REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO THE FAMILY RESPONSE TO THE MURDERS IN BOWRAVILLE

CORRECTED

At Sydney on 12 May 2014

The Committee met at 11.15 a.m.

PRESENT

The Hon. D. Clarke (Chair)

The Hon. Catherine Cusack
Mr S. MacDonald
The Hon. S. Mitchell
The Hon. P. T. Primrose
Mr D. M. Shoebridge

LARISSA BEHRENDT, Professor, Indigenous Research, Jumbunna Indigenous House of Learning, University of Technology, Sydney, sworn and examined, and

CRAIG LONGMAN, Senior Research, Jumbunna Indigenous House of Learning, University of Technology, Sydney, affirmed and examined:

CHAIR: I welcome everybody to this third hearing of the Standing Committee on Law and Justice's inquiry into the family response to the murders in Bowraville. The inquiry is examining the response to the murders in Bowraville of Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux and the impact that the murders of these children have had on family members and their community. Before I commence I would like to acknowledge the Gadigal people who are the traditional custodians of this land. I also pay respects to the elders past and present of the Eora nation and extend that respect to other Aboriginals present here today. I remind everybody that the Committee is not able to reinvestigate the murders of the three children or to review the decisions of the court. It is also unable to examine the merits of any case for prosecution or the application of the double jeopardy legislation. I ask everyone to keep their comments within the terms of reference, which are designed to give people an opportunity to talk about the impact that these murders have had on the families and the community.

Today we will hear from the Jumbunna Indigenous House of Learning, University of Technology, Sydney, representatives of the law firm Allens Arthur Robinson and Dr Tracy Westerman from Indigenous Psychological Services, who will appear via teleconference. Before we commence I will make some brief comments about the procedures for today. First of all with regard to the broadcasting guidelines, while members of the media may film or record Committee members or witnesses, people in the public gallery should not be the primary focus of any filming or photographs. I also remind media representatives that they must take responsibility for what they publish about the Committee's proceedings. The guidelines for the broadcast of proceedings are available from the secretariat should anybody require it.

Witnesses who give evidence at Committee hearings are protected by parliamentary privilege. This means that evidence given before a committee can be made freely and honestly without fear or threat of legal action for defamation. At the same time, committee hearings and submissions are not an opportunity to make adverse comments or accusation about individuals. In particular, we request that witnesses avoid naming the alleged perpetrator in these crimes. Comments made outside a hearing do not receive the protection of parliamentary privilege. I urge witnesses to be cautious about their comments to the media and others after they complete their evidence. Such comments would not be protected by parliamentary privilege if, for example, another person decided to take action for defamation.

There may be some questions that a witness could only answer if they had more time or with certain documents to hand. In these circumstances witnesses are advised that they can take questions on notice and provide answers within 21 days. Finally, I ask everyone to turn off their mobile phones because they interfere with the broadcasting of the hearing. I welcome Professor Behrendt and Mr Longman from the Jumbunna Indigenous House of Learning. Thank you for being with us today. In what capacity are you appearing before the Committee?

Professor BEHRENDT: I am here in my capacity as having been a support person for members of the Bowraville community over the past few years.

Mr LONGMAN: I have been a support person for the community.

CHAIR: Would you like to make a short opening statement?

Professor BEHRENDT: Yes, Mr Chair, I will do that. First of all, I would like to thank you for the opportunity of addressing the Committee today and also thank you for this inquiry into the impact of the failure to bring a conviction in the murders of Colleen, Evelyn and Clinton. We began working with the families over four years ago when we were approached by Aunty Elaine and Aunty Muriel, members of Colleen's family, who then arranged for us to meet with Uncle Thomas and Leonie Duroux, members of Clinton's family, and Aunty Becca Stadhams, Evelyn's mother. During this time we have worked to support the work of Leonie Duroux and the families to have the case sent to the Court of Criminal Appeal for a determination on whether there can be another trial on the matters of Clinton and Evelyn.

We would like to share with you our observations as we have assisted in the preparation of some of the community's written submissions to this inquiry, that is, that the opportunity to be heard by this Committee has been most welcome by a community that has, over the last 23 years, often felt overlooked or neglected by those in official positions. But it is also true to say that these moments where the community has the ability to speak about their experiences makes the emotions very raw and the level of trauma and grief is profound, even after all these years, as I am sure you observed during your time in the community.

You would have already heard detailed evidence about the flaws in the initial police investigation and we would point out that the period of the murders and the initial investigation at the end of 2000 into 2001 was a period when the Royal Commission into Aboriginal Deaths in Custody was investigating a range of factors relating to the relationship between Aboriginal people and the criminal justice system, including the generally antagonistic relationship between Aboriginal people and the police, so it must be said that the irony of the situation where Aboriginal people were being locked up for summary offences such as public drunkenness and using offensive language compared to a circumstance where a serial killer who has killed three Aboriginal children and seems to get away with it has not been lost on the families and community of Bowraville.

This matter has been an unusual one for us in that there has been, since the establishment of the task force and the reinvestigation of the matters in 1997, a strong alliance and development of a relationship of trust between the police, led by Detective Inspector Gary Jubelin, and the Aboriginal community. We believe that the approach taken by the police in developing community trust has been an example of best practice and should be recognised and praised. We would also point out that it is a fairly unique position where police find themselves advocating on behalf of the community and we would suggest that this is a reflection of the way in which other official arms of Government have failed to give the community the appropriate consideration, support and attention.

I understand that that is a pretty harsh criticism but we believe it is supported by the evidence and arguments in our submission and it goes to the heart of the terms of reference before the Committee, namely the impact of the failure to bring justice to the families and communities who have suffered the loss of three children. The loss of three loved children brings its own deep loss and grief. The perception that officials have not done their due diligence when making decisions at important moments of the process brings a new dimension of disappointment, frustration and anger. Our submission sets out particular instances where there has been a clear perception from a community point of view that decisions by previous Attorneys-General and their department have been careless in that clear errors of fact have been evident. Further, in several of the review processes, namely the review of the prosecution in Evelyn's case that failed to secure a conviction being undertaken by the Prosecutor himself was seen as a review that would fall short of any test of objectivity and naturally offered no consolation to an already aggrieved community and number of families.

We are not arguing that these decisions and reviews were made without due diligence, but conflict of interest is about perception and we say there is a clear perception from the community that there is a lack of diligence and objectivity. We would say that one of the remedies must be that the matter needs to be determined by an independent set of eyes to assess the merits of an application to the Court of Criminal Appeal. We would also say that an aggressive Prosecutor should look at the materials in close consultation with the police, particularly with Detective Inspector Gary Jubelin. We can confess to the Committee that after four years of putting our hearts into this case, we still consult closely with Gary Jubelin to ensure we have the facts straight as there is, as you would have seen, a high level of complexity to these matters. It certainly raised concerns in our mind that the prosecution of Evelyn's case did not draw on the resources of the police as detailed in the evidence given to you by Detective Inspector Gary Jubelin.

Finally, we say this about the continual hesitancy of previous Attorneys-General to send the case to the Court of Criminal Appeal. They have always erred on the side of caution, taking the view that the application would be rejected by the court. We argue that this legislation, and indeed the test contained within it, has never been considered by the Court of Criminal Appeal, so assuming its interpretation can only be done in a vacuum. Of course there are other pieces of legislation that can be of assistance but in this second-guessing of the views of the Court of the Criminal Appeal, not once has the prospect been considered that the court might interpret any vagaries by relying on the clear parliamentary intention that the legislation should cover the Bowraville matters. It is a first principal of statutory interpretation that where there is a grey area courts should look to the intention of Parliament. We do not say this is definitive in how a court may decide it, only to point out that this kind of consideration of broad interpretation appears to be missing from previous considerations of what a Court of Criminal Appeal might decide and reflects the way in which the previous decision-makers have seemed to follow a path of least resistance in relation to the application to the court.

We are not asking this Committee to reinvestigate the crimes. We share the views of Detective Inspector Gary Jubelin and his task force that there is no stone unturned and there is unlikely to be any new evidence, but it is an important part of the healing process for the families and communities that the failure of the system be fixed, and Parliament is the appropriate place for consideration of how that can be done. Along the way, we have heard people in official positions take the view that the family should move on or let it go. It is inconceivable that a person in an official capacity would have said that to the parents of a missing child. You have seen how raw that pain still is in your visits to the community. You would have also seen the intergenerational impact of these crimes. A resolution is needed to stop these impacts from continuing. Our submission recommends a range of remedies, including additional resources for the families and community, particularly programs targeting young people. We would say that these are compensatory, and true justice and resolution for the community depends on ensuring that the serial killer who preyed on the children goes to court to face all three matters.

My colleague Craig Longman can provide an overview of the points that our submission makes in relation to the consideration of tendency and coincidence evidence, if that is of interest to the Committee, including the use and misuse of the comments by Justice Badgery-Parker. Mr Longman could also, if the Committee was interested, provide more detail on our concerns with the review processes undertaken to date of the conduct of the Prosecutors, or if it is of use to the Committee he can provide further details on our concerns about the Government's submission to this inquiry or further details on our concerns about the mistakes in the various responses from previous Attorney-Generals in this matter. Thank you.

CHAIR: Thank you, Professor. Mr Longman, did you have some comments that you wanted to add?

Mr LONGMAN: No, I am happy to answer questions.

CHAIR: I will ask the first question. In your view, how did the Aboriginality of some of the witnesses in the court trial affect the way they were perceived by the court and their experience of the legal process? In your view, has this been a factor, possibly a pivotal factor, in this whole process?

Professor BEHRENDT: I think it is probably true to say that Aboriginality was not an issue in the actual murders. This is a situation where you have a predator who has come into a community where there is an element of dysfunction and has used that to their advantage. It is also true to say that once there was an investigation and judicial processes Aboriginality has started to become a factor. We have briefly touched on that in relation to the issues around the historic tension between the police and the community.

Moving specifically to your question about the issues within the courtroom: There is very strong research concerning the specific cultural approach that should be taken with Aboriginal witnesses, particularly when contextualising Aboriginal experience. I will let Mr Longman talk a little more about those details that are in our submission but I would say this: As well as the technical advice that can be given to juries about how to interpret indigenous evidence one should also look at the importance of contextualising indigenous experience. When I say that I draw from my own experience. You would have gone out to the Bowraville mission and for people who are not used to that kind of community it can be very confronting to see the impacts of a community that has a high level of socioeconomic need and also has a high level of overcrowding.

I spent my summers in a community like Bowraville, so to me it is not quite as shocking as it might be to other people. On the mission where I would spend my summers it looked almost exactly like Bowraville. The one thing I would say is that although to people looking from the outside it might look like it is a community where children run wild, I grew up in those circumstances where you might sleep in one house one night and another house the next. The connectedness between the communities and the closeness of the families meant that people knew where you were all the time. It is an incredibly different experience and unless you have lived in it it is hard to understand. To that extent when evidence was put before the court about the nature of the community I think it is very difficult for people to understand that without deeper context. How you get that across is probably something that needs to be thought about, in addition to the way evidence is given in these cases.

CHAIR: On the question of Aboriginality as it related to the witnesses in the court trial itself, do you have anything you want to say about that?

Mr LONGMAN: I am happy to address that. Speaking specifically in relation to Evelyn's trial, which is where this issue seems to be raised, as I understand the manner in which that trial was run there was an opportunity at the start of that trial to seek two approaches. The first was directions to the jury about how to understand the answers that Aboriginal witnesses give, and secondly, to control the manner in which questioning is done to the witnesses. Those have different impacts. In relation to cross-examination, which is traditionally the way that defence barristers test evidence in court, there is prolific evidence to suggest that that technique is particularly problematic with Aboriginal witnesses because of gratuitous concurrence. We have addressed that in my submission but Dr Diana Eades is the leading researcher in this area in the country and I note that she has given evidence.

Mr DAVID SHOEBRIDGE: Did the prosecution ask for a direction?

Mr LONGMAN: As I understand it what occurred was the prosecutor was invited by the court to ask for directions. The prosecutor indicated that in his view those directions would be sought on a case-by-case basis from the witnesses. To comment on that: First, let me say that in my experience as a solicitor, notwithstanding that these protections do exist in the Evidence Act, it is a daily occurrence that they are not taken up by defence solicitors or not granted by the court. The tools are there in the procedures and the documents that the judiciary have access to and the powers under the Evidence Act, in my view they are regularly not used. I think that is a problem.

When courts consider this question they often consider it in the sense of they will talk to the witness and if the judge is not of the view that the witness is not demonstrating clear difficulties in answering and clearly agreeing with the propositions put to them, the court will often interpret that as being no issue at all. In my submission that is an inappropriate way for a judicial system to try and grapple with the complexities of cultural issues in relation to witnesses. Secondly, with regard to the directions to juries, and I will draw on what Professor Behrendt was saying, because of the legal prohibitions on talking to jury members after trials it is impossible to say in this case that jury members did not hear evidence from aboriginal witnesses, that didn't seem strange to anyone else in that courtroom, and formed views about what that evidence meant because they did not understand the cultural context in which the circumstances were occurring.

One further point, in relation to the way in which this evidence was gathered and in particular the fact that there were no directions given to juries and no control on cross-examination, the evidence given by these witnesses, perceived inconsistencies and questions about their credit because of the way that evidence was received has been relied on by former Attorneys General as reasons not to bring these applications. This may seem to be a procedural issue just in relation to Evelyn's trial but as we address in the section titled "The perfect storm," this has haunted the applications that have been subsequently brought. Does that answer the Committee's question?

The Hon. PETER PRIMROSE: Mr Longman, Professor Behrendt indicated that you could possibly comment on the Government's submission to the inquiry and also the responses of former Attorneys General. You have alluded to some of that already. I was wondering if you could elucidate on that?

Mr LONGMAN: Certainly. First, I think it is fair to say as a general proposition that what both responses and the Government submission in this case demonstrate, in my view, is a reactive rather than a proactive approach to this issue. In my view one of the community's greatest frustrations is the sense that, with the exception of the NSW Police during the reinvestigation, every inch that this matter has progressed has had to come entirely out of the community. Every approach to have the matters brought back for reconsideration and every request to have all of the evidence considered has come from the community or the police.

In relation to the submissions of both Attorneys General, generally when they were compiled neither Attorney General ever sat down with the detective inspector in this matter. It is an extremely complicated matter. This is a matter which is extremely complicated. Tendency and coincidence evidence is always complicated but this has two different police investigations, two criminal trials and a coronial proceeding to understand. I have sat down with Gary Jubelin dozens of times and every time I sit down with him I realise something about the procedures adopted or evidence given that I did not know beforehand. I am informed by Detective Inspector Jubelin that the time he spent with Jumbunna far exceeds any time he spent with the Department of Public Prosecutions or Attorneys General in this matter.

The next thing is that all three responses contain errors. For a community that has made such an effort to get these things back on the table, the fact that the responses of the Government contain factual errors is

beyond insulting, in my view. The responses are short. They do not deal, in my view, with the complexity of the evidence, and I will give some examples to the Committee in a minute. As an example, the New South Wales Government submission is four and a half pages long. Our submission to this matter, with the assistance of the community, is over 80 pages and that was cut down from over 100 pages when we initially compiled all of the evidence.

I will give some examples. This is the initial rejection in 2010 by the then Attorney General Mr Hatzistergos. The first thing to note in all of the responses is that the Attorney General has responded to the application by the family and community. That may seem reasonable but in circumstances where we are talking about investigating and prosecuting a serial killer one would not expect that the responses would be limited solely to those grounds raised in an application to the Attorney General. One would expect a more proactive response. For instance, the Attorney General references the issue of the person of interest's vehicle being present at the scene from which one of the victims disappeared. He references that with respect to what he refers to as the 1994 trial. The 1994 trial related only to one disappearance. In 1993 there was an application to bring a trial that contained two indictments relating to two of the victims. That was the moment in which this evidence was considered. Because it was only two victims it was only ever evidence relating to the location of the vehicle at two locations, not three.

When the Coroner heard this evidence, rather than saying, as the Attorney General said, that it was not considered to be substantial evidence in the circumstances of the case, the Coroner's view was that the evidence indicated that this car was used to dispose of the body. So we would say that response is inaccurate and fails to deal with the detail of the information. Again there is discussion of evidence regarding the removal of underwear in the 2006 trial. Again that evidence was not led in the trial because it was not admitted. Again it related only to two cases and subsequent evidence obtained by NSW Police related to numerous occasions in which this pattern of behaviour was said to have been engaged in by the person of interest.

There is again evidence talking about similarities in the injuries that were sustained in relation to the 1994 trial. Again that trial dealt with just one case. The 1993 application to bring both matters dealt with the injuries. It was dealt with in a vacuum because there was subsequent tendency and coincidence evidence, which has been relied upon but has not been addressed and which gives evidence of the person of interest having a tendency towards violence and having a tendency to strike individuals in the face—in one case knocking a person out with a strike to the side of the jaw. The removal or separation of the mandible was one of the injuries experienced by the victim and is consistent with a heavy blow to the jaw, but generally this evidence is also consistent with a tendency to use violence directed towards the face and the scull. I am happy to address these issues in more detail with a subsequent submission to the Committee but I will move along because I am conscious of the time. In relation to Mr Smith's response—

The Hon. CATHERINE CUSACK: When you say "Mr Smith's response", what document are you referring to?

Mr LONGMAN: This is the response of Attorney General, Mr Greg Smith, SC, MP, to Allens solicitors, dated 8 February 2013. There is a general rolling together of issues. There are comments like,"[the person of interest] has stood trial twice in relation to the murders and on each occasion the jury has not accepted the Crown case and he has been acquitted." That statement maybe technically accurate but it suggests that he has been trialled for both disappearances twice and that is not the case. He has never faced any trial in which more than one disappearance has been the subject of an indictment. The Attorney General said generally in relation to tendency and coincidence, "… in circumstances where that evidence is either not fresh because of its availability to police in 1993 or is not compelling because it adds little to the similar fact evidence sought to be led at the 1993 trial." That is the only section in which he deals with the tendency and coincidence evidence.

The reality is when the 1993 application to bring the trials was brought the court limited the similarities that it considered down to three. Detective Inspector Jubelin's affidavit contains more than 20 areas of evidence, which is tendency and coincidence evidence, that links just the disappearances and then, I believe it is, 11 areas of tendency and coincidence evidence that links the person of interest to the murders. So to simply say it does not add much to what was led in 1993 is incorrect and it shows a lack of engagement with the material in our submission.

Briefly, just to give the Committee some examples, the following areas of tendency and coincidence evidence have arisen since 1993 so they were never led on that application: the admissions that the person of interest allegedly made to the prison informers—I am happy to go into the details of those to the Committee but

I will do that in a closed session at the end if the Committee would like those details; evidence that the person of interest had threatened individuals and had waved a screwdriver around on other occasion—that is relevant because a screwdriver has been said to be consistent with the injuries that two of the victims sustained; evidence of the person of interest's sexual interest in Aboriginal women in the community and a tendency to stalk women in the community; evidence of the person of interest removing the clothing of people whilst they were unconscious—which is relevant because there is direct testimony of that; further evidence of a tendency towards violence, and significant violence; and tendency and coincidence evidence of drugging and drink spiking.

Lastly, Attorney-General Smith's response also said that the jury in the person of interest's most recent trial rejected the prison informer evidence, and that is categorically wrong. There are numerous instances of prison informer evidence and, without going into the detail, only one of those instances related to an admission that might be thought to be relevant to the death of Evelyn Greenup. The 2006 trial was limited to that death. So there were numerous admissions made to police, to prison informers relating to the disappearances of other victims that have never been considered in a trial.

One other note I would like to make in relation to the responses is the issue of delay, but also the manner in which information was provided to the community. Initially in January 2007 the NSW Police submitted a report and an affidavit. The affidavit alone was more than 61 pages. That was the affidavit of Detective Inspector Jubelin to the NSW DPP asking for an application under the amended laws. The response they received back was one-page long and it took one year and two months to come back to the Detective Inspector.

Mr DAVID SHOEBRIDGE: Detective Inspector Jubelin said in the course of that year he was never brought in nor asked to discuss or answer any questions.

Mr LONGMAN: That is correct.

Mr DAVID SHOEBRIDGE: Nothing like the requisition kind of process that he would normally expect in getting a detailed case together.

Mr LONGMAN: And as I understand from Detective Jubelin that has been the case with all of the proceedings that he has been involved in. He has never felt that he has been adequately consulted in building a case for prosecution. The request by Allens Arthur Robinson to Attorney General Hatzistergos took eight months and one week to come back. The response from Attorney General Smith took well over a year to come back. Just to address the Committee's question in the New South Wales Government's submission and to wrap-up this point at the same time, according to the submission that decision was made in December 2012. Not only did the family not hear of that decision until February 2013, the media heard about it first. So they learnt of the decision through the media.

Professor BEHRENDT: If I can just clarify that? It was one particular journalist selected by the Attorney General because in that period through January and February when the families had been becoming increasingly anxious to find out what the decision might be, they approached several other journalists to ring the Attorney General's office to ask for any indication of when a decision might be made and were told that there would be one soon. None of those journalists were contacted when the announcement was about to be made, it was somebody else. It gives you both a sense of the lengths to which the community had gone to try and get some kind of answer and how they must have felt when they received that through the channels that they received it.

The Hon. CATHERINE CUSACK: The implication being that the Attorney General did not want to give a heads-up to journalists who had been working with the families?

Professor BEHRENDT: Yes, who had been proactively asking about it and those journalists did have a track record of working with the families.

The Hon. CATHERINE CUSACK: And who knew about the issues?

Professor BEHRENDT: Yes, were well across it. They had previously published.

The Hon. CATHERINE CUSACK: You are saying that there is a sense that they were then excluded from the information when the decision was made?

Professor BEHRENDT: That is right.

Mr DAVID SHOEBRIDGE: We heard from the families about that and the awful case of one family member rushing to tell one of the mothers before she saw it on the news that night. That is really heartbreaking stuff.

Mr LONGMAN: This goes to the general issue that I was trying to elucidate earlier in regards to how this has been dealt with by the Government. The communities have made all the effort here in conjunction with what, in my view, is an extraordinary relationship that has been developed with the NSW Police Force—certainly a relationship unlike any I have seen in my experience and practice. All the pressure has been coming from there. The responses they have received have been polite, reasonable and objective. But there is no sense that government is interested in supporting this community. When I say "government" I mean the government organisations that they have been in contact with. Nor have they been interested in pursuing this matter. That has been extremely hurtful to the community.

The Hon. PETER PRIMROSE: What in your view would be the most important recommendation that this Committee could make?

Professor BEHRENDT: It would be hard to privilege just one. A range of recommendations could be made that would assist in providing support to the community in terms of dealing with the emotional impact of what they have been through. That could include counselling services that would be specifically available in Bowraville and therefore not require people to travel to attend and working in the community and with the families. There could be substance and alcohol abuse programs running in the community that address those underlying issues focused in Bowraville, which, again, would not require people to travel. There is concern about breaking the intergenerational impact of this.

There could be some programs that target young children, particularly after-school programs for boys dealing with antisocial behaviour. There are some very good examples of those around the country. There could also be some investment in raising itself esteem. Dealing with issues for younger people in the community is another thing. One of the things that has been evident for the families throughout this campaign over 23 years, and that is noticeable as someone coming in and working with them, is that the usual victims of crime organisations have found that it is a very difficult situation to navigate because of the complexities. It raises the question whether in the longer term there might be support for the creation of a victims of crime body that is specifically used to dealing with the complexities around these issues when Aboriginal victims are involved.

As we indicated in our submission, we would like to see a review of the material done with the rigour that we have suggested; that is, consideration of whether the application should be made to the Court of Criminal Appeal. We think that should be done through independent, objective eyes. Justice for this community will not look like justice until they have had their day in court. That means all three matters going before the court.

Mr LONGMAN: I second Professor Behrendt's nomination of an independent reviewer because there is a perception in the community that former Attorneys General from both sides of politics have not reviewed the matter properly. There will be a perception in the community that there is some allegiance on the part of a new Attorney General, a new Director of Public Prosecutions or within the department to maintaining and upholding the decisions made before or excusing them. A genuinely independent reviewer will address that issue.

The other thing that is almost absurd to some extent is the hook that this matter is hanging on; that is, the question of what the word "adduced" means. After 23 years, two criminal trials, a coronial hearing and Directors of Public Prosecutions and two Attorneys General looking at it this is not going anywhere because on the one hand there is a view that "adduced" means admitted and on the other hand that it means led. It is essentially that distinction that is at the heart of the disagreement about the Attorneys General's opinions. Clearly I have some disagreements with the substantive opinion, but there is a larger problem.

In 2006, the New South Wales Parliament, after hearing the Bowraville community, attempted to amend the double jeopardy legislation in very discrete circumstances with very strong protections in terms of the Court of Criminal Appeal overview and the interests of justice criteria. They had in mind the circumstances of this case. In my submission it was their intention that the amendments would provide a recourse to this

community. The lack of a definition of "adduced" in the legislation has meant that tests have been picked up from elsewhere in the criminal law, which is not an unusual situation. However, it has resulted in a very difficult hurdle to overcome.

In my view, the intent of Parliament was not that this word be interpreted to mean admitted. I am happy to address that in a supplementary submission; I think there are arguments for why that is. That would be a simple way of enabling all of this evidence that has come out of a huge amount of police resources and an extremely dedicated investigation to go before the Court of Criminal Appeal. I submit that there is no body in New South Wales more equipped or qualified to balance the interests of the person of interest and the gravity of these offences and the questions of legal complexity than that court. However, there is a question about what that word means. While it was intended that the decision-makers—the Director of Public Prosecutions and the Attorney General—would exercise their judgement as to whether a set of circumstances fit the definition, they now finds themselves in the position of first having to create a definition and then evaluating where the merits lie. I submit that that was not Parliament's intention. That has been and remains today the greatest stumbling block to getting all the evidence together before a court.

Mr DAVID SHOEBRIDGE: Mr Longman, you said that you thought the definition would not mean admitted. Your view is that the word "adduced" should be read to mean admitted into evidence; not just presented to the court but actually admitted into evidence.

Mr LONGMAN: That is the Jumbunna Indigenous House of Learning's view.

Mr DAVID SHOEBRIDGE: That is consistent, is it not, with an English superior court decision?

Mr LONGMAN: It is. There is authority about that proposition and Allens Arthur Robinson has addressed it in its authority. There is an argument to be made in that this section was partly introduced to deal with the circumstance in which science or expertise improves over time. For example, expert evidence is admissible only if there is a recognised body of specialist knowledge, and it may take five years for an area to become recognised. In my submission, that evidence should be available to be used at that point. If one adopts the interpretation that we believe, with respect, the Attorney General and the Director of Public Prosecutions have applied, that would not be the result.

Mr DAVID SHOEBRIDGE: I am trying as best I can to understand why this is important. When Justice Badgery-Parker had the two cases before him an application was made, I think by the person of interest, that they not be heard together because evidence of coincidence and tendency in one case was said to be not sufficiently similar as the laws applied at the time in 1993. There was a -fact test. That was a very high hurdle in terms of similar-fact evidence from one case to another. For that reason Justice Badgery-Parker ruled against them in 1993 and separated the two cases.

Mr LONGMAN: That is correct.

Mr DAVID SHOEBRIDGE: The laws on that kind of similar-fact evidence have been fundamentally changed by legislative intervention in the Evidence Act between 1994 and 1997.

Mr LONGMAN: Fundamentally changed is correct. Not only has the test been made easier, but when Justice Badgery-Parker was exercising that discretion the similarities that could be relied upon could not include any evidence that linked the person of interest with the crime; it could include only evidence that linked the crimes. The test now is to look at all of the evidence together as a whole and to ask whether it is significantly probative. That is one other area in which, in our submission, both of the Attorney General's responses have mistaken the test. They have looked at each discrete area of evidence that has been relied upon and evaluated each of them in isolation from not only the other areas but also contextual evidence that has been gathered subsequently.

Mr DAVID SHOEBRIDGE: So, in other words, that coincidence tendency evidence was presented but rejected in large part—not all of it was rejected; but a core part of it was rejected—by Justice Badgery-Parker in 1993 and therefore, on your interpretation of it, was never adduced in court; and could not have been adduced in court. But if you take the approach that I think the most recent Attorney General Mr Smith has taken then simply presenting it to the court, even if it is rejected, would satisfy the test of adduced and therefore would make it not fresh. Is that accurate?

Mr LONGMAN: Yes, that is accurate. There is something that we say goes deeper than that and which has not been addressed—that is, the interpretation that has been adopted has come from an area of the criminal law that deals with overturning acquittals. That area says that, when we are talking about fresh evidence, we are actually talking about evidence that is not available at the time of the 1993 trial. That area also says that the interests of justice should be predominant. But, leaving that aside for a moment, there seems to be a perception that if the witnesses were around in 1993, ipso facto the evidence could be adduced. We say that that fundamentally misunderstands the difficulties that existed in that community at the time with questioning witnesses and obtaining evidence.

It does not address the fact that initially the police investigation treated the family and community members as suspects. There is no greater proof of the fact that improved investigative techniques and consideration of those cultural issues resulted in actual evidence than what we see coming out of the reinvestigation. In our submission, that has not been addressed by any of the attorney generals. They have looked at this matter as though if the fact was known to any potential witness, it was therefore available. That does not address the cultural and historical context in which those officers were operating.

Mr DAVID SHOEBRIDGE: When we heard from Mr Gary Jubelin, he made it very clear—and, in fact, the submission from the police made it very clear—that there were real critiques of the investigation that was done in 1993 but, in large part, that failure to deal sensitively and appropriately with Aboriginal witnesses was what occurred throughout the New South Wales police. It was their manner of operation, because at the time that was the way the New South Wales police were operating. And that has not been taken into account. Is that what you are saying?

Professor BEHRENDT: I guess it goes to why we highlighted the timing of the Royal Commission into Aboriginal Deaths in Custody. It was such a substantial overview of all of these aspects within the criminal justice system. You see a completely different approach taken to policing after that time. It is why we have on the record or available to the judiciary the notices to the jury. It all came out of that. So it is worth bearing in mind that it was a completely different state of play. I think it is also worth stressing that, apart from all of the arguments about the technical aspects of what that means, it leaves us with the situation where a community sees a failed police investigation as the reason why they cannot get their matters back into court. I just think that, at the end of the day, we cannot lose sight of that.

Mr DAVID SHOEBRIDGE: This is a long and very difficult history. We could cut through a lot of this not by changing the substantive law of double jeopardy but just by clarifying the statute and saying that adduced means admitted.

Professor BEHRENDT: Yes.

Mr DAVID SHOEBRIDGE: Then lots of this would fall away in terms of the problems.

Mr LONGMAN: And, with respect, we would say that that job was begun but not finished.

Professor BEHRENDT: And, with respect, if you look at the arguments that were had on the floor of the Parliament at the time of the legislation then it is possible to see that this was the intention but it is just not there in the black and white letter of the law.

CHAIR: I understand that there are some matters that you want to raise in camera with us today. Is that correct?

Mr LONGMAN: Yes, I think it would assist the Committee. It will not take long.

CHAIR: The problem we have is that there is another use booked for this room when we finish, and we are due to finish at 1.15 p.m., so I would suggest that we have that closed session part of the hearing now. We only have until 12.15 p.m. for you both to appear before us. We might go into closed session now.

The Hon. CATHERINE CUSACK: I have one question to ask.

CHAIR: Yes, you can still ask that question; but in closed session. I suggest that we now go into closed session. I ask other witnesses and those who are here in the audience to wait outside. There will be someone out there to wait with you. We will go back into open session at 12.15 p.m.

(The witnesses withdrew)

(Short adjournment)

(Evidence continued in camera)

RICHARD HARRIS, Partner, Allens Arthur Robinson, and

ALEXANDRA MASON, Solicitor, Allens Arthur Robinson, affirmed and examined:

CHAIR: Thank you for attending today. Would you like to start by making a short opening statement?

Mr HARRIS: Yes, thank you. Ms Mason and I are solicitors at Allens and we are acting for the families in relation to the inquiry. I suspect much of what I will say will overlap in part with your previous witnesses, but since at least 2006 the families have been lobbying for the retrial of a person accused of the murders of Clinton Speedy-Duroux and Evelyn Greenup. In late 2006 the families were successful in achieving a landmark amendment to the Crimes (Appeal and Review) Act. In essence, that amendment had the effect of permitting a retrial of persons previously acquitted of life-sentence offences where the Court of Criminal Appeal is satisfied of at least two things.

The first is that there is fresh and compelling evidence against the person and the second, we say importantly, is that in all the circumstances it is in the interests of justice. The Crimes (Appeal and Review) Act goes on at section 102 (2) to provide some instruction as to what it means by the concept of "fresh" and, importantly, it states that evidence is fresh if it was not adduced in the trial and it could not have been adduced in the trial without reasonable diligence. Obviously, as we have heard, some significance is placed on the word "adduced". Importantly, the Act provides that evidence is not to be precluded from being fresh simply because it would have been inadmissible in the initial trial.

The relevance of this issue arises here because in 1993 separate trials were conducted against the accused in relation to the murders of Evelyn Greenup and Clinton Speedy-Duroux. Those trials were conducted so as to avoid propensity and similar fact evidence from being adduced in those trials—in particular, evidence in relation to the facts and circumstances surrounding each of the other murders. However, in 1995 the introduction of the New South Wales Evidence Act relaxed the prohibition on tendency and coincidence evidence with the effect that there would now be very good arguments that evidence in respect of each of the other murders and the disappearance of Colleen Walker would now be admissible in those trials. That evidence would potentially include evidence of alleged confessions the accused made while an inmate in respect of each of the other murders.

The result of the introduction of the Evidence Act is that evidence relating to each of the other crimes now represents fresh and compelling evidence of the type contemplated by the Act and we say it should be sufficient to cause a retrial of those hearings and would, we think, have major bearing on the potential outcome of those cases. The issue, therefore, is simply whether that evidence was adduced in the initial trial. That is, if it was not it should satisfy the Act and could be used to cause the Court of Criminal Appeal to order a retrial. If it was then it would not be fresh.

Unfortunately, there is a marked lack of guidance in the Crimes (Appeal and Review) Act and elsewhere as to the precise meaning of the word "adduced". The question, in short terms, is whether it means anything put before the court whether or not it was accepted by the court. It is worth bearing in mind that matters not accepted or admitted into evidence are for all intents and purposes irrelevant; they do not exist in the eyes of the court.

Mr DAVID SHOEBRIDGE: They never get before a jury.

Mr HARRIS: They never get before the jury and they cannot be taken into account, so it is nothing. The alternative construction is that only material that was admitted into evidence should be relevantly regarded as adduced. Unfortunately, the Attorney General and the Director of Public Prosecutions—and it is important to note that we do not necessarily criticise them for this; there is a clear ambiguity about the way in which the word could be interpreted—take the view that the Court of Criminal Appeal is likely to regard the word "adduced" in

the Act to read anything that was put before the court whether or not it was in fact accepted by the court and whether or not the court was able to take it into account.

At a lay level, and from the perspective of the families, it is very hard to imagine how material that the court did not take into account or did not have regard to but now could have regard to is not precisely what the Parliament had in mind when it amended the Act. Our submission goes into a range of reasons why we think, in the absence of clear guidance in the Act, some United Kingdom authorities and general common sense should be applied to suggest that "adduced" should be read in the way that we have suggested—that is, actually admitted into evidence.

We have raised those matters with the Director of Public Prosecutions and the Attorney General. While we think it is fair to say that they acknowledge the ambiguity they remain of the view that the better view is that "adduced" means something that is put before the court in any way. While we could go into a lengthy debate about whether or not that word should be interpreted in that particular way, the real point of our submission is that, acknowledging that ambiguity, it would be a tolerably simple course for this body to take to add a definition to the Crimes Act which adds clarity to what is meant by the word "adduced" when it is used in that Act. We would say that that would be to the effect that it should be evidence which has been admitted into evidence in the trial at first instance. An alternative—and I admit this is something that only really occurred to me yesterday—would be to simply replace the word "adduced" with the word "admitted" in section 102.

CHAIR: My question is in several parts, so you may want to take it on notice to provide us with the detail we would like from you. On behalf of the families you lodged a submission to the former Attorney General to request that he consider retrying the person acquitted of the murders of Evelyn Greenup and Clinton Speedy-Duroux. The Attorney General subsequently declined to exercise his discretion in the matter.

(a) Could you please speak to the manner in which you and the families were informed of this decision?

(b) Was any effort made to explain the reasons behind this decision to you or the families? If so, were these efforts adequate in your mind?

(c) Could you please explain the impact this decision has had on the family members you have been working with?

(d) In your view, have the legal and other officers with whom you have had dealings demonstrated an adequate familiarity with the particulars of the case?

I suspect you are not in a position to answer the question today. We can provide you with a copy of the question and you may take it on notice to provide a full response, if that is your request.

Mr HARRIS: I could do either. I could answer it now in short terms and we could provide a more substantive answer, if you like.

Mr DAVID SHOEBRIDGE: That would be best.

CHAIR: I think that would be best, because we have other questions and, unfortunately, we only have a little over 15 minutes.

Mr HARRIS: In short terms, we had a useful engagement with officers of the Director of Public Prosecutions [DPP]. They gave it some consideration over some time. We were informed of the decision to essentially decline the submission that we had made by letter. My personal view is that the letter was a fair one. It went into the detail of the matters that we had raised with them. While we did not necessarily agree with the outcome, we could understand the reason it was put in the terms that it was. It is fair to say that that letter touches not only on this particular legal issue that I have raised but also on the probative value of a range of other pieces of evidence. In terms of the impact of the families, I suspect you have received that in other forms during the course of the Committee's deliberations, but obviously very disappointed that what appears to be legal rhetoric and technicalities are standing in the way of what they say the proper outcome of this should be.

CHAIR: In any event, you will elaborate?

Mr HARRIS: I can elaborate in writing.

The Hon. CATHERINE CUSACK: Which letter are you referring to? There is more than one letter, is there not?

Mr HARRIS: I am referring to the letter from Greg Smith dated—

Mr DAVID SHOEBRIDGE: February last year.

Mr HARRIS: Yes.

Ms MASON: 8 February.

The Hon. PETER PRIMROSE: I appreciate this might mean lawyers at 10 paces, but the issue between "adduced" and "tendered" in terms of the argument as to why the word "adduced" should be interpreted as "tendered", when that has been presented to you, are there any actual references or legal citations on that? Can you provide us with some material as to that counterargument because I have not heard that? Please, take that on notice, if you wish.

Mr HARRIS: To be fair, I agree with you. The reasoning behind interpreting it in the way that the Director of Public Prosecutions has interpreted it is a little bit elusive. Obviously, there is a United Kingdom piece of legislation which substantially mirrors this piece of legislation. There is one United Kingdom authority that we are aware of that has considered the issue. They took our view of the meaning of "adduced" that largely mirrors the one I am suggesting to the Committee should be applied. The Director of Public Prosecutions elected not to follow that. I think in part at least the one reason that I have been pointed to is that "adduced" is used in other Acts in the criminal justice system in a way which perhaps will make that an inconvenient distinction to draw. But for mine, that is thoroughly reconcilable and should be able to be dealt with, either by reading it in a particular way in the context of this Act or by legislative amendment, as we have suggested.

The Hon. PETER PRIMROSE: Simply by replacing the word "adduced" with "admitted"?

Mr HARRIS: Yes.

The Hon. CATHERINE CUSACK: We have had some pretty devastating criticism of that letter from the Attorney General both in terms of how long it took and the factual mistakes that are in the letter. Are you saying that that letter is fair enough? It is just that that contradicts a lot of the evidence that we have been receiving up until now.

Mr HARRIS: My assessment of the letter is it did take quite some time to prepare. That said, the matters that this Committee is dealing with and the matters that that letter deals with are matters of some complexity.

The Hon. CATHERINE CUSACK: Yes.

Mr HARRIS: I do not raise any particular concern in relation to the length of time it took. For the reasons that I have identified, I disagree with its outcome but I do not think that it is manifestly so wrong that no reasonable mind could come up with that. I think that this is a point upon which reasonable minds could differ. I prefer the view that I have expressed. If it remains ambiguous and it was Parliament's intention to achieve a certain result in relation to the Act, then it is a matter that Parliament could readily clarify.

The Hon. CATHERINE CUSACK: What about the factual errors in the letter?

Mr HARRIS: Which particular factual errors?

The Hon. CATHERINE CUSACK: Several, as we understand it, from evidence that was given earlier today.

Mr HARRIS: Sorry, I was not here.

Ms MASON: Was that in the letter to the families declining the submission, or was that in the Attorney General's actual submission to this Committee?

Mr DAVID SHOEBRIDGE: There were criticisms that there are errors in both, but the primary criticism of the 13 February letter was how it dealt with similar fact/coincidence-tendency evidence, and it mischaracterised what was put before the court.

The Hon. CATHERINE CUSACK: Which case? Which year?

Mr DAVID SHOEBRIDGE: In 1994. Obviously, similar fact evidence was not led in the trial in 1994 because it was rejected by Justice Badgery-Parker in 1993. That was the primary criticism we heard today. In saying that, that evidence was rejected as unreliable, et cetera, when it was never before the court.

The Hon. CATHERINE CUSACK: Given that you did not hear it, you must not have heard the factual errors that were listed in relation to that.

Mr HARRIS: No. We have not heard it. To be fair, we have come really on the basis of what is the best way to push this matter forward in a constructive way, given that the Director of Public Prosecutions now and subsequent Attorneys General have expressed the views they have about the prospects of bringing the case.

The Hon. SARAH MITCHELL: My question is probably a little bit more general. One of the things I have found us we have gone through this process as the Committee—and I am not a lawyer—is that it just seems every potential roadblock that could be put in front of these families, that seems to come up now. I assume that you have dealt with many complex cases and many families who have been victims of crime, but in this instance with the families in the Bowraville does it seem to you that this is almost a bit of an exception? Does it stand out in your experience as being one where there have been quite a few hurdles that they have had to try to overcome and that it has just not happened, for one reason or another?

Mr HARRIS: I should say that my primary expertise is as a commercial lawyer and so the instances in which I have acted for families, this is it. We have taken a highly legalistic type of approach as to what should happen in terms of how to bring about a retrial of this matter and, if that is not possible under the current legislative regime, what the legislation should do. The point of that answer is really I am just not qualified to answer your question.

The Hon. SARAH MITCHELL: I guess it partly stems from when we heard from Detective Inspector Jubelin. He used the analogy that, to the police, it is almost akin to a serial killing and Ivan Milat not being behind bars. I guess there is the community view on that. As I said, I guess I am trying to work out whether this is a particularly exceptional case for this sort of thing. If it is not your area, then that is all right.

Mr HARRIS: It is not my area.

Mr DAVID SHOEBRIDGE: Thank you for your appearance today and thank you for the work you have done on behalf of the families as, I understand, a pro bono matter. It has been very much appreciated by them in the evidence that they have given to us. Could I ask you about this idea of putting a clarification into the law—not really amending the law—and leaving the substantive law as it is and simply saying that for the purposes of part 8 of the Crimes (Appeal and Review) Act that "the word 'adduced' means"—what was the exact form of words that you would propose to clarify it?

Mr HARRIS: Perhaps that is a particular one we should take on notice, just to make sure that we cover off every single possible permutation.

Mr DAVID SHOEBRIDGE: I really would appreciate it if you did take it on notice and give us that, but perhaps your initial thoughts?

Mr HARRIS: My initial thoughts are that the simplest mechanism would be an amendments that reads along the lines of: That in section 101 (2) the word "adduced" be changed and substituted with the word "admitted". I think, with that simple amendment, it would be very difficult to argue that evidence of this kind should be excluded.

Mr DAVID SHOEBRIDGE: Another way would be to leave the substantive law exactly as it is—leave section 101 and section 102 reading exactly as they do—and simply put in the definition clauses in part 8 "for the purposes of Part 8 'adduced' means … ".

Mr HARRIS: That "'adduced' means 'admitted into evidence'."

Mr DAVID SHOEBRIDGE: If the Committee formed the view that not only would that be of substantial benefit in relation to the Bowraville matters but it would simply clarify where the Parliament's head was in 2006.

Mr HARRIS: Yes.

Mr DAVID SHOEBRIDGE: We would not he really amending the law. We would simply be clarifying the law in that matter.

Mr HARRIS: Yes. That is entirely fair.

Mr DAVID SHOEBRIDGE: Did you look at the parliamentary debate?

Mr HARRIS: It did not deal with this issue.

Mr DAVID SHOEBRIDGE: It did not deal with it?

Ms MASON: The word "adduced", no.

Mr DAVID SHOEBRIDGE: Did you look at the explanatory memorandums? Were they as helpful as explanatory memorandums tend to be?

Mr HARRIS: Yes, they talk about everything except the key thing you want. Largely we might not be here if this had been touched on because it would have given the Director of Public Prosecutions the ammunition it felt was necessary in order to be able to convince the Court of Criminal Appeal that this was the way in which the Act was to be read.

Mr DAVID SHOEBRIDGE: What contact did you have with the families after you received the February letter?

Ms MASON: We are, I would say, in fairly regular contact. We do not act, as a sort of mouthpiece, for the families the way, for example, Jim Bartles does. We contact them about legal issues and vice versa. We have obviously had quite a bit of contact with them since that letter because they do not want the matter to drop and they are always exploring ways that we can progress the matter forward.

Mr DAVID SHOEBRIDGE: How would you describe your first contact with the families after you received that letter? How were they feeling?

Ms MASON: As would be assumed, they were devastated. I think one of the difficulties with this matter has always been that technical and legal issues are standing in the way. It is not from want of will, I do not think, and it is difficult to explain to someone who is not a lawyer why it is that what seems like a rational and common sense approach is not necessarily being taken.

Mr DAVID SHOEBRIDGE: They must be difficult conversations to have with the families? They would be more difficult than dealing with your commercial clients, I would imagine.

Mr HARRIS: Yes, because of the gravity of the subject matter. Some of my commercial clients would not necessarily agree.

Ms MASON: Although I would have to say I have been extremely impressed with the contact that I have had with the families by the dignified manner they have taken these kinds of pieces of news. They have taken the constant regular setbacks they have faced with the utmost grace but with a quiet determination not to let it lie.

The Hon. CATHERINE CUSACK: I am not a lawyer but is double jeopardy reasonably controversial to people in the legal profession?

Mr HARRIS: It is. I think this is one of the key things that the Director of Public Prosecutions, to be fair to it, is struggling with. It is balancing between the interests of ensuring that an accused is not unfairly put through the ringer on multiple occasions against the interests of the families and victims of crime to ensure that justice is done. The Director of Public Prosecutions is struggling particularly with that. This notion of double jeopardy, for your benefit, is pointed directly at ensuring that an accused is not unfairly exposed to the criminal justice processes once they have been acquitted. That is a core tenet that is of value to lawyers and I think the community.

The Hon. CATHERINE CUSACK: Do lawyers tend to be more conservative in their approach to interpret these things? Is that a fair comment?

Mr HARRIS: Absolutely. It goes back to the kind of Blackstone principles that it is better for 10 guilty people to go free than one innocent man to be convicted, and that tenet of the law has informed its progression for hundreds of years.

The Hon. CATHERINE CUSACK: That starts in first year of university.

Mr HARRIS: Exactly, and believe me I was digging deep to come up with that. People will want to take a very conservative approach to relaxing rules in relation to double jeopardy but the way we see it is that this is an approach soberly and sensibly considered by this body and really all we are suggesting is that appropriate clarification be made to give effect to what we think they intended to do.

The Hon. CATHERINE CUSACK: Is a simple summary of the situation, if I can paraphrase from your submission, that the justice system has failed to deliver a conviction for the families of three little children? That, in its simplest form, is what has occurred.

Mr DAVID SHOEBRIDGE: I think that question is a trial where all three are run together and so the community feels like they had their day in court, rather than a conviction.

The Hon. CATHERINE CUSACK: No, that is the situation we are up to now. If you look at it in aggregate, three children have been murdered and the justice system has failed to make somebody accountable for those crimes. Is that right?

Mr HARRIS: Yes, I agree.

CHAIR: There will be some questions on notice which will be sent to you in the next few days. The Committee would like a response to them within 21 days, if you can. I give you full thanks and praise you for being with the family members over this period of time doing this work on a pro bono basis. I would like that praise and thanks also extended to Allens Arthur Robinson for being with the families through this very dark period for the families. The firm is certainly recognised for having stood by these families on a pro bono basis.

(The witnesses withdrew)

TRACY GILLIAN WESTERMAN, Psychologist, Indigenous Psychological Services, before the Committee via teleconference, affirmed and examined:

CHAIR: Would you like to start by making a short opening statement of a couple of minutes or so or would you prefer that we just ask you questions?

Dr WESTERMAN: Just go straight to the questions, if that is okay.

CHAIR: Yes, I will start with the first question. Could you please explain how you came to be involved with the Bowraville community?

Dr WESTERMAN: Back in February 2004 we were approached through the Federal Department, the Office for Aboriginal and Torres Strait Islander Health [OATSIH]. As I understand, that department had heard of the work of Indigenous Psychological Services [IPS], that we had carried out in remote aboriginal communities throughout Australia. Effectively, it was by reputation that OATSIH had approached IPS to undertake, initially, the scoping exercise into Bowraville. What occurred at that point was that OATSIH had funded two trips to Bowraville for the purpose of undertaking a scoping exercise of what had occurred, of any gaps in their service delivery and of what was still needed in terms of future work.

CHAIR: You have continued to be in communication with the family and the community generally?

Dr WESTERMAN: Yes. It is really interesting, IPS is a company that is unique in the sense that we are a private organisation with a complete absence of government funding. The reason I give you that background is because initially we were funded for two trips. What often occurs is that I make a decision to continue to work in communities that I see to be extraordinarily disadvantaged. My take on the Bowraville situation was that, you are dealing with people who have been through extraordinary trauma during 14 years and two visits was not going to be sufficient. So I made the decision to continue working in Bowraville and funded a few trips out of our own pocket. Fortunately, that enabled us to get such a level of information with the community and identify such a level of need that we were then able to go to the Federal Government—OATSIH—which then funded what I refer to as the gold standard. If you were going to do something that was the gold standard in relation to trauma of this type, this is what it would look like and they fortunately came to the party with that funding for approximately 18 months.

CHAIR: You have found, during all this period, a grieving community for a whole series of reasons. First of all because, I guess, you found them to be on a roller-coaster ride, where their expectations had been built up and had then fallen flat and also because justice has been very elusive in this situation. Would that be the general perspective?

Dr WESTERMAN: Yes, absolutely. From a psychological trauma perspective, horrific things happen when trauma occurs and when collective trauma occurs, it erodes trust. What we found was an extreme amount of resistance, particularly to people coming in from outside, wanting to open up a powder keg of emotions. The perception was that potentially we would not continue to go back and deal with that trauma. That was again a big part of the decision that I made to continue the work, regardless of the funding. What occurred in the community was that they had had a lack of direct support across a lot of systems.

What often happens to people, if they continue to reach out for help and no-one comes, understandably they eventually stop reaching out for help and internalise the trauma. It was distressing that when we spoke to people we found that, although they were 14 years down the track in their grief, they were still speaking as if the murders had occurred the previous week or very recently. We had people who still spoke of their loved ones in the present tense—14 years down the track. It was stunning to be dealing with a community where we had never encountered anything like it before, in the sense of the extraordinary degree of grief and trauma but a complete absence of any degree of mental health support.

CHAIR: I suppose their hopes were raised enormously when they heard of the changes to the double jeopardy laws and then justice continued to be elusive. Would that be the case?

Dr WESTERMAN: Yes. There is an emerging and interesting field around the impact of race and trauma which I went into quite extensively in my submission. What tends to happen with people is that their daily experience of racism impacts on them to the extent that they almost become disassociated from day-to-day

things. So it is interesting that you will often say that people's hopes get raised to an extent but then they start to disconnect from it, because their experience has been that each time they try to achieve justice they consistently get let down. Disconnecting from emotions is an effective way of coping with the inevitable let-down. Often what you will see is that people will sometimes not come to certain things because they need to protect themselves from the constant let-down.

CHAIR: Doctor, there is a question from the Deputy Chair of the Committee, the Hon. Peter Primrose.

The Hon. PETER PRIMROSE: Thank you, Dr Westerman. You mentioned the issue of racism on the experience of families in Bowraville. I was wondering if you could talk a bit more about that, but also how that affects the experience in relation to the families in Bowraville, as compared to other victims of crime?

Dr WESTERMAN: It is an emerging field. I must say, first of all, I do not want to talk about trauma as being hierarchical, because trauma is just trauma and people who are victims experience trauma to differing degrees. The difference with Bowraville that is interesting and distressing is that racism has now globally been seen as akin to a traumatic event. What that means is that an individual who experiences a traumatic event can go into almost a protective mode. There are factors in the Bowraville case that significantly added to the trauma of the actual murders. I speak in my submission about the responses to the trauma and that so many of those responses cannot be anything but racially based.

That then means that the bereaved family members cannot even deal with the grief of the death of their loved ones because they have to contend with racism. One of the sobering things I have seen is very old footage where, in the aftermath of when Evelyn disappeared, you had a bunch of community members speaking to the police and demanding action. Even at that critical junction, where there should have been a heightened degree of urgency, there should have been people scouring the streets, there should have been people joining together. The grief and loss was almost put aside because they had to contend with the lack of action and effectively that they were the victims.

CHAIR: There is a question from Mr David Shoebridge.

Mr DAVID SHOEBRIDGE: Thank you for your evidence, Dr Westerman. The concept of chronic collective trauma is not something I am familiar with. I am familiar with the idea of post-traumatic stress disorder for individuals. Can you give some further clarification about this concept of a chronic collective trauma and how it relates to Bowraville?

Dr WESTERMAN: It is an interesting thing and, dare I say, it is a unique diagnosis. It is unique because it is rare and it is rare that people will actually use those kinds of terms. Obviously, post-traumatic stress disorder is an individual response to a traumatic event. In isolated communities such as Bowraville, where there are some preconditions that make an entire race of people more vulnerable to future traumatic events, we refer to that as "collective trauma". The reason is that people are caught in a collective psyche and are dealt with in a stereotypical and collective way. In my submissions I have talked about the things that increase the likelihood of post-traumatic stress disorder affecting virtually everyone—the vast majority of people in the Bowraville community. The big one I talk about is pre-trauma and that is that Bowraville has had its own interesting history of racially divisive legislation. Charles Perkins particularly identified Bowraville as a place to go purely on that basis. So what you have there is a pre-existing vulnerability through being marginalised and through experiences of racism and those sorts of things.

What that then means is that when you have a critical event in the future your ability to cope with that critical event is significantly reduced. The other thing that is really interesting is that there is a strong evidence base for the environmental modelling of trauma. What that means is that if you experience trauma such as racism and marginalisation your whole life, there is a really strong likelihood that you will pass that down to your own children, pass that down to the next generation. What actually happens is then collectively there is this vulnerability based on these sorts of pre-conditions existing and then you have horrific events such as three murders occurring that then contribute to that and then obviously the responses to those murders are extraordinarily traumatic. They maintain the trauma and they actually exacerbate the trauma.

Mr DAVID SHOEBRIDGE: You talk in your submission that once you have this set in train, further traumas have a cumulative effect. We already had a very vulnerable, disadvantaged, racially divided town where the Aboriginal community was particularly vulnerable and isolated?

Dr WESTERMAN: Yes.

Mr DAVID SHOEBRIDGE: Then we had the multiple traumas from the horrific murders of the three children, couple with that is 23-odd years of struggling with the criminal justice system. Do you see that as being cumulative?

Dr WESTERMAN: Absolutely. Post-trauma is still a relatively new mental illness; we are still actually learning a lot about post-traumatic stress disorder. What we do know is its manifestation, that is, people tend to become depressed, people tend to use lots of alcohol and drugs, people tend to have a very limited ability to cope with critical events and crises. There is this great saying: the quicker the spring back from a critical event the better the childhood. What that means is that if you have that pre-existing vulnerability, then your ability to cope with even low-level critical events like arguments at home and so forth, what happens is that people lack the ability to control their emotions and to self-soothe and so their reaction can be out of whack with the actual incident itself and that is really around the fact that what happens with post-trauma is that it sets off a flight of fight response, which means that physiologically you are actually altered because of cumulative trauma. It means you cannot cope as well as someone who has not had previous trauma.

Mr DAVID SHOEBRIDGE: And then you have a heightened emotional response to further challenging things in your life?

Dr WESTERMAN: Yes, potentially that is the case.

Mr DAVID SHOEBRIDGE: This might be a question you cannot answer and if so, please tell me but if this community felt like they got some justice for these murders, would that ratchet down some of the cumulative impact? Would that have a positive psychological impact on the community?

Dr WESTERMAN: I think it is possibly the endpoint but you are effectively dealing with 23 years worth of critical incidents, events and memories. It is extraordinarily complex to deal with but it is extraordinarily easy if you know what you dealing with. What we have had to do with the people, without obviously giving away confidentiality, is we have literally had to break down each memory, each salient image, each salient event and reorganise it in a way that is more accurate and more healing. Even though the endpoint is justice, you are still dealing with 23 years worth of trauma and 23 years worth of pain.

Mr DAVID SHOEBRIDGE: No-one is suggesting it is a magic wand but if the resources were there to help people with it, would that allow that reconstructive process to more readily occur and be more effective?

Dr WESTERMAN: Most certainly. I think, though, the issue you have with the people in Bowraville is that the systems or the arms of justice are continuing to actually re-traumatise them. I find it interesting that we are still having the conversation—and I have had this conversation many times about Bowraville—about whether racism actually occurred. The thing with racism is that if people say racism occurs, then you need to validate that experience. I was interested to read the submission from the Director of Public Prosecutions that effectively said that race played no role. When you have the arms of justice continuing to deny that racism exists, that is re-traumatising.

Mr DAVID SHOEBRIDGE: We heard very clearly from one of the most impressive witnesses I have seen, which was Detective Inspector Gary Jubelin, who made it very clear that he thought racism did play a part in it, and played an ongoing part in it; indeed I think a number of other witnesses have said that. Is that also your view?

Dr WESTERMAN: Most definitely, and I have tried as much as I can to be objective about this whole thing and if I looked at racism as trauma, which racism actually is, the first step to healing when people have been traumatised is to validate their trauma. If someone says, "I have experienced racism", what you should say is, "You should acknowledge the experience" and you should say, "We will do everything in our power to make sure this doesn't occur again". What we have seen with the NSW Police in particular is that there has been acknowledgement of that; acknowledgement that they can actually do things better and race played a role. Those kinds of responses are actually really quite healing to people and you can see that with the community, that there has been significant healing around the police response because of those kinds of validation of the trauma experience.

The reason why validation is so important is because there is a primary fear within every traumatised person that what has happened to them is going to happen again so the validation is kind of symbolic but it is more than that; it actually says that, "We actually made mistakes. We acknowledge those mistakes and we have done this, this, this and this and we are going to do everything in our power to ensure it does not happen again." Those types of acknowledgements and those types of specific things that people do then enable the healing to properly occur.

The Hon. SARAH MITCHELL: First, Dr Westerman, I thank you for the very extensive submission that you supplied to the Committee. I am sure I speak on behalf of all members when I say it contains worthwhile information.

Dr WESTERMAN: Thank you.

The Hon. SARAH MITCHELL: I wanted to ask you about your interactions with the families and members of the community—and Mr Shoebridge touched on this before. Did you speak to them in detail, obviously not wanting you to go into areas of confidentiality, about the court process, and how they felt for the witnesses? I am referring to recommendation 4 on page 30 of your submission where you talk about relevant cultural information going to juries. Is there any feedback in that area that you could provide to the Committee?

Dr WESTERMAN: Yes. It is fairly interesting because I was obviously there to provide support to the families but I was also an observer of the court process. A lot of the training I conduct Australia-wide taps into things like Aboriginal English and the impact of race and culture on court processes and assessment—the whole gamut of different things. I know you have spoken to Dr Diane Eades whose evidence is compelling around this. Emerging research has been undertaken by Dr Greg Dear from Edith Cowan University that speaks to racism within juries. A couple of things I observed in the Evelyn Greenup trial is that Aboriginal witnesses through Aboriginal English and so forth in the way that questions are asked and so forth can actually appear inconsistent with their testimony.

I know Dr Diane Eades speaks of this being called gratuitous concurrence, which is basically that people agree with questions that are negatively phrased, so it is not just about the jury; it is also about the actual prosecutor and how they actually go about asking questions. So witnesses and very sympathetic witnesses did actually present often as being fairly inconsistent and unreliable in their testimony. There is this thing that people will use—and it is called reciprocal language, so people will tell a whole dialogue, a whole narrative around what is actually occurring at the time when they are asked a question. They will not actually talk in terms of quantitative language. There are things like that that are just so critical to how witnesses present.

The other thing I spoke to was juries themselves and the vast majority of people had had no contact with Aboriginal people to the extent they are able to separate out issues of race from the actual evidence itself. I speak to this in my submission. It is easy to be distracted by things such as people were drinking and kids were roaming and they cannot focus on the actual evidence. There is powerful global research that speaks to this and how consistently people of colour get less than positive outcomes in jury and court processes compared to non-Aboriginal people.

Mr DAVID SHOEBRIDGE: Dr Westerman, a summary of the evidence from Jumbunna Indigenous House of Learning earlier today was that in these trials the prosecutor and the judge only intervened to give directions, to the extent they did, or to use the powers under the Evidence Act to draw these vulnerabilities about Aboriginal witnesses to the attention of the jury once the witnesses were already drowning in the witness box. That is a very substandard way of dealing with it. Do you have any observations about that?

Dr WESTERMAN: Yes, absolutely. Effectively what happens is you are doing damage control and actually worse than that. If the culture can be presented as something that people can embrace and think I kind of get that and they can look at it from a purely objective standpoint that they can understand, if questions are asked in this way for people who have never been in a formal court process before, that there are going to be particular things they need to be aware of, then you are taking a positive approach to how you interpret evidence compared to if you are doing it in damage control. The damage has already been done. In terms of the research what we know is that if you give people pre-trial information, pre-trial cultural competency training or that kind of pre-trial information it has a direct correlation with juries being left racially biased. That is the research currently undertaken by Greg Dear and we need to have a lot more of it.

The Hon. PETER PRIMROSE: Thank you again Dr Westerman. I ask this question of every witness: Could you please say what you believe would be the most important recommendation this Committee could make?

Dr WESTERMAN: There are so many things. I guess from the experience we have had, we have worked effectively with close to 30 Aboriginal communities across Australia, so that is a fair whack of experience. I say this based on the sorts of things we have seen to be quite effective in communities that have ongoing chronic distress and so forth. I am a big believer in change the environment change the outcome. Trauma and grief is inextricably maintained by the environmental factors that are in the environment itself. I think there needs to be some canvassing of the whole community, not just the indigenous community. That is a significant gap in what has occurred in this community.

The Bowraville murders, for want of a better phrase, has become so divisive in this community that it is almost like you look at other child murders such as Daniel Morecombe and Ebony Simpson and there is this interesting joining of the entire community where people are universally outraged and joined together by the common experience. That is something that has not occurred in the Bowraville community. What actually happens is that people go away and the Aboriginal community exists over there and the non-Aboriginal community exists over here and they make interpretations about how each other are thinking and feeling and reacting to those experiences.

One of the most powerful things that speaks to this was after the Evelyn Greenup trial we came to Bowraville and did some debriefing and we talked about how people were making sense of the verdict and what are some of the good things that have come out of it. People spoke of things such as we are joined together as a community and quite a number of the bereaved family members spoke of non-Aboriginal people coming up to them in the streets and hugging them and saying, "We are so sorry." That was extraordinarily powerful. You saw a physical change in people when they were describing those stories. My guess is that this has been going on for so long and people are effectively on one side or the other in terms of their own psychological understanding of what has gone on. I really do not know how much of that is based in realities.

I think there needs to be a canvassing of the non-Aboriginal community to see how they feel and what they think should be done at the same time as the Aboriginal community. It would be great if something like a healing centre could be funded, that would achieve a fantastic outcome. It makes it okay for people to speak and grieve and support each other. I have not spoken to the families, but in other communities it has been extraordinarily powerful, perhaps at the site at which Evelyn and Clinton's remains were found some sort of memorial garden or site would have significant benefits. I am not just talking from a whole of community perspective but from a trauma perspective.

We have been in communities in the past where, for example, there has been a suicide and the communities that we have gone into that have sprung back and coped better in the aftermath of critical events have changed the look of the site where the person died. What happens when trauma occurs is that it becomes a constant reminder of the event. When people are walking around the town they are not seeing a particular site or area, they are constantly reminded and bombarded with memories of a particular event. The minute you change the environment it deals with that trauma response.

Mr DAVID SHOEBRIDGE: Dr Westerman, the site where Evelyn and Clinton were found, the sites were remote from the community and the memorial at the site where Clinton's body was found was regularly defaced before a metal memorial was put in place. Do you think that kind of memorial and changing of the site would work in the Bowraville case?

Dr WESTERMAN: It is certainly something that you need to really canvass the community about. I cannot be more at pains to say that. I am talking about this purely from a trauma perspective. That is what we know. We know it is hard to heal from trauma when you are constantly bombarded with a reminder of the event. Those sorts of initiatives, throughout other communities, have had significant impacts. For example, people sit at the actual place and talk to the young kids about positive memories and positive things rather than it being a site where people are extraordinarily overwhelmed with distress and not knowing where that goes. I would certainly say in other communities it has been quite an effective strategy.

Mr DAVID SHOEBRIDGE: You can incorporate that within the township as well?

Dr WESTERMAN: Possibly. The canvassing of non-Aboriginal and Aboriginal communities is essential to that. Unless you deal with the racial divisiveness the community will not move forward.

CHAIR: We thank you for joining us via phone from Western Australia. There may be some questions on notice that will be forwarded to you and we would appreciate a response within 21 days. That would be of great assistance to us. Thank you for assisting us in our deliberations. Thank you also for the work you have done with the community and particularly the relatives, I know they would be most appreciative of this and the way you worked with them, including visiting the family and community on a number of occasions at your own expense. That is a commitment and I know that is deeply appreciated. Thank you for being with us today.

Dr WESTERMAN: You are welcome and good luck with making sense of all the evidence.

(The witness withdrew)

(The Committee adjourned at 1.19 p.m.)