

28 September 2011

The Hon Adele Farina MLC
Chairman
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council
Parliament House
Perth WA 6000

By email: rjewell@parliament.wa.gov.au

Dear Ms Farina,

INQUIRY INTO CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

The Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) writes in response to the invitation by the Legislative Council of Western Australia (WA) Standing Committee on Uniform Legislation and Statutes Review (the Committee) to make written submissions on the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (the Bill).¹

About ALSWA

ALSWA is a community based organisation that was established in WA in 1973. ALSWA aims to empower Aboriginal and Torres Strait Islander peoples (Aboriginal peoples) and advance their interests and aspirations through a comprehensive range of legal and support services throughout WA. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal, civil, family, and human rights law. ALSWA's services are available throughout WA via 17 regional and remote offices and one head office in Perth. ALSWA is a representative body with 16 executive officers² elected by Aboriginal peoples from their local regions to speak for them on law and justice issues.

ALSWA'S Submission

ALSWA does not support the proposed amendments that seek to overturn the long established and fundamental double jeopardy principle in criminal law that:

¹ For further information about the Inquiry into the Bill see:

[http://www.parliament.wa.gov.au/web/newwebparl.nsf/pgFrameset?openpage&fcontent=http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(InqByName\)/Criminal+Appeals+Amendment+\(Double+Jeopardy\)+Bill+2011?opendocument](http://www.parliament.wa.gov.au/web/newwebparl.nsf/pgFrameset?openpage&fcontent=http://www.parliament.wa.gov.au/Parliament/commit.nsf/(InqByName)/Criminal+Appeals+Amendment+(Double+Jeopardy)+Bill+2011?opendocument)

² There are two Executive Officers for each of the former eight ATSIC regions (Metropolitan, Central Desert Region, Murchison/Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by Aboriginal and Torres Strait Islander peoples every three years.

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“a person may not be tried for the same offence twice. Its purpose is to ensure that criminal proceedings can be brought to a conclusion, and that the result in a trial can be regarded as final. It protects individuals against repeated, oppressive attempts by the state to prosecute. It encourages police and prosecutors to be diligent and careful in their investigation, and to gather as much evidence as possible against an accused. In this sense, it promotes fairness to an accused and the proper administration of justice for the victim and the community.”³

The purpose of the Bill is to respond to changes in forensic science by introducing exceptions to the double jeopardy rule in certain circumstances and with various safeguards.

ALSWA acknowledges Hon Michael Mischin’s comments about the importance of ensuring guilty defendants are convicted, the innocent remain free and that a balance is maintained in the criminal justice system.⁴

However we maintain that there is no balance in the justice system as Aboriginal peoples continue to experience lower socio-economic outcomes than non-Aboriginal peoples in a range of areas, are disproportionately targeted by police and experience structural discrimination at every stage of their contact with the justice system.

The WA Government must start reinvesting in justice to achieve balance in the system by diverting funding to tackle inherent social issues contributing to criminal offending, rather than finding more ways to lock people up in the prisons it continues to build at alarming rates.

ALSWA notes the arguments against changing the rule against double jeopardy have been stated in a number of other sources.⁵ We reiterate and summarise these arguments as follows:

- 1) The importance of finality of proceedings to ensure public confidence in the efficient operation of the courts and the justice system.
- 2) The risk of the State abusing its power to make multiple attempts to convict a person for the same act, in light of its greater resources and authority than the individual.

³ Hon Michael Mischin MLC, Second Reading Speech, *Criminal Appeals Amendment (Double Jeopardy) Bill 2011*, 8 September 2011.


⁴ Ibid.

⁵ See for example, R Johns, *Double Jeopardy Briefing Paper No 16/03*, NSW Parliamentary Library Research Service, 2003, see 5.2; the Hon former Justice Kirby, *Carroll, Double Jeopardy and International Human Rights Law*, (2003) 27 Crim LJ 231.

- 3) Emotional and psychological distress on the defendant where the double jeopardy rule protects a person from the humiliation, expense, anxiety and uncertainty that could accompany quashing an acquittal and subsequent retrial.
- 4) The competence of investigation and prosecution, where the double jeopardy rule encourages police investigates to be efficient and effective in presenting the best possible case from the outset, and to prevent police from prosecuting until all the relevant evidence is gathered.
- 5) The difficulties in the defendant receiving a fair second trial because of public knowledge of the case from the first trial and possible adverse publicity including possible adverse publicity stemming from a successful application to prosecute a second trial.
- 6) There would be a further risk of the presumption of innocence being eroded with any jury assuming new evidence must be compelling enough to warrant a retrial, therefore further comprising an individual's capacity to get a fair trial at a second trial.
- 7) It would be in breach of Australia's obligations under article 14 (7) of the International Covenant on Civil and Political Rights.

If you would like to discuss this submission further, please contact Seranie Gamble from this Office on (08) 9265 6650.

Yours faithfully,



PETER COLLINS

Director of Legal Services