Mark Speakman
Attorney General

Mr David Blunt
Clerk of the Parliaments
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

david.blunt@parliament.nsw.gov.au

Dear Mr Blunt

Government response to Legislative Council Standing Committee on Law and Justice Report 71

1. As you would be aware, on 30 August 2019 the Legislative Standing Committee on Law and Justice released Report 71 on the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 ('the Report').

2. The Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 ('the 2019 Amendment Bill') was introduced and second read in the Legislative Council by Mr David Shoebridge MLC on 30 May 2019.

3. As provided in the Standing Committee's Report, the 2019 Amendment Bill was developed and introduced against the backdrop of devastating events that have deeply affected the Bowraville, and broader NSW, community. More specifically, the 2019 Amendment Bill was intended to provide a legislative basis for the State to make a second application for the retrial of a person, 'XX' (name suppressed), for the murders of two Aboriginal children, Clinton Speedy-Duroux and Evelyn Greenup, to be retried jointly, and jointly on indictment for the murder of a third Aboriginal child, Colleen Walker-Craig.

4. The Report made two recommendations, as follows:

    1. *That the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019 not proceed.*

    2. *That the NSW Government consider the alternative reform model proposed by the Jumbunna Institute of [sic] Indigenous Education and Research.*

5. The Government notes the recommendation that the 2019 Amendment Bill not proceed.

6. In accordance with recommendation 2, the Government has considered the alternative reform model proposed by the Jumbunna Institute for Indigenous

Education and Research ('the Jumbunna Model'). In short, the Jumbunna Model proposes to the following:

a) Amend s102(2)(a) and (b) of the *Crimes (Appeal and Review) Act 2001* ('the CARA') to replace the word 'adduced' with 'admitted', with the effect that evidence would be 'fresh' if it:

   i. was not *admitted* in the proceedings in which the person was acquitted, and

   ii. could not have been *admitted* in those proceedings with the exercise of reasonable diligence.

b) Amend s105 of the CARA to allow the State to make unlimited applications for retrials in relation to a particular acquittal, but allow only one retrial to be undertaken following a successful application (i.e. if a retrial application were granted, and the subsequent retrial resulted in a further acquittal, then no further applications for retrial could be made), or alternatively that multiple retrial applications only be allowed in exceptional circumstances.

c) Amend Division 2 of Part 8 of the CARA to apply retrospectively.

7. As reflected in the Standing Committee's Report, the majority of NSW legal stakeholders consider that the law in NSW providing for strictly limited exceptions to the principle of double jeopardy strikes the right balance and should not be amended. That law, under Division 2 of Part 8 of the CARA, adopts the model provisions developed by the Model Criminal Code Officers Committee (MCCOC) and agreed by the Council of Australian Governments (COAG), which have likewise been adopted by other Australian states and territories.

8. It appears that the Jumbunna Model shares at least some of the characteristics of the 2019 Amendment Bill that stakeholders and the Standing Committee raised concerns with. The Government notes the following:

a) Amending the CARA in line with the Jumbunna Model would render NSW law inconsistent with the MCCOC model provisions agreed by COAG and adopted in other states and territories.

b) The 'overwhelming majority' of the legal fraternity consider that 'any change to the laws of double jeopardy would cause a significant erosion to the principle of finality'.[1]

c) Adoption of the Jumbunna Model may call the criminal justice system into disrepute, as it is specifically intended to enable the retrial of a specific person.[2]

---

[1] Legislative Standing Committee on Law and Justice, 'Report 71 – Crimes (Appeal and Review) Amendment 'Double Jeopardy Bill) 2019', August 2019, para 3.119.

[2] In one of its Submissions, the Jumbunna Institute for Indigenous Education and Research noted that its Model has been "*informed by our experience of… the frustration experienced by the Bowraville families as they have attempted to obtain justice*" and "*While [it] understand[s] that legislation should not look like it is crafted simply to remedy the problems in a single case… the current proposed amendment is one shaped by the experience with the families in the Bowraville murders… [and] their strongly held views about what justice should look like in this case*" [see Submission 25, paras 3-6].

d) The Jumbunna Model carries a potentially greater 'net widening' effect than the 2019 Amendment Bill, for allowing multiple applications for retrial.

e) If the Jumbunna Model were adopted, a large number of hurdles would still need to be cleared before there could be any retrial of the Bowraville cases, including that the NSWCCA would need to be satisfied of the following:

- The evidence on which the application is based is not only fresh (under the revised definition), but also compelling.
- In all the circumstances it is in the interest of justice for the order for a retrial to be made,[3] which may involve taking account of factors such as the length of time that has passed since the alleged offending, the likelihood of a fair trial, and the previous unsuccessful application for a retrial.

9. In light of the expectation that, even if the Jumbunna Model were adopted, this would not result in a further retrial with respect to the Bowraville cases (let alone result in a conviction), and its potential impact for cases beyond the Bowraville cases; and in weighing the merits of broadening the strictly limited exceptions to double jeopardy in NSW against considerations such as finality, certainty, national consistency and the rationale for the principle of double jeopardy, the Government does not propose to pursue the Jumbunna Model.

10. In coming to this conclusion, the Government acknowledges that the lasting grief and loss experienced by the families of Clinton, Evelyn and Colleen, and the Bowraville community, has been profound. The Government is deeply sorry for their pain and suffering. It is clear that there were failings in the criminal justice system's initial response to the suspected murders of the children. These failings have been acknowledged, and significant reforms in policing, cultural awareness, criminal investigations and prosecutions have been undertaken since 1991 to help ensure that such mistakes can never repeated.

11. I would be grateful if you could arrange for this letter to be tabled as the Government's response to Report 71.

Yours sincerely

Mark Speakman

[3] Legislative Standing Committee on Law and Justice, 'Report 71 – Crimes (Appeal and Review) Amendment 'Double Jeopardy Bill) 2019', August 2019, para 3.123.