Council for Civil Liberties in Western Australia Inc.

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Standing Committee on Uniform Legislation and Statutes Review
Parliament House
PERTH
Western Australia 6000

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Submission in regard to the Criminal Appeals Amendment (Double Jeopardy) Bill 2011.

Matters related to the scope, purpose and structure of the Bill.

The Council is strongly opposed to the Bill and sees no necessity for implementing the proposed amendments to the existing Act. The arguments in favour of change, do not, in our view, justify the tampering with what are long standing common law principles.

Our objection, in general terms, is based on what are well known and established arguments in support of retaining the principle of double jeopardy.

In our view the central argument against the proposal is that it changes the balance between the State and the individual which once again sees the erosion of an individual's rights and freedoms diminished. It is yet another attack by the State on liberalism or put another way, on civil liberties in Western Australia.

The double jeopardy rule as has been stated by others is that it 'acts as a curb on the unfettered power and resources of the State'. The legitimate role of the State is as a prosecutor on behalf of the public and not a persecutor.

In the *Queen v Carrol* the then Chief Justice together with Justice Haynes said:

> Many aspects of the rules which are lumped together under the title of double jeopardy find their origins not so much in the considerations we have just mentioned as in the recognition of two other no less obvious facts. Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression. Further, finality is an important aspect of any system of justice.

Much of the argument for amending the law relating to the defences underlying the double jeopardy principle focuses on advantages in technology, particularly DNA. This rationale is problematic since it is here that the individual is most disadvantaged. An individual usually has limited access to resources and, with DNA evidence in particular, the police enjoy a huge advantage both in technology and in controlling access to a crime scene.

It has been said that double jeopardy represents a practical balance between the power of the State and the rights of the individual. It also reflects a practical balance between truth and justice. As Lord Wilberforce has said:

> Any determination of disputable facts may, the law recognises, be imperfect: the law aims at providing the best and safest solution. It closes the book. The law knows and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result but in the interests of peace, certainty and security, it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: those values cannot always coincide.

A further argument is that, contrary to what we have seen in many previous and current cases in this State, the double jeopardy rule requires the police investigation to be efficient, thorough and competent. The police need to get it right the first time. If they know they will have a further opportunity, a second crack, it can only encourage inefficiency. It also requires a proper and appropriate treatment by the State prosecution authorities, unlike what was witnessed in the DPP's actions in the Mallard case: an approach that at best can be described as cavalier, and likely the result of a win-at-all-costs mentality prevailing in that office.
The proposed amendments will also tend to undermine the jury system. Public confidence in the jury decision will be challenged by knowing that the State will be able to facilitate the overturning of the original acquittal verdict to one that the State wishes to achieve.

We have seen recent evidence of this in the police attitude in refusing to accept that a convicted person, subsequently acquitted by the court, was indeed innocent and maintaining this stance publically in statements to the media.

It is with obvious concern that the Council notes that the proposed changes to the rule against double jeopardy will seriously erode the principle of finality. As has been identified by others, including the High Court, the proposed amendments, if brought to law would introduce a new kind of verdict, the conditional acquittal, which would increase the power of the State at the expense of civil liberty.

It is perhaps trite to say that accepting the finality of a decision allows the acquitted person and his or her family to get on with their lives. The psychological distress that an accused person suffers cannot be over emphasised. It would be grossly unfair to force a second trial on a person who has been previously acquitted. To quote Blackstone:

> it is better that ten guilty person escape than one innocent person suffer.

This maxim provides the recognition that innocent people need to be protected. A second trial increases the chance of an innocent person being convicted because the DPP has become aware of, and is familiar with, the defendant's arguments. Moreover, it is likely that attendant publicity, usually unfair and uninformed, despite court ordered restrictions, will result in an unfair trial. It is worth remembering that the initiatives which have driven the attacks on double jeopardy originated with *The Australian* newspaper following the *Carrol* case in Australia and the *Steven Laurence* case in the United Kingdom.

The cost of a trial can amount to millions of dollars. Currently in Western Australia we have the judiciary desperate for increased funding if justice is to be delivered appropriately. The double jeopardy rule, in preventing the retrial of acquitted people for the same or similar offences arising from the same factual situation, encourages the efficient use of community resources and obviates costly retrials for the same offence.

Double jeopardy as argued in other forums also underpins the authority of the courts by avoiding inconsistent verdicts on the same issue. This is not only embarrassing for the judicial system it creates a lack of confidence in our system of justice.

Abrogation of the Double Jeopardy rule affronts the principle of a fair trial. How can a retrial be fair when it is commenced with the presumption of guilt rather than the presumption of innocence that underpins our legal system.

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

It has not been possible in the time line provided to provide a detailed analysis of the proposed amendments. Our comments are accordingly addressed on the matters we regard as significant.

Safeguards

DPP authorisation

We are concerned with the requirement for the Director of Public Prosecution to authorise a police reinvestigation and with the proposed urgency 'exception'. In our view this provision is no safeguard at all. It is evident to us that the DPP requirement and the urgency exception will, if previous experience is anything to go by, be a mere rubber stamping by that office.

The only authorisation for a police investigation must be by senior judge who must provide written reasons for his or her decision if the decision is to authorise a retrial.

Restrictions on publication.

In our view, It is insufficient protection to provide that a court **may** prohibit publication if it appears that such publication give rise to a substantial risk of prejudicing the retrial. The court **must** prohibit any public comment on the retrial prior to its commencement including comment in the electronic media.

The legislation

Definitions of fresh and compelling evidence

In view of the nature of the changes the requirement that in clause 46I(1)(a) the term 'reasonable diligence" should be amended to a stronger term, perhaps rigorous diligence. We believe given the power and resources of the State it should not be encouraging what is likely to have been sloppy police work in the initial prosecution. Increasing the standard of diligence should reduce the number of case falling into the ambit of the Act.

Similarly, the definition of compelling should be tightened, the term highly probative is inadequate. As suggested in other legislative jurisdictions, the evidence to be compelling should be such that it could likely have eliminated all reasonable doubt.

Retrospectivity

We note that the Bill provides for the legislation to be retrospective, clause 46B(2), moreover the retrospectivity is open. We find this proposal repugnant. The arguments against retrospectivity are well known and need not be repeated here. We note that the Queensland legislation does not provide for retrospective investigation and know of no evidence to justify why the legislation is not prospective.

Tainted Acquittal

We note that the proposed legislation at clause 46J (a) allows an acquittal to become tainted by an AOJ offence committed by a third party. It is manifestly unfair to the acquitted person to subject them to a retrial without being satisfied of their complicity in the tainting.

One final note, we believe there to be a case for providing for penalties in this legislation where public officers, members of the police service and DPP staff, have acted contrary to the intent and provisions of this Bill.

Regards,

Peter Weygers JP President. David Pugh BA (Hons), LL.B. MIR. Vice President