in the UK, which has nearly identical double jeopardy provisions to New South Wales.

6.31 However, the committee notes the information provided in chapter 5 that the UK provisions refer to 'new' and compelling evidence, as opposed to 'fresh' and compelling evidence. Further, we note that during the period the double jeopardy legislation in New South Wales was developed and the subject of a draft consultation bill, it was specifically acknowledged by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General that the decision to adopt the term 'fresh' rather than 'new' was deliberate and made with the intent of having a higher threshold for the evidence.

6.32 The committee notes that the double jeopardy legislation in Western Australia, on the other hand, provides that evidence is 'fresh' if it was 'available to the prosecutor in trial A but 'could not have been adduced in it'. Like all other double jeopardy provisions in Australia, the Western Australian provision has not been judicially considered. It is difficult to conceive of a class of evidence that would fit this description other than evidence that, while available, would have been rejected by a trial judge if tendered in evidence.

6.33 The Western Australian formulation therefore arguably requires the term 'adduced' in s 46I(1)(b) to be read as 'admitted'. That is, the fresh evidence was available to the prosecutor but could not have been admitted in evidence in the trial.

6.34 At first blush section 46I(3) of the *Criminal Appeals Act 2004* (WA) might appear to suggest that the question of 'admissibility' is irrelevant to the operation of s 46I and therefore the word 'adduced' cannot be read as a reference to the admissibility of the evidence. However, the committee is of the view that this would misunderstand the purpose of s 461(3). We believe that this section is simply a legislative statement to the effect that even if the evidence might have been inadmissible at the initial trial (due to more restrictive evidentiary provisions) this will not prevent it from being considered fresh evidence in any further proceedings.

6.35 In other words, the committee considers that s 46I(3) of the Western Australian laws is designed to achieve the same ends as s 102(4) of the New South Wales *Crimes (Appeal and*

372 Submission no. 23, NSW Government, p 4.

Review) Act, namely it precludes the defence from arguing that fresh and compelling evidence is limited to evidence that would have been admissible at the time of the first trial.

6.36 Section 102(4) of the *Crimes (Appeal and Review) Act* provides that evidence that would be admissible on a retrial 'is not precluded from being fresh and compelling merely because it would have been inadmissible in the earlier proceedings against the acquitted person.'

6.37 This formulation differs from the September 2003 NSW Consultation Draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 which read:

> 9D(4) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

6.38 The wording of 9D(4) was criticised by Justice Jane Mathews in her November 2003 advice to the then Premier on the draft bill. Her Honour suggested clarification of the law to clarify its purpose and intent. In particular, Justice Mathews recommended clarifying if the purpose of the provision was to 'exclude from the purview of 'fresh evidence' any evidence which was not introduced in the earlier proceedings because it was, or was considered to be, inadmissible.[373]

6.39 Despite this advice, the ultimate form of what is now s 102(4) of the New South Wales Act expressly fails to exclude from the operation of the fresh and compelling provisions evidence that, whilst inadmissible at the time of the initial trial, may have become admissible since. While this does not expressly provide that simply by reason of becoming admissible post-trial the evidence may be considered 'fresh', it also does not preclude the possibility, despite being urged to do so by her Honour.

6.40 It would appear that the lack of clarity and uncertainty around the double jeopardy provisions has been felt in other jurisdictions. As David Harmer said in his 2008 critique of the Queensland and New South Wales reforms on double jeopardy:

> Time will tell just how much use the laws get. But the possibility cannot be ruled out that the forces giving rise to the reforms – public sentiment, media campaigns and the determination of victims, investigators and prosecutors – will now be redirected to ensuring that the new laws get the maximum possible use. And, in the that event, attention will turn from sensational questions of guilt and innocence, the lofty competition between finality and accuracy, and the politics of law and order, to more prosaic matters of statutory operation and interpretation which, it appears, will provide further sources of contention.[374]

6.41 The committee notes there is a valid argument for either interpreting 'adduced' to mean 'admitted' under the existing New South Wales laws, or replacing the current provisions with the Western Australian formulation. However, in the absence of any specific submission from the government or other stakeholders in relation to the merits or otherwise of adopting this course of action, it is unable to make a final assessment as to the legal and other ramifications of this beyond the instant case where the merits are, on the evidence before us, clear.

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373 Acting Justice Jane Matthews, *Safeguards in relation to proposed double jeopardy legislation*, 27 November 2003, p 9.

374 David Hamer, 'The (dys)functionality of double jeopardy reform in Queensland' (2008) 19 PLR 5, pp 19-20.

6.42 The committee therefore recommends that the government, as a matter of priority, clarify the definition of 'adduced' in section 102 of the *Crimes (Appeal and Review) Act 2001*, and in doing so consider:

- the legal or other ramifications of defining adduced as 'admitted', particularly on the finality of prosecutions
- the matters considered by the English courts under the equivalent UK legislation
- the merit of replacing s 102 of the *Crimes (Appeal and Review) Act 2001* with the provisions in s 461 of the *Criminal Appeals Act 2004* (WA), and
- the merit of expressly broadening the scope of the provision to enable a retrial where a change in the law renders evidence permissible at a later date.

6.43 The committee recommends that a report on the outcome of the review and any subsequent recommendations be tabled in Parliament.

6.44 The committee acknowledges that further delay in these matters is likely to impact on the recollection and availability of witnesses to take part in further proceedings due to the age of some of the witnesses and the high early mortality rate in Aboriginal communities. Any additional delay is also likely to further exacerbate the pain and frustration already experienced by the three families. In view of these considerations, the committee recommends that this process be completed as soon as practicable.

Recommendation 8

That the NSW Government review section 102 of the *Crimes (Appeal and Review) Act 2001* to clarify the definition of 'adduced', and in doing so consider:

- the legal or other ramifications of defining adduced as 'admitted', particularly on the finality of prosecutions
- the matters considered by the English courts under the equivalent UK legislation
- the merit of replacing section 102 of the *Crimes (Appeal and Review) Act 2001* with the provisions in section 461 of the *Criminal Appeals Act 2004* (WA), and
- the merit of expressly broadening the scope of the provision to enable a retrial where a change in the law renders evidence admissible at a later date.

The report of this review should be tabled in the NSW Legislative Council as soon as practicable.

The families' observations of the application process

6.45 Leonie Duroux was the families' primary spokesperson and point of liaison throughout all three application processes. She described her experience of these processes to the committee.

6.46 Leonie advised that when the double jeopardy amendments were passed by the parliament, after the families had vigorously campaigned for the changes, the families felt like there was a 'light at the end of the tunnel'.[375]

6.47 After the first application for a retrial was submitted to the DPP, the families of the three children became aware that the review of the matter was being undertaken by same the prosecutor who had carriage of the 2006 trial for Evelyn Greenup's murder. Leonie stated that the families were concerned that the prosecutor's assessment may have been influenced by his previous involvement in the case, as during Evelyn's trial he had expressed the view that there was little likelihood that the case would result in conviction (as noted in chapter 4). For this reason, the families wrote to the DPP to request that 'fresh eyes' review the petition.[376]

6.48 Leonie informed the committee that four months after the application was lodged, the family received a letter from the DPP advising them to contact the police officer in charge of the investigation, Detective Inspector Jubelin, to find out whether or not the application had been successful. However, Detective Jubelin, upon being contacted, informed the family that he had not been advised of the outcome.[377]

6.49 In November 2007 the families, under the *Freedom of Information Act 2009*, obtained an affidavit prepared by Detective Inspector Jubelin that summarised the evidence in the case.[378] The affidavit was provided to the Public Interest Law Clearing House (PILCH), who subsequently arranged the independent legal assessment provided by Mr Chris Barry SC.[379] Following this advice, PILCH retained the services of Allens law firm, who began preparing a written submission to request a retrial.

6.50 In 2010, Allens law firm lodged the second application for a retrial on the families' behalf, this time with the then Attorney General Hatzistergos. Several months later, a journalist from the Daily Telegraph contacted Leonie to make inquiries about the outcome of the application. Leonie told the committee that the families did not receive the news from the Attorney General that the application had been unsuccessful until after she had been contacted by the journalist, which in her view suggested that the media was briefed before the families.[380] In addition, the notification was received late on a Friday afternoon, preventing the families from contacting anyone for further explanation or clarification and preventing them from preparing a media statement in time for the Saturday papers.[381]

6.51 As noted in chapter 2, in the months leading up to the March 2011 State Election, the then Shadow Attorney Greg Smith gave the families an undertaking that he would review the case if the Liberal Party won the State Election.[382] Leonie recalled that this had raised the families' hopes once again. In view of Mr Smith's comments, the families submitted another

375 Submission no. 7, Leonie Duroux, p 5.

376 Submission no. 27, Jumbunna IHL, p 24; Submission no. 7, Leonie Duroux, p 5.

377 Submission no. 7, Leonie Duroux, p 5.

378 Submission no. 7, Leonie Duroux, p 5; Submission no. 20, NSW Police Force, p 29.

379 Submission no. 7, Leonie Duroux, pp 5-6.

380 Submission no. 7, Leonie Duroux, p 6.

381 Submission no. 7, Leonie Duroux, p 6.

382 Submission no. 7, Leonie Duroux, p 6.

application for a retrial following the change in government.[383] Leonie told the committee that Mr Smith gave a personal undertaking to the families that he would reach a determination on the matter before the end of 2012.[384]

6.52 Nevertheless, the family were not advised until February 2013 that the matter had been rejected.[385] Leonie spoke of her frustration resulting from the delay taken by the Attorney General to assess the application:

> It took him nearly two years to make this decision which he emphasised was important and was so complex that he took the matter home to review. He also made the promise that we would have an answer before the end of 2012 ... Time and time again we have been told that the matter is important and complex, but time and time again we get treated with the same contempt that the families were treated with 23 years ago. My thinking is that if it is such a complex and important decision (which we know it is), why not send it to the Courts and allow them to make the decision?[386]

6.53 Leonie also pointed out that the NSW Government submission to this inquiry stated that the Attorney General had made his decision in December 2012, and questioned the reason for the delay before the family was informed of the decision.[387]

6.54 Leonie further expressed anger and disappointment over the manner in which the news was conveyed to the family. She stated that once again, late on a Friday afternoon, she received a phone call, this time from the Hon Andrew Stoner MP, the local member for the region, who advised that the families' application had not been successful.[388] Leonie told the committee she was particularly disappointed to receive the call because Mr Stoner had previously promised to attend Bowraville to deliver the news in person.[389] Instead, Leonie was left to relay the news to the three family groups, a task made more difficult by the fact that she was living in Brisbane at the time.[390]

6.55 Other family members who gave evidence to the committee also expressed their disappointment that Leonie had been tasked with passing on the decision[391] as both Mr Smith and Mr Stoner had given the families undertakings to deliver the decision in person.[392] Elaine Walker told the committee that she recalled seeing the Attorney General speak on television in support of another victim's family and questioned why he had chosen not to support their family:

> I remember getting upset because I was watching the news about the Attorney General and that he went to a courthouse in Sydney somewhere. Out in front of the court was a European family and he got up and spoke about something – about a

383 Submission no. 7, Leonie Duroux, p 6.
384 Submission no. 7, Leonie Duroux, p 6.
385 Submission no. 7, Leonie Duroux, p 7.
386 Submission no. 7, Leonie Duroux, p 6.
387 Evidence, Leonie Duroux, 2 May 2014, p 60.
388 Submission no. 7, Leonie Duroux, p 7.
389 Submission no. 7, Leonie Duroux, p 7.
390 Submission no. 7, Leonie Duroux, p 7.
391 Evidence, Ronella Jerome, 2 May 2014, p 7.
392 Evidence, Janette Blainey, 2 May 2014, p 56.

> child or something or a young fella, and I said, "You know, that man got up and spoke for that family, but he can't come and talk to our family".[393]

6.56 At the conclusion of his phone call with Leonie, Mr Stoner informed her that an article regarding the decision would appear in the newspaper the following day.[394] Soon after the conclusion of the call Leonie received another phone call from a journalist who Leonie discovered had been briefed on the decision before she had. Leonie shared her recollection of both conversations:

> I received a phone call from Andrew Stoner probably 4.30, quarter to five on the Friday afternoon about the most recent decision. Later that evening I had a call from Paul Bibby from the *Sydney Morning Herald* and he actually let it slip that they had already been briefed. Mr Stoner actually said to me—which set off alarm bells—'There will be an article in the *Sydney Morning Herald* tomorrow'. And I am thinking, 'Hang on a minute you guys have already briefed the media'. So I said, 'When did you find out?' He said, 'After you did'. I said, 'Well what time was that?' He said, 'Whatever time I said.' And I said, 'Well, I am sorry but we were not told until quarter to five this afternoon' and he went, 'Oh.'[395]

6.57 Leonie said that she then contacted Detective Inspector Jubelin to ascertain if he could provide any further information, however, he advised that once again he had not been made aware of the decision.[396]

6.58 Leonie expressed the view that the decision to advise the media of the outcome of the decision before the families appeared to be tactical:

> I believe that was tactical, I believe that was done so they had their point across and we did not have enough time to get to the media and put our feelings across, we could not call anyone to clarify because it was Friday afternoon and everyone goes home at 4.30. It was left up to me to inform the families.[397]

6.59 The committee was informed that some months later, a protest against the decision was led by the families outside Parliament House, and that soon after, the families received a call from Ray Jackson, President of the Indigenous Social Justice Association, to advise that he had secured a meeting for the families with Mr Smith to discuss the decision. The meeting was attended by Leonie, Thomas Duroux and Jasmin Speedy (Clinton's cousin), Mr Smith, Mr Smith's chief of staff, the Minister for Aboriginal Affairs' chief of staff and another government representative.[398] Leonie expressed concern at a number of comments made to the families during the meeting, including a comment that the families should 'move on' and get more counselling:

> Thomas travelled on the night train from Macksville in order to get there and travelled straight back on the afternoon train which meant he had very little sleep if any for 24 hours. We left that meeting feeling disappointed, hurt and angry at the lack of

393 Evidence, Elaine Walker, 2 May 2014, p 57.

394 Submission no. 7, Leonie Duroux, p 7.

395 Evidence, Leonie Duroux, 2 May 2014, p 7.

396 Evidence, Leonie Duroux and Detective Inspector Jubelin, 2 May 2014, p 7.

397 Evidence, Leonie Duroux, 2 May 2014, p 7.

398 Submission no. 7, Leonie Duroux, p 7.

> understanding Mr Smith has for our plight. He advised us to walk away, move on and get more grief counselling. He was also very open about the fact that he was involved in getting Evelyn's matter to trial, therefore we believe there is a huge conflict of interest here. After the meeting Ray Jackson had another meeting with him in relation to another matter. They pulled Ray aside and accused him of winding us up and getting us angry. This is insulting. Aren't the families of three murdered innocent children entitled to be upset at the lack of empathy and action shown by him and previous governments over the past 20 plus years?[399]

6.60 Thomas Duroux also commented on the meeting, stating that he found Mr Smith's suggestion that the families get counselling 'patronising' and that he was particularly unhappy with the limited period of time that Mr Smith spent with the family:

> I did have a meeting with Greg Smith. I haven't had much contact with officials while the case had gone on. He said he knew the case but he thought I was Clinton's brother, not his father. He also called me [the name of the murderer] by mistake but realised and quickly apologised. He also asked me if I had counselling and I found that to be patronising especially after he seemed to understand so little about me and my situation. I had travelled for 8 hours on the train to meet with Smith – and travelled 8 hours back. The Attorney gave me only 20 minutes of his time.[400]

Third party observations of the application process

6.61 Several inquiry participants external to the families also made a number of observations regarding the application process for the retrials and the determinations by the DPP and Attorneys General.

6.62 Both Detective Inspector Jubelin and Jumbunna Indigenous House of Learning expressed concern that, in their view, the responses of the DPP and Mr Smith regarding the 'Norco Corner' evidence were contradictory.[401] Detective Inspector Jubelin stated that Mr Cowdery's response had determined that the evidence was fresh but not compelling, whereas Mr Smith's response had determined that the evidence was compelling but not fresh:

> When Mr Cowdery headed up the DPP, we put in a submission in I think 2006, straight after the legislation came in, in regards to the Norco Corner evidence, and he accepted that it was fresh but said that it was not compelling. So it was "fresh" but "not compelling" from Mr Cowdery. In the rejection from Attorney General Greg Smith – the most recent one – there is a complete backflip: it is compelling but not fresh. They are two very informed legal people and they have conflicting ideas on the interpretation of the evidence. They looked at the same set of evidence and they came up with completely conflicting viewpoints – in writing – on it. That is causing the families confusion because they look at it and say, "Well, hold on, he is saying it is fresh and [not] compelling, and he is saying it is compelling but not fresh". So it is a complex issue.[402]

399 Submission no. 7, Leonie Duroux, p 7.

400 Submission no. 10, Thomas Duroux, p 1.

401 Evidence, Detective Inspector Jubelin, 1 May 2014, p 7; Submission no. 27, Jumbunna Indigenous House of Learning, p 58.

402 Evidence, Detective Inspector Jubelin, 1 May 2014, p 7.

6.63 Detective Inspector Jubelin also challenged the suggestion made by Attorney General Smith to the families during their meeting (see paragraph 6.28) that, if the case was retried on the evidence currently available and was not successful, they would be left with no further options. In Detective Inspector Jubelin's view, that advice was incorrect because no one has been charged with the murder of Colleen Walker-Craig, therefore they could still prosecute on Colleen's matter.[403]

6.64 Craig Longman from Jumbunna Indigenous House of Learning voiced concern that although the DPP and Attorneys General have been appropriately objective in their approach to the consideration of the families' applications, the progress on matters to date had largely been at the urging of the families and the police.[404] He questioned the government's commitment to resolving the matters:

> This goes to the general issue that I was trying to elucidate earlier in regards to how this has been dealt with by the government. The communities have made all the effort here in conjunction with what, in my view, is an extraordinary relationship that has been developed with the NSW Police Force – certainly a relationship unlike any I have seen in my experience and practice. All the pressure has been coming from there. The responses they have received have been polite, reasonable and objective. But there is no sense that government is interested in supporting this community. When I say 'government' I mean the government organisations that they have been in contact with. Nor have they been interested in pursuing this matter. That has been extremely hurtful to the community.[405]

6.65 By way of example, Mr Longman cited the response from Attorney General Hatzistergos in regard to the families' first application, which responded only to the specific matters raised in the application. Mr Longman said 'that may seem reasonable but in circumstances where we are talking about investigating and prosecuting a serial killer one would not expect that the responses would be limited solely to those grounds raised in an application to the Attorney General. One would expect a more proactive response'.[406]

6.66 Related to this concern, both Jumbunna and Detective Inspector Jubelin suggested that the responses prepared by the two Attorneys General, together with the submission prepared by the NSW Government to the committee's inquiry, demonstrated either a lack of familiarity with the evidence in this matter, or a tendency to consider the matters with reference to the context in which prior applications have been rejected, and with the incorrect assumption that the evidence has previously been considered by the court.[407]

6.67 Mr Longman also expressed concern that due to the absence of clear direction within the *Crimes (Appeal and Review) Act*, the DPP and Attorneys General had been in the position of determining not only whether evidence meets the requirements of the Act, but also the legal test against which that evidence is weighed:

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403 Evidence, Detective Inspector Jubelin, 1 May 2014, pp 10-11.

404 Evidence, Craig Longman, Jumbunna, 12 May 2014, p 36.

405 Evidence, Craig Longman, Jumbunna, 12 May 2014, p 36.

406 Evidence, Craig Longman, Jumbunna, 12 May 2014, p 34.

407 Evidence, Craig Longman, Jumbunna, 12 May 2014, pp 33-35; Evidence, Detective Inspector Jubelin, 1 May 2014, p 12.

> While it was intended that the decision-makers—the Director of Public Prosecutions and the Attorney General—would exercise their judgement as to whether a set of circumstances fit the definition, they now finds themselves in the position of first having to create a definition and then evaluating where the merits lie. I submit that that was not Parliament's intention. That has been and remains today the greatest stumbling block to getting all the evidence together before a court.[408]

6.68 However, Mr Harris from Allens law firm told the committee he could appreciate that the DPP was likely to have struggled with the inherently controversial nature of the double jeopardy amendments in view of the core legal tenet that an accused not be unfairly exposed to the criminal justice process once acquitted:

> I think this is one of the key things that the Director of Public Prosecutions, to be fair to it, is struggling with. It is balancing between the interests of ensuring that an accused is not unfairly put through the ringer on multiple occasions against the interests of the families and victims of crime to ensure that justice is done. The Director of Public Prosecutions is struggling particularly with that. This notion of double jeopardy, for your benefit, is pointed directly at ensuring that an accused is not unfairly exposed to the criminal justice processes once they have been acquitted. That is a core tenet that is of value to lawyers and I think the community.[409]

6.69 Ms Alex Mason, Solicitor, Allens law firm also noted it can be difficult to explain that, rather than there necessarily being a lack of will to assist the families, there are technical and legal issues standing in the way:

> I think one of the difficulties with this matter has always been that technical and legal issues are standing in the way. It is not from want of will, I do not think, and it is difficult to explain to someone who is not a lawyer why it is that what seems like a rational and common sense approach is not necessarily being taken.[410]

6.70 Ms Mason commended the manner in which the families had responded to the setbacks they had continually been faced with:

> I would have to say I have been extremely impressed with the contact that I have had with the families by the dignified manner they have taken these kinds of pieces of news. They have taken the constant regular setbacks they have faced with the utmost grace but with a quiet determination not to let it lie.[411]

Consultation with police

6.71 Detective Inspector Jubelin expressed concerns regarding consultation with police arising out of the retrial application process. Detective Jubelin was highly critical of the lack of consultation between those charged with reviewing the applications and the police throughout the process:

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408 Evidence, Craig Longman, 12 May 2014, p 37.

409 Evidence, Richard Harris, Allens, 12 May 2014, p 44.

410 Evidence, Alexandra Mason, Allens, 12 May 2014, p 43.

411 Evidence, Alexandra Mason, Allens, 12 May 2014, p 43.

> ... I think the lack of consultation that has been had with the police in regard to the assessment of the material is somewhat disgraceful. I will always defer to an informed legal person. Unfortunately, to be an informed legal person you have to be informed. There have been mistakes made in the assessment of the material that we have presented because there has been lack of consultation. There have been exceptions, I acknowledge that, but in a general sense for the majority of the applications the consultation with police has been, if not non-existent, minimal.[412]

6.72 Detective Inspector Jubelin advised the committee that when the first application was considered by the DPP, he had not been contacted for the purposes of consultation, despite having lodged 14 lever arch folders in evidence and having made himself available for questioning.[413]

6.73 He stated that a similar situation again arose during the consideration of the application by then Attorney General Hatzistergos in 2010:

> Concerning the submission in 2010 to the Attorney General John Hatzistergos, there was absolutely no communication whatsoever. We provided 12 lever arch folders – I do not need to go over the complexities of the case – but there was absolutely no communication. The families requested that they consult with the police, the police requested that they consult with us and there was no communication whatsoever. I think you will find in the submission by Jumbunna Indigenous House of Learning all the factual errors that were made with regard to the rejection of that application. It is very frustrating.[414]

6.74 Detective Inspector Jubelin told the committee that when the most recent application was lodged to Attorney General Smith in 2011, he was contacted in February 2012, eight months after the application had been lodged, with a request to re-interview the two men who had witnessed the Norco Corner incident. Detective Jubelin said he was surprised to have received the request as the witnesses had already been interviewed on three occasions and there was comprehensive evidence available comprising an electronic interview, a video walkthrough and a record of interview, together with the evidence of 11 other witnesses. Detective Inspector Jubelin told the committee that he had inferred from this request that the officers charged with reviewing the application had not looked at the evidence available, as he did not believe there was any need to interview the witnesses again.[415]

6.75 Nevertheless, Detective Inspector Jubelin acknowledged that there were occasions during the process where consultations had been sought. For example, during the consideration of the 2011 application, members of the legal team consulted with Detective Jubelin on several occasions.[416] However, he contended that the consultation process was not suitably comprehensive:

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412 Evidence, Detective Inspector Jubelin, 1 May 2014, p 2.

413 Evidence, Detective Inspector Jubelin, 1 May 2014, p 12.

414 Evidence, Detective Inspector Jubelin, 1 May 2014, p 12. The 12 folders comprised of the same folders previously provided to the DPP containing the official brief of evidence, minus two folders that had contained miscellaneous additional photographs.

415 Evidence, Detective Inspector Jubelin, 1 May 2014, p 11.

416 Evidence, Detective Inspector Jubelin, 1 May 2014, p 12.

> Following the submission put in June 2011 to Attorney General Greg Smith there was consultation and we pushed up on it. In my opening address I said there were exceptions and there was some consultation had with Crown Solicitor's in regard to that but what I would like to highlight to the committee is it is easy to say you have consulted with me but I have spent more time talking to the committee than when I spoke to the people who consulted from Crown Solicitor's. I think to consult on this you need to embed yourself with the police and we need to go through it page by page so you can understand it.[417]

6.76 In Detective Inspector Jubelin's view, the overarching lesson to be taken from the retrial application process was the need for any individual charged with assessing a future application to take the time to fully comprehend the complexities of the evidence before them:

> ... I cannot stress strongly enough that if anyone is assessing this material, because of the complexities of it and the subtle problems with communication styles and whatnot, a proper assessment cannot be done unless the person or group of people, whoever that might be, sit down with the police and go through the evidence that we have gathered piece by piece. Unfortunately, I do not think that has happened.[418]

Requests for an independent review

6.77 Several inquiry participants recommended that, because assessments of the various applications have often involved individuals who have had a prior connection to the prosecutions of the cases,[419] it would be beneficial for any future application for a retrial to be considered by someone completely independent of the various proceedings to date. Michelle Stadhams stated:

> When I asked for a review of Evelyn's case, [it] went back to the Crown Prosecutor. He wasn't going to criticise himself. I have a similar concern about the Attorney General making a decision when he has been involved in the cases. I would like to see the question of whether the evidence is 'fresh and compelling' given to someone independent.[420]

6.78 Similarly, Detective Inspector Jubelin emphasised to the committee:

> In summing up, what I think needs to be done or what I would like to see done is for an independent person to review the material. That has been a frustration of the families during their course of endeavours for justice. Every time we have put a submission in, the families have asked for an independent person to review it, a fresh set of eyes, not someone who has reviewed them. They just want a fresh set of eyes. I think that is important.[421]

6.79 Craig Longman observed there is a perception of an 'allegiance' on the part of those in authority and, whether or not justified, it is likely to remain until a referral is made to an independent assessor:

417 Evidence, Detective Inspector Jubelin, 1 May 2014, p 12.

418 Evidence, Detective Inspector Jubelin, 1 May 2014, p 12.

419 For example, see paragraphs 7.3, 7.34, 7.45.

420 Submission no. 13, Michelle Stadhams, p 2.

421 Evidence, Detective Inspector Jubelin, 1 May 2014, p 5.

> … there is a perception in the community that former Attorneys General from both sides of politics have not reviewed the matter properly. There will be a perception in the community that there is some allegiance on the part of a new Attorney General, a new Director of Public Prosecutions or within the department to maintaining and upholding the decisions made before or excusing them. A genuinely independent reviewer will address that issue.[422]

Committee comment

6.80 The committee acknowledges the concerns raised by inquiry participants regarding the bias or conflict of interest, whether real or perceived, of certain individuals that have been involved in the retrial process.

6.81 We agree that as the assessments of past applications for a retrial have involved individuals who have had a prior connection to the prosecution of the cases, it would be preferable that any future application made on behalf of the families be considered by someone independent of the various proceedings to date.

6.82 The committee believes that in order to overcome these issues, the merits of any further application submitted to the DPP or Attorney General by the families should be considered by an independent assessor, such as a retired senior judge or senior prosecutor from another jurisdiction.

Recommendation 9

That the NSW Government ensure that, should any new application for a retrial of the Bowraville murders be submitted to the NSW Director of Public Prosecutions or Attorney General, the merits of the application be considered by an independent assessor, such as a retired senior judge or senior prosecutor from another jurisdiction.

6.83 With regard to the previous applications for a retrial, the committee believes that the manner in which the families were notified of the outcomes of their applications, specifically the suggestion that media may have been briefed before the families, is particularly concerning. While the committee makes no comment on the decisions made by former Attorneys General, the committee believes that responses to the families could have been communicated with greater sensitivity and with a cognisance that while the motivations behind the decisions may have been clear to the decision makers, these motivations may not have been effectively conveyed to the families. We encourage the department to be more mindful of these issues in future communications with the families and others in similarly sensitive circumstances.

Disappointment with the justice system

6.84 One of the dominant themes raised with the committee throughout the inquiry is the families' sense that despite their efforts to campaign for changes to the double jeopardy legislation and

422 Evidence, Mr Craig Longman, 21 May 2014, p 36.

work through the process of making multiple applications for a retrial, all of the evidence relating to the three murders has still not been heard together by the courts.[423]

6.85 Troy Duroux said that although he has tried to remain hopeful, he does not know how much more the family can take:

> So many times I got my hopes up about the case. When the [POI] was charged, then again when he was charged with Evelyn's murder, then again when we helped overturn the double jeopardy laws, then again when Gary and Jason put the submission in to the DPP, and then again when we were represented by a great law firm, then again when a submission went before the Attorney-General. How do you keep up with it all? How do you continue feeling hope? Our families are strong but how much can we take?[424]

6.86 Thomas Duroux told the committee that 'each time we think we are going to get justice, we are let down. We keep going but it is hard'.[425] June Speedy similarly pointed out that 'we have had lots of times when expectations have been raised only to be disappointed'.[426]

6.87 Karen Kelly described the process as a 'never-ending story':

> We have been fighting and fighting and trying to have our voice heard for so long it just seems like it is a never-ending story. That is just how I feel.[427]

6.88 Karen's sister, Lana Kelly, explained to the committee that the experience of the families' attempts to utilise the new double jeopardy provisions had taken on a different meaning for the Walker and Craig families, as they had relied on the evidence relating to Clinton and Evelyn in order to obtain a conviction for Colleen's murder:

> It has been difficult for us, particularly for Auntie Muriel, because we never had justice or enough evidence for Colleen. We had always relied on evidence for Clinton and for Evelyn, so we have put a lot of energy into there. But when the double jeopardy laws changed we thought that was an opportunity for us ... If there is any justice to be done, we need the three tried together.[428]

6.89 For Lesley and Penny Stadhams, the ups and downs arising from the applications for a retrial have added to the emotional rollercoaster that occurred throughout the process of the investigations and criminal trials:

> The biggest disappointment for me was every time there was evidence found, and it was so powerful, it did not go anywhere, it just did not do anything. I thought, 'God this is so full of this evidence that is so strong' and it just did not go anywhere. I thought, 'Oh, my gosh, what do we have to do? Yell, scream, jump [up] and down so people can hear us?'[429]

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423 Evidence, Clarice Greenup, 2 May 2014, p 16; Submission no. 3, Barry Toohey, p 6.

424 Submission no. 6, Troy Duroux, p 1.

425 Submission no. 10, Thomas Duroux, p 1.

426 Submission no. 25, June Speedy, p 2.

427 Evidence, Karen Kelly, 2 May 2014, p 53.

428 Evidence, Lana Kelly, 2 May 2014, p 56.

429 Evidence, Penny Stadhams, 2 May 2014, p 41.

> Like clothing that was found from [the POI's] caravan being at one of the crime scenes. You think, 'We're finally getting something, something is finally going to happen'. And then you get this big hit in the face and it is like, 'You're kidding me. Nothing has become of this.' It is just like a big hit in the face. It knocks you back down and you have to build yourself back up and then there is nothing. Surely this is enough.[430]

6.90 Several family members highlighted to the committee that their anger and disappointment with the process was exacerbated by the fact that they did not understand why, having seemingly done everything they could in accordance with the correct legal process, those in authority had still decided to reject their case.[431] As put by Michelle Stadhams:

> We also don't understand why the double jeopardy hasn't worked. It was changed with us in mind. Everything isn't black and white. It seems like we jumped through all the hoops but we are still jumping, just to get justice for [our] kids.[432]

6.91 Ronella Jerome expressed her frustration with a legal system that she had been taught would protect her:

> It frustrated me because under the way I was reared we were taught to learn the white man's way the best way that we can so we can use his tactics later on in life to get through to what we need in courts, trials and whatever. I understand the law and the legal system, but I do not understand that we are still without a murderer in jail. I just do not understand it.[433]

6.92 Helen Duroux, Ronella's sister, described her experience through the process as 'layer after layer of disappointment with the justice system':

> My feeling is it is not just layers of grief, there is layer after layer of disappointment with the justice system. They build us up – 'Yes, we are going to do that for you' – and then cut us down. You need to take into consideration all those things that are not just grief but the disappointment we have had with the justice system over the last 23 or 24 years. Nobody has done anything to address that for us. We are completely disillusioned with all things legal. Nothing even looks like giving us closure with regard to this case. We have got no faith in any legal proceedings.[434]

6.93 Barry Toohey told the committee that, as a result of past experience, it is a common sentiment in many Aboriginal communities that they will never receive fair and proper treatment from the 'powers that be':

> There are other direct family members who do not wish to have anything to do with the 'fight for justice'. The reason being is that that they have absolutely no faith at all in the Westminster System after their experience with how the initial investigation was conducted and subsequent failed trials. They believe that there will never be a time

430 Evidence, Lesley Stadhams, 2 May 2014, p 41.

431 Submission no. 13, Michelle Jarrett, p 1; Submission no .21, Donald Binge, p 1; Submission no. 25, June Speedy, p 2.

432 Submission no. 13, Michelle Jarrett, p 13.

433 Evidence, Ronella Jerome, 2 May 2014, p 5.

434 Evidence, Helen Duroux, 2 May 2014, p 9.

> when they (or any other Indigenous person) will ever get fair and proper treatment from the powers that be.
>
> It must be acknowledged that this pessimistic view of Government Institutions is inherent throughout most Aboriginal Communities as a result of Colonisation. However continued failure to address and correct weaknesses and failures of Institutions reinforces beliefs that Aboriginal people are second class citizens and will never be on an equal footing with white Australia. People here (and elsewhere) are therefore restricted in their ability to move forward. They are 'stuck' in their grief.[435]

Committee comment

6.94 The committee acknowledges that the families feel they have continually been let down by the justice system, and acknowledge that all they want is for the evidence relating to all three murders to be heard together by a court of law.

6.95 While the committee is hopeful that the recommendations made in this chapter will help the families in their pursuit for justice, we recognise that even if the scope of evidence deemed 'fresh' is broadened, this by no means is the 'silver bullet' solution to the cases being retried. We emphasise that a number of stringent legal tests remain that must be met in order for an acquittal to be quashed and a retrial ordered, and we note that the passage of time since the cases were first tried is likely to be a significant impediment to any application for retrial.

[435] Submission no. 3, Barry Toohey, p 7.

Chapter 7 Addressing the impacts

> The fact the families strongly believe they know who murdered their children is singularly the most difficult issue for them to deal with and a source of continual frustration.[436]
>
> —*Detective Inspector Jubelin, NSW Police Force*

The stories shared with the committee during the course of the inquiry have highlighted the disappointment, frustration, pain and deep sense of injustice that the families have experienced in the 23 years since Colleen, Evelyn and Clinton first disappeared.

This chapter will discuss the experiences each family shared with the committee and the observations of other people who have walked alongside them and shared in their pursuit of justice for their children.

Impacts of the murders on the families

7.1 While the families of the three children have shared many similar experiences over the past 23 years, each family group shared stories that were specific to their own journey for justice for their loved ones. These are discussed below.

The Walker and Craig families

7.2 Karen Kelly described the impacts of Colleen Walker Craig's murder on the family, including the particular struggles that Colleen's family had faced because her body has never been located:

> … I hope that the committee can see that the emotion today is as raw 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. Hearing the three cases separate, not even knowing or having anything for Colleen is gut wrenching. It is something that is missing within all of us. Not actually knowing where she is and what has happened to her is something that we carry every single day. It is so hard to watch my mother, my aunty, my aunty's family and my cousins live without their sister and not know that the rest of the community can recognise that this should never have happened.[437]

7.3 Colleen's aunt, Elaine Walker, told the committee that in an effort to bring some sense of closure the family still regularly searches for Colleen:

> As the years went on without finding Colleen it got harder and harder for my sister [Muriel Craig] and all of the family. To this day we still go to search for her. My nieces, nephews, children and grandchildren (Colleen's siblings, cousins, nieces, nephews, aunties and uncles) all come together in the hope that they will find her. Knowing that they are looking for remains (bones).[438]

436 Submission no. 20, NSW Police Force, p 18.

437 Evidence, Karen Kelly, 2 May 2014, p 52.

438 Submission no. 11a, Elaine Walker, p 1.

7.4 Barry Toohey, a mental health clinician from Darrimba Maara Aboriginal Health Clinic who has worked closely with the families for many years, described some of the challenges faced by Colleen's family and expressed his concern at the actions of people who purport to be psychics or mediums privy to visions of Colleen:

> Because the Walker-Craig Family do not even have a body to grieve over their grief is particularly compounded. They are continually grasping at any hint there may be of finding the body of Colleen. They often get in touch with mystics/mediums and other Indigenous 'Clever' people who make promises that haven't been delivered. Building up hopes and then dashing them.[439]

7.5 Members of Colleen's family are also related to Evelyn and Clinton's families. Elaine Walker said that she has also struggled to support Evelyn and Clinton's families while still searching for answers for Colleen.[440]

The Stadhams family

7.6 Whereas Colleen's murder has in many respects brought her family together, the committee heard that Evelyn Greenup's murder had a very different effect – as put by Michelle Stadhams: 'Evelyn's murder has ripped our family apart'.[441]

7.7 The Stadhams family informed the committee that their grief over the loss of Evelyn has been compounded by the guilt the family, particularly Evelyn's mother, Rebecca, and her grandmother experienced following her disapearance. Unlike Colleen and Clinton's family, members of Evelyn's family were sleeping in the same house as the child when she was taken. Rebecca Stadhams described the mixture of torment over the loss of her daughter and the blame that both she and others attributed to her in the months and years following Evelyn's disappearance:

> I went through a lot of things. I had alcoholic breakdowns after I lost her and my life just turned upside down. It was really painful for me. I went through a lot. I even tried to kill myself because I wanted to be with her. It affected me so badly.[442]

> My heart was ripped apart and I felt numb as I knew Evelyn was never coming back to me. I would never be able to give her a hug or give her a kiss, tell her everything is alright and I would never see my daughter grow up into a beautiful woman. I blamed myself everyday but now I realise that an evil person took her away us and murdered my child.

> I was always treated like I had no right to Evelyn's information on updates of the investigation and I was always left out of everything because everyone blamed me. No-one will ever know how I feel because I was Evelyn's mother and had that special bond with her. I carried her for 9 months, I felt her move and grow in my womb and I gave birth to my first born child Evelyn Clarice Greenup.[443]

439 Submission no. 3, Barry Toohey, p 6.

440 Submission no. 11a, Elaine Walker, p 2.

441 Submission no. 13, Michelle Jarrett, p 1.

442 Evidence, Rebecca Stadhams, 2 May 2014, p 36.

443 Submission no. 17a, Rebecca Stadhams, p 2.

7.8 The family told the committee that Evelyn's grandmother is also still overcome by grief and guilt flowing from her inability to reach Evelyn when she heard her crying on the night she was taken.[444]

7.9 Rebecca's sisters reflected that they had experienced very mixed feelings following Evelyn's disappearance. On the one hand, the whole family was deeply grieving Evelyn's loss and were extremely worried about the evident anguish Rebecca was experiencing:

> It got to that point where she was trying to self-harm herself. So my constant fear was constantly worrying about her trying to hurt herself because it was like she really blamed herself.[445]

7.10 However, they admitted that they initially attributed blame to Rebecca because she did not know where Evelyn was when she first went missing, and because she was in the habit of drinking heavily at the time. Rebecca's sisters, Michelle, Penny and Lesley, said that it took many years for them to redirect that blame to the person who had harmed Evelyn. They now support Rebecca '100 per cent':

> **Ms REBECCA STADHAMS:** Yes, my sisters did blame me because they were angry.
>
> **Ms MICHELLE JARRETT:** Because we were angry because she did not know where Evelyn was. She has not only had to put up with her own family in the initial stages of blaming her and being angry with her but also she had to deal with own community, Evelyn's father's side of the family and also the way the general wider community was looking at it. Bowraville was a Peyton Place. Everybody knows everybody's business.
>
> **The Hon. SHAOQUETT MOSELMANE:** Does that feeling still exist?
>
> **Ms MICHELLE JARRETT:** No, we support Becca 100 per cent.
>
> **Ms LESLEY STADHAMS:** Between the sisters, yes.
>
> **Ms MICHELLE JARRETT:** And the other community now when everybody can see what we have been fighting for and that she is not to blame. Yes, she had a drinking problem at the time but the majority of the people who lived on The Mission had a drinking problem ... It was just unfortunate that Becca just happened to be the victim that night.[446]

7.11 The sisters added that they also share their own sense of guilt that they were not there on the night when Evelyn was taken and could not keep her safe.[447]

7.12 The family further noted that, due to the impact of Evelyn's death, Rebecca has struggled with the responsibility of raising her other children. This has brought its own challenges for the

444 Evidence, Rebecca Stadhams and Patricia Stadhams, 2 May 2014, p 36; Penny Stadhams, Michelle Jarrett, Rebecca Stadhams and Lesley Stadhams, 2 May 2014, pp 47-48; Submission no. 13, Michelle Jarrett, p 1.

445 Evidence, Lesley Stadhams, 2 May 2014, p 36.

446 Evidence, Rebecca Stadhams, Michelle Jarrett and Lesley Stadhams, 2 May 2014, p 38.

447 Evidence, Michelle Jarrett and Lesley Stadhams, 2 May 2014, p 45.

family, who have taken on the primary caregiving role. This was highlighted by Michelle Jarrett:

> I have mainly looked after Rebecca's kids for the last few years and I have also helped look after my mum. I have been the main caregiver for her kids ... That's six kids and that is even before I had my own child. I did not have my own child until I was 32. It impacted a lot on my first marriage because my husband, being a white man, he could not understand why I had to take care of these kids. Becca's kids, Penny's kids are my kids… These kids are very emotionally damaged because they do not understand what's going on. They don't understand their parents' grief. They don't understand their own grief, they don't understand their brothers and sisters' grief and they are just angry.[448]

7.13 The committee heard that tensions have also flowed between Evelyn's parents' families, the Stadhams and the Greenups, with many hurtful accusations made over the years towards Rebecca.[449]

The Greenup family

7.14 The Greenup family advised the committee that they have similarly been impacted by a mixture of both pain and guilt, particularly in the case of Evelyn's father, Billy. Billy Greenup attended the committee's hearing in Macksville but found it very difficult to share his experiences with the committee, however, other members of his family and his support network shared their observations of the impact that Evelyn's death has had on her father.[450]

7.15 Clarice Greenup, Evelyn's aunt, told the committee that due to the lack of support the families had received, particularly prior to 2004, she had struggled with supporting Evelyn's father and watching his pain, while also trying to deal with her own pain over Evelyn's death:

> For the past 23, 24 years I had to be a support for my brother, because we didn't have anyone coming out there to support us. We are still trying to support each other 23, 24 years later and that is not fair. I have seen what this has done to my brother … Ever since this has happened to our family I have seen him go off down the street and everybody would be coming down off the Mission to see me: 'You had better go and see what is happening with your brother, he's going off his head down the street.' I would have to go down there and try and calm him down. I remember one night he was down the street going off his head and all of a sudden two police cars come from nowhere. I said, 'Leave him alone, he's had a hard time.' I said, 'Something's gone on with our kids. Leave him with me and I'll take him home.' He is just not the same person and he has blamed himself for the last 23 years.[451]

7.16 Barry Toohey has also worked very closely with Evelyn's father and noted that the blame Billy feels over his daughter's death has made him very overprotective of his other children:

> I have often spent time with Evelyn's father (who blames himself for her death). He is a man who lives from day to day. He sees no reason or benefit in fighting for justice.

448 Evidence, Michelle Jarrett, 2 May 2014, p 43.

449 Evidence, Lesley Stadhams and Rebecca Stadhams 2 May 2014 p 38.

450 Submission no. 3, Barry Toohey, p 7.

451 Evidence, Clarice Greenup, 2 May 2014, pp 13-14.

> He is now naturally overly protective of his family and gets extremely upset at others who have in the past blamed his children for alleged misdemeanours ...[452]

7.17 Barbara Greenup-Davis, Evelyn's aunt, commented that many members of the family have struggled with this same sense of responsibility:

> We as a family and individually in our hearts carry our own sense of guilt, sense of responsibility. We question ourselves.[453]

7.18 Misty Kelly, Evelyn's cousin, shared the perspective of the younger members of the Greenup family, for whom 'the pain is always there inside of you':

> Me personally, even though I was only 10 years old – I knew what was going on and for me it was like losing a little sister. 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 you, you just find ways to deal with it but it never goes away. The anger – well yes that is always there as well. It's something I don't talk to many people about because it still has a very emotional effect on me. I haven't ever spoken to a counsellor about it, I just keep it bottled up inside me. The birthdays, Easter, Chistmas's, holidays we have missed out on and will never get to experience is hard.[454]

7.19 Clarice Greenup recalled her children being taunted at school in regard to Evelyn's disappearance and death, another sad aspect of the families' struggle to cope with the broader community's response:

> I had to go up to the school when my children were at school because my daughter got upset over what one white kid said to her about Evelyn. It is soul-destroying when you send your kids off to school in the morning and then you get this phone call to say, "You need to come down and see what's happening". Would that happen with a white family? No, it would not. Mean, nasty and hurtful things have been said to our family and our kids while they were at school and it is just not bloody fair.[455]

7.20 Clarice also remembers Rebecca Stadhams enrolling Evelyn in school during the period in which she was missing, having held hope that she would still be found and be ready to commence school that year. Sadly, however, in February 1991, at the time at which many children were commencing the school year, Evelyn's body was found.[456]

The Duroux family

7.21 While the families of all three children spoke of their sense of injustice, this was a particularly strong theme for the Duroux family, who have led much of the campaign for justice over the past 23 years. Family members such as June Speedy, Clinton's mother, told the committee that

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452 Submission no. 3, Barry Toohey, p 7.

453 Evidence, Barbara Greenup-Davis, 2 May 2014, p 14.

454 Submission no. 29, Misty Kelly, p 1.

455 Evidence, Clarice Greenup, 2 May 2014, pp 17.

456 Evidence, Clarice Greenup, 2 May 2014, pp 17.

it has been incredibly difficult to discuss their grief because of the overriding sense of injustice after watching the person accused of Clinton's murder walk away:

> Even though Clinton was taken from us over twenty years ago, it is really hard to talk about him.
>
> His niece, Morgan, who was born just after Clinton was murdered, says that she hears how highly everyone talks about him and thinks it's sad she never got to meet him. She also believes it's sad that the person who did this to our family is living their lives normal but everyone in our family has to live with this pain.
>
> … All of us are emotional when we talk about Clinton's murder and we remain very angry about it.[457]
>
> The whole thing has made us lose faith in the justice system because they help some people but our family has been waiting for 23 years to get some answers.[458]

7.22 Troy Duroux, Clinton's brother, expressed similar sentiments:

> I never really talked about him to anyone; it took me nearly a year to talk about it to my wife, Kerry. I couldn't deal with it. I didn't know how to, was never told or learnt how to. I still don't really.[459]

7.23 Another family member, Delphine Charles, reflected that the struggle to deal with the pain of Clinton's death had affected not only herself and David Duroux, another of Clinton's brothers, but also their children:

> When he first went missing, I was pregnant with my daughter, Clinton's niece. Being pregnant, I was very emotional. His disappearance and murder really affected me and there was a point at which it was thought I might be miscarrying. My son, Nathan, who was three, knew something was wrong and it took him a long time to be able to talk about it. Clinton's loss affected my relationships.
>
> Clinton's loss meant we were over-protective with our kids. I ended up working at the school and high school because I didn't want to let them out of my sight. Now that I look on it, I realise we hardly let them do anything because we were worried something would happen then.[460]
>
> After we reburied Clinton's bones, my partner [David Duroux] would push me away and he shut down, wouldn't talk to me and it caused a fracture in our relationship. Luckily, we were able to repair that because we realised we were in this together but it took a long time for us to understand how Clinton's murder affected him. I am amazed that he has survived as he has and, with all the pain he has suffered, is still kind. He [once used] to deal with his grief through drinking. He never received any counselling. He has now broken his dependence on alcohol.[461]

457 Submission no. 25, June Speedy, pp 1-2.

458 Submission no. 25, June Speedy, p 2.

459 Submission no. 6, Troy Duroux, p 1.

460 Submission no. 22, Delphine Charles, p 1.

461 Submission no. 22, Delphine Charles, p 1.

7.24 Many of the family members commented that they have struggled with feelings of anger and powerlessness and have found it extremely difficult to maintain the resolve to fight and see the person who murdered Clinton convicted.[462]

7.25 Leonie Duroux spoke on behalf of Marbuck Duroux (Snr), Clinton's brother, who for many years felt 'completely powerless' until, after finally discussing his feelings with Leonie, became determined for Clinton's death to not be in vain:

> I met Marbuck nearly 3 years after Bubby died, so I never got to meet Bubby, but I saw the effects of his murder not only on Marbuck but the rest of the family. However, I can only really speak for Marbuck. Like a lot of young Aboriginal men, Marbuck already had a mistrust of the system but more so after Bubby was murdered. We were together for a few years before he even really spoke about it. He felt completely powerless, not knowing what happened to his brother, not being told what was going on, feeling like no-one was doing anything about it because he was just another black kid and it didn't matter. Once spoken about, there was the realisation that he didn't have to remain silent and he had a resolve to fight. There was the determination that Bubby's death would not be in vain, that his memory would be kept alive and our kids would know what a great person their Uncle was, what a beautiful Uncle he would have been and that he would keep on fighting for justice until we got it. Marbuck was just over one year older than Bubby. His birthday was on the 12th February. Clinton went missing on the 1st February 1991 and his remains were located on the 18th February 1991. Marbuck turned 18 on the 12th February 1991. He distinctly remembers the last thing he said to Bubby was "don't forget to come back for my 18th". As you can imagine Marbuck's 18th was a memorable one, but not for the reason it is for most 18 year olds.[463]

7.26 Marbuck, with Leonie's assistance, continued to drive the family's fight for justice even despite his own personal battle with motor neuron disease:

> In 2002 we made the decision to return from Tasmania to the mainland to begin asking questions of the politicians about why Justice has not been afforded to the Bowraville Families. This was the beginning of a very long journey for us.
>
> ...
>
> Marbuck was diagnosed with Motor Neurone Disease in October 2004. During the trial for Evelyn's murder he travelled to Port Macquarie every day and sat either in the court room or waited outside with his father. He could not walk, he was being fed via a peg tube in his stomach and could hardly talk and could not toilet himself. He was so determined in his fight for justice and in showing his support for the other families and so desperately wanted to see closure for his brothers murder before he died. We have always held the view that if we got [the accused] for one murder, then we would be satisfied because we believe there is no doubt that he is responsible for the three murders ...
>
> Sadly Marbuck lost his battle with Motor Neurone Disease in September 2009 so he was never able to see this matter brought to justice. I find it extremely sad that our

462 Submission no. 6, Troy Duroux, p 1; Evidence, Ronella Jerome, 2 May 2014, p 5; Helen Duroux, 2 May 2014, pp 8-9; Submission no. 21, Donald Binge, p 1; Submission no. 8, Elijah Duroux, p 1.

463 Submission no. 7, Leonie Duroux, p 1.

> children who are now 18 and 16 feel the pain their father and the extended family felt and continue to feel.[464]

7.27 Leonie advised the committee that like David, Marbuck (Snr) had been incredibly overprotective of his sons and of his little brother Troy, always mindful of what had happened to Bubby (Clinton).[465]

7.28 Leonie and Marbuck (Snr)'s sons, Elijah and Marbuck (Jnr), shared their memories of their families' struggle for justice, and the stress that it placed on their father:

> The ongoing problems, setbacks and obstacles that our families have faced have been unbearable at times. It has affected the stress levels of my mother, father, grandfather, grandmother, aunties and uncles etc. I have [found] that the struggle has put a lot of stress onto my mother especially, she has struggled to cope with things at times.
>
> It was my father's last wish to see justice for Uncle Bubby (Clinton). This put more than enough stress on him during his final stages of his terminal illness (Motor Neurone Disease). It had an effect [on] how he lived definitely, a bit jumpy and stressed at times. Sadly my dad passed away in 2009, not seeing the murderer … get convicted, in saying so, I want to see my father's dying wish come true, and I won't stop until it does.[466]
>
> I have grown up missing Uncle Bub even though we never met him. It wasn't something that dad talked about too often, but we always knew what was going on. When dad talked about him he used to tell us stories about him, like he could walk on his hands, dance like Michael Jackson and how much he loved his shoes. Everyone called him pretty boy because he like to take care of himself and look good. Dad taught me how to dance like Uncle Bubby to keep his memory alive. Even though dad always told us good yarns about Uncle Bub, I could always see the pain in his eyes.[467]

7.29 Members of Clinton's family emphasised that the impacts of Clinton's death had been felt far beyond the boundaries of Bowraville. Clinton had grown up in Tenterfield and Warwick and had only been in Bowraville for two weeks at the time of his murder. A very popular boy, the pain of his death had a huge impact throughout the community.[468] Clinton's aunt, Helen Duroux, also explained that, like many Aboriginal families, theirs is a family that shares the responsibility for raising their children. Therefore, it was not just Clinton's mother and father who lost a son – they all did:

> With our family, one of us did not own the kids, we all owned each other's children. So even as they were growing up, while they were babies, if somebody wanted to go somewhere, then, you know, it was okay, someone was always there to look after the children … As we all grew up and even as we all grew older and started having our own kids, you know, Thomas was not just the father to Clinton, we were mothers to Clinton, as Thomas was a father to all of our children in the family. I just want to say Thomas did not only lose a son, we all did.

464 Submission no. 7, Leonie Duroux, p 4.

465 Evidence, Leonie Duroux, 2 May 2014, pp 59-60.

466 Submission no. 8, Elijah Duroux, p 1.

467 Submission no. 5, Marbuck Duroux, p 1.

468 Submission no. 22, Delphine Charles, p 2; Submission no. 25, June Speedy, p 3.

> Somebody mentioned yesterday that there are aunties, uncles and everything, and there is always someone there to look after the kids, and that is how it was, not only with our family, but with most Aboriginal families, that is how it works: you do not only have one parent. There are nine of us here in the family, so nine of us lost a son … So we have all felt the loss in an awful way.[469]

Impact on mental health

7.30 Barry Toohey, who has provided the three families of the murdered children and other Aboriginal people with grief and loss counselling, social and emotional wellbeing supports and other activities that serve to improve the health and wellbeing of the Bowraville community since 2007,[470] commented on the psychological impact of the murders on the families:

> In my opinion not one of the three families' direct relatives has escaped psychological harm from the murders.
>
> Major depression and anxiety are the prime mental health conditions. However post-traumatic stress, agoraphobia, alcohol and drug abuse, poor academia, anger issues, self-blame, guilt, petty crime and distrust of the police and other figures in authority also play a significant part.[471]

7.31 In response to the comments of family members who spoke of feeling overly protective, Mr Toohey confirmed that many people in the community tend to be highly protective of their children, which in turn serves to exacerbate the general fear and anxiety already felt:

> … during my seven years at Bowraville and Darrimba Maarra I have gained a much deeper understanding of the long term effects that these murders have had not only with the immediate families but the wider community. There is widespread fear through the community that the killer is still free and as a result people, especially parents and grandparents, tend to be overprotective of their young children. This causes undue anxiety and stress in households.[472]

7.32 Mr Toohey gave one example when there had been a stressful period of worry and anxiety when one of Clinton's nephews who had been staying in Victoria with another uncle decided to come back to Bowraville without telling anyone. Mr Toohey said that he had received countless phone calls asking if there had been any developments and he remembers the boy's grandfather, Clinton's father Thomas, trying to keep up a brave face but admitting his fear that his grandson had met with the same fate as Clinton.[473]

7.33 Mr Toohey made numerous other observations as result of his work with the families and the community. These will be discussed later in this chapter.

7.34 Dr Daniel Ryan, a rural general practitioner who has been working in the Bowraville community since 1988 (and specifically at the Aboriginal Health Clinic located on the Mission

469 Evidence, Helen Duroux, 2 May 2014, p 2.

470 Submission no. 3, Barry Toohey, p 2.

471 Submission no. 3, Barry Toohey, p 5.

472 Submission no. 3, Barry Toohey, pp 3-4.

473 Submission no. 3, Darrimba Maarra Aboriginal Health Clinic, p 3.

between 1996 until its closure in 2010), told the committee that he had observed a sense of shame from the families, which he attributed to feelings of powerlessness due to their inability to protect the three children:

> The grief over the murder of their three young people for those families is real, ongoing and unresolved. It is extremely difficult to accept the way that the justice system has not brought resolution and I think there is a sense of shame that these families were not able to protect their young people at the time and then were powerless in the initial days, weeks and months when the institutional response was inadequate and/or negligent.[474]

7.35 Dr Tracey Westerman of Indigenous Psychological Services (IPS), who first began working with the Bowraville families during the 2004 coronial inquest, advised the committee that IPS had made a unique diagnosis of 'chronic collective trauma' following their assessment of the community, a term applied by psychologists when certain preconditions present in a community make the entire community more vulnerable to future traumatic events.[475]

7.36 Dr Westerman expressed the view that while many factors present in the Bowraville community had made them vulnerable to trauma, the most dominant had been racial divisiveness. This, in her opinion, had brought about a pre-existing vulnerability through being marginalised and through experiences of racism. Dr Westerman explained the relationship between this pre-existing vulnerability and the impact of the murders on the Bowraville community, stating 'when you have a critical event in the future your ability to cope with that critical event is significantly reduced'.[476]

7.37 Dr Westerman commented that the families' experience of trauma has been exacerbated by the manner in which, in her view, the race of the victims and their families led to disinterest in the Bowraville case by groups and institutions such as police, leaders, government services, the media and the judicial system.[477] (The impact of the Aboriginality of the families on the cases is discussed in more detail later in this chapter.) Dr Westerman contended that the experience of trauma has been particularly magnified because these government bodies and services are the very services who, in theory, are there to help, and when people are not helped adequately, 'the trauma develops whole new dimensions'.[478] She stated:

> What often happens to people, if they continue to reach out for help and no-one comes, understandably they eventually stop reaching out for help and internalise the trauma. It was distressing that when we spoke to people we found that, although they were 14 years down the track in their grief, they were still speaking as if the murders had occurred the previous week or very recently. We had people who still spoke of their loved ones in the present tense – 14 years down the track. It was stunning to be dealing with a community where we had never encountered anything like it before, in the sense of the extraordinary degree of grief and trauma but a complete absence of any degree of mental health support.[479]

474 Submission no. 15, Daniel Ryan, p 1.

475 Evidence, Dr Tracy Westerman, 12 May 2014, p 46.

476 Evidence, Dr Tracy Westerman, 12 May 2014, p 46.

477 Submission no. 26, Indigenous Psychological Services, pp 9-14.

478 Submission no. 26, Indigenous Psychological Services, p 14.

479 Evidence, Dr Tracey Westerman, 12 May 2014, p 45.

7.38 The effects of this lack of support and response were felt by many inquiry participants. This and other recurring themes discussed by the individuals who gave evidence to the committee are discussed in the following pages.

The need for adequate support and services

7.39 At the time of and in the immediate years following the murders of the three children, the Aboriginal community located in and around the Mission did not have access to local or specialised medical or mental health support services.

7.40 Family members spoke of their feelings of powerlessness and abandonment during this period and the sense of failure that came from trying to deal with such a complex loss on their own:

> There was no support offered to the families afterwards. The families were just left to go and deal with it on their own ...[480]

> None of the families were ever referred to at the time of the kids going missing. They were never supported by any services. There was no counselling, no nothing. We were debriefing and talking to ourselves. We were trying to deal with the loss and the grief. There was a sadness, a big blanket of sorrow over the community. It was unbelievable. We were all at breaking point and trying to be strong for the parents of the kids who were all having mental breakdowns because they did not know what was happening.[481]

> The ministry team was not there, the health service was not there. You all heard; they came later. As for the Aboriginal Legal Service, they are still coming. As a family and as a community we were walking through a crime that we had no understanding of.[482]

7.41 In 1996, a small medical clinic was established in Gumbaynggirr Road on the Mission. The clinic was very basic and was established to provide only general medical services.[483]

7.42 The community first received formal psychological or therapeutic input in 1998, some eight years after the first child went missing. The committee was informed that this input came in the form of a weekend workshop with no ongoing service plan or follow-up, leaving the families feeling that they had no support and had to fend for themselves.[484] This remained the case until the period in which the coronial inquest took place in 2004, when local allied health services via Durri Aboriginal Medical Services and North Coast Mental Health Services requested support and services to assist the families and the local community.[485] The federal government office for Aboriginal and Torres Strait Islander Health (OATSIH) approached IPS, based in Western Australia, and funded two trips to Bowraville for the purposes of

480 Evidence, Leonie Duroux, 2 May 2014, p 3

481 Evidence, Penny Stadhams, 2 May 2014, p 42.

482 Evidence, Barbara Greenup-Davis, 2 May 2014, p 14.

483 Evidence, Dr Daniel Ryan, 1 May 2014, p 23.

484 Submission no. 26, Indigenous Psychological Services, p 3; Submission no. 3, Darrimba Maarra Aboriginal Health Clinic, p 2.

485 Submission no. 26, Indigenous Psychological Services, p 3.

undertaking a scoping exercise to determine what had occurred to date, to identify gaps in service delivery and determine what was still needed for the future work.[486]

7.43 The committee was advised that, following this initial delivery of services, IPS were offered sporadic contract extensions from April 2005 through to early 2008. Although the nature of these contracts resulted in gaps between contracts in terms of funding availability, IPS nevertheless continued to work in the Bowraville community at their own expense.[487] The work carried out by IPS during this period included Aboriginal Mental Health Training for service providers, counselling services focused on immediate and extended families of the victims, psychological assessment, community and immediate family grief and loss workshops and youth intervention programs facilitated out of the school.[488] Family members commented on the great benefit of the services offered by IPS, describing Dr Westerman as 'fantastic'.[489]

7.44 Dr Westerman advised that, due to the lengthy period in which they were able to engage with the community, IPS were able to acquire an in-depth understanding of the challenges faced by the community and identified such a level of need that they were able to apply to the federal government for funding for approximately 18 months.[490] Following on from this, IPS was then able to establish two full-time employed mental health worker positions from 2006 to assist in meeting the continual mental health support needs of the families and the community, funded recurrently by OATSIH.[491]

7.45 One of these support workers came in the form of Barry Toohey. Mr Toohey explained that although he is employed by Durri Aboriginal Corporation Medical Service, his job interview was conducted by representatives of the three families as it was recognised that the families should be empowered by having a major say in who was to assist them. He also had to complete a 'Cultural Competency Questionnaire' and Personality Profile Questionnaire. This was to ensure that apart from his professional qualifications as a mental health clinician he was culturally competent to work within the Aboriginal community.[492] Mr Toohey's suitability for and success in the position was unanimously confirmed by the evidence of many family members and other service providers who spoke of his kindness, compassion and general 'awesomeness'.[493]

7.46 The committee was advised that although two positions had been funded, for some time the second support position originally remained unfilled.[494] Mr Toohey has therefore shouldered a very heavy support role within the community. While the inquiry participants who had worked with Mr Toohey spoke extremely highly of his services, Dr Ryan also expressed concern for

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486 Submission no. 26, Indigenous Psychological Services, p 3; Evidence, Dr Tracey Westerman, 12 May 2014, p 45.

487 Submission no. 26, Indigenous Psychological Services, p 3.

488 Submission no. 26, Indigenous Psychological Services, pp 4-5.

489 Evidence, Penny Stadhams and Michelle Jarrett, 2 May 2014, p 42.

490 Evidence, Dr Tracey Westerman, 12 May 2014, p 45.

491 Submission no. 26, Indigenous Psychological Services, p 4.

492 Submission no. 3, Darrimba Maara Aboriginal Health Clinic, p 3.

493 Evidence, Leonie Duroux, 2 May 2014, p 62; Michelle Jarrett, 2 May 2014, p 42; Troy Duroux, 2 May 2014, p 66; Elaine Walker, 2 May 2014, p 54-55; Submission no. 26, Indigenous Psychological Services, p 29.

494 Evidence, Dr Daniel Ryan, 1 May 2014, p 25.

Mr Toohey and emphasised the need for at least one other support person to be appointed to ensure that Mr Toohey can continue in his work.[495] Dr Westerman agreed that the services currently offered are vital and successful, but noted that they are underfunded and under-resourced, which has made it difficult to attract and retain candidates for the positions.[496]

7.47 Mr Toohey and Dr Ryan advised that the majority of the funding for the area has continued to be sourced from the federal government.[497] Up until August 2012, there was a health presence in the area around the Mission in the form of either general practitioner or mental health support services five days a week. However, in 2012, seemingly due to a dispute between the Durri Aboriginal Medical Centre and the local Bowraville Land Council[498] the lease on the medical centre building at the Mission, from which support services were based, was terminated and the centre was closed. The Durri Aboriginal Medical Centre has not operated in Bowraville since that time, although the committee was informed at its meeting with family members in August 2014 that another health provider operates out of the centre one day per week. Dr Ryan remarked that the closure of the medical clinic is an example of 'the way a community like Bowraville and the families are so vulnerable to decisions that are made by outsiders whereby resources are just taken away without any notice and without any consultation with the community, which was another thing that I found really difficult to stomach'.[499]

7.48 Mr Toohey pointed out that while both he and Dr Ryan have endeavoured to continue to make services available to members of the Bowraville community, the relocation of the service to Nambucca Heads has imposed limitations on the families' ability to access the service:

> We are now based at the Aboriginal Medical Service in Nambucca Heads but off the top of my head we do not see that many clients from Bowraville even though we provide transport. It is difficult for them to go there; it is difficult for them to relate to that sort of clinic because the Aboriginal clinic at Bowraville was actually on the Mission and so it was there, it was part of the community and I guess there is that sense of loss there. People either go somewhere else or they neglect their health.[500]

7.49 Mr Toohey informed the committee that Durri has purchased a building in the main street of Bowraville in the hope of continuing its services to the community, however, the organisation has encountered problems with funding and other building concerns and it was not known when the service would finally open.[501]

7.50 Dr Ryan explained the importance of ensuring a continued service from the medical centre at the Mission and of demonstrating to the Bowraville community that there is a long term, vested interest in providing ongoing support:

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495 Evidence, Dr Daniel Ryan, 1 May 2014, p 25.

496 Submission no .26, Indigenous Psychological Services, p 29.

497 Evidence, Barry Toohey and Daniel Ryan, 1 May 2014, p 24.

498 Evidence, Dr Daniel Ryan, 1 May 2014, p 23.

499 Evidence, Dr Daniel Ryan, 1 May 2014, p 23.

500 Evidence, Barry Toohey, 1 May 2014, p 23.

501 Evidence, Barry Toohey, 1 May 2014, p 24.

> That clinic out at Bowraville has been really important. It is important that if we are going to serve the community we have a presence in the community. It is difficult for people to travel. It is difficult when you do not have the resources and when you cannot plan your day. It is difficult to organise to get yourself to doctors' appointments or other health professionals' appointments or any appointments in a remote town. Also, when that clinic was closed, it feels like you are just another organisation that comes to town, hangs around for a while and then disappears, like so many organisations that have funding for a 10-week program or a six-month program. They rush in with great enthusiasm and best intentions and then sort of disappear. [502]

7.51 Dr Ryan stressed that 'for any service that you want to resource the Bowraville community with, it has to be in Bowraville; it has to have a presence in Bowraville itself and as much as possible it needs to have a fairly open door'.[503]

7.52 Dr Ryan expressed the view that institutions have given up on the Bowraville community because of the inherent difficulties:

> There has been very little consultation with the community and almost no evidence of a longterm commitment to the Bowraville community.[504]

> It is not easy for service providers to work in the Bowraville community but that does not excuse the way that providers have given up on this community. I particularly appreciate that it is difficult for the police to work with some people who are uncooperative until they need help. The perception is that other agencies have given up on this community as well. The Department of Community Services has been extremely reluctant to engage with families who need help. Durri Aboriginal Medical Service suddenly and without explanation closed the medical service in the community that I used to work in (this occurred in August 2012 and it has not reopened yet). Numerous young men and some women from this community seem to rotate in and out of gaol yet there seems no plan to get these young people into education or employment. The local schools genuinely try with limited resources but the perception is that services and particularly government services that you and I take for granted are not provided in Bowraville "mission" because it is too hard.[505]

7.53 Mr Toohey, Dr Westerman and Dr Ryan outlined some potential programs that could be put in place to help to address the problems in the Bowraville community:

- *The Red Dust Healing package delivered by Tom Powell and Randal Loss*: The program comprises of a three day workshop, followed by another workshop four to six weeks later. Mr Toohey suggested that this could be offered to the community on a six monthly basis. Mr Toohey advised that the package can be tailored to both male and female participants from ages 16 and up and feedback suggested that the outcomes had been particularly positive, with the course equipping participants to move beyond grief, depression and many other problems.[506] Family members also expressed support for this program.[507]

502 Evidence, Dr Daniel Ryan, 1 May 2014, p 23.

503 Evidence, Dr Daniel Ryan, 12 May 2014, p 24.

504 Submission no. 15, Dr Daniel Ryan, pp 1-2.

505 Submission no. 15, Daniel Ryan, p 1.

506 Evidence, Barry Toohey, 1 May 2014, p 27.

507 Evidence, Leonie Duroux, 2 May 2014, p 61.

- *Enhanced mental health services*: Dr Westerman suggested that a review of existing services be undertaken with the specific focus of ascertaining the families' views as to whether the support currently offered has achieved its objectives, and on targeted intervention programs focused on addressing intergenerational trauma. Dr Westerman also suggested that existing mental health services may benefit from the input of external mental health support workers with expertise in chronic trauma and disaster-type relief. Dr Westerman observed that, should this occur, there would need to be a long term commitment to ensure that a relationship was built with the community, that the impacts were measurable, that the support was predictable and that the support was provided in conjunction with the local mental health service already in place.[508]
- *Enhanced drug and alcohol services*: In addition to Dr Ryan's suggestion that services be improved,[509] family members insisted that such services are crucial to break the 'cycle' of dependence on alcohol that has developed due to the lengthy periods in which family members have internalised their grief.[510]
- *Health assistance for families post-birth*: Dr Ryan suggested that post-birth support would be valuable, stating 'as a doctor I spend a lot of money ordering tests and ultrasounds and all this while babies are in the womb but once babies are born we seem to push people out the hospital door with very few resources. I think future generations are going to look back and scratch their heads and wonder why we neglected those crucial first years of life'.[511]
- *A men's program*: Several family members have had the opportunity to participate in specialised men's programs with Barry Toohey and commended their effectiveness. For example, Troy Duroux commented: 'Without that support from Barry we would not have anything else'.[512]

7.54 Families members also made additional suggestions to the committee such as opportunities for families to take part in short breaks or a camping weekend with the guidance of a support worker to assist the families to resolve some of the issues of the past together as a family, increased Aboriginal education in schools, and increased community education programs focusing on sexual assault awareness and reporting.[513]

7.55 Mr Toohey, together with a number of other inquiry participants, emphasised the importance of ensuring that any such support services are made available to family members both in Bowraville and beyond, such as to those family members in Tenterfield and Warwick.[514] As an example, the Duroux family advised the committee that following Clinton's trial, June Speedy, Clinton's mother, was transported home to Warwick and, aside from the limited support that

508 Submission no. 26, Indigenous Psychological Services, p 29.

509 Evidence, Dr Daniel Ryan, p 27.

510 Submission no. 22, Delphine Charles, p 2; Submission no. 13, Michelle Jarrett, p 2.

511 Evidence, Dr Daniel Ryan, p 27.

512 Evidence, Troy Duroux, 2 May 2014, p 63-64; Leonie Duroux, 2 May 2014, p 61; Submission no. 13, Michelle Jarrett, p 2.

513 Evidence, Troy Duroux and June Speedy, p 63; Submission no. 13, Michelle Jarrett, p 2.

514 Evidence, Barry Toohey, 1 May 204, p 25; Evidence, Ronella Jerome, 2 May 2014, p 4; Leonie Duroux, 2 May 2014, p 61; Leonie Duroux and June Speedy, 2 May 2014, p 64.

her family could give her, was then left to 'fend for herself' without any support services.[515] Mr Toohey noted that if such services were put in place, he would have a point of liaison in towns beyond Bowraville through which he could continue to provide support to family members from his base point in Bowraville.[516] Other family members considered that it would also be beneficial for more isolated family members spread further around Australia to be able to access and participate in support services as well.[517]

Committee comment

7.56 The loss of a loved one in any circumstance is a tragedy. The loss of three loved children to murder in a short period of time from a small community is indescribable. It is clear to the committee that in addition to the recommendations made in this report to address issues with the criminal justice system, there are also a number of recommendations to be made to try to redress, or even just acknowledge, the impacts of the murders on the families and their respective communities.

7.57 Several months after its hearings the committee revisited Bowraville on 29 August 2014 to meet with representatives from the families of Colleen, Evelyn and Clinton, as well as Barry Toohey, to informally discuss options for some potential recommendations. We wish to thank these family members and Mr Toohey for meeting with the committee, a number of whom were meeting with the committee for the third time.

7.58 One of the most apparent issues that arose from our meeting with the families, and the formal evidence received during the inquiry, is the importance of having appropriate support to assist families and communities during periods of grief and trauma. Unfortunately for these families, no such support was provided in the critical aftermath of the murders. Aside from a weekend workshop in 1998, the families were not provided with mental health services until 2005 - some 15 years after the first child went missing. Even though these services were provided so long after the murders, it is clear from the evidence that the families found this support extremely valuable.

7.59 The committee notes that two full-time mental health worker positions have been funded since 2006, however, we note with concern that the second position has been unfilled for some time. We acknowledge the evidence from inquiry participants regarding the significant pressure this has placed on the incumbent mental health worker, Barry Toohey. We also acknowledge the significant work carried out by Mr Toohey, whose ongoing guidance, care and support has been a pivotal factor in building resilience and cohesiveness amongst the three families.

7.60 The committee therefore urges the government to ensure that the position filled by Mr Toohey is made permanently available to the Bowraville community, and that a second mental health position is filled as soon as possible to ensure there is adequate mental health support available. Further, in order to ensure the suitability and cultural competence of the second worker, we recommend that the families be involved in the selection process, as they were during the selection of Mr Toohey.

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515 Evidence, Leonie Duroux and June Speedy, 2 May 2014, p 64.

516 Evidence, Barry Toohey, 1 May 204, p 25.

517 Evidence, Leonie Duroux, 2 May 2014, p 62.

Recommendation 10

That the NSW Government ensure that funding for the mental health worker position for the Bowraville community is made permanently available.

Recommendation 11

That the NSW Government ensure that the second mental health worker position for the Bowraville community be filled as a matter of priority, and that the families of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux be involved in the selection process.

7.61 The committee also notes the concerns raised by inquiry participants regarding the loss of the Aboriginal health clinic in Bowraville. We acknowledge that Durri Aboriginal Medical Centre has purchased a building in the Bowraville town centre in the hope of continuing its services to the community, however, note that there are genuine doubts as to whether that service will be able to open due to funding and building issues.

7.62 At the committee's meeting in Bowraville in August the family representatives and Barry Toohey expressed a strong preference for a health clinic to be reinstated on the Aboriginal Mission. It was suggested that the clinic provide a general medical service and be staffed by a general practitioner, nurse, health worker and receptionist, as well Barry Toohey and the second mental health worker, and that the funding for the clinic be isolated to Bowraville. The family members also expressed a desire for some of these positions, such as the general health worker and receptionist, to be filled by members of the Bowraville Aboriginal community who could be trained up in the positions.

7.63 The committee also notes that inquiry participants emphasised the importance of ensuring that support services are also made available to family members outside of Bowraville, the majority of whom reside in or around Tenterfield. This point was again emphasised to the committee at the August meeting.

7.64 The committee agrees that the families should have access to adequate health services, and strongly support the suggestion that an Aboriginal health clinic be reinstated on the Bowraville Mission. At the same time, however, we have not received evidence regarding the nature of the health services currently available or the service providers responsible for their delivery in these communities. We therefore recommend that a government working group be established to examine the adequacy of Aboriginal health services in Bowraville and Tenterfield, in consultation with the communities, and report back with a plan to address any deficits. The committee recommends that as part of this process, particular consideration should be given to reinstating a health clinic on the Bowraville Mission.

Recommendation 12

That the Minister for Health, Minister for Mental Health and Minister for Family and Community Services establish a working group to examine the adequacy of Aboriginal medical and mental health services in Bowraville and Tenterfield, in consultation with the communities, and report back with a plan to address any deficits. The working group should give particular consideration to the reinstatement of a permanent Aboriginal health clinic on the Bowraville Mission.

7.65 In regard to ongoing mental health services, the committee notes the suggestions raised by inquiry participants for family members to participate in support programs or family group counselling retreats to assist with the healing process. At the August meeting the family representatives identified the 'Red Dust Healing' program, which some of the family members have participated in, as a particularly effective program which equips participants with tools to help them deal with grief, depression and other problems.

7.66 The committee was informed that the three day workshop, which is followed by another workshop four to six weeks later, can be provided to around 10 participants at a time. It was suggested that the program could be undertaken as a family group counselling retreat at a suitable location, such as Valla (near Bowraville), as well as at a location near Tenterfield.

7.67 Noting the intergenerational impacts of the murders, the family representatives also expressed a desire for younger family members to participate in the program. It was suggested at the meeting that the program could perhaps be tailored to provide a one day workshop for participants aged 14-15 years.

7.68 The committee supports the suggestion that the Red Dust Healing program be made available to the families of Colleen, Evelyn and Clinton, including the younger family members from 14 years of age. We recommend that the government provide a funding grant to enable all of the family members to participate in the program in either the Bowraville or Tenterfield regions.

Recommendation 13

That the NSW Government fund the Red Dust Healing Program to make it available to family members of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux. The program should be provided in both the Bowraville and Tenterfield regions.

7.69 In addition to the Red Dust Healing program, it was suggested that the younger family members would benefit from having a youth centre in Bowraville. This idea was further elaborated at the August meeting where the family representatives told the committee that the Nambucca Youth Services Centre provides valuable and effective services, particularly for Aboriginal youth.

7.70 The committee supports the suggestion for youth services, particularly Aboriginal youth services, to be provided in Bowraville. Given the positive feedback regarding the Nambucca

Youth Service, it seems logical to expand that organisation to provide outreach services in Bowraville. Family members suggested that the youth service could be run out of a local school hall. The committee agrees that this may be a practical solution.

Recommendation 14

That the NSW Government fund the Nambucca Youth Services Centre to provide outreach services, particularly Aboriginal youth services, in Bowraville.

7.71 The committee also spoke to the family representatives about memorials for the children. There is already a memorial for the three children on the Bowraville Mission and a memorial park for Clinton in Tenterfield (the 'Clinton Speedy Memorial Park'). At the August meeting the family members said they would welcome funding for the beautification and upkeep of these memorials. In addition, representatives from Colleen's family requested that a memorial for Colleen be erected in Sawtell, where their family is from.

Recommendation 15

That the NSW Government provide funding to:

- beautify and maintain the memorial dedicated to Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux in Bowraville
- beautify and maintain the Clinton Speedy Memorial Park in Tenterfield, and
- erect a memorial to Colleen Walker-Craig in Sawtell.

The beautification or establishment of these memorials should be undertaken in consultation with the families of the three children.

7.72 Finally, a number of inquiry participants suggested that there should be some form of apology or acknowledgement to the families for their experience of the criminal justice system.

7.73 It is clear to the committee that the families' experience of the initial police investigation, trials and appeal process has been largely ill-fated to date. We have met with the families on several occasions throughout this inquiry, and can attest that even though these crimes occurred 23 years ago, the pain and suffering that they have endured remains very alive today, having been exacerbated by their experience of the justice system.

7.74 The committee takes this opportunity to formally acknowledge the pain and suffering experienced by the families of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux over the past 23 years following the deaths of the three children, and acknowledges that this was significantly and unnecessarily contributed to by the failings identified in this report.

Impact of Aboriginality on the case

7.75 As noted earlier, Dr Westerman gave evidence to the committee that the manner in which official institutions have responded, or not responded, to the Bowraville case has served to repeatedly 're-traumatise' the families of the three children in the years since their murders.[518] This lack of recognition and acknowledgement also became a very clear theme in the evidence provided to the committee by the families.

7.76 To demonstrate this point, Dr Westerman gave the example of the 'newsworthiness' of the Bowraville case. Dr Westerman asserted that, generally speaking, homicides involving multiple victims, white victims, vulnerable victims and those taking placing in wealthy neighbourhoods are amongst those most likely to receive news media attention. In contrast, the Bowraville case suffers from extreme marginalisation in that the community is relatively remote and therefore less 'relatable' to the average person on the street.[519] In support of this supposition, Dr Westerman cited an article by Malcolm Knox in *The Monthly* which made the following observation:

> ... In a country where the names of missing or murdered children remain indelibly in the national consciousness, why do the Bowraville children not figure? The Beaumont children, Samantha Knight, Jaidin Leskie – these and many more are embedded in the Australian lexicon of tragedy. Why are Colleen Walker, Evelyn Greenup and Clinton Speedy-Duroux not firmly fixed in our national memory?[520]

7.77 These sentiments have not been lost on the families of the three children. Barbara Greenup-Davis commented:

> It felt like we were out of sight and out of mind and it stayed that way—from the police to the media, to all the services that should have come but did not come.[521]

7.78 Leonie Duroux, who has been a lead point of contact for much of the families' efforts, has also struggled with the political response to the families' requests for assistance and answers:

> Very few of our elected representatives have stopped talking politics to us and been real and honest with us. Over the many years I've written letters, I've asked members not to reply with this is not my jurisdiction, however for the very few responses we've received over the years, most of them refer it on because it is not in their portfolio. I don't care whose portfolio it is, can't someone see that it is the lives of three innocent children they are playing their political games with. It's plain and simple. All we want is justice and for some responsibility to be taken for this.[522]

7.79 The views of the families were supported by Detective Inspector Jubelin, who discussed his experience in trying to draw people's awareness to the events that have occurred in Bowraville, stating '[w]e just cannot get people interested in it. That has been a frustration for everyone.'[523]

518 Evidence, Dr Tracey Westerman, 12 May 2014, p 47.

519 Submission no. 26, Indigenous Psychological Services, p 19.

520 Submission no. 26, Indigenous Psychological Services, p 19.

521 Evidence, Barbara Greenup-Davis, 2 May 2014, p 15.

522 Submission no. 7, Leonie Duroux, p 8.

523 Evidence, Detective Inspector Jubelin, 1 May 2014, p 9.

7.80 In December 2010, two months after the application for a retrial had been rejected, a large meeting and rally was held at the Mission in Bowraville to provide the family members and community with an opportunity to voice their dissatisfaction with the investigation and the criminal justice process to date and seek information and answers from relevant stakeholders in the process. The families advised the committee that they were very disappointed that although the Premier, Attorney General, DPP, Police Commissioner and local state and federal politicians were invited to attend, only Detective Jubelin and his team, a representative from Allens and Dr Diana Eades, a sociolinguist from the University of New England who assisted the police, chose to attend.[524]

7.81 The committee heard that it has been particularly important to the families that those in authority make the time to visit Bowraville as, in their experience, it is only when individuals external to the community have visited the town to familiarise themselves with the facts of the case that they have come to appreciate the merits of the case.[525] Leonie therefore spoke of her frustration that the families' invitations have been persistently refused:

> Countless times we have invited the decision makers to come to Bowraville and see where the kids went missing from and where they were found and where Colleen's clothing was found. Time and time again our invitations have been refused. My belief is that unless you come to Bowraville it is impossible to make an informed decision about the matter. Coming to Bowraville puts everything into perspective.[526]

7.82 The evidence provided to the committee highlighted a persistent perception amongst the families that the disinterest of those in authority and the broader community over the course of the past 23 years is directly attributable to their Aboriginality. Michelle Jarrett stated:

> The actual murders were not a black-white issue. The actual murder was just an evil person with a cold heart and no morals. But the way we were treated and the way it was investigated was a black/white issue.[527]

7.83 Helen Duroux said that the disinterest from those in authority has left the family feeling worthless:

> It makes you feel like why bother and you have to admit and think, well, we are only Aboriginals, nobody gives a stuff about justice, just put us on the backburner. It makes you feel worthless.[528]

7.84 The committee received evidence that it has been particularly hard for elders in the community, such as Elaine Walker, who relate the treatment of the three families to the racial prejudice they have experienced since they were children in a segregated town:

> The saddest thing today is that we are still being judged by the colour of our skin and looking back our children were judged wrongly then by the colour of their skin as the proper procedures were not carried out. Today we are still suffering.[529]

524 Submission no. 7, Leonie Duroux, p 6.

525 Submission no. 7, Leonie Duroux, p 9.

526 Submission no. 7, Leonie Duroux, p 9.

527 Submission no. 13, Michelle Jarrett, p 2.

528 Evidence, Helen Duroux, 2 May 2014, p 9.

529 Submission no. 11a, Elaine Walker, p 2.

7.85 Leonie Duroux compared the reaction to the Bowraville case to the reaction to other high-profile murder cases involving white victims, such as the Daniel Morcombe case, and questioned the marked difference in response:

> … the Premier of Queensland actually marched with the Morcombe family a few years ago. I have invited the Premier of New South Wales to Bowraville. I have invited many politicians quite a number of times to come to Bowraville. We had a meeting in 2010 to which I invited quite a number of politicians and not one turned up. I think only one or two replied to my invitation. So that sends a very powerful message to the community that no-one really cares. No-one gives a stuff. And yet you see the family of this boy—and, as Helen says, I do not want to take away from their grief; what they have been through is terrible—and you compare what happened in that case. It is really sad to see the difference. It just reinforces our belief that you have Aboriginal kids on one hand and white kids on the other ...[530]

7.86 The families' perception was reiterated by other individuals who have worked within the community over the years, such as Dr Westerman[531] and Detectiver Inspector Jubelin:

> The families frequently voice their opinion that they are being treated this way because of their Aboriginality. It appears to them that the same racial divide and disrespect they suffered in the 1990s, which resulted in the poor quality of the original investigation, is still occurring today with the lack of respect they have been shown. I personally have witnessed incidents and events over the past 17 years working on this matter that has shown a bias against this group.
>
> The type of things I am referring to can be very subtle right through to outright racism. They can include racial typecasting from people who misunderstand or are ignorant of cultural issues in an Indigenous Community, through to open bigotry and racism.[532]

Rebuilding the Bowraville community

7.87 A number of witnesses spoke of the detrimental impacts that the murders of Colleen, Evelyn and Clinton have had beyond the immediate family members and into the broader Bowraville community.[533]

7.88 Thomas Duroux reflected that the failure to call anyone to account has torn people apart, rather than bringing them together:

> As a result of the murders and the failure to call anyone to account, the community started to divide. It tore people apart rather than bring them together. If we had justice, maybe things would change around the town. Justice would be something for the whole town, not just the families.[534]

530 Evidence, Leonie Duroux, 2 May 2014, pp 9-10.

531 Evidence, Dr Tracy Westerman, 12 May 2014, p 47.

532 Submission no. 20, NSW Police Force, p 18.

533 Evidence, Karen Kelly, 2 May 2014, pp 52-53.

534 Submission no. 10, Thomas Duroux, p 1.

7.89 Elaine Walker expressed the view that fear is an overriding factor in the fractures that still remain in the community:

> A lot of people are still afraid, even after over twenty years. I want the community to go back to how it was before the murders, when we were more united. We need closure for our next generation.[535]
>
> Parents, who were only children at the time of the murders, are still afraid because the person who killed them is still out there.[536]

7.90 Barry Toohey informed the committee about events that followed when Clinton Speedy-Duroux's family attempted to erect a wooden plaque in memorial of Clinton at the site where his body located:

> When Clinton's family decided to establish a 'memorial' (a wooden plaque on a timber pole) at the site where his body was found, the memorial sign was vandalised within 1 week of it being placed there. I found it pulled out of the ground and thrown about 20 metres away. The family then decided to concrete the sign into the ground. About a week later I found that the timber pole had been broken off at the base and the memorial sign was nowhere to be found.
>
> A meeting with the local police inspector and the family ensued. I found the Inspectors demeanour to be quite patronising and unhelpful as he suggested that the vandalism had been provoked (by the Family) in that the wording on the memorial ('we want justice') would be offensive to some people.
>
> A more permanent memorial was made from steel has since been erected. This has not been vandalised. I believe that this is due to the fact that the local paper did a story on the vandalism and a 'smoking ceremony' was conducted when the more permanent structure was erected.[537]

7.91 The committee was advised that there are already some programs operating in the community to try to encourage unity and also address racial tensions in the community – for example, programs operating in the local school.[538] However, inquiry participants suggested that more could be done to bring the community together and challenge underlying racial tensions which, despite the years since the murders, still remain within the town and often manifest in subtle ways.[539]

Alleged misappropriation of funds

7.92 Another issue raised during the inquiry concerned local organisations which had allegedly made submissions to government agencies for funding to support the families of the three children, however these applications were generally not made in consultation with the families and the families believe that the subsequent funding is only reaching certain sections of the

535 Submission no. 11, Elaine Walker, p 1.

536 Submission no. 11, Elaine Walker, p 1.

537 Submission no. 3, Barry Toohey, p 5.

538 Evidence, Daniel Ryan, 1 May 2014, p 26.

539 Evidence, Barry Toohey, 1 May 2015, p 25; Evidence, Lana Kelly, 2 May 2014, p 53; Michelle Jarrett and Penny Stadhams, 2 May 2014, pp 45-46; Janette Blainey, 2 May 2014, p 55.

community. Family members were extremely concerned that they, and the children's murders, were being exploited by others for financial gain.[540] Mr Toohey expressed a similar concern.[541]

Intergenerational impacts

> The children and grandchildren feel what we feel and the sadness has been dripping through all the family, affecting generation after generation.[542]
>
> *- Elaine Walker, Colleen's aunt*

7.93 Many inquiry participants spoke of their fear that if the three murders remained unresolved, the 'legacy of sadness'[543] connected with the case would be passed on from generation to generation.[544]

7.94 Indeed, in his capacity as a professional mental health clinician, Barry Toohey expressed the view that 'unless the families get justice then the unresolved grief and concomitant stress related illnesses will continue to become intergenerational and entrenched (which to some extent has already started to occur)'.[545]

7.95 For some family members, this concern stems from their desire to ensure that their children do not have to experience the pain that they had felt.[546] Other family members were children themselves who had witnessed the pain of the older family members and feared that the burden would soon be theirs, and eventually their children's.[547] Clinton's nephew Marbuck (Jnr) told the committee that he was worried that his family's fight was going to become his fight for an uncle he had never been fortunate enough to have the chance to meet:

> Dad lost his battle with Motor Neurone Disease when I was 14 years old. He never got to see Uncle Bubby's killer brought to justice. All my life I have been watching my family fight for justice and I'm 18 years old and worried this is going to become my fight for an uncle I never even had the chance to meet. Something should have already been done and something needs to be done now before they see it happen again and before it is ignored all over again.[548]

7.96 Marbuck (Jnr)'s brother, Elijah, echoed similar sentiments:

> This has affected me in a lot of ways and it shouldn't … because I'm 16 and I wasn't even alive when my uncle got murdered. This has affected me in ways like over

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540 Evidence, Karen Kelly, 2 May 2014, p 54; Submission no. 11a, Elaine Walker, p 1; Evidence, Michelle Jarrett and Rebecca Stadhams, May 2014, pp 48-49.

541 Evidence, Barry Toohey, 1 May 2014, p 28.

542 Submission no. 11, Elaine Walker, p 1.

543 Submission no. 22, Delphine Charles, p 2.

544 Submission no. 13, Michelle Jarrett, p 1; Evidence, Karen Kelly, 2 May 2014, p 54.

545 Submission no. 3, Barry Toohey, p 8.

546 Submission no. 6, Troy Duroux, p 1; Submission no. 22, Delphine Charles, p 2; Submission no. 11, Elaine Walker, p 1; Evidence, Clarice Greenup, 2 May 2014, p 17.

547 Submission no. 29, Misty Kelly, pp 1-2.

548 Submission no. 5, Marbuck Duroux, p 1.

> panicking, if I'm walking around I am always a bit more hesitant and anxious than the other people in my group, it doesn't matter if it is daylight or night time, I always walk around with the Bowraville murders, the murder of Uncle Bubby in the back of my mind.[549]
>
> … While there is still a breath in me or my brother or the next generations of these families for that matter, we will never give up.[550]

7.97 Inquiry participants were adamant that the only way forward both for themselves and their families was for there to be 'justice'.

Justice

7.98 Inquiry participants left the committee in no doubt that, for them, justice would be achieved if the evidence relating to all three murders was considered together by a court.[551]

7.99 Karen Kelly said that if the three cases were heard together, the families would at least know that they had done their best for the children:

> At least if everything was heard together, we could have some kind of sense of, "Well, we've done our best. People out there, the wider community, have actually heard us and they've actually realised that for us to know what's happened to the three kids is for everything to be heard together, and everything then will become clearer how the whole three were connected and how everything ties into together. With them being heard separately, things have been missed and there are gaps in between ...[552]

7.100 The committee heard that, for the families, it is vital that a jury be presented with the totality of the evidence, with Michelle Jarrett observing that '[y]ou cannot tell a story unless you know all of it'.[553]

7.101 Detective Inspector Jubelin illustrated the importance of this objective by providing a comparison between the Bowraville cases and the Ivan Milat serial killings, the trial for which, in his view, was unlikely to have resulted in a conviction had the evidence relating to each of the murders been heard separately:

> I can say on good authority that if Ivan Milat's trials were separated there is a strong likelihood that he would be acquitted of all the offences and perhaps be walking the streets. That is what the Bowraville people are facing. It is very unfortunate. I hope this committee or inquiry can bring some form of closure, but I know from the

549 Submission no. 8, Elijah Duroux, p 1.

550 Submission no. 8, Elijah Duroux, p 1.

551 Submission no. 2, Aboriginal Catholic Ministry, p 2; Submission no. 6, Troy Duroux, p 1; Submission no. 11a, Elaine Walker, pp 22-3; Submission no. 22, Ms Delphine Charles, p 3; Submission no. 29, Misty Kelly, p 2; Evidence, Leonie Duroux, 2 May 2014, p 4; Evidence, Ronella Jerome, 2 May 2014, p 9; Evidence, Barbara Greenup-David, 2 May 2014, p 12; Evidence, Penny Stadhams, 2 May 2014, p 43; Evidence, Lana Kelly, 2 May 2014, p 56; Evidence, Professor Larissa Behrendt, 12 May 2014, p 36; Submission no. 19, Allens, p 1.

552 Evidence, Karen Kelly, 2 May 2014, p 56.

553 Evidence, Michelle Jarrett, 2 May 2014, p 49.

> families' point of view, having worked with them for such a long time, that closure will come in the form of justice for the murder of their children.[554]

7.102 Detective Jubelin added:

> In regard to the actual investigation and how it impacts on the family - and this comes to the very heart of the matter - could these matters have been solved? Yes, they could have. Should they have been solved? Yes, they should have. I think they still can be solved. Based on my experience as a homicide detective, I feel that we already have the evidence available to convict this person at court. But that would be on the basis that all three matters were heard at court simultaneously so all the evidence was heard together. That has not happened, and I know that has been a frustration of the families for a very long time.[555]

7.103 Marbuck Duroux told the committee that justice would also be a means through which he would feel that his father's battle had been brought to some finality and would alleviate the burden that will otherwise pass on to the younger members of the family:

> I have been asked what I would like to see out of this inquiry and the answer for me [is] simple. Justice! Something that my father should have seen in his lifetime, something that me and my brother shouldn't have to keep fighting for.[556]

554 Evidence, Detective Inspector Jubelin, 1 May 2014, p 3.

555 Evidence, Detective Inspector Jubelin, 1 May 2014, p 2.

556 Submission no. 5, Marbuck Duroux, p 1.

Chapter 8 Conclusion

8.1 The committee is mindful that this has been a particularly complex inquiry which has brought back painful and inherently personal memories for the family members involved.

8.2 The committee acknowledges the strength, fortitude and tenacity shown by the three families over a protracted period of frustration and uncertainty. Like others external to the families who provided evidence during the inquiry, the committee has been struck by the dignified yet determined manner in which the families have approached their efforts to achieve justice for Colleen, Evelyn and Clinton. Having met with the families to discuss firsthand their stories, the committee can speak to the suffering and raw emotion that was so clearly evident, both amongst the individual families and those who have supported them.

8.3 The inquiry has touched on a broad range of issues, from police attitudes and responses, to the operation of the criminal justice system, the changing landscape of evidentiary law, race, the role of health and other support services in assisting communities to respond to disaster and hardship, interfamilial relationships and the complex social fabric of a small country town such as Bowraville. The committee has made a number of recommendations which we hope will go some way to redressing some of the systemic flaws that were shown to have compounded the families' experiences, particularly their interaction with the justice system and the need to build on the effective but limited support networks already in place.

8.4 Nevertheless, the families have left the committee in no doubt that, for them, they will not rest until the evidence relating to the three cases has been heard, together, by a court of law.

8.5 In view of the concerns raised during the inquiry regarding the admissibility of much of the evidence referred to in the family's application for a retrial, the committee has recommended (at Recommendation 8) that the government act promptly to clarify the definition of 'adduced' within s 102 of the *Crimes (Appeal and Review) Act 2001* with particular consideration, amongst other things, of the ramifications of defining adduced as 'admitted'.

8.6 It is important to note, however, that even if the government determines that adduced can be defined as 'admitted', the committee is by no means convinced that this will be the 'silver bullet' solution to the obstacles faced by the families in their efforts to have the cases retried. There are a number of varied and stringent legal tests that must still be met in order for an acquittal to be quashed and a retrial ordered. The families have repeatedly called on the committee and the government to 'be real' with them, and to not give false hope. For this reason, we reiterate that there are substantial hurdles remaining in the way of a retrial.

8.7 The families have told the committee that on many previous occasions, their requests for information, assistance, justice and even just to be heard have fallen on deaf ears. The committee would like to make clear to the families that, on this occasion, the committee has listened. The committee has approached this inquiry with a sincere will to assist the families, as best it can within the parameters of its terms of reference, and we are hopeful that by

providing the families with a forum in which to share their stories, and through the recommendations made, this report will go some way towards that.

8.8 The committee extends its sincere thanks to all of those who have participated in the inquiry, particularly the families of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux.

Appendix 1 Submissions

No	Author
1	Dr Vivienne Tedeschi
2	Aboriginal Catholic Ministry
3	Darrimba Maarra Aboriginal Health Clinic
4	Confidential
5	Mr Marbuck Duroux
6	Mr Troy Duroux
7	Ms Leonie Duroux
8	Mr Elijah Duroux
9	Ms Marion Giles
10	Mr Thomas Duroux
11	Ms Elaine Walker
11a	Ms Elaine Walker
12	Confidential
13	Mrs Michelle Jarrett
14	Professor Diana Eades
15	Dr Daniel Ryan
16	Mr Enda O'Callaghan
17	Confidential
17a	Ms Rebecca Stadhams
18	Confidential
19	Allens Lawyers
20	NSW Police
21	Mr Donald Binge
22	Ms Delphine Charles
23	NSW Government
24	Ms Helen Duroux
25	Ms June Speedy
26	Dr Tracy Westerman
27	Confidential
27a	Confidential
28	Ms Janette Blainey
28a	Confidential

No	Author
29	Ms Misty Kelly
30	Ms Penny Stadhams

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Thursday 1 May 2014 Council Chambers, Nambucca Shire Council, Macksville	Detective Inspector Gary Jubelin	Detective Inspector, NSW Police Force
	Dr Diana Eades	Adjunct Professor, Fellow of the Australian Academy of the Humanities, School of Behavioural, Cognitive and Social Sciences, University of New England
	Dr Daniel Ryan	Bowraville Aboriginal Health Clinic
	Mr Barry Toohey	Darrimba Maarra Aboriginal Health Clinic
	Fr Paul Gerard Sullivan	Aboriginal Catholic Ministry
Monday 12 May 2014 Macquarie Room, Parliament House, Sydney	Prof Larissa Behrendt	Professor of Law Jumbunna Indigenous House of Learning, University of Technology
	Mr Craig Longman	Senior Researcher, Jumbunna IHL (Research), University of Technology
	Mr Richard Harris	Partner, Allens
	Ms Alexandra Mason	Senior Associate, Allens
	Dr Tracy Westerman	Managing Director, Indigenous Psychological Services

Appendix 3 Site visit – Bowraville - 29 August 2014

The committee met with Mr Barry Toohey from Darrimba Maarra Aboriginal Health Clinic and the following family representatives to discuss some potential recommendations for the committee's report:

- Ms Leonie Duroux
- Mr Thomas Duroux
- Ms Elaine Walker
- Ms Michelle Jarrett
- Ms Clarice Greenup
- Ms Muriel Craig
- Ms Paula Craig
- Mr Lucas Craig.

Appendix 4 Answers to questions on notice

- Professor Diana Eades, University of New England
- Detective Inspector Gary Jubelin, NSW Police
- Allens Lawyers

Appendix 5 *Crimes (Appeal and Review) Act 2001* (Part 8)

Part 8 Acquittals

Division 1 Preliminary

98 Definitions

(1) In this Part:

administration of justice offence means any of the following offences:

(a) bribery of, or interference with, a juror, witness or judicial officer,

(b) perversion of (or conspiracy to pervert) the course of justice,

(c) perjury.

life sentence offence means murder or any other offence punishable by imprisonment for life.

Note. On the enactment of this Part, the following offences were offences punishable by imprisonment for life:

(a) murder (section 19A of the *Crimes Act 1900*),

(b) an offence under section 61JA (1) of the *Crimes Act 1900* (Aggravated sexual assault in company),

(c) an offence under section 23 (2), 24 (2), 25 (2), 25 (2A), 26, 27 or 28 of the *Drug Misuse and Trafficking Act 1985*, being an offence that relates to a large commercial quantity of certain prohibited plants or drugs.

15 years or more sentence offence means an offence punishable by imprisonment for life or for a period of 15 years or more.

(2) For the purposes of this Part, the retrial of an acquitted person for an offence includes a trial if the offence is not the same as the offence of which the person was acquitted.

(3) In this Part, a reference to the proceedings in which a person was acquitted includes, if they were appeal proceedings, a reference to the earlier proceedings to which the appeal related.

Division 2 Retrial after acquittal for very serious offence

99 Application of Division

(1) This Division applies where:

(a) a person has been acquitted of an offence, and

(b) according to the rules of law relating to double jeopardy (including rules based on abuse of process), the person is thereby precluded or may thereby be precluded from being retried for the same offence, or from being tried for some other offence, in proceedings in this State.

Note. Under section 100 a person to whom this Division applies can only be retried for a life sentence offence (in the case of fresh or compelling evidence). Under section 101 a person to whom this Division applies can only be retried for a 15 years or more sentence offence (in the case of a tainted acquittal).

(2) This section extends to a person acquitted in proceedings outside this State of an offence under the law of the place where the proceedings were held. However, this section does not so extend if the law of that place does not permit that person to be retried and the application of this Division to such a retrial is inconsistent with the Commonwealth Constitution or a law of the Commonwealth.

(3) This section extends to a person acquitted before the commencement of this Division.

100 Court of Criminal Appeal may order retrial—fresh and compelling evidence

(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.

(2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).

(3) The Court of Criminal Appeal may order a person to be retried for a life sentence offence under this section even if the person had been charged with and acquitted of manslaughter or other lesser offence.

(4) The Court of Criminal Appeal cannot order a person to be retried for a life sentence offence under this section where the person had been charged with and acquitted of the life sentence offence but had been convicted instead of manslaughter or other lesser offence.

101 Court of Criminal Appeal may order retrial—tainted acquittals

(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 15 years or more sentence offence if satisfied that:

(a) the acquittal is a tainted acquittal, and

(b) in all the circumstances it is in the interests of justice for the order to be made.

(2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).

(3) The Court of Criminal Appeal may order a person to be retried for a 15 years or more sentence offence under this section even if the person had been charged with and acquitted of a lesser offence.

102 Fresh and compelling evidence—meaning

(1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.

(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.

(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.

(4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

103 Tainted acquittals—meaning

(1) This section applies for the purpose of determining under this Division whether the acquittal of an accused person is a tainted acquittal.

(2) An acquittal is ***tainted*** if:

(a) the accused person or another person has been convicted (in this State or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted, and

(b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

(3) An acquittal is not a tainted acquittal if the conviction for the administration of justice offence is subject to appeal as of right.

(4) If the conviction for the administration of justice offence is, on appeal, quashed after the Court of Criminal Appeal has ordered the acquitted person to be retried under this Division because of the conviction, the person may apply to the Court to set aside the order and:

(a) to restore the acquittal that was quashed, or

(b) to restore the acquittal as a bar to the person being retried for the offence,

as the case requires.

104 Interests of justice—matters for consideration

(1) This section applies for the purpose of determining under this Division whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.

(2) It is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances.

(3) The Court is to have regard in particular to:

(a) the length of time since the acquitted person allegedly committed the offence, and

(b) 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.

105 Application for retrial—procedure

(1) Not more than one application for the retrial of an acquitted person may be made under this Division in relation to an acquittal.

(1A) An application may be made for a further retrial of a person acquitted in a retrial under this Part but only if it is made on the basis that the acquittal at the retrial was tainted.

(2) An application for the retrial of an acquitted person cannot be made under this Division unless the person has been charged with the offence for which a retrial is sought or a warrant has been issued for the person's arrest in connection with such an offence.

Note. Section 109 requires the Director of Public Prosecutions' approval for the arrest of the accused or for the issue of a warrant for his or her arrest.

(3) The application is to be made not later than 28 days after the person is so charged with that offence or the warrant is so issued for the person's arrest. The Court of Criminal Appeal may extend that period for good cause.

(4) The Court of Criminal Appeal must consider the application at a hearing.

(5) The person to whom the application relates is entitled to be present and heard at the hearing (whether or not the person is in custody). However, the application can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.

(6) The powers of the Court of Criminal Appeal under section 12 of the *Criminal Appeal Act 1912* may be exercised in connection with the hearing of the application.

(7) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned should be tried on the same indictment.

(8) If the Court of Criminal Appeal determines in proceedings on an application under this Division that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.

106 Retrial

(1) An indictment for the retrial of a person that has been ordered under this Division cannot, without the leave of the Court of Criminal Appeal, be presented after the end of the period of 2 months after the order was made.

(2) The Court must not give leave unless it is satisfied that:

(a) the prosecutor has acted with reasonable expedition, and

(b) there is good and sufficient cause for the retrial despite the lapse of time since the order was made.

(3) If, after the end of the period of 2 months after an order for the retrial of an accused person was made under this Division, an indictment for the retrial of the person has not been presented or has been withdrawn or quashed, the person may apply to the Court of Criminal Appeal to set aside the order for the retrial and:

(a) to restore the acquittal that was quashed, or

(b) to restore the acquittal as a bar to the person being tried for the offence,

as the case requires.

(4) If the order is set aside, a further application cannot be made under this Division for the retrial of the accused person in respect of the offence concerned.

(5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person or, as the case requires, that it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

Division 3 Appeals on questions of law

107 Directed jury acquittals or acquittals in trials without juries

(1) This section applies to the acquittal of a person:

(a) by a jury at the direction of the trial Judge, or

(b) by a Judge of the Supreme Court or District Court in criminal proceedings for an indictable offence tried by the Judge without a jury, or

(c) by the Supreme Court or the Land and Environment Court in its summary jurisdiction in any proceedings in which the Crown was a party.

(2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any such acquittal on any ground that involves a question of law alone.

(3) An appeal may be made within 28 days after the acquittal or, with the leave of the Court of Criminal Appeal, may be made after that period.

(4) The accused person is entitled to be present and heard at the appeal. However, the appeal can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.

(5) The Court of Criminal Appeal may affirm or quash the acquittal appealed against.

(6) If the acquittal is quashed, the Court of Criminal Appeal may order a new trial in such manner as the Court thinks fit. For that purpose, the Court may (subject to the *Bail Act 2013*) order the detention or return to custody of the accused person in connection with the new trial.

(7) If the acquittal is quashed, the Court of Criminal Appeal cannot proceed to convict or sentence the accused person for the offence charged nor direct the court conducting the new trial to do so.

(8) This section does not apply to a person who was acquitted before the commencement of this section.

Note. See section 5C of the *Criminal Appeal Act 1912* for appeals against the quashing of an indictment.

108 Appeals not affecting existing acquittal

(1) This section applies to the acquittal of a person:

(a) in any proceedings tried on indictment (whether in respect of the whole or part of the indictment), or

(b) in any proceedings tried by the Supreme Court or the Land and Environment Court in its summary jurisdiction in which the Crown was a party.

(2) The Attorney General or the Director of Public Prosecutions may submit for determination by the Court of Criminal Appeal any question of law arising at or in connection with the trial (together with a statement of the circumstances out of which the question arose). The Court is to hear and determine any such question.

(3) The determination by the Court of Criminal Appeal of the question submitted does not in any way affect or invalidate the verdict of acquittal or any other decision given at the trial.

(4) Any person charged at the trial or affected by the decision is entitled to be heard before the Court of Criminal Appeal on the determination of the question submitted. If the person does not propose to be represented, the Attorney General or Director of Public Prosecutions is to instruct (and pay the reasonable costs of) counsel to argue the question before the Court on behalf of the person.

(5) The hearing and determination of any question under this section is to be held in camera.

(6) The following is not to be published:

(a) any report of a submission made under subsection (2),

(b) any report of proceedings under this section that discloses the identity of the person charged at the trial or affected by the decision given at the trial.

Any such publication is punishable as a contempt of the Supreme Court.

Division 4 Miscellaneous

109 Authorisation of police investigations

(1) This section applies to any police investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence under Division 2.

(2) For the purposes of this section, a police investigation is an investigation that involves:

(a) any arrest, questioning or search of the acquitted person (or the issue of a warrant for the arrest of the person), or

(b) any forensic procedure carried out on the person or any search or seizure of premises or property of or occupied by the person,

whether with or without his or her consent.

(3) A police officer is not to carry out or authorise a police investigation to which this section applies unless the Director of Public Prosecutions:

(a) has advised that in his or her opinion the acquittal would not be a bar to the trial of the acquitted person in this State for the offence, or

(b) has given his or her written consent to the police investigation on the application in writing of the Commissioner or a Deputy Commissioner of Police.

(4) The Commissioner or a Deputy Commissioner of Police may make an application for the police investigation only if satisfied that relevant evidence for the purposes of an application for a retrial under Division 2 has been obtained or is likely to be obtained as a result of the investigation.

(5) The Director of Public Prosecutions may not give his or her consent to the police investigation unless satisfied that:

(a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation, and

(b) it is in the public interest for the investigation to proceed.

110 (Repealed)

111 Restrictions on publication

(1) A person must not publish any matter for the purpose of identifying or having the effect of identifying:

(a) an acquitted person the subject of a police investigation referred to in section 109 (or of an application for authority for such an investigation), or

(b) an acquitted person the subject of an application for a retrial under Division 2 or an appeal under Division 3, or

(c) the acquitted person the subject of an order for retrial under this Part or who is being retried under this Part,

unless the publication is authorised by order of the Court of Criminal Appeal or of the court before which the acquitted person is being retried.

(2) The relevant court may make an order under this section only if the court is satisfied that it is in the interests of justice to do so.

(3) Before making an order under this section, the Court is to give the acquitted person a reasonable opportunity to be heard on the application for the order.

(4) The Court may at any time vary or revoke an order under this section.

(5) The prohibition on publication under this section ceases to have effect (subject to any order under this section):

(a) when there is no longer any step that could be taken which would lead to the acquitted person being retried under this Part, or

(b) if the acquitted person is retried under this Part, at the conclusion of the trial,

whichever is the earliest.

(6) Nothing in this section affects any prohibition of the publication of any matter under any other Act or law.

(7) A contravention of the prohibition on publication under this section is punishable as contempt of the Supreme Court.

112 Other appeal or review rights not affected

(1) Nothing in this Part affects a right of appeal in respect of a person's acquittal on the ground of mental illness where mental illness was not set up as a defence by the person, as provided by section 5 (2) or 5AA (2) of the *Criminal Appeal Act 1912*.

(2) Nothing in this Part affects a right of appeal or review under this or any other Act or law in respect of a person's acquittal.

Appendix 6 UK Act (Part 10, ss 75-79)

Changes to legislation: *There are outstanding changes not yet made by the legislation.gov.uk editorial team to Criminal Justice Act 2003. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)*

Criminal Justice Act 2003

2003 CHAPTER 44

PART 10

RETRIAL FOR SERIOUS OFFENCES

Cases that may be retried

75 Cases that may be retried

(1) This Part applies where a person has been acquitted of a qualifying offence in proceedings—

(a) on indictment in England and Wales,

(b) on appeal against a conviction, verdict or finding in proceedings on indictment in England and Wales, or

(c) on appeal from a decision on such an appeal.

(2) A person acquitted of an offence in proceedings mentioned in subsection (1) is treated for the purposes of that subsection as also acquitted of any qualifying offence of which he could have been convicted in the proceedings because of the first-mentioned offence being charged in the indictment, except an offence—

(a) of which he has been convicted,

(b) of which he has been found not guilty by reason of insanity, or

(c) in respect of which, in proceedings where he has been found to be under a disability (as defined by section 4 of the Criminal Procedure (Insanity) Act 1964 (c. 84)), a finding has been made that he did the act or made the omission charged against him.

(3) References in subsections (1) and (2) to a qualifying offence do not include references to an offence which, at the time of the acquittal, was the subject of an order under section 77(1) or (3).

(4) This Part also applies where a person has been acquitted, in proceedings elsewhere than in the United Kingdom, of an offence under the law of the place where the proceedings were held, if the commission of the offence as alleged would have

amounted to or included the commission (in the United Kingdom or elsewhere) of a qualifying offence.

(5) Conduct punishable under the law in force elsewhere than in the United Kingdom is an offence under that law for the purposes of subsection (4), however it is described in that law.

(6) This Part applies whether the acquittal was before or after the passing of this Act.

(7) References in this Part to acquittal are to acquittal in circumstances within subsection (1) or (4).

(8) In this Part "qualifying offence" means an offence listed in Part 1 of Schedule 5.

Annotations:

Commencement Information

I1 S. 75 wholly in force at 4.4.2005, see s. 336(3) and S.I. 2005/950, **art. 2(1)**, Sch. 1 para. 5 (subject to art. 2(2), Sch. 2)

Application for retrial

76 Application to Court of Appeal

(1) A prosecutor may apply to the Court of Appeal for an order—

(a) quashing a person's acquittal in proceedings within section 75(1), and

(b) ordering him to be retried for the qualifying offence.

(2) A prosecutor may apply to the Court of Appeal, in the case of a person acquitted elsewhere than in the United Kingdom, for—

(a) a determination whether the acquittal is a bar to the person being tried in England and Wales for the qualifying offence, and

(b) if it is, an order that the acquittal is not to be a bar.

(3) A prosecutor may make an application under subsection (1) or (2) only with the written consent of the Director of Public Prosecutions.

(4) The Director of Public Prosecutions may give his consent only if satisfied that—

(a) there is evidence as respects which the requirements of section 78 appear to be met,

(b) it is in the public interest for the application to proceed, and

(c) any trial pursuant to an order on the application would not be inconsistent with obligations of the United Kingdom under Article 31 or 34 of the Treaty on European Union relating to the principle of *ne bis in idem*.

(5) Not more than one application may be made under subsection (1) or (2) in relation to an acquittal.

Annotations:

Commencement Information

I2 S. 76 wholly in force at 4.4.2005, see s. 336(3) and S.I. 2005/950, **art. 2(1)**, Sch. 1 para. 5 (subject to art. 2(2), Sch. 2)

77 Determination by Court of Appeal

(1) On an application under section 76(1), the Court of Appeal—

(a) if satisfied that the requirements of sections 78 and 79 are met, must make the order applied for;

(b) otherwise, must dismiss the application.

(2) Subsections (3) and (4) apply to an application under section 76(2).

(3) Where the Court of Appeal determines that the acquittal is a bar to the person being tried for the qualifying offence, the court—

(a) if satisfied that the requirements of sections 78 and 79 are met, must make the order applied for;

(b) otherwise, must make a declaration to the effect that the acquittal is a bar to the person being tried for the offence.

(4) Where the Court of Appeal determines that the acquittal is not a bar to the person being tried for the qualifying offence, it must make a declaration to that effect.

Annotations:

Commencement Information

I3 S. 77 wholly in force at 4.4.2005, see s. 336(3) and S.I. 2005/950, **art. 2(1)**, Sch. 1 para. 5 (subject to art. 2(2), Sch. 2)

78 New and compelling evidence

(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.

(2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).

(3) Evidence is compelling if—

(a) it is reliable,

(b) it is substantial, and

(c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.

(4) The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

(5) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

Annotations:

Commencement Information

I4 S. 78 wholly in force at 4.4.2005, see s. 336(3) and S.I. 2005/950, **art. 2(1)**, Sch. 1 para. 5 (subject to art. 2(2), Sch. 2)

79 Interests of justice

(1) The requirements of this section are met if in all the circumstances it is in the interests of justice for the court to make the order under section 77.

(2) That question is to be determined having regard in particular to—

(a) whether existing circumstances make a fair trial unlikely;

(b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;

(c) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition;

(d) whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.

(3) In subsection (2) references to an officer or prosecutor include references to a person charged with corresponding duties under the law in force elsewhere than in England and Wales.

(4) Where the earlier prosecution was conducted by a person other than a prosecutor, subsection (2)(c) applies in relation to that person as well as in relation to a prosecutor.

Annotations:

Commencement Information

I5 S. 79 wholly in force at 4.4.2005, see s. 336(3) and S.I. 2005/950, **art. 2(1)**, Sch. 1 para. 5 (subject to art. 2(2), Sch. 2)

Appendix 7 Minutes

Minutes no. 27
Wednesday 27 November 2013
Standing Committee on Law and Justice
Members' Lounge, Parliament House, 1.11 pm

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Previous minutes
Resolved, on the motion of Mrs Mitchell: That draft Minutes No. 26 be confirmed.

3. ***

4. Inquiry into the family response to the murders in Bowraville
The Chair tabled the following terms of reference for an inquiry into the family response to murders in Bowraville, referred by the House on 26 November 2013:

> That the Standing Committee on Law and Justice inquire into and report on the family response to the murders in Bowraville of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux and in particular, give the families the opportunity to appear before the committee and detail the impact the murders of these children have had on them and their community

Resolved, on the motion of Mr Moselmane:

- That an advertisement containing the full terms of reference, calling for submissions, and indicating that the Committee will not be conducting a murder investigation or a cross-examination of the police case, be placed in the Mid North Coast Observer, and that a media release advertising the Inquiry be distributed to all media outlets in the State
- That the closing date for submissions be Friday 28 February 2014
- That the Secretariat email members with a list of stakeholders to be invited to make written submissions, and that members be invited to nominate additional stakeholders by Wednesday 5 December 2013
- That the Committee hold at least one day of hearings in Bowraville in early April with the dates to be confirmed by the Secretariat in consultation with the Chair and subject to the availability of members and witnesses
- That family members of the victims be invited as witnesses, and any other witnesses be determined by the Secretariat in consultation with the Chair and the Committee
- That the Committee authorise the publication of all submissions to the Inquiry into the family response to murders in Bowraville, subject to the Committee Clerk checking for confidentiality, adverse mention and other issues.

5. ***

6. Adjournment
The Committee adjourned at 1.47 pm until 7 March 2014

Teresa McMichael
Clerk to the Committee

Minutes no. 28
Tuesday 14 January 2014
Standing Committee on Law and Justice
Room 1153, Parliament House, 10.30 am

1. Members present
Mr Clarke, *Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Apologies
Mr Primrose, as he was attending a funeral.

3. Previous minutes
Resolved, on the motion of Mrs Mitchell: That Draft Minutes No. 27 be confirmed.

4. Inquiry into the family response to the murders in Bowraville - briefing
The Committee met with Professor Larissa Behrendt, Mr Craig Longman and Professor Diana Eades to discuss different consultation methods for Aboriginal communities.

5. Adjournment
The Committee adjourned at 11:40 am until Friday 7 March 2014.

Teresa McMichael
Clerk to the Committee

Minutes no. 29
Friday 7 March 2014
Standing Committee on Law and Justice
Macquarie Room, State Library of New South Wales, 9.20 am

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge (9.35 am)

2. Previous minutes
Resolved, on the motion of Mr MacDonald: That draft Minutes No. 28 be confirmed.

3. ***

4. ***

5. Inquiry into the family response to the murders in Bowraville

5.1 Submission from minor
The Committee noted that Submission No. 8 is from a minor. The secretariat advised that the author had requested that their name be published.

5.2 Publication of submissions
The Committee noted that Submission Nos 2, 3, 9, 14, 15 and 16 were published by the Committee Clerk under the authorisation of an earlier resolution.

Resolved, on the motion of Mr Moselmane: That the Committee authorise the publication of Submission Nos 1, 7 and 11 with the exception of certain information that the authors have requested be kept confidential.

Resolved, on the motion of Mr Moselmane: That the Committee authorise the publication of Submission Nos 4, 5, 6, 8 and 10 with the exception of identifying information and/or the name of the alleged perpetrator of the Bowraville murders which are to remain confidential.

5.3 Confidential submissions
Resolved, on the motion of Mrs Mitchell: That Submission Nos 12, 17 and 18 remain confidential.

5.4 Submission No. 13
Resolved, on the motion of Mr Shoebridge: That Submission No. 13 remain confidential, pending the further consideration of the Committee.

5.5 Site visit and hearing dates
Resolved, on the motion of Mrs Mitchell: That the Committee conduct a site visit to Bowraville on Monday 31 March 2014, then conduct roundtable hearing sessions in Bowraville on Friday 2 May 2014.

5.6 Site visit – Monday 31 March 2014
Mr Primrose moved: That no evidence be recorded on the Committee's first visit to Bowraville on Monday 31 March 2014.

Mr Shoebridge moved: That the motion of Mr Primrose be amended by inserting at the end "but in all other respects the meeting will be a formal meeting of the Committee."

Amendment put and passed.

Original question, as amended, put and passed.

Resolved, on the motion of Mr Primrose: That the Committee hold a second hearing on a date to be determined in Sydney.

6. ***

7. Inquiry into the family response to the murders in Bowraville

7.1 Aboriginal English workshop
Mr Shoebridge moved: That Professor Diana Eades be invited to provide a two-hour workshop for up to 20 members and secretariat staff regarding Aboriginal English.

The Committee divided.

Ayes: Mr Clarke, Mrs Mitchell, Mr Moselmane, Mr Primrose, Mr Shoebridge.

Noes: Mr MacDonald.

Question resolved in the affirmative.

7.2 Naming of alleged perpetrator
Resolved, on the motion of Mr Shoebridge: That the secretariat omit the name of the alleged perpetrator of the Bowraville murders wherever it is mentioned during the inquiry.

7.3 Report deliberative date

Resolved, on the motion of Mr Shoebridge: That the Committee hold a report deliberative for the Inquiry into the family response to the murders in Bowraville on Monday 11 August 2014.

7.4 Publication of submissions
Resolved, on the motion of Mr Shoebridge: That the Committee authorise the publication of the attachments to Submission No. 14.

7.5 Partially confidential submissions
Resolved, on the motion of Mrs Mitchell: That the Committee authorise the publication of Submission No. 19 with the exception of the name of the alleged perpetrator of the Bowraville murders, and that the attachments remain confidential.

8. ***

9. Adjournment
The Committee adjourned at 4:45 pm until Monday 17 March 2014.

Teresa McMichael
Clerk to the Committee

Minutes no. 30
Monday 17 March 2014
Standing Committee on Law and Justice
Hamilton Room, Level 47, NSW Trade and Investment Centre, MLC Centre, Sydney, 8.50 am

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Previous minutes
Resolved, on the motion of Mr MacDonald: That draft Minutes No. 29 be confirmed.

3. Inquiry into the family response to the murders in Bowraville

3.1 Partially confidential submissions
Resolved, on the motion of Mr Shoebridge: That the Committee authorise the publication of Submission Nos. 20, 21, 22, 23, 24 and 25 with the exception of identifying information and/or the name of the alleged perpetrator of the Bowraville murders which are to remain confidential.

3.2 Submission No. 4
Resolved, on the motion of Mr MacDonald: That Submission No. 4 be changed from partially confidential to fully confidential, at the request of the author.

3.3 Submission No. 13

Resolved, on the motion of Mr Shoebridge: That Submission No. 13 be changed from fully confidential to partially confidential, with certain personal information relating to family members remaining confidential.

3.4 Screening of documentary on the murders in Bowraville

The Committee noted that it has been invited to watch a private screening of a documentary produced by Jumbunna Indigenous House of Learning, UTS titled "Innocence Betrayed", containing interviews with family and community members from Bowraville.

3.5 Dress code for site visit – 31 March 2014

The Committee noted advice from the secretariat that suitable attire for meeting with community members on 31 March 2014 is smart casual.

3.6 Media attendance

Resolved, on the motion of Mrs Mitchell: That the Committee permit the media to film or photograph members and interview the Chair for a period of approximately 10 minutes at 10.30am on Monday 31 March 2014 at the Memorial Park in Bowraville, next to the memorial for the three children.

3.7 Sydney hearing

Resolved, on the motion of Mr Primrose: That the Committee conduct a half day hearing for the Bowraville inquiry in Sydney on Monday 12 May 2014, commencing at 9.00 am.

4. ***

5. Aboriginal English workshop

The Committee attended a workshop on Aboriginal English conducted by Professor Diana Eades, consultant sociolinguist at the University of New England.

6. Adjournment

The Committee adjourned at 4.30 pm until Friday 21 March 2014.

Teresa McMichael
Clerk to the Committee

Minutes no. 31
Thursday 20 March 2014
Standing Committee on Law and Justice
Room 1153, Parliament House, 4.15 pm

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane

2. Apologies

Mr Shoebridge

3. Inquiry into the family response to the murders in Bowraville

3.1 Attendance of members' research assistants

Resolved, on the motion of Mr Primrose: That Mr Will Coates, My Louay Moustapha and Mr Luke Whitington be permitted to watch the private, confidential pre-screening of the Bowraville documentary, entitled 'Innocence Betrayed', with the Committee.

3.2 Filming screening 'Innocence Betrayed'

The Committee, Mr Coates, Mr Moustapha, Mr Whitington and secretariat staff viewed a private, confidential pre-screening of a documentary produced by Jumbunna Indigenous House of Learning, UTS entitled 'Innocence Betrayed', containing interviews with family and community members from Bowraville.

4. Adjournment

The Committee adjourned at 5.10 pm until Friday 21 March 2014.

Teresa McMichael
Clerk to the Committee

Minutes no. 32
Friday 21 March 2014
Standing Committee on Law and Justice
Hobart Room, Sofitel Sydney Wentworth Hotel, Sydney, 8.50 am

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane from 10.55 am
Mr Shoebridge

2. Apologies

Mr Moselmane until 10.55am.

3. Previous minutes

Resolved, on the motion of Mr MacDonald: That Draft Minutes No. 30 and 31 be confirmed.

4. ***

5. Inquiry into the family response to the murders in Bowraville

5.1 Bowraville hearing dates

Resolved, on the motion of Mr Shoebridge: That the Committee conduct an additional half day hearing in Bowraville on 1 May 2014.

5.2 Submissions

Resolved, on the motion of Mr Shoebridge: That the Committee authorise the publication of Submission No. 26.

5.3 Hearing venue

Resolved, on the motion of Mr MacDonald: That the hearings on 1 and 2 May 2014 be held at the Nambucca Shire Council Chambers in Macksville

Resolved, on the motion of Mr Primrose: That any further arrangements for the hearings on 1 and 2 May 2014 be left in the hands of the Chair and the Secretariat.

5.4 Participating member

Resolved, on the motion of Mr Shoebridge: That the Committee invite the Hon Catherine Cusack MLC to participate in the Committee's proceedings for the inquiry into the family response to the murders in Bowraville.

6. ***

7. Adjournment

The Committee adjourned at 4.05 pm until Friday 28 March 2014.

Teresa McMichael
Clerk to the Committee

Minutes no. 33
Friday 28 March 2014
Standing Committee on Law and Justice
Macquarie Room, State Library, Sydney, 8.47 am

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane (from 8.55 am)
Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mrs Mitchell: That Draft Minutes No. 32 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received:

- ***

Sent:

- 20 March 2014 – From Chair to Dr Diana Eades, University of New England, thanking Dr Eades for conducting the Aboriginal English workshop on 17 March 2014
- 20 March 2014 – From Chair to Hon Andrew Stoner MP, Minister for Trade and Investment, Minister for Regional Infrastructure and Services, Minster for Oxley, advising the members that the Committee will be conducting a site visit to Bowraville on Monday 31 March 2014.
- 24 March 2014 – From Chair to the Hon Catherine Cusack MLC, inviting Ms Cusack to participate in the Committee's proceedings for the inquiry into the family response to the murders in Bowraville
- 25 March 2014 – From Chair to staff of Jumbunna Indigenous House of Learning thanking them for the private screening of the film 'Innocence Betrayed'.

***

4. ***

5. Inquiry into the family response to the murders in Bowraville

5.1 Submission No. 26 – requested amendment
Resolved, on the motion of Mr Moselmane: That the amended submission of Dr Tracey Westerman be published as Submission No. 26.

5.2 Site visit to Bowraville – 31 March 2014
The Committee was briefed by the Secretariat on the schedule for afternoon tea with the family members on 31 March 2014.

5.3 Bowraville hearing format
Resolved, on the motion of Mr Shoebridge: That:

- witnesses on 1 May 2014 be non-family members, and that these sessions be held in public
- witnesses on 2 May 2014 be family members, and that these sessions be private roundtable discussions that are closed to the public and media, yet open to other witnesses and support people for witnesses
- third parties attending the roundtable hearing on 2 May 2014 will only be permitted in the room if they have the unanimous consent of each witness during a session.

6. ***

7. Adjournment
The Committee adjourned at 5.15 pm until Monday 31 March 2014, at 9.30 am in the Pioneer Community Hall, Bowraville (Inquiry into the family response to the murders in Bowraville).

Teresa McMichael
Clerk to the Committee

Minutes no. 34
Monday 31 March 2014
Standing Committee on Law and Justice
Pioneer Community Hall, High Street, Bowraville

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Participating member
Ms Cusack attended the meeting as a participating member.

3. ***

4. Inquiry into the family response to the murders in Bowraville
The Committee met with Detective Inspector Gary Jubelin, Detective Sergeant Jerry Bowden, State Crime Command Analyst Bianca Comina and Ms Leonie Duroux for a briefing on the Bowraville murders.

Resolved, on the motion of Mrs Mitchell: That, for the purposes of the media conference resolved by the Committee to be held at 10.30am, the Chair be the primary spokesperson for the Committee but any

other member be authorised to make additional remarks related to the purpose and scope of the Committee's inquiry.

Detective Inspector Jubelin led the Committee on a tour of key locations in Bowraville relevant to the three murders.

The Committee met with the family members of the three children to discuss the purpose and scope of the inquiry and the format for hearings in May.

5. Adjournment

The Committee adjourned at 3.15 pm until Thursday 1 May 2014, at the Nambucca Shire Council Chambers, Macksville for the public hearing into the family response to the murders in Bowraville.

Teresa McMichael
Clerk to the Committee

Minutes no. 35
Thursday 1 May 2014
Standing Committee on Law and Justice
Nambucca Shire Council Chambers, Macksville, 1.50 pm.

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Participating members

Ms Cusack

3. Correspondence

The committee noted the following items of correspondence:

Received:

- ***
- 10 April 2014 – From Mr David Blunt, Clerk of the Parliaments, to Chair, providing advice in relation to inviting an additional stakeholder to give evidence
- ***
- 17 April 2014 – From Detective Inspector Gary Jubelin, NSW Police, to Chair, providing information on working with children checks for the Bowraville inquiry.
- ***

Sent:

- 3 April 2014 – From Chair to NSW Police Force staff thanking them for the briefing provided to the committee during its site visit to Bowraville on 31 March 2014.

4. Previous minutes

Resolved, on the motion of Mr MacDonald: That draft minutes nos. 33 and 34 be confirmed.

5. Inquiry into family response to the murders in Bowraville

5.1 Public hearing

Witnesses, the media and the public were admitted.

The following witness was sworn and examined:

- Detective Inspector Gary Jubelin, NSW Police Force.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Dr Diana Eades, Adjunct Professor, Fellow of the Australian, Academy of the Humanities, School of Behavioural, Cognitive and Social Sciences, University of New England.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Barry Toohey, Darrimba Maarra Aboriginal Health Clinic
- Dr Daniel Ryan, Bowraville Aboriginal Health Clinic.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Father Paul Sullivan, Aboriginal Catholic Ministry.

The evidence concluded and the witness withdrew.

The public hearing concluded at 5.16 pm.

5.2 Scope of inquiry

Resolved, on the motion of Mr Shoebridge: That the committee defer consideration of the scope of the inquiry until after the public hearing on 12 May 2014.

5.3 Invitation to additional stakeholder

Resolved, on the motion of Mr Shoebridge: That the committee note the advice received from the Clerk of the Parliaments regarding the invitation of an additional stakeholder to give evidence, but take no further action at this stage.

5.4 Working with children check

Resolved, on the motion of Mrs Mitchell: That the committee keep the letter from Detective Inspector Gary Jubelin, NSW Police, providing information on working with children checks for the Bowraville inquiry, confidential.

5.5 Answers to questions on notice

Resolved, on the motion of Mr Moselmane: That witnesses be requested to return answers to questions on notice from members within 21 days of the date on which questions are forwarded to the witnesses by the committee clerk.

6. ***

7. ***

8. Committee meeting dates

Resolved, on the motion of Mr Shoebridge: That the committee secretariat circulate an updated timetable for all of the Law and Justice Committee meeting and report deliberative dates.

9. Adjournment

The committee adjourned at 5.40pm until Friday 2 May 2014 at 9.00am (closed roundtable hearing for inquiry into the family response to the murders in Bowraville).

Teresa McMichael
Clerk to the Committee

Minutes no. 36
Friday 2 May 2014
Standing Committee on Law and Justice
Council Chambers, Nambucca Shire Council, Macksville, 9.00 am

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Participating members

Ms Cusack

3. Inquiry into the family response to the murders in Bowraville

3.1 Roundtable discussions

The following participants appeared at a series of closed roundtable discussions:

- Mr Thomas Duroux
- Ms Helen Duroux
- Ms Ronella Duroux
- Ms Leonie Duroux
- Mr Billy Greenup
- Ms Diane Greenup
- Ms Barbara Greenup-Davis
- Ms Clarice Greenup
- Ms Muriel Craig
- Ms Muriel Craig (Jnr)
- Mr Lucas Craig
- Ms Paula Craig
- Ms Rose Griffin
- Ms Rebecca Stadhams
- Ms Patricia Stadhams
- Ms Lesley Stadhams
- Ms Penny Stadhams
- Ms Michelle Jarrett
- Ms Elaine Walker
- Ms Karen Kelly
- Ms Lana Kelly
- Ms Kerry Kelly

- Ms Jeanette Blainey
- Ms June Speedy
- Mr Troy Duroux
- Ms Leonie Duroux.

The evidence concluded and the witnesses withdrew.

4. Adjournment

The committee adjourned at 4.27 pm until Monday 12 May 2014 at 9.00 am in the Macquarie Room, Parliament House.

Teresa McMichael
Clerk to the Committee

Minutes no. 37
Monday 12 May 2014
Standing Committee on Law and Justice
Macquarie Room, Parliament House, 8.55 am

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Shoebridge

2. Apologies

Mr Moselmane

3. Participating members

Ms Cusack

4. Recording of evidence

Resolved, on the motion of Mrs Mitchell: That Jumbunna Indigenous House of Learning be provided with a copy of the in-house video recording of their evidence from 12 May 2014 for their own personal record.

5. ***

6. Inquiry into family response to the murders in Bowraville

6.1 Public hearing

Witnesses, the media and the public were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Professor Larissa Behrendt, Director, Jumbunna Indigenous House of Learning, UTS
- Mr Craig Longman, Senior Researcher, Jumbunna Indigenous House of Learning, UTS.

Resolved, on the motion of Mrs Mitchell: That the committee proceed to take evidence from Professor Behrendt and Mr Longman *in camera.*

The public and the media withdrew.

Resolved, on the motion of Mr Shoebridge: That the following witnesses from Allens law firm be authorised to attend Professor Behrendt and Mr Longman's *in camera* hearing:

- Mr Richard Harris, Partner, Allens law firm
- Ms Alex Mason, Solicitor, Allens law firm
- Mr Rohan Platt, Allens law firm.

The committee proceeded to take *in camera* evidence.

Persons present other than the committee: Mr Richard Harris, Partner, Allens law firm; Ms Alex Mason, Solicitor, Allens law firm; Mr Rohan Platt, Allens law firm; Teresa McMichael, Jenelle Moore, Christine Nguyen and Hansard reporters.

The evidence concluded and the witnesses withdrew.

The hearing resumed in public.

The public and the media were readmitted.

The following witnesses were sworn and examined:

- Mr Richard Harris, Partner, Allens law firm
- Ms Alex Mason, Solicitor, Allens law firm.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined via teleconference:

- Dr Tracey Westerman, Indigenous Psychological Services.

The evidence concluded and the witness withdrew.

The committee adjourned at 1.15 pm and reconvened at 1.25 pm in Room 1153, Parliament House.

7. ***

8. ***

9. Inquiry into the family response to the murders in Bowraville

9.1 Publication of submission

The committee noted that submission no. 28 was published by the Committee Clerk under the authorisation of an earlier resolution.

9.2 Scope of inquiry

The committee discussed the terms of reference and scope of the inquiry.

9.3 Invitation to additional stakeholders

The committee considered whether additional witnesses should be invited to give evidence before to the inquiry.

9.4 Roundtable evidence

Resolved, on the motion of Mr MacDonald: That the evidence provided in a separate session by Ms Michelle Jarrett at the closed roundtable hearing on 2 May 2014 remain confidential.

10. Adjournment
The committee adjourned at 2.15 pm until Monday 2 June 2014.

Teresa McMichael
Clerk to the Committee

Minutes no. 38
Monday 2 June 2014
Standing Committee on Law and Justice
Room 1254, Parliament House, 8.55 am

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell *(via teleconference)*
Mr Shoebridge

2. Apologies
Mr Moselmane

3. Participating members
Ms Cusack *(from 11.18 am, via teleconference)*

4. ***

5. Previous minutes
Resolved, on the motion of Mr Shoebridge: That draft minutes no. 37 be confirmed.

6. Correspondence

Received:

- ***
- 9 May 2014 – From Mr Barry Toohey, Darrimba Maara Aboriginal Health Clinic, providing answers to questions on notice from 1 May hearing to the Bowraville inquiry
- ***
- 22 May 2014 – From Father Paul Sullivan, Aboriginal Catholic Ministry providing answers to questions on notice from 1 May hearing to the Bowraville inquiry
- 27 May 2014 – From Prof Diana Eades, University of New England providing answers to questions on notice and an additional attachment from 1 May hearing to the Bowraville inquiry
- 28 May 2014 – From Detective Inspector Gary Jubelin, NSW Police providing answers to questions on notice and answers to supplementary questions to the Bowraville inquiry
- ***

Sent:

- ***
- ***

7. ***

8. Inquiry into the family response to the murders in Bowraville

8.1 Publication of submissions

Resolved, on the motion of Mr Primrose: That the committee authorise the publication of submission no. 29 and supplementary submission nos 11a and 17a.

8.2 Answers to questions on notice

Resolved, on the motion of Mr Shoebridge:

- That answers to questions on notice provided by Mr Barry Toohey and Father Paul Sullivan be kept confidential at the request of the authors.
- That the committee authorise the publication of the answers to questions on notice received from Professor Diana Eades.
- That in regard to the answers to questions on notice provided by Detective Inspector Gary Jubelin:
  - the committee keep the answer to supplementary question 3 confidential
  - the committee authorise the publication of the remainder of the answers to questions on notice and supplementary questions, but that the answers not be published on the committee's website
  - the Chair and secretariat consult with the Attorney General and Director of Public Prosecutions regarding the publication of certain correspondence attached to an answer to a question on notice.

8.3 Scope of inquiry

The committee discussed the terms of reference and scope of the inquiry.

8.4 Invitation to additional stakeholders

Resolved, on the motion of Mr Shoebridge: That the secretariat request a private briefing with representatives of the Department of Police and Justice to discuss suggestions raised by stakeholders during evidence.

8.5 Consultation with inquiry stakeholders

Resolved, on the motion of Mr MacDonald: That the committee consult with inquiry stakeholders regarding some of the proposed report recommendations.

8.6 Possible tabling event

The secretariat briefed the committee regarding options for an event to be held in Bowraville to coincide with the tabling of the final report.

9. Adjournment

The committee adjourned at 12.10 pm until Friday 27 June 2014.

Teresa McMichael
Clerk to the Committee

Minutes no. 39
Friday 27 June 2014
Standing Committee on Law and Justice
Room 1153, Parliament House, Sydney, 9.11 am

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Previous minutes
Resolved, on the motion of Mr Macdonald: That draft minutes no. 38 be confirmed.

3. Correspondence
The committee noted the following items of correspondence:

Sent

- 20 June 2014 – From the Chair to Mr Lloyd Babb SC, Director of Public Prosecutions, regarding the proposed publication of certain correspondence relating to the Bowraville cases
- 20 June 2014 – From the Chair to the Hon Brad Hazzard MP, Attorney General, regarding the proposed publication of certain correspondence relating to the Bowraville cases
- 25 June 2014 – From the Chair to the Hon Brad Hazzard MP, Attorney General, requesting the Department of Police and Justice to respond to questions from the committee regarding the Bowraville inquiry.

Resolved, on the motion of Mrs Mitchell: That until further consideration, the committee keep the following items of correspondence confidential:

- Letter from the Chair to Mr Lloyd Babb SC, Director of Public Prosecutions, regarding the proposed publication of certain correspondence relating to the Bowraville cases, dated 20 June 2014
- Letter from the Chair to the Hon Brad Hazzard MP, Attorney General, regarding the proposed publication of certain correspondence relating to the Bowraville cases dated 20 June 2014.

Received

- ***
- 5 June 2014 – From Detective Inspector Gary Jubelin, NSW Police, to Principal Council Officer, regarding the proposed publication of certain correspondence relating to the Bowraville cases
- ***
- 18 June 2014 – From Ms Alexandra Mason, Senior Associate, Allens, to Principal Council Officer, regarding the proposed publication of certain correspondence relating to the Bowraville cases
- ***
- ***
- 24 June 2014 – From Mr Keith Alder, Deputy Director of Public Prosecutions, to the Chair, regarding the proposed publication of certain correspondence relating to the Bowraville cases.

Resolved, on the motion of Mr Shoebridge: That until further consideration, the committee keep the following items of correspondence confidential:

- Email from Detective Inspector Gary Jubelin, NSW Police, to Principal Council Officer, regarding the proposed publication of certain correspondence relating to the Bowraville cases, dated 5 June 2014

- Email from Ms Alexandra Mason, Senior Associate, Allens, to Principal Council Officer, regarding the proposed publication of certain correspondence relating to the Bowraville cases, dated 18 June 2014
- Letter from Mr Keith Alder, Deputy Director of Public Prosecutions, to the Chair, regarding the proposed publication of certain correspondence relating to the Bowraville cases, dated 24 June 2014.

4. ***

5. Inquiry into the family response to the murders in Bowraville

5.1 Supplementary submission no. 27a

Resolved, on the motion of Mr Primrose: That supplementary submission no. 27a remain confidential, as requested by the author.

5.2 Attachments to submission no. 7

Resolved, on the motion of Mr Primrose: That the attachments to submission no. 7 remain confidential, as requested by the author.

5.3 Answers to questions on notice

Resolved, on the motion of Mr Moselmane: That:

- the committee authorise the publication of the answers to questions on notice provided by Allens Lawyers
- the answers to questions on notice provided by Jumbunna Indigenous House of Learning, and its attachment, remain confidential, as per the request of the authors
- the answer to question on notice provided by Ms Leonie Duroux, received 23 June 2014, remain confidential, as per the request of the author.

5.4 Addendum to answers to questions on notice

Resolved, on the motion of Mr MacDonald: That the committee authorise the publication of the addendum to the answers to questions on notice from Professor Diana Eades.

5.5 Consultation with inquiry stakeholders

Resolved, on the motion of Mr Moselmane: That after consideration of the draft Bowraville report, and prior to the adoption of the final report, the committee travel to Bowraville to consult with representatives from each family and other key stakeholders regarding some of the proposed report recommendations.

5.6 Possible tabling event

Secretariat briefed the committee on discussions with inquiry stakeholders regarding a possible tabling event in Bowraville.

6. ***

7. ***

8. Adjournment

The committee adjourned at 1.17 pm until Monday 11 August 2014, 10.00 am.

Teresa McMichael
Clerk to the Committee

Minutes no. 40

Tuesday 29 July 2014
Standing Committee on Law and Justice
Room 814/815, Parliament House, Sydney, 9.55 am

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Ms Cusack (via teleconference)
Mr Moselmane
Mr Shoebridge

2. Apologies
Mr MacDonald
Mrs Mitchell

3. Previous minutes
Resolved, on the motion of Mr Shoebridge: That draft minutes no. 39 be confirmed.

4. Correspondence
The committee noted the following items of correspondence:

Received

- ***
- 2 July 2014 – From the Hon Brad Hazzard MP, Attorney General to Chair, regarding the proposed publication of certain correspondence relating to the Bowraville cases
- ***

***

5. Inquiry into the family response to the murders in Bowraville

5.1 Private meeting
The committee met with the following representatives from the Department of Justice and Attorney General's office:

- Ms Penny Musgrave, Director, Criminal Law Review, Department of Justice
- Ms Janet de Castro Lopo, Assistant Manager, Justice Legal, Department of Justice
- Mr Edward Clapin, Senior Policy Advisor, Office of the Attorney General and Minister for Justice.

Resolved, on the motion of Mr Primrose: That:

- the Chair write to the Attorney General to formally request information that the officers undertook to provide to the committee
- members submit any supplementary questions to the secretariat by 5.00 pm, Wednesday 30 July 2014
- the Department of Police and Justice be requested to provide the information and answers to supplementary questions within 14 days of the date on which the letter is forwarded to the department.

5.2 Publication of submissions
Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of submission no. 30.

5.3 Confidential submission
Resolved, on the motion of Mr Primrose: That the committee keep supplementary submission no 28a confidential, as per the request of the author.

5.4 Publication of correspondence

The committee considered the publication status of certain correspondence from the Attorney General and Director of Public Prosecutions.

Resolved, on the motion of Mr Shoebridge: That the correspondence be partially published, in consultation with the Bowraville families, and that the excerpts for publication be considered at a future committee meeting.

5.5 Request for Crown Advocate advice

Resolved, on the motion of Mr Shoebridge: That the committee request the Attorney General to provide a copy of the Crown Advocate's advice to the former Attorney General, the Hon Greg Smith MP, regarding the second application for a retrial, and that the committee undertake to keep the document confidential to any extent requested.

6. ***

7. Adjournment

12.00 pm until Monday 25 August 2014, 9.30 am (*Bowraville report deliberative*).

Teresa McMichael
Clerk to the Committee

Minutes no. 41

Monday 25 August 2014
Standing Committee on Law and Justice
Room 1254, Parliament House, Sydney, 9.34 am

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Ms Cusack (participating) (from 9.35 am)
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mr MacDonald: That draft minutes no. 40 be confirmed.

Ms Cusack joined the meeting at 9.35 am.

3. Correspondence

Received

- ***
- 22 August 2014 – Email from the secretariat to members, regarding information provided by the Witness Assistance Service on Aboriginal Witness Assistance Officers.

4. Inquiry into the family response to the murders in Bowraville

4.1 Consideration of chair's draft report

The Chair submitted his draft report entitled *The family response to the murders in Bowraville* which, having been previously circulated, was taken as being read.

Summary of recommendations

Resolved, on the motion of Mr Shoebridge: That recommendation 1 be amended by inserting ', in consultation with Detective Inspector Gary Jubelin, Dr Diana Eades and Dr Tracey Westerman,' before 'and update them where necessary'.

Resolved, on the motion of Mr Shoebridge: That the following new recommendation be inserted after Recommendation 1:

'**Recommendation X**
That the NSW Police Force develop a case study detailing the various lessons learned from the Bowraville investigation and incorporate it into the mandatory course content for Aboriginal cultural awareness training. The case study should include the transcripts of public evidence from this inquiry.'

Resolved, on the motion of Mr Moselmane: That Recommendation 2 be amended by omitting 'NSW Office of the Director of Public Prosecutions provide additional Aboriginal Witness Assistance Service Officers across New South Wales' and inserting instead 'NSW Government fund three additional Aboriginal Witness Assistance Service Officer positions to service the Southern, Sydney West and Sydney Metropolitan regions of New South Wales'.

Resolved, on the motion of Mr Shoebridge: That Recommendation 3 be amended by:

a) omitting 'the NSW Department of Police and Justice' and inserting instead 'NSW Department of Justice'
b) omitting 'practising solicitors' and inserting instead 'lawyers that practise primarily in criminal law, as well as'.

Resolved, on the motion of Mr Shoebridge: That Recommendation 5 be amended by:

a) omitting 'permissible' and inserting instead 'admissible'
b) omitting 'by September 2015' and inserting instead 'as soon as practicable, but no later than September 2015'.

Resolved, on the motion of Mr Shoebridge: That the following new recommendation be inserted after paragraph 4.72:

'Recommendation X
That the NSW Government liaise with the Legal Profession Admission Board of New South Wales, the New South Wales Bar Association and all accredited universities offering legal training in New South Wales to request that Aboriginal cultural awareness training be included as a compulsory element in their legal training and accreditation.'

Resolved, on the motion of Mrs Mitchell: That the following new recommendation be inserted after paragraph 4.72:

'Recommendation X
That the NSW Government provide funding to the Parliament of New South Wales to develop a training module for members of Parliament and parliamentary staff on Aboriginal cultural awareness and appropriate interactions with Aboriginal constituents, including taking evidence at committee inquiries.'

Resolved, on the motion of Mr Primrose: That Recommendation 6 be amended by omitting 'That the NSW Government ensure that the merits of any new application for a retrial of the Bowraville murders submitted to the NSW Director of Public Prosecutions or Attorney General be considered by an independent assessor', and inserting instead 'That the NSW Government ensure that, should any new application for a retrial of the Bowraville murders be submitted to the NSW Director of Public Prosecutions or Attorney General, the merits of the application be considered by an independent assessor, such as a retired judge or senior prosecutor from another jurisdiction'.

Chapter 1

Resolved, on the motion of Mr Primrose: That the secretariat insert a new paragraph after paragraph 1.4 to note the committee's efforts to participate in cultural awareness training in preparation for this inquiry.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.9 be amended by inserting at the end: 'The committee is grateful to the families for their willingness to meet in this way.'

Resolved, on the motion of Mrs Mitchell: That paragraph 1 of page 4 be amended by omitting 'Colleen's family told the family' and inserting instead 'Colleen's family told the committee'.

Resolved, on the motion of Mrs Mitchell: That paragraph 2 of page 4 be amended by omitting 'Muriel recalled' and inserting instead 'Colleen's mother, Muriel Craig, recalled'.

Resolved, on the motion of Mrs Mitchell: That paragraph 3 of page 4 be amended by omitting 'Colleen's mother, Muriel Craig remembers' and inserting instead 'Muriel remembers'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2 of page 6 be amended by omitting ', several hundred metres from the township' after 'the 'Mission'', and inserting instead 'on the southern edge of the township'.

Chapter 2

Resolved, on the motion of Mr Shoebridge: That paragraph 2.18 be amended by omitting 'December 2006' and inserting instead 'December 1996'.

Chapter 4

Resolved, on the motion of Mr Moselmane: That paragraph 4.62 be amended by omitting 'the 2012-13 Annual Report states that there are currently only three Aboriginal WAS officers' and inserting instead 'there are currently only two such officers in New South Wales, serving the Northern and Western regions. Aboriginal WAS officers have not been allocated to the remaining three New South Wales regions, comprising Southern, Sydney West and Sydney Metropolitan.' [FOOTNOTE: Telephone conversation between Ms Catherine Bettison Santoro, Acting Manager, Witness Assistance Service, and Principal Council Officer, 19 August 2014.]

Resolved, on the motion of Mr MacDonald: That paragraph 4.69 be amended by omitting 'The committee considers it alarming' and inserting instead 'The committee is concerned'.

Resolved, on the motion of Mr Moselmane: That paragraph 4.71 be amended by omitting 'that there are only three such officers in New South Wales' and inserting instead 'there are currently only two such officers in New South Wales, serving the Northern and Western regions. The committee understands that if three additional Aboriginal WAS Officers were made available to service the Southern, Sydney West and Sydney Metro regions, the WAS would be in a position to offer Aboriginal people across the state an early point of liaison when they first come into contact with the criminal justice system in their capacity as a witness and, as is often the case, also a victim'.

Resolved, on the motion of Mrs Mitchell: That paragraph 4.72 be amended by omitting 'We recommend that this occur.' after 'issues affecting communication.'.

Chapter 6

Resolved, on the motion of Mr Moselmane: That footnote no. 407 on p 82 be amended by inserting at the end: 'The 12 folders comprised of the same folders previously provided to the DPP containing the official brief of evidence, minus two folders that had contained miscellaneous additional photographs.'

Resolved, on the motion of Mr Shoebridge: That paragraph 6.72 be amended by omitting 'prosecutor' and inserting instead 'senior prosecutor'.

4.2 Recommendations for consultation

Resolved, on the motion of Ms Cusack: That the following draft recommendation be included in the list of possible recommendations for consultation with family members of the three children:

> 'That the Minister for Health, Minister for Mental Health and Minister for Community Services establish a working group to examine the adequacy of health services in Bowraville and Tenterfield, in consultation with the communities, and report back with a plan to address any deficits.'

Resolved, on the motion of Mrs Mitchell: That the list of possible recommendations pertaining to the family and the community, as amended, be sent to the families on Monday 25 August 2014.

4.3 Tabling date

The committee discussed a possible tabling date and tabling event for the Bowraville report.

5. Adjournment

The committee adjourned at 12.00 pm until Thursday 28 August 2014, 9.30 am, Room 1254, Parliament House (WorkCover and Dust Disease report deliberatives).

Teresa McMichael
Clerk to the Committee

Minutes no. 42

Thursday 28 August 2014
Standing Committee on Law and Justice
Room 1254, Parliament House, Sydney, 9.40 am

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald
Mrs Mitchell
Mr Moselmane (until 1.11 pm)
Mr Shoebridge

2. Correspondence

Sent:

- 25 August 2014 – From committee secretariat to Ms Leonie Duroux, providing a list of possible recommendations for the Bowraville report pertaining to the family and community
- 25 August 2014 – From committee secretariat to Ms Michelle Stadhams, providing a list of possible recommendations for the Bowraville report pertaining to the family and community
- 25 August 2014 – From committee secretariat to Ms Penny Stadhams, providing a list of possible recommendations for the Bowraville report pertaining to the family and community
- 25 August 2014 – From committee secretariat to Ms Muriel Craig, providing a list of possible recommendations for the Bowraville report pertaining to the family and community
- 25 August 2014 – From committee secretariat to Mr Barry Toohey, providing a list of possible recommendations for the Bowraville report pertaining to the family and community.

3. ***

4. Adjournment

The committee adjourned at 2.05 pm until 7.45 am, Friday 29 August 2014, Terminal 3, Sydney Airport (Inquiry into the family response to the murders in Bowraville)

Teresa McMichael
Clerk to the Committee

Minutes no. 43

Friday 29 August 2014
Standing Committee on Law and Justice
Aboriginal Medical Clinic, Bowraville, 11.00 am

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Ms Cusack (participating)
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Previous minutes
Resolved, on the motion of Mr MacDonald: That draft minutes no. 41 be confirmed.

3. Correspondence
The committee noted the following item of correspondence:

Received

- 25 August 2014 – Email from Mr Edward Clapin, Senior Policy Advisor, Office of the Attorney General and Minister for Justice, to the committee secretariat forwarding a schedule of meetings held with individuals connected to the Bowraville families during Attorney General Smith's consideration of the families' application for a retrial, information regarding double jeopardy reforms and the definition of the word 'adduced'.

Resolved, on the motion of Mrs Mitchell: That the committee authorise the publication of correspondence from Mr Clapin containing a schedule of meetings held, and information regarding double jeopardy reforms and the definition of the word 'adduced', dated 25 August 2014.

4. Inquiry into the family response to the murders in Bowraville

4.1 Private consultation with families
The committee met with Mr Barry Toohey from Darrimba Maarra Aboriginal Health Clinic and the following family representatives to discuss some potential recommendations for the committee's report:

- Ms Leonie Duroux
- Mr Thomas Duroux
- Ms Elaine Walker
- Ms Michelle Jarrett
- Ms Clarice Greenup
- Ms Muriel Craig
- Ms Paula Craig

- Mr Lucas Craig.

4.2 Tabled document
Michelle Jarrett tabled a document providing information about the Nambucca Youth Services Centre.

5. Adjournment
Monday 8 September 2014, 9.00 am, Waratah Room, Parliament House *(Bowraville inquiry report deliberative)*.

Teresa McMichael
Clerk to the Committee

Minutes no. 44
Monday 8 September 2014
Standing Committee on Law and Justice
Waratah Room, Parliament House, 9.00 am

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Ms Cusack (participating)
Mr MacDonald
Mrs Mitchell
Mr Moselmane *(from 9.35 am)*
Mr Shoebridge

2. Apologies

3. Previous minutes
Resolved, on the motion of Mrs Mitchell: That draft minutes nos. 42 and 43 be confirmed.

4. Correspondence
The committee noted the following items of correspondence:

Received

- 1 September 2014 – Email from Michelle Jarrett to Principal Council Officer providing information about Nambucca Youth Services Centre
- 1 September 2014 – Email from Michelle Jarrett to Principal Council Officer providing further information about Nambucca Youth Services Centre
- 5 September 2014 – Letter from Barry Toohey, Mental Health Clinician, Darrimba Maara Aboriginal Health Clinic, providing report on Red Dust Healing program entitled 'Working Together - Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice' and video on Red Dust Healing on USB stick.

5. Tabled document
Resolved, on the motion of Mr Shoebridge: That the committee accept the document tabled by Michelle Jarrett in Bowraville on 29 August 2014 providing information about the Nambucca Youth Services Centre.

6. Inquiry into the family response to the murders in Bowraville

6.1 Further consideration of Chair's draft report

The Chair submitted his draft report entitled *The family response to the murders in Bowraville*, which having been previously circulated, was taken as read.

Resolved, on the motion of Mr Primrose: That the following new paragraphs be inserted after paragraph 1.13:

Consultation on draft recommendations

'On 29 August 2014 the committee travelled back to Bowraville to meet with representatives from the families of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux to discuss some potential recommendations the committee could make to provide better support and services to the families and their communities, and to acknowledge the pain and suffering they have experienced over the past 23 years. A list of these family members is provided at Appendix 2.

The committee again thanks these family members for taking the time to meet with the committee, for some of whom it was the third time.'

Resolved, on the motion of Mr Shoebridge: That paragraph 4.62 be amended by:

a) omitting 'three New South Wales regions' and inserting instead 'two New South Wales regions'

b) omitting "Southern," before "Sydney West and Sydney Metropolitan'.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.71 be amended by:

a) omitting 'three additional Aboriginal WAS Officers' and inserting instead 'two additional Aboriginal WAS Officers

b) omitting 'Southern' before 'Sydney West and Sydney Metropolitan regions of New South Wales'.

Resolved, on the motion of Mr Shoebridge: That Recommendation 2 be amended by:

a) omitting 'three additional Aboriginal Witness Assistance Service Officer positions' and inserting instead 'two additional Aboriginal Witness Assistance Service Officer positions'

b) omitting 'Southern,' before 'Sydney West and Sydney Metropolitan regions of New South Wales'.

Resolved, on the motion on Mrs Mitchell: That the following new paragraph be inserted after paragraph 4.94:

Disallowable questions

'The committee heard that s 41 the *Evidence Act 1995* provides a mechanism for the court to disallow a question put to a witness in cross-examination, or to inform the witness that the question need not be answered, in certain circumstances. Both Jumbunna and Dr Eades advised that one of the categories of a 'disallowable question' is whether it is misleading or confusing. Therefore, the court already has sufficient power for the control of proceedings in relation to Aboriginal witnesses, particularly in circumstances where the court recognises that the issue of gratuitous concurrence may be influencing the evidence given. Dr Eades told the committee that Western Australia and the Northern Territory already use the equivalent statutory provision to stop leading questions in situations where they feel that Aboriginal witnesses are being led into gratuitous concurrence, and the same course of action would be equally available to New South Wales courts should they choose to use it.

The Judicial Commission of New South Wales' *Equality before the Law Bench Book* already notes that provision is made under s 41 of the Act to prevent Aboriginal witnesses from being questioned in a manner which is misleading, confusing, unduly annoying, harassing, intimidating, offensive, oppressive,

humiliating, repetitive, or putting a question to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or has no basis other than a stereotype.' [FOOTNOTE: Judicial Commission of New South Wales, Equality before the Law Bench Book, 2006, p 2305.]

Resolved, on the motion of Mrs Mitchell: That the following new committee comment be inserted after Recommendation 4:

'The committee also supports the suggestion by Dr Eades that New South Wales follow the practice of Western Australia and the Northern Territory by utilising the powers provided by s 41 of the *Evidence Act 1995* to disallow questioning of Aboriginal witnesses in circumstances where the questioning is demonstrably leading Aboriginal witnesses into gratuitous concurrence. The committee notes that the *Equality before the Law Bench Book* makes this power clear. We encourage the judiciary to utilise this power.'

Resolved, on the motion of Mr MacDonald: That Recommendation 8 be amended by omitting 'September 2015'and inserting instead 'October 2015'.

Resolved, on the motion of Mr Primrose: That paragraph 7.47 be amended by omitting 'The centre has remained closed since that time' and inserting instead: 'The Durri Aboriginal Medical Centre has not operated in Bowraville since that time, although the committee was informed at its meeting with family members in August 2014 that another health provider operates out of the centre one day per week.'

Resolved, on the motion of Mrs Mitchell: That the following committee comments and recommendations be inserted at paragraph 7.56:

'The loss of a loved one in any circumstance is a tragedy. The loss of three loved children to murder in a short period of time from a small community is indescribable. It is clear to the committee that in addition to the recommendations made in this report to address issues with the criminal justice system, there are also a number of recommendations to be made to try to redress, or even just acknowledge, the impacts of the murders on the families and their respective communities.

Several months after its hearings the committee revisited Bowraville on 29 August 2014 to meet with representatives from the families of Colleen, Evelyn and Clinton, as well as Barry Toohey, to informally discuss options for some potential recommendations. We wish to thank these family members and Mr Toohey for meeting with the committee, a number of whom were meeting with the committee for the third time.

One of the most apparent issues that arose from our meeting with the families, and the formal evidence received during the inquiry, is the importance of having appropriate support to assist families and communities during periods of grief and trauma. Unfortunately for these families, no such support was provided in the critical aftermath of the murders. Aside from a weekend workshop in 1998, the families were not provided with mental health services until 2005 – some 15 years after the first child went missing. Even though these services were provided so long after the murders, it is clear from the evidence that the families found this support extremely valuable.

The committee notes that two full-time mental health worker positions have been funded since 2006, however, we note with concern that the second position has been unfilled for some time. We acknowledge the evidence from inquiry participants regarding the significant pressure this has placed on the incumbent mental health worker, Barry Toohey.

The committee therefore urges the government to ensure that this second mental health position is filled as soon as possible to ensure there is adequate mental health support available to the Bowraville community. Further, in order to ensure the suitability and cultural competence of the second worker, we recommend that the families be involved in the selection process, as they were during the selection of Mr Toohey.

Recommendation

That the NSW Government ensure that the second mental health worker position for the Bowraville community be filled as a matter of priority, and that the families of Colleen Walker Craig, Evelyn Greenup and Clinton Speedy-Duroux be involved in the selection process.

The committee also notes the concerns raised by inquiry participants regarding the loss of the Aboriginal health clinic in Bowraville. We acknowledge that Durri Aboriginal Medical Centre has purchased a building in the Bowraville town centre in the hope of continuing its services to the community, however, note that there are genuine doubts as to whether that service will be able to open due to funding and building issues.

At the committee's meeting in Bowraville in August the family representatives and Barry Toohey expressed a strong preference for a health clinic to be reinstated on the Aboriginal Mission. It was suggested that the clinic provide a general medical service and that it be staffed by a general practitioner, nurse, health worker and receptionist, as well Barry Toohey and the second mental health worker, and that the funding for the clinic be isolated to Bowraville. The family members also expressed a desire for some of these positions, such as the general health worker and receptionist, to be filled by members of the Bowraville Aboriginal community who could be trained up in the positions.

The committee also notes that inquiry participants emphasised the importance of ensuring that support services are also made available to family members outside of Bowraville, the majority of whom reside in or around Tenterfield. This point was again emphasised to the committee at the August meeting.

The committee agrees that the families should have access to adequate health services, and strongly support the suggestion that an Aboriginal health clinic be reinstated on the Bowraville Mission. At the same time, however, we have not received evidence regarding the nature of the health services currently available or the service providers responsible for their delivery in these communities. We therefore recommend that a government working group be established to examine the adequacy of Aboriginal health services in Bowraville and Tenterfield, in consultation with the communities, and report back with a plan to address any deficits. The committee recommends that as part of this process, particular consideration should be given to reinstating a health clinic on the Bowraville Mission.

Recommendation

That the Minister for Health, Minister for Mental Health and Minister for Community Services establish a working group to examine the adequacy of Aboriginal medical and mental health services in Bowraville and Tenterfield, in consultation with the communities, and report back with a plan to address any deficits. The working group should give particular consideration to the reinstatement of a permanent Aboriginal health clinic on the Bowraville Mission.

In regard to ongoing mental health services, the committee notes the suggestions raised by inquiry participants for family members to participate in support programs or family group counselling retreats to assist with the healing process. At the August meeting the family representatives identified the 'Red Dust Healing' program, which some of the family members have participated in, as a particularly effective program which equips participants with tools to help them deal with grief, depression and other problems.

The committee was informed that the three day workshop, which is followed by another workshop four to six weeks later, can be provided to around 10 participants at a time. It was suggested that the program could be undertaken as a family group counselling retreat at a suitable location, such as Valla (near Bowraville), as well as at a location near Tenterfield.

Noting the intergenerational impacts of the murders, the family representatives also expressed a desire for younger family members to participate in the program. It was suggested at the meeting that the program could perhaps be tailored to provide a one day workshop for participants aged 14-15 years.

The committee supports the suggestion that the Red Dust Healing program be made available to the families of Colleen, Evelyn and Clinton, including the younger family members from 14 years of age. We recommend that the government provide a funding grant to enable all of the family members to participate in the program in either the Bowraville or Tenterfield regions.

Recommendation
That the NSW Government fund the Red Dust Healing Program to make it available to family members of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux. The program should be provided in both the Bowraville and Tenterfield regions.

In addition to the Red Dust Healing program, it was suggested that the younger family members would benefit from having a youth centre in Bowraville. This idea was further elaborated at the August meeting where the family representatives told the committee that the Nambucca Youth Services Centre provides valuable and effective services, particular for Aboriginal youth.

The committee supports the suggestion for youth services, particularly Aboriginal youth services, to be provided in Bowraville. Given the positive feedback regarding the Nambucca Youth Service, it seems logical to expand that organisation to provide outreach services in Bowraville. Family members suggested that the youth service could be run out of a local school hall. The committee agrees that this may be a practical solution.

Recommendation
That the NSW Government fund the Nambucca Youth Services Centre to provide outreach services, particularly Aboriginal youth services, in Bowraville.

The committee also spoke to the family representatives about memorials for the children. There is already a memorial for the three children on the Bowraville Mission and a memorial park for Clinton in Tenterfield (the 'Clinton Speedy Memorial Park'). At the August meeting the family members said they would welcome funding for the beautification and upkeep of these memorials. In addition, representatives from Colleen's family requested that a memorial for Colleen be erected in Sawtell, where their family is from.

Recommendation
That the NSW Government provide funding to:

- *beautify and maintain the memorial dedicated to Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux in Bowraville*
- *beautify and maintain the Clinton Speedy Memorial Park in Tenterfield, and*
- *erect a memorial to Colleen Walker-Craig in Sawtell.*

The beautification or establishment of these memorials should be undertaken in consultation with the families of the three children.

Finally, a number of inquiry participants suggested that there should be some form of apology or acknowledgement to the families for their experience of the criminal justice system.

It is clear to the committee that the families' experience of the initial police investigation, trials and appeal process has been largely ill-fated to date. We have met with the families on several occasions throughout this inquiry, and can attest that even though these crimes occurred 23 years ago, the pain and suffering that they have endured remains very alive today, having been exacerbated by their experience of the justice system.'

Resolved, on the motion of Mr Primrose: That Recommendation 1 be amended by:

a) omitting 'in consultation with Detective Jubelin, Dr Diana Eades and Dr Tracey Westerman'

b) inserting 'This should be done in consultation with Aboriginal people and those with relevant expertise, such as Detective Inspector Jubelin, Dr Diana Eades and Dr Tracey Westerman.' at the end.

Resolved, on the motion of Mr Primrose: That Recommendation 2 be amended by inserting 'relevant excerpts from' after 'The case study should include'.

Resolved, on the motion of Mr Primrose: That Recommendation 4 be amended by:

a) omitting 'requiring lawyers that' and inserting instead 'requiring lawyers who'

b) omitting 'in New South Wales' after 'court officers'.

Resolved, on the motion of Mr Primrose: That Recommendation 6 be amended by

a) inserting a full stop after 'Aboriginal cultural awareness'

b) inserting 'The module should include resources on relevant matters such as how to interact appropriately with Aboriginal constituents, how to notify and convey information, and how to take evidence at committee inquiries.' at the end.

Resolved, on the motion of Mr Primrose: That Recommendation 7 be amended by:

a) omitting 'that may be required in New South Wales,' after 'cultural and linguistic factors'

b) inserting a full stop after 'linguistic factors'

c) inserting 'This should be done' before 'in consultation with Aboriginal and other communities'.

Resolved, on the motion of Mr Shoebridge: That the Preface be amended by omitting 'murders associated with the two bodies found' and inserting instead 'murders of Clinton and Evelyn'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.7 be amended by inserting 'to Colleen's family' after 'experienced a similar reaction'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.81 be amended by omitting 'stationed in remote areas' and inserting instead 'stationed in areas'.

Resolved, on the motion of Mr Shoebridge: That the case study after paragraph 4.3 be amended by omitting 'In effect, this required a trial judge to determine whether the probative value of certain similar fact evidence outweighed its prejudicial effect.'

Resolved, on the motion of Mr Shoebridge: That paragraph 4.17 be amended by omitting 'which was set out in the' and inserting instead 'as considered in the'.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.32 be amended by omitting 'These amendments were subsequently passed in 1997 and came into force in 1999' and inserting instead 'These amendments were subsequently passed in 2007 and came into force in 2009'.

Mr Moselmane arrived at 9.35 am.

Resolved, on the motion of Mr Shoebridge: That paragraph 5.2 be amended by inserting 'and promotes certainty and finality in the law and judicial proceedings' at the end.

Resolved, on the motion of Mr Shoebridge: That paragraph 5.30 be amended by omitting 'The review confirmed that the wording recommended' and inserting instead ''The review confirmed that this wording recommended'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs be inserted after paragraph 5.32:

Consideration in other jurisdictions

'As noted at paragraph 5.25, in 2006 the COAG Working Group made a series of recommendations to adopt a national framework for the reform of double jeopardy legislation. Following from these recommendations, all Australian jurisdictions adopted the definition of 'fresh evidence' as provided under the New South Wales Act except for Western Australia, [FOOTNOTE: Answers to questions on notice, NSW Department of Justice, 25 August 2014, pp 2-3] which differs significantly. The *Criminal Appeals Act 2004* (WA) provides:

> **46I Meaning of fresh and compelling evidence**
>
> (1) For the purposes of section 46H, evidence is fresh in relation to the new charge if –
>
> a) despite the exercise of reasonable diligence by those who investigated offence A, it was not and could not have been made available to the prosecutor in trial A; or
>
> b) it was available to the prosecutor in trial A but was not and could not have been adduced in it.
>
> (2) For the purposes of section 46H, evidence is compelling in relation to the new charge if, in the context of the issues in dispute in trial A, it is highly probative of the new charge.
>
> (3) For the purposes of this section, it is irrelevant whether the evidence being considered by the Court of Appeal would have been admissible in trial A against the acquitted accused.

In response to a request from the committee, the NSW Department of Justice liaised with other Australian jurisdictions and advised that none were aware of any consideration of the definition of 'fresh' evidence, or evidence 'adduced' for the purpose of being fresh under the terms of their respective Acts.' [FOOTNOTE: Answers to questions on notice, NSW Department of Justice, 25 August 2014, p 3.]

Resolved, on the motion of Mr Shoebridge: That paragraph 5.33 be amended by inserting 'and consideration of the different Western Australian provision,' after 'provisions'.

Resolved, on the motion of Mr Shoebridge: That paragraph 6.5 be amended by omitting 'based upon substantially' and inserting instead 'based in substantially'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph and quote be inserted after paragraph 6.17:

'The experience in the UK, which has a far larger population than Australia, would suggest that the numbers of retrials of acquitted persons on the basis of previously inadmissible evidence becoming admissible are relatively limited:

> Data provided by the Crown Prosecution Service indicate that the DPP has made 13 applications to the Court of Appeal to have acquittals quashed on the basis of "new and compelling evidence" … In nine cases the appeal was allowed, the acquittal quashed and a new trial ordered.' [FOOTNOTE: Marilyn McMahon, 'Retrials of persons acquitted of indictable offences in England and Australia' (2014) 38 Crim LJ 159 at 173-174.]

Resolved, on the motion of Mr Shoebridge: That paragraph 6.26 be amended by omitting 'rejected their decision' and inserting instead 'rejected their application'.

Resolved, on the motion of Mr Shoebridge: That the following paragraph 6.64 be omitted:

'Having considered the substance of the applications for a retrial made on behalf of the police and the families, and the responses of the DPP and Attorneys General, there appear to be two key issues – the first, whether there is sufficiently fresh and compelling evidence for a retrial, and the second, whether consideration of the merit of an application for a retrial should be conducted by an independent party.'

Resolved, on the motion of Mr Shoebridge: That paragraph 6.65 be amended by omitting 'The first issue speaks directly to the definition of adduced' and inserting instead 'The key issue is whether there is there is sufficiently fresh and compelling evidence for a retrial, which comes down to the definition of adduced'.

Resolved, on the motion of Mr Shoebridge: That the following amended committee comments at paragraphs 6.63 – 6.66 be moved to appear as a new committee comment after paragraph 6.27:

> 'It is clear to the committee that the legal arguments in regard to the admissibility of evidence for a retrial are incredibly complex.
>
> The key issue is whether there is there is sufficiently fresh and compelling evidence for a retrial which comes down to the definition of 'adduced'. There is currently no definition of 'adduced' in the *Crimes (Appeal and Review) Act 2001*. The committees notes that the comments of the DPP and Attorneys General suggest that they consider that evidence not previously 'adduced' must not have been previously 'available'. Allens law firm, on the other hand, argue that the term 'adduced' should be taken to mean evidence 'admitted'. In support of this, Allens note that this is the interpretation that has been applied in the UK, which has nearly identical double jeopardy provisions to New South Wales.
>
> However, the committee acknowledges the information provided in chapter 5 that the UK provisions refer to 'new' and compelling evidence, as opposed to 'fresh' and compelling evidence. Further, we acknowledge that during the period the double jeopardy legislation in New South Wales was developed and the subject of a draft consultation bill, it was specifically acknowledged by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General that the decision to adopt the term 'fresh' rather than 'new' was deliberate and made with the intent of having a higher threshold for the evidence.'

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs be inserted after the new committee comments at paragraph 6.28:

> 'The committee notes that the double jeopardy legislation in Western Australia, on the other hand, provides that evidence is 'fresh' if it was 'available to the prosecutor in trial A but 'could not have been adduced in it'. Like all other double jeopardy provisions in Australia, the Western Australian provision has not been judicially considered. It is difficult to conceive of a class of evidence that would fit this description other than evidence that, while available, would have been rejected by a trial judge if tendered in evidence.
>
> The Western Australian formulation therefore arguably requires the term 'adduced' in s 46I(1)(b) to be read as 'admitted'. That is, the fresh evidence was available to the prosecutor but could not have been admitted in evidence in the trial.
>
> At first blush section 46I(3) of the *Criminal Appeals Act 2004* (WA) might appear to suggest that the question of 'admissibility' is irrelevant to the operation of s 46I and therefore the word 'adduced' cannot be read as a reference to the admissibility of the evidence. However, the committee is of the view that this would misunderstand the purpose of s 461(3). We believe that this section is simply a legislative statement to the effect that even if the evidence might have been inadmissible at the initial trial (due to more restrictive evidentiary provisions) this will not prevent it from being considered fresh evidence in any further proceedings.
>
> In other words, the committee considers that s 46I(3) of the Western Australian laws is designed to achieve the same ends as s 102(4) of the New South Wales *Crimes (Appeal and Review) Act*, namely it precludes the defence from arguing that fresh and compelling evidence is limited to evidence that would have been admissible at the time of the first trial.
>
> Section 102(4) of the *Crimes (Appeal and Review) Act* provides that evidence that would be admissible on a retrial 'is not precluded from being fresh and compelling merely because it would have been inadmissible in the earlier proceedings against the acquitted person.'

This formulation differs from the September 2003 NSW Consultation Draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 which read:

> 9D(4) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

The wording of 9D(4) was criticised by Justice Jane Mathews in her November 2003 advice to the then Premier draft bill. Her Honour suggested clarification of the law to clarify its purpose and intent. In particular, Justice Mathews recommended clarifying if the purpose of the provision was to 'exclude from the purview of "fresh evidence" any evidence which was not introduced in the earlier proceedings because it was, or was considered to be, inadmissible.' [FOOTNOTE: Acting Justice Jane Matthews, *Safeguards in relation to proposed double jeopardy legislation*, 27 November 2003, p 9.]

Despite this advice, the ultimate form of what is now s 102(4) of the New South Wales Act expressly fails to exclude from the operation of the fresh and compelling provisions evidence that, whilst inadmissible at the time of the initial trial, may have become admissible since. While this does not expressly provide that simply by reason of becoming admissible post-trial the evidence may be considered 'fresh', it also does not preclude the possibility, despite being urged to do so by her Honour.

It would appear that the lack of clarity and uncertainty around the double jeopardy provisions has been felt in other jurisdictions. As David Harmer said in his 2008 critique of the Queensland and New South Wales reforms on double jeopardy:

> Time will tell just how much use the laws get. But the possibility cannot be ruled out that the forces giving rise to the reforms – public sentiment, media campaigns and the determination of victims, investigators and prosecutors – will now be redirected to ensuring that the new laws get the maximum possible use. And, in the that event, attention will turn from sensational questions of guilt and innocence, the lofty competition between finality and accuracy, and the politics of law and order, to more prosaic matters of statutory operation and interpretation which, it appears, will provide further sources of contention.' [FOOTNOTE: David Hamer, 'The (dys)functionality of double jeopardy reform in Queensland' (2008) 19 PLR 5, pp 19-20]

Resolved, on the motion of Mr Shoebridge: That the following new dot point be inserted after the second dot point at paragraph 6.41 and in Recommendation 8:

'the merit of replacing s 102 of the *Crimes (Appeal and Review) Act 2001* with the provisions in s 461 of the *Criminal Appeals Act 2004* (WA)'

Resolved, on the motion of Mr Shoebridge: That Recommendation 8 be amended by inserting 'expressly' after 'merit of' in the last dot point.

Resolved, on the motion of Mr Shoebridge: That the following paragraph 6.40 be omitted: 'The committee further notes that, in the absence of any evidence from the government in relation to the merits or otherwise of defining adduced as 'admitted', it is unable to make a balanced and informed assessment as to the legal or other ramifications of adopting this interpretation. We are also cognisant that broadening the definition of adduced may signal a significant shift in both government policy and legal principle.' and the following new paragraph be inserted instead:

'The committee notes there is a valid argument for either interpreting 'adduced' to mean 'admitted' under the existing New South Wales laws, or replacing the current provisions with the Western Australian formulation. However, in the absence of any specific submission from the government or other stakeholders in relation to the merits or otherwise of adopting this course of action, it is unable

to make a final assessment as to the legal and other ramifications of this beyond the instant case where the merits are, on the evidence before us, clear.'

Resolved, on the motion of Mr Shoebridge: That the following amended committee comments at paragraphs 6.67 – 6.70 and Recommendation 8 be moved to appear after the new committee comment at paragraph 6.28:

'The committee notes there is a valid argument for either interpreting 'adduced' to mean 'admitted' under the existing New South Wales laws, or replacing the current provisions with the Western Australian formulation. However, in the absence of any specific submission from the government or other stakeholders in relation to the merits or otherwise of adopting this course of action, it is unable to make a final assessment as to the legal and other ramifications of this beyond the instant case where the merits are, on the evidence before us, clear.

The committee therefore recommends that the government, as a matter of priority, clarify the definition of 'adduced' in section 102 of the *Crimes (Appeal and Review) Act 2001*, and in doing so consider:

- the legal or other ramifications of defining adduced as 'admitted', particularly on the finality of prosecutions
- the matters considered by the English courts under the equivalent UK legislation
- the merit of replacing s 102 of the *Crimes (Appeal and Review) Act 2001* with the provisions in s 46I of the *Criminal Appeals Act 2004* (WA), and
- the merit of expressly broadening the scope of the provision to enable a retrial where a change in the law renders evidence permissible at a later date.

The committee recommends that a report on the outcome of the review and any subsequent recommendations be tabled in Parliament.

The committee acknowledges that further delay in these matters is likely to impact on the recollection and availability of witnesses to take part in further proceedings due to the age of some of the witnesses and the high early mortality rate in Aboriginal communities. Any additional delay is also likely to further exacerbate the pain and frustration already experienced by the three families. In view of these considerations, the committee recommends that this process be completed within 12 months of the date of tabling of this report.

Recommendation X

That the NSW Government review section 102 of the Crimes (Appeal and Review) Act 2001 to clarify the definition of 'adduced', and in doing so consider:

- *the legal or other ramifications of defining adduced as 'admitted', particularly on the finality of prosecutions*
- *the matters considered by the English courts under the equivalent UK legislation*
- *the merit of replacing s 102 of the Crimes (Appeal and Review) Act 2001 with the provisions in s 46I of the Criminal Appeals Act 2004 (WA)*
- *the merit of expressly broadening the scope of the provision to enable a retrial where a change in the law renders evidence admissible at a later date.*

The report of this review should be tabled in the NSW Legislative Council as soon as practicable, but no later than September 2015.

Resolved, on the motion of Mr Shoebridge: That paragraph 6.72 be amended by inserting 'senior' before 'retired judge'.

Resolved, on the motion of Mr Shoebridge that Recommendation 9 be amended by inserting 'senior' before 'retired judge'.

7. Report tabling and formal acknowledgement
The committee discussed options for the tabling of the report and a potential formal acknowledgement from the government to the families for their pain and suffering.

8. Adjournment
The committee adjourned at 10.30 am until Thursday 11 September 2014 *(WorkCover review report deliberative)*.

Teresa McMichael
Clerk to the Committee

Minutes no. 46
Thursday 23 October 2014
Standing Committee on Law and Justice
Members Lounge, Parliament House, 4.00 pm

1. Members present
Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Ms Cusack (participating) (until 4.31 pm)
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Previous minutes
Resolved, on the motion of Mr Shoebridge: That draft minutes nos 44 and 45, as circulated, be confirmed.

3. Correspondence
The committee noted the following items of correspondence:

Received

- 25 September 2014 – Email from the Hon John Dowd AO QC, President, Community Justice Coalition, requesting a meeting with the committee to discuss issues related to incarcerated female inmates
- 7 October 2014 – Email from Ms Leonie Duroux to the secretariat, forwarding correspondence between the Community Relations Unit of the NSW Department of Justice and Mr Enda O'Callaghan concerning matters related to the murders in Bowraville.

Resolved, on the motion of Mrs Mitchell: That the committee keep the correspondence from Ms Leonie Duroux dated 7 October 2014 confidential.

4. Inquiry into the family response to the murders in Bowraville

4.1 Attachments to submissions
Resolved, on the motion of Mr Primrose: That:

- the committee authorise the partial publication of Attachments B and F to submission no. 27, as agreed to by the submission author
- the committee authorise the partial publication of Attachments 1, 2 and 4 of submission no. 19, as agreed to by the submission author
- all other attachments to submissions received during the inquiry remain confidential.

4.2 Publication of private roundtable transcript

Resolved, on the motion of Mr Moselmane: That the committee authorise the publication of the transcript of the private roundtable hearing held on 2 May 2014, with the exception of sensitive or identifying information, as agreed to by the witnesses, and that it be published on the committee's website after the report has been tabled.

4.3 Publication of submission

Resolved, on the motion of Mrs Mitchell: That the committee authorise the partial publication of submission no. 27, as agreed to by the author.

4.4 Publication of attachment to answer to question on notice

Resolved, on the motion of Mr Shoebridge: That the committee:

- authorise the partial publication of Attachment F to the answer to a question on notice received from Detective Inspector Gary Jubelin on 28 May 2014
- keep the remaining attachments to the answer to a question on notice received from Detective Inspector Gary Jubelin on 28 May 2014 confidential.

4.5 Publication of correspondence

Resolved, on the motion of Mr Primrose: That the committee authorise the publication of the following items of correspondence:

- letter from Mr Keith Alder, Deputy Director of Public Prosecutions, to the Chair, regarding the proposed publication of certain correspondence relating to the Bowraville cases, dated 24 June 2014
- letter from the Hon Brad Hazzard MP, Attorney General and Minister for Justice, to the Chair, regarding the proposed publication of certain correspondence relating to the Bowraville cases, dated 20 June 2014.

4.6 Tabling date

Resolved, on the motion of Mrs Mitchell: That:

- the report be tabled on Thursday 6 November 2014
- the Chair give notice of a motion in the House to request that the take note debate on the report proceed immediately, and that members' contributions to the debate be not more than 10 minutes
- the secretariat inform inquiry participants of the tabling date.

Ms Cusack left the meeting at 4.31 pm.

4.7 Further consideration of Chair's draft report

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs be inserted after paragraph 1.15:

> 'In the week following the committee's final visit to Bowraville, the committee was informed of the passing of Ms Elaine Walker on 5 September 2014. Ms Walker, known as 'Aunty Elaine' to the Bowraville community, was aunt to Colleen Walker-Craig and a respected elder within the Bowraville Aboriginal community.
>
> The committee would like to take this opportunity to acknowledge the contribution that Aunty Elaine made to this inquiry and thank her for her warm welcomes to country during the committee's visits to Bowraville. The committee is deeply appreciative of the time that Aunty Elaine spent with us, both during her formal evidence alongside her family, and during the informal discussions she held with members prior to and following the hearing process. Aunty Elaine's quiet dignity, strength and evident love for her family and her community made a strong impression on the committee and our staff. We extend our sincere condolences to both Aunty Elaine's immediate family and the wider Bowraville community.'

Resolved, on the motion of Mrs Mitchell: That:

- paragraph 7.59 be amended by inserting at the end: 'We also acknowledge the significant work carried out by Mr Toohey, whose ongoing guidance, care and support has been a pivotal factor in building resilience and cohesiveness amongst the three families.'
- paragraph 7.60 be amended by omitting 'The committee therefore urges the government to ensure that this second mental health position is filled as soon as possible to ensure there is adequate mental health support available to the Bowraville community' before 'Further, in order to' and inserting instead 'The committee therefore urges the government to ensure that the position filled by Mr Toohey is made permanently available to the Bowraville community, and that a second mental health position is filled as soon as possible to ensure there is adequate mental health support available'.
- the following new recommendation be inserted after paragraph 7.60:

  'Recommendation
  That the NSW Government ensure that funding for the mental health worker position is made permanently available.'

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 7.73:

'The committee takes this opportunity to formally acknowledge the pain and suffering experienced by the families of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux over the past 23 years following the deaths of the three children, and acknowledge that this was significantly and unnecessarily contributed to by the failings identified in this report.'

4.8 ***

4.9 ***

5. Adjournment

The committee adjourned at 4.45 pm until Thursday 30 October 2014 at 9.30 am *(Bowraville report deliberative)*.

Teresa McMichael
Clerk to the Committee

Draft minutes no. 47
Thursday 30 October 2014
Standing Committee on Law and Justice
Room 1153, Parliament House, 9.30 am

6. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mrs Mitchell (via teleconference)
Mr Moselmane
Mr Shoebridge

7. Apologies

Mr MacDonald

8. Previous minutes

Resolved, on the motion of Mr Moselmane: That draft minutes no. 46 be confirmed.

9. Correspondence

The committee noted the following item of correspondence:

Sent:

- 27 October 2014 – Email from Committee Director to the Hon John Dowd QC, President, Community Justice Coalition in response to request to meet regarding women in prison.

10. Inquiry into the family response to the murders in Bowraville

10.1 Further consideration of Chair's final report

Resolved, on the motion of Mr Shoebridge: That:

- the final report, as amended, be the report of the committee and that the committee present the report to the House;
- the transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, minutes of proceedings and correspondence relating to the inquiry be tabled in the House with the report;
- upon tabling, all transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, minutes of proceedings and correspondence relating to the inquiry not already made public, be made public by the committee, except for those documents kept confidential by resolution of the committee;
- the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- the report be tabled on 6 November 2014.

10.2 Morning tea and lunch for the families

Resolved, on the motion of Mr Moselmane: That the committee provide morning tea and lunch for family members and inquiry participants following the tabling of the report.

Resolved, on the motion of Mr Shoebridge: That committee members and the Hon Catherine Cusack MLC be provided with a confidential copy of the final report, prior to tabling.

Resolved, on the motion of Mr Shoebridge: That the Hon Victor Dominello MP, Minister for Aboriginal Affairs, and the Hon Linda Burney MP, Shadow Minister for Aboriginal Affairs, be invited to attend lunch with the family members and inquiry participants following the tabling of the report.

11. Adjournment

The committee adjourned at 9.50 am until Wednesday 5 November 2014 at 1.00 pm, Parkes Room, Parliament House *(Legacy report deliberative)*.

Teresa McMichael
Clerk to the Committee