

**STANDING COMMITTEE ON LAW AND JUSTICE – THE FAMILY RESPONSE TO THE
MURDERS IN BOWRAVILLE**

Response on behalf of

Legal Aid NSW

To the Department of Justice

Introduction

Legal Aid NSW welcomes the opportunity to respond to the Recommendations of the Standing Committee on Law and Justice set out in *The Family Response to the Murders in Bowraville: Report 55 November 2014* ('Bowraville Report').

The Legal Aid NSW criminal law practice assists people charged with criminal offences appearing before the Local Court, Childrens Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court.

Legal Aid NSW represents criminal defendants who are charged with serious criminal offences and who may become subject to a retrial following acquittal in certain limited circumstances.

Legal Aid NSW also provides assistance to disadvantaged persons who are granted leave to appear at coronial inquests where there is a significant public interest. Most usually this involves us providing assistance and representation to family members of deceased persons.

Legal Aid NSW employs over 100 criminal lawyers and provides in-house training in a number of areas, including cultural awareness.

Accordingly, this submission seeks to respond to Recommendations 4, 8 and 9 only.

Overview

In relation to Recommendation 4, Legal Aid NSW supports Aboriginal cultural awareness training for criminal lawyers.

In relation to Recommendation 8, Legal Aid NSW does not support amending s 102 of the *Crimes (Appeal and Review) Act 2001* (the 'Act').

Legal Aid NSW does not support Recommendation 9.

Should you require any further information, please contact Alex Curnick, Policy Officer, Strategic Policy and Planning – Legal Aid NSW, 02 9219 5909, alex.curnick@legalaid.nsw.gov.au.

Recommendation 4

That the NSW Department of Justice consider and report on the merit of requiring lawyers who practise primarily in criminal law, as well as judicial officers and court officers, to undergo Aboriginal cultural awareness training

Legal Aid NSW supports Aboriginal cultural awareness training for criminal lawyers.

Legal Aid NSW has been providing Aboriginal Cultural Awareness training to its in-house lawyers for eight years now. This program has been designed to provide lawyers with a broad knowledge of Aboriginal culture, history and interaction with the justice system. It also includes practical skills in representing Aboriginal clients, such as taking instructions and communication skills, as well as community and kinship responsibilities. These workshops have been held in metropolitan and regional locations including Coffs Harbour and Lismore on the Mid and Far North Coast respectively.

Legal Aid NSW has also been providing Aboriginal Cultural Awareness training to private legal practitioners who undertake legal aid work for three years. Similar in content to the in-house legal program, this particular course is run on the weekends in metropolitan locations and during the week in regional locations. The interest from private legal practitioners has been exceptional with the course running in both Coffs Harbour and Lismore in 2014.

This year Legal Aid NSW will be providing for the first time a targeted Kinship and Communication workshop that will be tailored to the specific needs of criminal lawyers. This workshop will be conducted in conjunction with our annual Criminal Law Conference which runs from 1-3 July 2015. The Aboriginal targeted workshop will be held on Tuesday 30 June 2015 and is open to both in house and private legal practitioners at no cost to the practitioners.

Recommendation 8

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:

- ***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***
- ***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 report of this review should be tabled in the NSW Legislative Council as soon as practicable.

The Bowraville case represents a number of failings in the criminal justice system, in particular, the manner in which the original police investigation was undertaken.

Legal Aid NSW has considered the issues raised in the Bowraville Report but has not had access to the primary materials available to the Committee.

It is the view of Legal Aid NSW that the amendment of s 102 is unlikely, in all the circumstances, to overcome the evidentiary hurdles faced in previous trials or the subsequent consideration by the DPP and Attorneys General as to whether there are grounds to apply for a retrial in the Bowraville case.

Legal Aid NSW disagrees with the legal interpretation of s 102 of the Act by Allens that is set out in the Bowraville Report: that the combined effect of ss 102(2) and 102(4) is that evidence that was previously inadmissible is capable of constituting 'fresh evidence' on the sole basis that the law governing admissibility has changed since the first trial.¹

Legal Aid NSW does not support the amendment of legislation on the basis of a single matter, particularly in circumstances where the provision has not been judicially considered.

Legal Aid NSW is not satisfied that a review of s 102 to clarify the meaning of 'adduced', in circumstances where the provision has not been judicially considered to date, is necessary or warranted.

This response will deal with each of the suggested considerations in Recommendation 8 in turn.

- ***the legal or other ramifications of defining adduced as 'admitted', particularly on the finality of prosecutions***

Legal Aid NSW does not agree with the suggestion that 'adduced' should be defined to mean 'admitted'.

We are unable to comment on the specific legal ramifications of this suggested amendment as there has been no judicial consideration of s 102 to date. We do however have a number of concerns with the suggested amendment.

We are concerned that amending the definition of 'fresh evidence' in s 102(3) so as to define 'adduced' as 'admitted' has the potential to expand the category of matters which can be subject to a retrial, and in turn, affect the finality of prosecutions.

Legal Aid NSW is also concerned that amending the definition of 'fresh evidence' to include evidence available but not 'admitted' may result in a person being tried twice, when little has changed.

In relation to the Bowraville case, Legal Aid NSW is not satisfied that this suggested amendment would have resulted in a retrial being available under the Act in any case. Even if the evidence was capable of constituting 'fresh evidence' pursuant to s 102(2), it does not appear to be 'compelling' evidence as required by s 102(3).²

¹ See Bowraville Report, [6.11].

² See, for e.g. Bowraville Report, [6.2], [6.27].

Further, it is not clear from the Report that the relevant evidence sought to be adduced is now admissible under the *Evidence Act 1995* (NSW) as tendency and coincidence evidence.³

- ***the matters considered by the English courts under the equivalent UK legislation***

Legal Aid NSW does not believe that the matters considered by the UK courts are helpful. The UK legislation is different, and operates in a different legislative scheme and legal context.

Further, despite what is stated in the Report,⁴ it is not clear any of the UK cases to date have considered an application for retrial on the sole basis that the law governing the admissibility of evidence has changed since the original trial.⁵

- ***the merit of replacing section 102 of the Crimes (Appeal and Review) Act 2001 with the provisions in section 46I of the Criminal Appeals Act 2004 (WA), and***

Legal Aid NSW does not support this suggested amendment.

Section 46I has not been judicially considered and is part of a different legislative scheme. It is not appropriate to import the provision in isolation. Further, on its face, s 46I introduces a greater degree of uncertainty and complexity than s 102, and there is no evidence to suggest that it is a preferable provision to s 102.

- ***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.***

Legal Aid NSW does not support this suggested amendment.

As a matter of principle, there is no merit in broadening the scope of the provision to enable a retrial where the law governing admissibility of evidence has changed.

This suggested amendment represents a fundamental change to the double jeopardy provisions.

Legal Aid NSW does not agree that the UK cases cited in the Bowraville Report relate to retrials where previously inadmissible evidence has become admissible due to a change in law governing admissibility.⁶ The majority of the UK cases relate to evidence which did not exist at the time of the original trial.⁷

This suggested amendment would undermine the principles of fairness to an accused and finality in prosecutions. Such a provision could mean that an accused person is never able to put a matter behind them as it is not clear when and if a law may be changed. Further, it may lead to a further period in custody pending the second trial. It could affect the fairness of

³ See, for e.g., comments of the then DPP Nicholas Cowdery in 2007 cited in Bowraville Report, [6.2]

⁴ See Bowraville Report, [6.13], [6.18].

⁵ See Marilyn McMahon, 'Retrials of persons acquitted of indictable offences in England and Australia', (2014) 38 Crim LJ 59, 173-176.

⁶ See Bowraville Report, [6.18].

⁷ See Marilyn McMahon, 'Retrials of persons acquitted of indictable offences in England and Australia', (2014) 38 Crim LJ 59, 173-176.

trials as the reliability of evidence is affected (i.e. memories fade/change) and at a later trial evidence that was previously available to the defence may no longer be available (e.g. alibi evidence, corroborating witnesses).

There would also be significant costs for Legal Aid NSW in funding the legal costs of retrials where the law has changed. There may also be an additional client base who have funded their first trial themselves but require Legal Aid NSW to fund the second trial.

Recommendation 9

That the NSW Government ensure that, should any new application for a retrial of the Bowraville murders be submitted to the NSW Director of Public Prosecutions or Attorney General, the merits of the application be considered by an independent assessor, such as a retired senior judge or senior prosecutor from another jurisdiction.

Legal Aid NSW does not support Recommendation 9.

The procedure established by the legislation is appropriate. The legislation provides that applications for retrial are made by the NSW Director of Public Prosecutions. Applications can also be made by the Attorney General, who may exercise the functions of the Director of Public Prosecutions.

Legal Aid NSW does not consider it is appropriate to interfere with the independence of the Director of Public Prosecutions.

In any event, Legal Aid NSW is not satisfied that, having regard to the extensive consideration this matter has had from a number of senior practitioners of the Bowraville matter, including a Director of Public Prosecutions and two Attorneys General, that this Recommendation is warranted.