Submission No 19

INQUIRY INTO FAMILY RESPONSE TO THE MURDERS IN BOWRAVILLE

Organisation: Allens

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Allens
Deutsche Bank Place
Corner Hunter & Phillip Streets
Sydney NSW 2000 Australia
T +61 2 9230 4000
F +61 2 9230 5333
www.allens.com.au

GPO Box 50
Sydney NSW 2001 Australia
DX 105 Sydney

ABN 47 702 595 758

Allens › ‹ Linklaters

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The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

By Courier

Dear Director

Submission to the Standing Committee on Law and Justice – Inquiry into the Family Response to the Murders in Bowraville

We have been requested by the Clinton Speedy-Duroux Association Inc., an association formed by the family and friends of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux (the ***Families***) to make the following submission to the Standing Committee on Law and Justice (the ***Standing Committee***) on behalf of the Families.

The submission is made in relation to the Standing Committee's inquiry into the response of the family to their unsuccessful attempts to have the man previously acquitted of the murders of Clinton Speedy-Duroux and Evelyn Greenup, retried for these murders under the exception to the double jeopardy principle set out in the *Crimes (Appeal and Review) Act 2001* (NSW) (***Crimes Appeal and Review Act***).

The submission seeks to:

1 summarise the steps that have been taken by the Families to seek that be retried for the murders of Clinton Speedy-Duroux and Evelyn Greenup pursuant to the exceptions to the double jeopardy laws;

2 outline the impact on the Families of having those applications denied; and

3 respectfully suggest to the Committee an amendment to the Crimes Appeal and Review Act that would clarify the position in relation to the admissibility of evidence under the Act. In summary, the Families submit that a definition of the word 'adduced' in the context of s102(2) of the Crimes Appeal and Review Act should be added to the Act in order to clarify what is intended to be considered 'fresh' evidence under the Act and that the addition of such a definition would assist in seeing a just outcome to the family's requests for a retrial.

For the families and friends of Clinton Speedy-Duroux, Coleen Walker-Craig and Evelyn Greenup, the grief they have experienced over their loss has been exacerbated by the fact that the NSW criminal justice system has so far been unable to see the person responsible for those crimes brought to justice.

1. Submission under the Crimes Appeal and Review Act

Legislative Background to the Submission

On 15 December 2006 the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006* (the ***Bill***) was enacted amending the Crimes Appeal and Review Act by, among other things, inserting sections 98-112. These sections effectively provide an exception to the principle of double jeopardy so that an acquitted person may be retried for a serious crime in certain circumstances. Sub-sections 100(1) and (2) of the Crimes Appeal and Review Act define those circumstances as follows:

(a) 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:

(i) there is **fresh and compelling evidence** against the acquitted person in relation to the offence, and

(ii) in all the circumstances it is in the interests of justice for the order to be made.

(b) 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(2) of the Crimes Appeal and Review Act provides that 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.

Section 102(4) of the Crimes Appeal and Review Act provides:

> 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.

The Bill was enacted following a significant lobbying effort by the Families (then known as the Ngindayjumi (Truth Be Told) Action Group).[1]

The exception to the double jeopardy principle provided for by the Bill effectively mirrored the equivalent provisions under Part 10 of the *Criminal Justice Act 2003* (UK) (the ***CJA***), legislation which had been introduced in the United Kingdom in 2003 and came into force in April 2005.[2]

Submission to the Honourable Greg Smith

On 3 June 2011, on behalf of the Families, Allens sent to the Attorney General of New South Wales, the Honourable Mr Greg Smith, a written submission requesting that the Attorney use the discretion provided to him under s115 of the Crimes Appeal and Review Act (which allows an Attorney General to exercise any function conferred on the DPP by the Act) to:

1 with respect to the murders of Evelyn Greenup and Clinton Speedy-Duroux, to apply to the Court of Criminal Appeal under s100 of the Crimes Appeal and Review Act for an order that the person who was quitted of those murders, be retried; and, if that application was successful

2 with respect to the murders of Colleen Walker, Evelyn Greenup and Clinton Speedy, lodge ex officio indictments against

A copy of the submission made by the Families to the Attorney General is enclosed as Schedule 1 to this submission.

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[1] Now the Clinton Speedy-Duroux Association Inc.

[2] Second reading speech for the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill, NSW Legislative Council Hansard, 17 October 2006; see also S Broadbridge, 'Double Jeopardy', House of Commons Library Standard Note: SN/HA/1082, 28 January 2009, at 22.

The submission was sent to the Attorney General after a submission on substantially similar terms that had been provided to the previous Attorney General, the Honourable Mr John Hatzistergos, in February 2010 had been declined. The submission sent to the Attorney sought to deal with the concerns raised by Mr Hatzistergos in his letter notifying the Families of his decision to decline to exercise his discretion. A copy of the letter sent by Mr Hatzistergos is Schedule 2 to this submission.

Summary of the Submission

In summary, the submission made by the Families to the Attorney General argued that as a result of the introduction of the *Evidence Act 1995* (NSW) (the ***Evidence Act***) evidence in relation to each of the murders of Clinton Speedy-Duroux, Evelyn Greenup and Coleen Walker-Craig became admissible in a trial for each of the other murders under the 'tendency and coincidence' rules set out in sections 97 and 98 of that Act. This evidence had previously been ruled as inadmissible at the trial of 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 made on the basis of common law principles which set a higher threshold for the admissibility of propensity and similar fact evidence than is now found in the Evidence Act.[3]. The submission argued that this evidence was 'fresh' within the meaning of section 100 of the Crimes Appeal and Review Act because it was not previously admissible and thus could not have been adduced against the acquitted person in his previous trials.[4]

In effect, the submission relies on the proposition that the combined effect of subsections 102(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. Central to this position is the characterisation of the word 'adduced' in the context of s102 as meaning 'admitted' into evidence. Without any guidance from the Act as to the meaning of 'adduced in the proceedings', and in the absence of any direct Australian case law or commentary on the question, it was submitted that 'adduced' should be interpreted as meaning 'admitted' on the basis that this construction was supported by a United Kingdom authority as well as other general public policy considerations.[5]

Rejection of the Submission

In a letter dated 8 February 2013, the Attorney General notified the Families that, having reviewed and considered the submission and having taken advice from the Crown Advocate, he had decided to decline to exercise his discretion and apply to have retried. A copy of this letter is at Schedule 4 to this submission.

In particular, the letter stated that the Attorney General was not satisfied that the change in the law relating to admissibility of tendency and coincidence evidence constituted fresh evidence within the meaning of s 102 of the Act. The letter stated:

> "Your application submitted that this change in the law constitutes 'fresh evidence' within the meaning of section 102 of the Act because the word 'adduced ' in section 102 means 'admitted' and although evidence of Evelyn's murder was tendered at the trial for Clinton's murder, it was not admitted ... 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."

The Attorney General further stated that he had formed the view that the Court of Criminal Appeal would be unlikely to accept that the word 'adduced' means 'admitted'. While the Attorney acknowledged the existence

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[3] See paragraphs 65 -74 of the Submission to Attorney General, June 2011, for an explanation of how the Evidence Act reduced the threshold for admissibility of propensity and similar fact evidence under the common law.

[4] It was also submitted that it would be in the interests of justice that Hart be tried for the murders of Colleen Walker, Evelyn Greenup and Clinton Speedy together, with reference to all the available evidence.

[5] See at Schedule 3 of this submission a letter dated 11 October 2012 to Ms Natalie Adams SC, Crown Advocate, Solicitor General and Crown Advocate, addressing this argument.

of United Kingdom authority supporting this reading of the term 'adduced' (discussed below), the Attorney appears to have dismissed the persuasiveness of this authority, although, it is unclear on what basis this decision was made.

2. Response of the Families to the rejection of the Submission

The Families were and remain disappointed by the decision. In particular, they are disappointed by the fact that, having lobbied successfully for the introduction of the Crimes Appeal and Review Act, the amendment has not secured the desired aim due principally to an apparently unintended legal ambiguity. In circumstances where it is clear that there are alternative readings of the term 'adduced' available, the Families are not satisfied that the there was a sufficient basis for the view ultimately adopted in the Attorney's rejection.

If the parliament of New South Wales wishes to address this circumstance, the Families submit that one tangible and relatively simple way of doing this would be to address the ambiguity arising from the absence of a definition of what is meant by the term 'adduced' in the context of s 102 of the Act by amending the legislation to include a definition of this term.

The Families submit that, should a definition be added to the Act, it should be framed on the basis that only evidence that has been admitted into evidence at a previous trial is relevantly 'adduced'.

3. Arguments to support legislative amendment

Defining 'adduced'

The Families submit that evidence should not be considered to have been 'adduced' in circumstances where the evidence was ruled inadmissible in the trial at first instance or where it would not have been admissible at law under the laws of evidence as they then stood and as such the evidence could never have been taken into account, and that that position should be clearly articulated in the Crimes Appeal and Review Act. In support of that proposition:

1 Neither the Explanatory Notes nor the Second Reading speech for the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (the ***Amending Act***), which amended the Crimes Appeal and Review Act by inserting s102, provide guidance as to the meaning of 'adduced in the proceedings'.[6]

2 No Australian court has considered the meaning of 'adduced' under s102 in the context of an application for a retrial under the Act.[7]

3 In circumstances where there is no Australian guidance on the meaning of 'adduced' in this context, it is instructive to consider the interpretation of the equivalent provision under Part 10 of the CJA, the UK legislation upon which the Amending Act was based. Like the Crimes Appeal and Review Act, the CJA enables the prosecuting authorities, with the consent of the DPP, to apply to the English Court of Appeal for an order quashing the original acquittal and directing a retrial where 'new and compelling' evidence has come to light. The CJA defines 'new evidence' in virtually identical terms to the definition of 'fresh evidence' under the Crimes Appeal and Review Act:

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[6] Second reading speech for the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill, NSW Legislative Council Hansard, 17 October 2006, available at: http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/805603fb8527f381ca2571e100197f3e/$FILE/LC%2069-7006.pdf

[7] *R v Gilham* (2007) 190 A Crim R 303; [2007] NSWSC 231 is the only decision to consider the meaning of the words 'fresh' and 'compelling' in s 102 of the Act, albeit in the unrelated context of an application for a stay of an indictment. At [64], Howie J commented 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'.

(a) Section 78(2) of the CJA provides that 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)'.

(b) Section 78(5) provides that:

> 'it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person'.

4 Given that the Crimes Appeal and Review Act has been drafted in virtually identical terms, we think the Court is likely to be materially assisted in its interpretation of s102 by the approach taken in *R v B* [2012] EWCA Crim 414 which was the first (and remains the only) decision in which an English court has considered this issue. A copy of this decision is at Schedule 5 to this submission. There 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 s78(2) of the CJA. Allowing the application, the English Court of Appeal held that:

> "Subject to the interests of justice requirement found in s79, evidence which was available to be used, but which was not used, may be 'new' evidence for the purposes of s78(2) ... Evidence sought to be advanced by the Crown at the original trial had undoubtedly been available to be considered by the trial judge ... Without considering it he could not have provided a proper ruling on the question. However, once the judge had ruled that it should not be admitted at the respondent's trial, notwithstanding that it was *available* for his consideration, and indeed that he considered it, it was not, in our judgment, '*adduced*' in the proceedings".[8] (emphasis added)

5 The Court of Appeal also suggested that there is a clear and deliberate legislative intention to allow applications based on new evidence which was available but not adduced (read 'admitted') at trial given that the language 'adduced in those proceedings' was adopted in preference to the broader standard of evidence which was 'available' at the time of the acquittal:

> 'From these [Parliamentary] debates it is clear that the language of...the original Bill (the predecessor to s 78(2) of the 2003 Act to the effect that where at the original trial evidence was available in the broad sense, it should not be treated as new evidence) was deliberately amended to the current position that whether or not it was available, it is new evidence if it was not adduced in the proceedings'.[9]

6 The approach taken in *R v B* is consistent with that of the English DPP[10] 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.

In the absence of any Australian case law or commentary on the meaning of the expression 'adduced in the proceedings', it is our submission that a Court, and indeed this Standing Committee, should be persuaded by the approach in *R v B*, in coming to the view that previously inadmissible evidence, such as that which was sought to be relied on in this case, is 'fresh evidence', and that that proposition should find expression in the Crimes Appeal and Review Act.

In addition to the compelling nature of the UK position, we submit there are obvious public policy grounds which militate in favour of the construction of 'adduced' as admitted and the reflection of that is in the Act. The intent of the Act is plainly to permit a retrial where 'fresh' and 'compelling' evidence exists which is highly

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[8] *R v B* [2012] EWCA Crim 414, at [8]-[9].

[9] *R v B* [2012] EWCA Crim 414, at [11]. See also 'Criminal Justice Bill: Double Jeopardy and Prosecution Appeals' (Bill 8 of 2002/03), House of Commons Library Research Paper 02/74, at 41.

[10] Crown Prosecution Services (CPS), 'Retrials of Serious Offences: Legal Guidance', current and available at http://www.cps.gov.uk/legal/p_to_r/retrial_of_serious_offences/

probative of the case against the acquitted person. It seems unlikely that the intent of the legislation would have been to restrict those circumstances beyond the requirement that the material is 'fresh and compelling' and 'highly probative'. Section 102(4) adds material support for that proposition and that the legislation did not intend to preclude material not previously considered on the substantive question by the Court. 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.

It is difficult to conceive of a reasonable basis to exclude from the material contemplated by s102 material which is 'fresh' and 'compelling' and which could not have been considered by the Court at first instance.

Other Considerations

In our discussions with the Crown Advocate in 2012 regarding our April 2011 submission to the Attorney General, a number of issues were raised in order to further assist the Attorney's analysis and review.

One such issue was whether allowing applications for retrials of acquitted persons on the basis of previously inadmissible evidence becoming admissible through a change in the law would lead to a 'floodgates' problem (the ***Floodgates Argument***). To the extent that this or similar concerns may arise in the context of legislative review of the meaning of 'adduced', we make the following comments:

1 The requirement of 'fresh evidence' in s102(1) is balanced by the second threshold requirement that the evidence also be 'compelling', under s102(3).[11] This means that previously inadmissible evidence that becomes admissible will not, in and of itself, be sufficient to warrant a retrial, unless it is also highly probative of the case against the acquitted.

2 In circumstances where legislators consider it necessary to change a law in relation to the admissibility of evidence, it is open to imply that the law replaced did not reflect the community standard, it seems appropriate and in keeping with the purpose of the Amending Act[12] that compelling evidence that was not able to be adduced against a defendant because of admissibility issues is able to be adduced once an amendment has been made which would allow it.

3 Given that there is no discussion concerning the Floodgates Argument in the Explanatory Notes or the Second Reading speech for the Amending Act, it is also instructive to consider the English treatment of the Floodgates Argument in the context of the passing of the CJA. In introducing the CJA, it was open to the English parliament (as it was to the NSW parliament) to expressly exclude the possibility of previously inadmissible evidence constituting new evidence. Instead, the Parliament sought to ensure that previously inadmissible evidence could qualify as 'new' evidence. This intention is demonstrated by the language of s78 of the CJA defining 'new' evidence as that which had not been *'adduced in the proceedings'* which amended the draft s65(2) of the original Bill, which had originally provided that evidence is 'new' if it was not 'available or known' to an officer/prosecutor at the time of the acquittal.

4 Had Parliament adopted the definition found in the original Bill, previously inadmissible evidence would have been excluded from qualifying as 'new' evidence.[13] Parliament there chose another

[11] See Second Reading speech where the reforms to the double jeopardy rule were described as 'a measured way [of] creating exceptions framed with precision and containing appropriate safeguards'.

[12] See Second Reading speech where one of the purposes of the Act is described as being to provide justice to the victim and the community, where sometimes evidence has been concealed, or there have been technological developments revealing new evidence, 'or new conclusions to be drawn from existing evidence'.

[13] Any evidence which was not used due to a finding that it was inadmissible at the original trial "must have been known to the prosecution even if it could be argued that it was not 'available' because of its inadmissibility": 'Criminal Justice Bill: Double Jeopardy and Prosecution Appeals' (Bill 8 of 2002/03), House of Commons Library Research paper 02/74, 41.

direction to avoid that outcome. It is readily inferable that parliament here modelled s102 on s78 of the CJA to achieve a similar objective.

5 As in many instances where 'floodgate' arguments are raised the fear does not bear scrutiny. There is no basis to conclude that interpreting s102 of the Crimes Appeal and Review Act to read adduced consistently with the concept of 'admitted into evidence' will open up a floodgate of applications. The floodgate remains protected by the 'fresh' and 'compelling' requirement in s100(1)(a) and the requirement in s100(1)(b) that the order be in the 'interests of justice.' There is also no basis to conclude that parliament intends to alter the laws of evidence in ways which will make wide categories of previously inadmissible evidence admissible and lead to a flood of applications to the Court of Criminal Appeal from the DPP in respect of life sentence offences. Even if parliament has to alter the laws of evidence in such a way there is no basis to conclude that permitting applications under s100 in respect of previously inadmissible evidence is not precisely what is contemplated.

In summary, the Families are of the view that there is not a sound basis to read the word 'adduced' in s102 in a way which would exclude evidence that did not form part of the judge or jury's decision making process. It is submitted that if there be any doubt as to that meaning it can be readily dealt with by amendment to the Act. The Families are of the view that there are clear and compelling reasons to make that amendment, in particular:

(a) it is consistent with the apparent purpose of the Amending Act;

(b) it is consistent with the weight of common law authority which has considered the issue;

(c) it would give effect to sensible community expectations as to the circumstances in which previously unconsidered evidence should found the need, in the interests of justice, of a retrial;

(d) it would not give rise to any undue burden or unfairness on accused persons given the other thresholds new evidence is required to meet; and

(e) it would help address the deep concerns and cynicism experienced by the Families as to the 'fairness' of the NSW criminal justice system.

We would be happy to discuss this submission in more detail with you or provide a more detailed submission in relation to these issues should you think it would assist you in your deliberations.

Please do not hesitate to contact us if you would like to discuss.

Yours sincerely

Richard Harris
Partner
Allens

Alexandra Mason
Senior Associate
Allens

Rowan Platt
Lawyer
Allens