



WESTERN AUSTRALIA POLICE

LEGAL AND LEGISLATIVE SERVICES

Your Ref: CDJ (A308654)
Our Ref: LS 11-5534
Inquiries: Liam Mc Namara
92632526

POLICE HEADQUARTERS
4TH FLOOR
2 ADELAIDE TERRACE, EAST PERTH
WESTERN AUSTRALIA 6004
TELEPHONE : (08) 9263 2522
FACSIMILE : (08) 9263 2586

Renae Jewell
Standing Committee on Uniform Legislation
and Statutes Review
Parliament House
PERTH WA 6000

Dear Renae

Inquiry into Criminal Appeals Amendment (Double Jeopardy) Bill 2011

I refer to your letter dated 13 September 2011 inviting Western Australia Police to make a written submission on the above Bill that was referred to the committee on Thursday 8 September 2011. In accordance with the extension in time you granted to police to make their submission to Friday 7 October 2011, I now provide the following comments from relevant divisions.

In relation to the re-investigation of a matter that must be authorised by the Office of the Director of Public Prosecutions ("DPP"), any such matter may occur sometime after an acquittal either because (a) forensic technology and procedures have enabled better testing of smaller samples producing conclusive results that is not possible with present technology or (b) an administration of justice offence that does not come to light for some time after court proceedings. In these cases, it is unclear as to whether the matter would need to be referred to the DPP for authorisation before for example samples could be re-tested or an investigation commenced following a statement from a person alleging that there has been an administration of justice offence during a previous trial.

The Bill is silent on what would occur in circumstances where leave is given to charge an acquitted accused with a new charge, but before the trial the charge needs to be amended or substituted. For example, due to intervening circumstances such as a further witness coming forward after the new charge is laid. It is unclear as to if the charge is able to be amended or substituted or is this precluded due to leave being granted only for a particular new charge and a further leave application is required for the substituted charge.

The proposed amendments in relation to clauses 46E to 46G with reference to whether the accused is required to be notified and present at a leave application are uncertain. Subclause 46E(5) states that an application may be made without giving notice of it to the acquitted accused. Subclause 46G(1) then goes on to say that the acquitted accused is entitled to be heard at the hearing of a leave application. Subclause 46G(4) states that

if the court is satisfied the acquitted accused has received adequate notice of the hearing, the court may hear a leave application in the absence of the acquitted accused.

To make it clearer, clause 46E ought to be amended to include the words 'ex-parte' in subclause 46E(5) so it reads 'an application made under subsection (1) may be made ex-parte without giving notice of it to the acquitted accused'. Then subclause 46F(1) should be amended to include the word ex-parte as follows 'as soon as practicable after an ex-parte leave application is made, the Court of Appeal, unless it is satisfied the application is an abuse of process must (a) issue a summons...or (b) issue an arrest warrant'.

Clause 46G refers to the hearing of a leave application. Leave application is defined in clause 46A as meaning 'an application for leave made under section 46E'. Subclause 46G(1) states that an acquitted accused is entitled to be heard at the hearing of a leave application. Given the leave application is as defined in clause 46A and subclause 46E(5) states that an application may be made without giving notice of it to the acquitted accused, these provisions are confusing. It is presumed the initial application is made ex-parte (Appearance A) perhaps because of a potential flight risk of the accused when considering a murder charge, then the court issues either a summons or arrest warrant and the accused is presented to court (Appearance B) and able to be heard in relation to the application. However, given the definition of leave application and the wording of these clauses they appear contradictory on first reading. Perhaps clause 46G can be amended to clarify at which appearance the accused is entitled to be heard that being (Appearance B) rather than (Appearance A).

Clause 46M deals with who may commence a prosecution of a new charge after leave has been given by the Court of Appeal. This clause only allows the person given leave or another authorised person to commence the prosecution. 'Authorised officer' is defined in clause 46A and does not include a police officer. However, the term 'Authorised person' is not defined, so it is not clear that even after leave has been given to charge, a police officer should not be the person laying the fresh charge. Presently, even for charges that are to be heard in the Supreme Court, it is usually a police officer who lays the initial charge in the Magistrates Court. It is anticipated that the DPP will have a very close relationship with the investigating police on any matter that proceeds under these proposed amendments, given the DPP will have to approve any investigation and then have to be the officer who charges the acquitted accused rather than police.

Yours sincerely



Malcolm Penn
Assistant Director
Legal & Legislative Services

7 October 2011