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Networked Knowledge research report on trial of Susan Neill-Fraser

[Underlining, where it occurs, is for NetK editorial emphasis]

19 October 2021 – Further procedure in the matter of Susan Neill-Fraser

In response to the Submission to the Parliament of Tasmania, I have been asked to clarify what further procedure might be possible. My response is as follows:

I understand that this matter is currently under consideration by the Court of Criminal Appeal. However, that should not prevent all further consideration of this matter in the interim.

In my view the correct procedure would be to request the Director of Public Prosecutions (DPP) and the Forensic Science Centre (FSC) to consider the issues which have been raised in our main research paper.

It would be a simple matter to check our references to the trial transcript with the online version which is available here:

Full Transcript of Susan Neill-Fraser Trial

The relevant scientific and legal principles would be well known to any reviewer being fundamental and non-contentious.

If after completing their review which could be accomplished within a single day, they were to agree that any one of the substantive issues had been made out, then they would have to accept that this case amounted to a 'substantial miscarriage of justice' warranting the overturning of the conviction.

In that event the further procedure would be straightforward.

The Crown has a duty of disclosure.

If it is discovered that the Crown has led false or misleading evidence at trial, or made incorrect submissions, then upon that discovery the Crown is obliged to make immediate disclosure of that finding to the court. It is also clear that the Crown is obliged to make inquiries to ascertain if such disclosable material exists. Our

submissions are merely intended to assist in the fulfilment of that duty. The Crown clearly includes bodies such as the DPP (Director of Public Prosecutions) the FSC (Forensic Science Centre) and TasPol (Tasmanian Police). It is also clear that the parliament (through the Attorney-General) has the ultimate responsibility to ensure that the Crown agencies – the DPP and the FSC – abide by their legal duties especially to any person who may be wrongly convicted.

Justice Blue of the South Australian Supreme Court explained "[t]he duty of disclosure is owed to the court and not to the defendant" - adding "[a]lthough the defendant is the beneficiary of the duty". (Emphasis added) *R v Keogh (No 2)* [2015] SASC 180 at [62] [which is discussed in further detail in the Bromley briefing paper at p 83].

It is well accepted that the duty extends beyond the trial into both the appeal and the post-appeal periods.

In order to fulfil that duty, the prosecutor (with the consent of the appellant's counsel, of course) should apply to the Court of Criminal Appeal to re-convene to hear the further submissions.

The prosecutor and defence counsel should then make a similar submission to that of Mr Sonnet in the Farah Jama case (mentioned in the Tasmania submission) and the court should of course respond in the same manner by setting aside the conviction.

I do appreciate of course that this procedure would be 'unusual' - but so is the case in question.

When we first suggested that the rules governing the appeal courts in all states and territories in Australia, along with those of the High Court and the statutory petition procedure infringed basic human rights principles, the claim was met with incredulity. Those rules had been in force for over 100 years and in all that time nobody had ever complained about their legal and moral force.

However, the Australian Human Rights Commission agreed with our claim and informed the parliament in South Australia of their view. That then led to the unanimous alteration of the law by the SA parliament by establishing the new right of appeal. The parliament in Tasmania, and the parliament in Victoria also unanimously adopted similar provisions.

At the end of the day the guiding principle must be the pursuit of justice and whenever there has been a manifest miscarriage of justice it is incumbent upon every one of us to do all we can to correct it. I have always taken the view that when procedural provisions and justice collide, the procedure must be altered to attain a just outcome.

In this case, whilst the procedure is unusual, the guiding principles are not - the duty to ensure that the appeal court is correctly and fully informed of the true position is both a legal and moral necessity, and of course the public would expect that to be so.

I do hope that the parliament of Tasmania can request such a review by the DPP and the FSC to ensure that justice is done.