Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015 (Proof)

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CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2015

Bill introduced, and read a first time and ordered to be printed on motion by Mr David Shoebridge.

Second Reading

Mr DAVID SHOEBRIDGE [9.58 a.m.]: I move:

That this bill be now read a second time.

I begin by acknowledging that the House is meeting on Gadigal land and I pay my respects to the elders past and present of this land. I also pay my respects to the families of the three murdered children from Bowraville, their friends and supporters, who are in the President's gallery today—I will not name each and every one of them—and in the public gallery.

Almost a quarter of a century ago, three Aboriginal children—Colleen Walker-Craig, Clinton Speedy-Duroux and Evelyn Greenup—were murdered in Bowraville and, as I said, representatives of those children's families are in Parliament with us today. I acknowledge, thank and commend them for their continuing courage and, indeed, their persistence with a system of government, a system of law and justice and a Parliament that makes laws that have not always been sympathetic to their plight. In acknowledging that the families are in the gallery today, I also pay particular tribute to a member of the NSW Police Force, Detective Gary Jubelin, who for 19 years has stood with the families and done everything in his power to ensure that their path to justice will lead to a result and justice for their three murdered children.

On 26 November 2013 this House unanimously adopted a motion calling on the Standing Committee on Law and Justice to inquire into and report on the family response to the murders in Bowraville of Colleen Walker, Evelyn Greenup and Clinton Speedy-Duroux, and in particular to give the families the opportunity to appear before the committee and detail the impact that the murders of those children have had on them and their community. At the time there was genuine debate in the House as to whether it was a good or a bad motion. People both within the House and in the Aboriginal community thought a broadly worded motion and a committee inquiry could achieve no result. I formed the view that when members of Parliament—whom I know personally and whom I often disagree with during political debates—stood before the families and heard firsthand their unquenchable demand for justice, their personal tribulations and their personal sorrow, the good people would do the right thing.

It was a privilege to be a member of that committee, chaired by the Hon. David Clarke with Hon. Peter Primrose as deputy-chair, and to sit with the Hon. Catherine Cusack, Mr Scot MacDonald, the Hon. Sarah Mitchell and the Hon. Shaoquett Moselmane—members from across the political spectrum—and do just that. We listened, we heard and we responded, regardless of our political colours. It was politics working. The families who, before November 2013, stood on the street outside the Parliament feeling ignored,

marginalised and forgotten, are now in the President's gallery and in the public gallery. At 12.15 p.m. today after this second reading speech they will meet again with the Attorney General and the Minister for Aboriginal Affairs. We have done good work, and I commend all my political colleagues. I make special mention of the Chair of that committee for crossing the political divide—for ignoring the political divide—and responding to a common humanity to do justice. I also commend the staff of this House for their assistance, diligence, competence and empathy in the course of preparing the report.

The committee delivered its recommendations in November 2014. Many members will remember that it was an emotional day in the House. We made a collective commitment not only to deliver the report and speak to it but also to ensure that we implemented its recommendations to achieve justice for the families. When we tabled that report on the family responses to the murders at Bowraville the committee recommended that Parliament look at changing the law so that artificial barriers preventing a fresh murder trial could be removed. That, of course, requires a change to the way the principle of double jeopardy operates where the rules of evidence have changed over time. Since delivering that report, with its 15 recommendations, I am pleased to say that, also ignoring the political divide between us, my local member—whom I did not vote for—the Attorney General Gabrielle Upton, has adopted each and every one of those recommendations and is working to implement them.

I commend the Attorney General not only for her actions in adopting the recommendations but also because one of the first things she did was what previous attorneys general had failed to do: She met with the families and listened to them. When I spoke to the families after that meeting they said what a wonderful change and a fine moment it was to have the Attorney General not only invite them into her office but also listen to them. She listened, she responded and she adopted the recommendations. I commend the Attorney General and the Government for doing that. I know that other Government members have been working away from the public gaze to achieve this result. Today I publicly commend them for their efforts.

I welcome and commend the Government's decision to implement all the recommendations of the law and justice committee's unanimous report. The recommendations included a review of NSW Police Force policies and procedures, lawyer training on Aboriginal cultural awareness, a review of the adequacy of Aboriginal medical and mental services in Bowraville, and memorials to the victims of the murders. The Government's announcement on Tuesday is the culmination of the hard work and dedication—the ceaseless dedication—of the Bowraville families, which ultimately galvanised and united this Parliament in sympathy with their story to support the inquiry. And now we see support for the implementation of its recommendations.

I believe the Government should have gone further in relation to recommendation 8—and I say that without partisan criticism. The Government could have implemented an immediate reform to the law of double jeopardy, at least removing one substantial hurdle to a retrial of the Bowraville murders. Time is of the essence. The committee recommended a review. The Government has supported the review and has appointed Justice James Wood, one of the most eminent jurists in the State, to conduct it. His review and the report must be tabled and made public by November. Of course, that is a further delay. It is 25 years after the murders and the families of the victims continue to suffer. The recollection of witnesses is fading and, sadly, some key witnesses have died. We must remember that we are dealing with witnesses from an Aboriginal community and, to our eternal shame, the average life expectancy of Indigenous Australians is substantially less than that of non-Indigenous Australians. Time is of the essence. Recommendation 8 of the committee's report states:

> 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:
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> • 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
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> • 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 background to that recommendation is as follows. In 1996 there was an attempt to prosecute two of the Bowraville murder trials together under the previous, more restrictive common law evidence rules regarding propensity and similar fact evidence. That was denied, and instead each of the murders was tried separately and the same accused person was acquitted in each separate trial. Since that time the New South Wales Parliament has made substantial changes to the laws of evidence. Running the three trials together would be facilitated by the laws of today, with what the Evidence Act 1995 now terms tendency and coincidence reasoning, and this would considerably strengthen the prosecution case. This is the type of evidence that was used to convict serial murderer Ivan Milat of seven joined murder charges. The similarity in the serial killer evidence is what ultimately builds a cumulative case for the prosecution.

Legislation was passed in 2006 to create a limited exception to the principle of double jeopardy. Part 8, division 2 of the Crimes (Appeals and Review) Act 2001 allows the Court of Criminal Appeal to order a retrial following a murder acquittal if there is "fresh and compelling evidence" and it is considered to be in the interests of justice. "Fresh evidence" is defined as evidence that was not and could not have been adduced in the trial, section 102. It is not a barrier to retrial that the evidence was inadmissible at the time of the first trial. The provisions allow the prosecution to seek a retrial in very limited circumstances after a defendant is acquitted of a crime that carries a penalty of life imprisonment. This is a very small category of crimes, including murder and the most serious aggravated sexual assaults. Further, any such application is subject to a series of checks and balances, including that the Court of Appeal must decide that allowing a retrial is in the interests of justice. If implemented, this would remove a significant impediment to a retrial in the Bowraville case.

The need for finality in litigation was comprehensively ventilated in the context of the parliamentary debate, with the decision ultimately being taken to proceed with the double jeopardy reforms. Since then, the significant concerns raised about the impact of the reforms have not been made out in practice, with not one application being made to the Court of Criminal Appeal under the 2006 amendments. After an extensive homicide reinvestigation by a police strike force, further evidence has come to light in the Bowraville murder cases. Based on that and the change to tendency and coincidence law, the families of the Bowraville victims asked the Office of the Director of Public Prosecutions to apply to the New South Wales Court of Criminal Appeal for a retrial. That request was denied by the previous Director of Public Prosecutions and two former Attorneys General on the basis that the evidence did not meet the test for retrial under the exception to double jeopardy.

Despite the 2006 legislation being passed with Bowraville in mind—I note that members in this Chamber raised the Bowraville case in passing that legislation—there was a difficulty with the term "adduced" in section 102. It was considered that the Bowraville case could not be retried because the prosecution tendered some evidence of one murder in the trial of another of the murders, but it was not admitted under the common law of evidence. However, the meaning of "adduced" is yet untested in New South Wales courts. The reasons given for the Director of Public Prosecutions and former Attorneys General declining to make the application to the Court of Appeal for a retrial in the Bowraville case was at least in part due to the problem of the definition of "adduced" in the Act.

One legal interpretation of "adduced" is that if the evidence is presented to the judge, but rejected as inadmissible under the laws of evidence, then it has been "adduced". Another, alternative interpretation is that evidence is "adduced" only once it is both presented to the court and admitted into the evidence before a jury. This is important in the Bowraville case because if "adduced" has the former meaning then the tendency and coincidence evidence linking all three murders cannot be fresh under the New South Wales double jeopardy laws. If it has the latter meaning, then the evidence could be the basis for a double jeopardy application. In order to address this uncertainty, the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015 proposes a straightforward statement to the effect that the definition of "fresh" evidence is satisfied if the laws of evidence are changed so evidence that was previously inadmissible is now admissible.

The bill clearly and squarely addresses this problem and removes it as a significant barrier to a future application under the double jeopardy provisions. If fresh evidence included evidence that was not and could not have been admitted into evidence, as opposed to being tendered in court but rejected by the judge as inadmissible, it would remove a significant barrier to a retrial for the Bowraville murders. The tendency and coincidence evidence was not admissible under the old evidence law, and now could be under the new Evidence Act. I turn now to the bill. The long title of the bill describes its purpose and function as:

> An Act to amend the Crimes (Appeal and Review) Act 2001 to extend an exception to the rule against double jeopardy in relation to an acquitted person where previously inadmissible evidence becomes admissible.

The relevant application provision in section 100 of the Crimes (Appeal and Review) Act 2001 reads:

> (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).

Section 102 of the Act defines the term "fresh and compelling" as follows:

> (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.

This bill inserts into section 102 of the Crimes (Appeal and Review) Act 2001 the following clarification:

> (2A) Evidence is also fresh if:
>
> > (a) it was inadmissible in the proceedings in which the person was acquitted, and
> >
> > (b) as a result of a change in the law since the acquittal, it would now be admissible

if the acquitted person was to be retried.

This proposed amendment is designed to give effect to what many thought were the intentions of the 2006 double jeopardy reforms, which through a drafting technicality have continued to fail the families of the Bowraville victims in their search for justice. These reforms balance against the principle of finality and acknowledge that the criminal justice system is an imperfect one that can be, and has been, demonstrated to produce serious miscarriages of justice. Where a miscarriage of justice is patently obvious, a highly rarefied and conservative legal response that fails to address that injustice risks bringing the justice system into disrepute. If the justice system cannot be perfected, there must be avenues for redress that provide some mechanism of attaining substantive justice following a grossly unjust acquittal in the most serious of cases. Of course, that mechanism must be carefully circumscribed.

The likely rate of uptake of applications under the bill must be considered in light of the existing scheme under part 8, division 2 of the Crimes (Appeals and Review) Act. That division contains a rigorous system of checks and balances for retrials by prosecution application. For such an application to be successful, the following steps must be taken. First, an accused must be acquitted for a crime that attracts a life sentence. That is a very small class of offences at the most serious end of the spectrum and it includes murder, aggravated sexual assault in company, or aggravated sexual intercourse with a person under the age of 10 years. Secondly, fresh evidence must come to the prosecution's attention. Thirdly, the Office of the Director of Public Prosecutions must decide through its internal processes—themselves subject to levels of internal oversight—that an application for retrial would both have reasonable prospects of success and be in the public interest, according to the Prosecutorial Guidelines. Fourthly, the Director of Public Prosecutions must apply to the NSW Court of Criminal Appeal for a retrial under section 100 of the Act. Fifthly, the Court of Criminal Appeal must be satisfied both that there is fresh and compelling evidence against the acquitted person in relation to the offence, and, importantly, that in all the circumstances it is in the interests of justice for the order to be made.

Not only is the class of crimes restricted to the most serious crimes in the criminal law, and the new evidence must be compelling, but the Court of Criminal Appeal must, crucially, consider whether a retrial would be in the interests of justice. This test allows for a wide discretion to reject any application that amounted to an abuse of process or which could otherwise yield unjust outcomes. The bill contains a narrow, additional opening for retrial that is highly unlikely to produce a flood of retrials. It continues to be subject to all the checks and balances I have set out, including the essential interests of justice test in the Court of Criminal Appeal. Care has been taken in the drafting, with the further qualifications following a period of consultation. Those further qualifications include: first, that it must be a legislative change to the laws of evidence, not a shift in the interpretation of the Court of Criminal Appeal to trigger the definition of "fresh"; and, secondly, it must be a substantive change in the laws of evidence.

I turn now to the United Kingdom equivalent law. Section 77 of the United Kingdom's Criminal Justice Act 2003 provides that the Court of Appeal can order a retrial following an acquittal if certain tests in sections 78 and 79 are met. Section 78 provides:

> New and compelling evidence
>
> (l) 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.

Section 79, relevantly, states:

> 79 Interests of justice
>
> (l) 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.

The law in the United Kingdom is almost identical to the law in Australia but the English Court of Appeal appears to have implicitly interpreted "new" evidence, which is its equivalent of "fresh", to include evidence that was available but could not be adduced due to the evidence laws at the time—that is, it proceeds on the same interpretation that would be clarified by this bill and may allow, or at least remove, a substantial barrier to a retrial in the Bowraville murders.

What has happened in the United Kingdom with the state of the law that this bill is proposing for New South Wales? I think it is illustrative. Indeed, it is implicit in several judgements, including *R v C* (2009) EWCA Crim 633. In that case a man was tried for the brutal bashing murder of his ex-girlfriend and acquitted. He was then charged with the near-fatal bashing of another ex-girlfriend. That victim gave evidence that the man had made admissions to her about physically assaulting the first victim on the night that she died and said there were other occasions when he had been violet towards her. A retrial was granted and the court remarked:

> That was a matter which could not be adduced before the jury because of the then state of the law, but which was in fact supported by independent evidence.

It acknowledged that a change in the laws of admissibility triggered the United Kingdom fresh evidence test. Thirteen applications have been made since the exception to double jeopardy was introduced in the United Kingdom in 2003. Of those, four were refused by the United Kingdom Court of Appeal and nine resulted in an acquittal being quashed. In several cases the mere fact of the order allowing a retrial was enough to precipitate a plea to the charges. Given the United Kingdom's population is substantially larger than that of New South Wales, the numbers of retrials of acquitted persons on the basis of previous inadmissible evidence would be expected to be extremely limited in this State.

Given our common legal traditions, we believe this is a reasonable indicator of how New South Wales would respond to such a legislative change. These were not trivial offences in the United Kingdom; they are the most serious we know of. Of the United Kingdom cases, at least seven out of the nine successful double jeopardy applications resulted in extremely lengthy sentences of imprisonment for crimes of rape and murder. They were cases crying out for justice, and when the outline of the facts in each judgement is read no sympathetic person could say that the murderer or the rapist should have walked free through the sheer good luck of an acquittal before all the evidence came to light or was presented before a jury. Indeed, the

Court of Appeal in *R v D* (2006) EWCA Crim 1354, the first application under the United Kingdom 2003 reforms to find its way to the court, quoted the United Kingdom Law Commission as follows:

> There is, further, the spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person's own admission) points strongly or conclusively to guilt. Such cases may undermine public confidence in the criminal justice system as much as manifestly wrongful convictions. The erosion of that confidence, caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself.

The Court of Appeal went on to say:

> We are dealing here with the crime of murder. The Law Commission identified the unique features of this crime as providing a unique justification for an exception to the double jeopardy rule the strongest justification for the exception is likely to be the case of murder.

In Bowraville it was the murder of three innocent children. The justice system does not always get it right and, for cases as serious as this one, justice for victims and their families needs to take priority. I acknowledge frankly and openly that this proposed amendment will not guarantee a conviction for the murders of Colleen Walker, Clinton Speedy-Duroux and Evelyn Greenup, and nor should any action of a Parliament. I acknowledge also that it will not even guarantee a retrial. I make that acknowledgement to the families in the public gallery and in the President's gallery. But I sincerely hope that with this bill, if it becomes law, we can clear one substantial impediment so that the families of these children have at least a fair chance at justice. When families have been waiting 25 years for justice according to law for the deaths of their three children, The Greens believe—and I know many members in this Chamber believe, regardless of their politics—that the Parliament has an obligation to act.

The unanimous report of the Standing Committee on Law and Justice recommended the path to justice for Bowraville. The time has now come to walk down it. We hope that every political party can get behind this reform and put concrete action behind our collective promises following last year's parliamentary inquiry. It has been a quarter of a century of heartache, campaigning, frustration and persistence by the families of the victims of the Bowraville murders. Their spirits are indomitable. They stand strong and proud for their families and their community. I introduce this bill knowing that the Government has instituted its review and knowing that the Hon. James Wood, AO, QC, is looking at this very issue. I introduce it so that the bill and the second reading speech can be on the parliamentary record and before the Hon. James Wood, AO, QC, as he undertakes that review. The review will report in November, precisely 12 months after the standing committee's report was delivered on the Bowraville murders. That will be the time, the very moment, when we must immediately convert our collective promises to legislative action. I am pleased to introduce the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015, and I commend it to the House.