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Merrin Thompson
Standing Committee on Law and Justice Committee
Legislative Council
NSW Parliament
By Email: lawandjustice@parliament.nsw.gov.au

5 August 2019

Dear Committee Members,

RE: SUBMISSION TO THE INQUIRY INTO THE CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2019 (THE BILL).

Thank you for the invitation to give evidence in Sydney on 24 July 2019 during the Committee's Inquiry into the Bill (the **Hearing**). We have extracted below the questions on notice as we understand them along with our responses.

<u>**Question:**</u>

Mr LONGMAN:... There is an issue between the definition of fresh and new, which has not really been raised today but which is worth noting. The distinction between fresh and new arose first in the common law and first in the civil jurisdiction of the common law and then in the criminal jurisdiction of the common law. It arose in the context of appeal rights. Ratten v R, which is a Commonwealth High Court decision that is often cited as to this distinction, addressed the distinction in a very specific way. It said, yes, evidence should be fresh if what you are arguing is you lost the chance of an acquittal. If there was evidence that a jury may have acquitted you on, it needs to be fresh. But if evidence proves innocence, it does not need to be fresh. It never needed to be fresh. It could be new.

I would like to go away and write some of this down as a supplementary submission because I do not want to overreach, but that strain in the common law has existed for a long time. The appeal rights have always been asymmetric. The circumstances under which one can appeal final verdicts have always changed and morphed in response to the common law and do in response to Parliament. We say that some of the submissions to date perhaps fail to properly grasp that reality.

The CHAIR: I will formalise that. Could you take a question on notice and come back with your definitions or differences between fresh and new in that interpretation?

Mr LONGMAN: Certainly.

Answer:

1. During the Hearing, multiple witnesses referenced the distinction between 'fresh' and 'new' evidence in the common law that has arisen in the context of appeals against conviction.

2. In this section, we provide an overview of the history of the distinction between Fresh and New evidence, and argue that the development of that distinction is conditioned on the balancing of certain interests that must be taken into account both in the interpretation of the term 'adduced' and in the standard applicable to 'reasonable diligence.'

3. At the outset, it is relevant to note that there is a complexity that arises as a result of a tendency to reach to the prior Australia jurisprudence on Fresh Evidence as a way of interpreting section 102(2). Some previous decision-makers have imported the definition of 'fresh evidence' from a different statutory context, namely the use of fresh evidence to establish the statutory ground of 'miscarriage of justice' on an appeal against conviction. Consequently, many of the decisions below comingle the concepts of whether evidence was 'adduced' and whether it could 'reasonably have been adduced' without reference to any explicit standard of 'reasonable diligence'. Rather, they deal with the question of whether a defendant could have adduced the evidence by reference to the particular facts in the case. In this regard therefore, limited guidance is available as to what such a standard may be.

4. One interpretation of 'Fresh' is that it means tendered to the Court. That interpretation draws on a 'technical legal distinction' between 'fresh' and 'new' cited by the Hon. James Wood.[1] That definition is originally drawn from the civil arena in the NSW Supreme Court of Appeal decision *Akins v National Australia Bank*,[2] a decision in the equity jurisdiction in which the Court interpreted a provision of the *Supreme Court Act 1970* which allowed a Court to receive fresh evidence on an appeal where there are 'special grounds' for doing so. That determination was subsequently applied by the Court in its common law jurisdiction.[3] In that case, evidence was not considered to be 'fresh' in circumstances where a party had simply failed to speak to an obviously relevant witness.

5. The concept has been considered in the criminal law context in the area of appeals by accused against conviction or sentence (in the NSW context under what is now section 6(1) of the *Criminal Appeal Act).* Under that section, the Court has the power to set aside a conviction for a number of reasons, including that the Court is satisfied there has been a 'miscarriage of justice'.

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[1] James Wood, *Review of Section 102 of the Crimes (Appeal and Review) Act 2001 (NSW)* (2015) 32.
[2] (1994) 34 NSWLR 155, 160.
[3] *Hashman v Downie* (1996) 39 NSWLR 169, 185.

6. The use of fresh evidence in the criminal context has been to establish that a miscarriage of justice has occurred, by reason of the fact that relevant evidence demonstrating innocence is now available that was not considered at the trial, or, that fresh evidence is available that demonstrates the accused was denied a chance at acquittal.[4]

7. The first thing to note is that, pursuant to the statutory power, the primary concern for the Court in these decisions remains the question of miscarriage of justice. Consequently, the distinction between 'fresh' and 'new' Evidence was, on occasion, irrelevant. It depended on the intended use of the evidence.

8. The first occasion we have been able to identify that the concept was determinatively considered in the criminal law was in the 1974 High Court case of *Ratten v R*. In that case, an applicant sought to overturn his conviction, either by way of a pardon or the referral of his matter, on the basis of evidence received by the Court of Criminal Appeal but not received on the trial. The analysis by the Court proceeded from an examination of the powers of the Court under s 568 of the *Crimes Act*, which stated the Court was to allow an appeal if, on any ground, a miscarriage of justice had occurred, and could reject an appeal, even with an error in the original proceedings, where there was no miscarriage of justice. Consequently, the concept of fresh evidence arose as a basis for establishing a miscarriage of justice. The Court went on to define "Fresh Evidence" as:

> *"Evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case".*[5]

9. The Court imported that concept from the civil jurisdiction, noting that it could '*not be translated without qualification*' to the criminal context and that therefore, '*great latitude*' must be given to the defendant when considering what evidence could and could not have been available to them with reasonable diligence.[6] Importantly, the consequence of whether the evidence was fresh or not was not the determinative question for the Court. Rather the determinative issue was the intended use of the evidence;

> *"If the court is considering whether the verdict of guilty should be set aside outright for the reason that innocence is shown, or the existence of an appropriate doubt establish, the court will consider all the material itself, forming and acting upon its own belief in, or disbelief of, the evidence, and upon its own view of the facts of the case including the evidence at the trial, though, as I have said, taking the facts as proved at the trial in the sense which having regard to its verdict the jury must have taken them. Of course, if it is concluded that there was a miscarriage in the sense*

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[4] *Ratten v R* (1974) 131 CLR 510; *R v Abou-Chabake* [2004] NSWCCA 356; *Leuschel v Police*(1999) 75 SASR 231.
[5] *Ratten v R* (1974) 131 CLR 510, 516.
[6] Ibid 517.

that the court itself is satisfied of innocence or entertains a reasonable doubt as to guilt, there will be no question of a new trial. The verdict of guilty will be quashed and the appellant discharged.

Further, when the material before the court satisfied the court of a miscarriage of this kind, it will not matter that the new material or some part of it is not fresh evidence, in the sense that it was not or could have been available at the time of the trial. Thus, until the court decides that there is no miscarriage of this kind, it will not need to consider whether or not any part of the new evidence satisfied the criterion of fresh evidence. The court's acceptance that guilt beyond reasonable doubt is not established, means inevitably that to maintain the verdict of guilty would be a miscarriage of justice...

But if the material before the Court of Criminal Appeal does not convince the court of such miscarriage, or if the appellant's claim is only for a new trial, the fact that the new material is not wholly fresh evidence in the sense I have described will be material."[7]

10. The distinction drawn in *Ratten* was explained by Giles JA in *R v Bikic*[8] where he said:

> *"The Chief Justice identified what, for brevity, I will call innocence/doubt of guilt miscarriage leading to acquittal and fair trial miscarriage leading to a new trial. He said that the production of fresh evidence may be regarded as an instance of fair trial miscarriage leading to a new trial, and considered that if the evidence was not fresh evidence there was no such miscarriage, but by the emphasised words further evidence which was not fresh evidence could establish innocence/doubt of guilt miscarriage. And, as will appear, further evidence which was fresh evidence could also establish innocence/doubt of guilt miscarriage".*

11. Whilst there have been a series of cases in which Courts have expressed 'some difficulties' in this approach,[9] the 2004 case of *R v Abou-Chabake*[10] confirmed the distinction between 'fresh' and 'new' evidence in summarising the principles applying to 'fresh' evidence in this context;

> *First, a distinction is made between "new evidence" and "fresh evidence". Fresh evidence is evidence not available to the accused at the time of the trial, actually or*

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[7] Ibid 518-9.
[8] [2002] NSWCCA 227, 245.
[9] Including Giles JA himself in *R v Bikic* [2002] NSWCCA 227 at 275. See also *R v Illic* [2000] WASCA 411,
[10] [2004] NSWCCA 356.

> *constructively. Evidence is constructively available if it could have been discovered, or available at the trial by the exercise of due diligence.*[11]

Question:
The CHAIR: *Will you also take this on notice-or you can answer it, it is up to you. You would have heard from the Department of Justice and the police questioning around changes to the system, and even the Bar Association. I think they referenced even the fact that Jumbunna is involved in that developing some of the work in relation to cultural sensitivity and guidance towards practices within the courts system. Do you want to make any comments as to any other areas that may need to be addressed or any areas in that part of the system-I will call it the judicial system as a whole-that it may be beneficial for us to also make other recommendations on, or will assist in? Again, you can take that on notice.*

Professor BEHRENDT: *Thank you.*

The CHAIR: *But it is quite clear that throughout the last inquiry and subsequent cases and things that have arisen that there have been some changes. The unfortunate thing is they are not changes that have led to the outcome that the families can point to and say that that is the outcome that gives them probably the comfort that they are after. But we are looking at the system proper, and not just the one case. Anything we can learn or get some advice on as far as systematic improvements are concerned, we would also be open to.*

Professor BEHRENDT: *I think we would welcome an opportunity to do that and take your question a little broadly, both in terms of what sorts of education, reforms, the sorts of things that were alluded to earlier, the bench books and things that are being developed, some of which we are involved in. But also, if you will allow it, we have continued to think deeply because of our experiences of working with the Bowraville families and other Aboriginal families particularly, who are going through coronial inquests and deaths in custody, what more structural support could be given to victims of crime. If we may also include that in the submissions that would be really helpful from our point of view in terms of giving a broader answer to that question.*

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[11] Ibid [63].

Mr DAVID SHOEBRIDGE: *If you are doing that, one of the issues that might be useful to look at would be the extent to which the previous recommendations from this Committee have been implemented by the courts and the Executive.*

Professor BEHRENDT: *We would be happy to have a look. We have kept an eye on them so we would be happy to make some comments on that too.*

Answer:

12. We note that the section on Aboriginal People in the *Equality Before the Law* Benchbook was updated in June 2014. That update was substantial and provides much better guidance now on cultural safety issues.

13. With regard to unconscious bias training, the Law Council of Australia has recognised the issue in the context of the Australian legal profession and developed training for Australian solicitors,[12] though that training is neither free of charge nor mandatory.[13]

14. Jumbunna has produced updated cultural safety training for the NSW Police built around the Bowraville matter as a case study. A copy of the that training film would be available from the NSW Police Force.

Implementation of the Prior Recommendations.

15. The Government accepted the majority of the recommendations of the prior report with some caveats.[14] The government committed to reviewing whether relevant lawyers, judicial officers and court officers should be required to undergo Aboriginal cultural awareness training, undertaken in consultation with the Judicial Commission, which is responsible for judicial education (in response to Recommendation 4) and whether cultural awareness training being included as a compulsory element of legal training and education (in response to Recommendation 5).

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[12] *Unconscious bias training now available to all Australian lawyers*, Media Release, 8 March 2017 available at https://www.lawcouncil.asn.au/media/media-releases/unconscious-bias-training-now-available-to-all-australian-lawyers

[13] The training is delivered by Symetra through the following website - http://www.diversityinlaw.com.au/.

[14] *Government Response – Bowraville,* tabled 02 June 2015 and available here - https://www.parliament.nsw.gov.au/lcdocs/inquiries/2131/Government%20response%20-Bowraville%20-received%202%20June%202.pdf

16. As part of this process, in 2016 the NSW Department of Justice convened an 'Aboriginal Cultural Awareness Roundtable' which included stakeholders from the academic sector, including Jumbunna.

17. In relation to Recommendation 4, it is our understanding from communications in 2016 that the Department concluded that training should remain voluntary for most relevant lawyers and judicial officers, but should be mandatory for lawyers at the major government legal agencies providing family and criminal law advice. The Department indicated it would make training mandatory for court officers and we understand has previously written to Legal Aid NSW, Crown Solicitor's Office and the Office of the Director of Public Prosecutions to request that they consider making training mandatory for relevant employees.

18. Jumbunna staff are aware of a tendency within the legal profession, including its representative bodies, to view such training as only necessary for those practitioners who practice in criminal or family law (including child protection). In our view this is unfortunate, and represents a fixation of the profession on its role as service providers rather than a larger role as contributors to dialogues of justice in Australia. An obvious example is the raft of constitutional lawyers who are now asked about questions of treaty, sovereignty and the Uluru Statement of the Heart, none of whom would have any obligation to undergo such training. One recommendation made by Jumbunna during these consultations was that the NSW Government, as the single largest employer of practitioners in NSW should make such training a pre-requisite for employment, which would ensure take-up of such training by the academy. We are not aware whether the Government adopted this recommendation.

19. In relation to Recommendation 5, we understand (again from discussions in 2016) that the NSW Department of Justice liaised with stakeholders about including Aboriginal cultural awareness training in legal training and education, and that ultimately it was the Legal Services Council that determined such training should not be mandatory. Nonetheless, we are aware that Law Faculties are adopting such training and our understanding from the Department of Justice is that as at 2016, overall up to 11 of 14 providers intended to have a relevant graduate attribute.

20. In addition to the above, Jumbunna has provided cultural competency training at the request of the Aboriginal Legal Service on two occasions, again built around the Bowraville case study. We are also in discussions with stakeholders about developing further training on unconscious bias, though funding is, as always, an issue. We have received no requests from either the Attorney Generals department or the DPP to provide such training, though we understand that the Crown Solicitors Office has previously organised such training from Dr Diana Eades who is eminently qualified in this area.

Support for the family

21. Throughout our work with the Bowraville community and other communities across Australia in coronial work and in cases of unsolved murders, it has become apparent that there is a significant need to support First Nation families and communities in navigating the Australian legal system. Ultimately, what is required is a culturally safe and holistic support service that is capable of:

21.1. Advocating for the interests of the victims and communities within the legal and political arenas. Traditionally, victims do not have legal rights or standing in cases of unsolved murders, and unless a private solicitor is willing to act to advocate for their interests, we are not aware of any community legal services that offer legal assistance. It is evident from the Bowraville Case that on multiple occasions the families concerns for their children were minimised or ignored;

21.2. Provide culturally appropriate support to the victims to ensure their voice is heard amongst stakeholders. Such a service needs competency in the political and public advocacy realm with expertise in media and journalism to ensure the victims' voices and interests are not subsumed by media organisations or allied organisations with their own interests; and

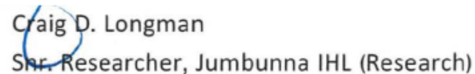
21.3. Provide culturally appropriate support to assist communities to heal and grieve (together **the Service**).

22. The first stage in the development of the Service is speaking to appropriate communities about their experiences of Aboriginal victims of crime to identify the experiences of victims, their families, and the communities in which crime occurs. This research needs to be informed with an awareness of critical race and settler-colonial theories in order to navigate the complex historic and contemporary relationships between Indigenous communities and the Colonial legal and political system. We recommend the NSW Government commit to the funding of an event organised and facilitated by Jumbunna in mid-2020 to bring together First Nation representatives touched by violent death. The vent should:

22.1. Provide a culturally safe place for First Nation communities and families of victims of crime (including deaths in police or prison custody) to tell their stories, share their experiences and support one another; and

22.2. Generate an evidence base that can guide the establishment of the Service in answer to the concerns and priorities raised by the attendees.

Yours Sincerely,



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