DIRECTOR'S CHAMBERS

ODPP
New South Wales

YOUR REFERENCE

DATE

7 August 2019

The Hon Niall Blair MLC
Chairperson
Legislative Council Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Blair

Inquiry into Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019
Response to questions

I refer to the evidence I gave before the Committee on 24 July 2019. I have reviewed the transcript provided and have one suggested amendment at page 29 in the attached document.

Turning to the questions I undertook to answer on notice:

1. *Did the Court of Criminal Appeal in Attorney General for NSW v XX [2018] NSWCCA 198 (XX) make any conclusions on the nature of the evidence?*

   In determining the Attorney-General's application, the Court of Criminal Appeal set out in some detail the categories of evidence said by the Attorney to be "fresh" and "compelling" at pars [36] to [69], referring to those categories as the "Walker" evidence, the "informer" evidence, the "other admissions" evidence and the "lies evidencing consciousness of guilt" evidence.

   Having established the appropriate legal tests for the reception of evidence on the application, the Court ruled that the "Walker" evidence was not "fresh" as it was available to be tendered at the Greenup trial; in those circumstances the Court was not required to consider whether it was "compelling". The Attorney conceded that the "informer" evidence, the "other admissions" evidence and the "lies evidencing consciousness of guilt" evidence, even if fresh, would not, in circumstances where the "Walker" evidence was not also fresh, be sufficient to justify setting aside either of the respondent's acquittals: see pars [69] and [257].

   The only evidence which the Court considered fresh was that part of the "other admissions" evidence from the 2016 interview of the respondent by a journalist; the Court held that this evidence was not compelling, in fact it was "destructive of any question of the guilt of the respondent" for the Greenup murder.

   In these circumstances I maintain that the Court of Criminal Appeal made conclusions about the nature of the evidence said to be fresh and compelling.

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2. *In the context of the submission by the Jumbunna Institute for Indigenous Education and Research, what is the DPP's view about the submission generally but particularly the merits of changing the word "adduced" in section 102 (2) (a) to the word "admitted".*

I note that the Jumbunna Institute has proposed alternate amendments to the Bill, as the combination of uncertainties that arise in the current draft could lead to "an unintended expansion of the categories of cases that would fall under the exceptions". In particular, Jumbunna raises the issue, over which the ODPP has also expressed concern, that the "law of evidence" is not defined and potentially includes a broad and uncertain cohort of changes to the law. For example, a statement previously only admissible on a hearsay basis prior to the current interpretation of the *Evidence Act 1995* might, if tendered now, be admissible as proof of the fact. Will this change to "the law of evidence" become a basis for applying to overturn acquittals?

Jumbunna suggests replacing the word "adduced" with "admitted". I consider that there still remains a number of arguments against this approach. In broad terms, the interpretation of "adduced" as determined by the CCA in *XX* is in accordance with what was intended when the provision was introduced, and I respectfully agree with the persuasive opinions of former judges and experienced criminal jurists James Wood QC and Jane Matthews as to why this is the preferable position.

While the suggested change would broaden the range and nature of evidence that may found an application under section 102 (2), I do note that the safeguards inherent in requiring that the evidence be fresh and compelling and in the interests of justice would still need to be met. Overall then it would seem that while this change would broaden the application of the section, it may do so only modestly.

I agree with the Jumbunna proposal to the extent that it recognises the inappropriate legal artificiality involved in deeming evidence to be fresh because of a later change in the law. This impermissibly stretches the ordinary and well-understood legal definition of "fresh" evidence.

While I stand by my earlier position on the question of amending the Bill, I do consider the Jumbunna suggestion to be a preferable course to the Bill as currently proposed.

I do not support the second part of the Jumbunna proposal concerning imposing no limitation on the number of applications that may be made pursuant section 105, but rather imposing a limitation of one retrial after an acquittal. If clause 102(2A) of the Bill is enacted and the number of applications the State may make for a retrial is not limited, in my submission a very oppressive legislative regime is established, particularly if the necessary exceptional circumstances may be met by a later substantial change in the law of evidence. A failed application in a notorious case could give rise to political impetus driving further changes to the law of evidence to provide the basis for a further application in that case.

I note that there is considerable cost and emotional toll involved in these applications, if the *XX* application is any indication. The matter took at least 12 months to prepare, was argued over 6 days and there was a further wait of 10 months before the judgment was delivered. This chronology speaks of the complexity of the application. As stated in *R v Carroll* (2002) 213 CLR 635 at 21 the position of the State compared to the accused in these applications is not equal, the resources of the State greatly outweighing those of the accused.

In my submission the ability for the State to repeatedly bring applications substantially undermines the important principle of finality of the verdict.

3. *Additional question: Please provide information on the numbers of serious child sexual assault offences and other life sentence cases where the defendant was acquitted.*

The ODPP has limited capacity to identify information about cases involving particular offences, without resorting to significant manual investigation of our case management system. The process of reviewing the case files is time consuming and could not be completed within the time frame provided.

ODPP business management information captures information about cases from about 2005. From that system we are able to identify case files where a verdict of not guilty was the result for a particular offence. Without further manual interrogation of the files it is not possible to say whether there was a conviction for alternate or other offences or it was an acquittal on all charges.

Sexual offences

There are three sexual offences that carry a maximum penalty of life, namely section 61JA , section 66A (2) and section 66EA of the Crimes Act.

Section 61 JA was introduced in 1.10.2001 and the maximum penalty for section 66A(2) was increased to life in 1.1.2009.

Section 66EA, although introduced in 1999 was substantially amended in 2018 with retrospective effect (with some limitations). I also note that s66EA was amended on the recommendation of the Royal Commission into Responses to Institutional Child Sexual Abuse, because it was underutilised.

In respect of each offence category since about 2005 to present:

s61JA - 14 acquittals

s66A(2) – 66 acquittals

s66EA – 10 acquittals

Murder

Murder – 238 acquittals

Yours faithfully

Peter McGrath SC
Acting Director of Public Prosecutions