Government of **Western Australia**
Department of the **Attorney General**
Victims of Crime Reference Group

Your Ref: CDJ (A308654)

Hon Adele Farina MLC
Chairman
Standing Committee on Uniform Legislation and Statutes Review
Parliament House
PERTH WA 6000

Attention: Renae Jewell rjewell@parliament.wa.gov.au

Dear Adele

INQUIRY INTO CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

Thank you for your letter dated 13 September 2011 inviting the Victims of Crime Reference Group (VOCRG) to provide a written submission in regards to the above Inquiry. The VOCRG would like to make the following comments in regards to the draft Bill:

Please note that these comments do not necessarily reflect the views of the Agency Representatives on the VOCRG.

Scope, Purpose and Structure of the Bill

While it is commendable that the bill addresses grave injustices, the categories of circumstance creating exceptions to the double jeopardy rule are too prescriptive. The Bill states there needs to be "fresh and compelling" evidence or "tainted" evidence to justify a prosecution being reinvestigated. For example it does not address the issues faced by the most vulnerable of victims of crime – children.

Notwithstanding the high quality Child Witness Service, Commonwealth and state instrumentalities do not lightly commence prosecutions involving child victims or indeed lightly commence prosecutions at all. And yet the acquittal rate of sexual offences against children is overwhelming. Very often it is because of the way children give evidence. Despite court preparation and support services provided by the State, some children are simply unable to give cogent evidence because of the level of trauma, or because of family dynamics where a relative is involved, and in other cases, when defence counsel are ruthless or insidious in their approach and confuse child victims and witnesses.

In the latter circumstance juries are often distracted by minor discrepancies in evidence and seem in many cases unable to resist the smoke and mirrors of competent and not so competent defence counsel. If the common thread of the bill is to address injustices then it would be appropriate to allow serious child sexual offences to be retried in certain circumstances where, for example, it could be established that inappropriate and overzealous cross examination adversely affected the giving of evidence by a child.

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Matters of interpretation of the Bill as drafted, or the likely possible extent and application of its provisions

The legislation provides a number of checks and balances to ensure that prosecutions are not lightly brought when there has been a prior acquittal. Thus only an authorised officer (the Attorney General, the Solicitor-General, the State Solicitor, or the State or Commonwealth DPP) may commence proceedings, leave must be sought, the Court of Appeal has to provide this leave, and the requirements of tainted acquittal or fresh and compelling evidence must be the grounds and even after satisfying this there is an overarching requirement that it be in the interests of justice. It therefore seems appropriate that there be stringent conditions surrounding such a serious matter. However there are two concerns the Group share's with the current drafting:

Firstly, the definition of fresh evidence in essence is where something could not be adduced because of issues where the investigation does not expose all of the key evidence. This second category is concerning as it goes to whether or not the investigative team was competent. Why should a victim of crime be unable to have a new action brought because there was a poor case officer(s) at first instance? Secondly, the words "could not have been (made available)" raise the bar too high and in the Group's view should be excised. "It was not available" is more reasonable and proper.

Secondly, the definition of "compelling" (s 46I(2)) is problematic. It requires the new evidence to be "in the context of the issues in dispute highly probative of the new charge". It appears to require the new piece of evidence itself to be highly probative. It may be that the piece of newly discovered evidence is extremely minor but that taken with all of the other evidence it has probative value. If the section is read as currently drafted one could argue that "in the context of the issues in dispute" means no more than a reference to the type of offence it is. The section would be better worded "in the context of evidence in the case, it is highly probative of the new charge".

In regards to the safeguards adopted in the draft bill, the Group considers these adequate and well justified.

Thank you for the opportunity to comment on these important reforms. It is important that people are brought to justice for offences where there is fresh and compelling new evidence or where it might be revealed there was interference in a trial.

Yours sincerely

Hon Cheryl Edwardes
CHAIR
VICTIMS OF CRIME REFERENCE GROUP

3 October 2011