THIRTY-EIGHTH PARLIAMENT

REPORT 66

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

THE CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

Presented by Hon Adele Farina MLC (Chairman)

November 2011

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:
17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)
Hon Nigel Hallett MLC (Deputy Chairman)
Hon Liz Behjat MLC
Hon Linda Savage MLC

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Government Response

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO

THE CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

EXECUTIVE SUMMARY

1.1 The Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (**Bill**) makes significant changes to the criminal law in Western Australia, a system of law that has lain substantively undisturbed for the past century.

1.2 The Bill prescribes certain "*serious*" and "*administration of justice*" offences as offences for which the common law rule against double jeopardy, codified in section 17 of *The Criminal Code* as a defence, will be removed. The rule provides that:

> *No man is to be brought into jeopardy of his life, more than once, for the same offence. If the prosecution attempts to do so, the accused may plead that he has already been convicted (autrefois convict*[1]*) or acquitted (autrefois acquit*[2]*) of the same matter*.[3]

1.3 Removal of the defence against double jeopardy followed public outrage over the decision in the seminal case of *R v Carroll*[4] in 2002 as well as other local and international criminal case law and inquiries.

RECOMMENDATIONS

1 The Committee has made eight narrative form recommendations and one statutory form recommendation. The recommendations are grouped as they appear in the text at the page number indicated.

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1 Meaning, 'I have already been convicted'.

2 Meaning, 'I have already been acquitted'.

3 *R v Carroll* (2002) 213 CLR 635 at paragraph 128 per McHugh J.

4 (2002) 213 CLR 635.

Page 11

Recommendation 1: The Committee recommends that the Parliamentary Secretary representing the Attorney General amend the Bill to make it clear and put beyond doubt whether an alternative verdict for an offence, which was not a "*serious offence*", would be available on an indictment for a serious offence filed following the grant of leave.

Page 13

Recommendation 2: The Committee recommends that the Parliamentary Secretary representing the Attorney General explain the reason for the position taken with respect to retrospectivity in the Bill given the position taken by Queensland.

Page 14

Finding 1: The Committee finds that proposed subsection 46B(2) has a retrospective effect and clearly abrogates the defence against double jeopardy in section 17 of *The Criminal Code* for "*serious*"; and "*administration of justice*" offences.

Page 15

Recommendation 3: The Committee recommends that the Parliamentary Secretary representing the Attorney General amend the Bill to make clear and put beyond doubt, whether a further leave application is required in circumstances where a new charge requires amendment or substitution and the extent to which an amendment or substitution can be made.

Page 17

Recommendation 4: The Committee recommends that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of a tainted acquittal may result in more than one retrial. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.

Page 17

Recommendation 5: The Committee recommends that that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of fresh and compelling evidence is only available once. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.

Page 18

Finding 2: The Committee finds that proposed subsection 46E(5) denies an acquitted accused the right to be heard in circumstances where the right to personal liberty is at risk. This reflects a policy decision of the Executive.

Page 18

Recommendation 6: The Committee recommends that the Parliamentary Secretary representing the Attorney-General provide justification for why an acquitted accused is denied the opportunity to attend the leave application in proposed subsection 46E(5).

Page 20

Finding 3: The Committee finds that proposed subsection 46L(2) protects the identity of an acquitted accused from publication during a leave application. However, this restraint on the freedom of the press is lifted if, at a retrial, the Court of Appeal exercises a discretion under proposed subsection 46L(4) to make an order authorising publication of some or all of the information to which proposed subsection 46L(2) applies. This order can only be made if it is in the interests of justice. These proposed subsections will assist in a fair retrial of the acquitted accused.

Page 21

Recommendation 7: The Committee recommends that the Parliamentary Secretary representing the Attorney General:

(1) confirm the persons that are intended to fall within the term "*authorised person*" in proposed subsection 46M(1); and

(2) amend the Bill so as to make clear and put beyond doubt, the Executive's intent with respect to those persons.

Page 25

Recommendation 8: The Committee recommends that the Parliamentary Secretary representing the Attorney General advise the Legislative Council whether it is the intent of the Executive to remove the double jeopardy defence for an acquitted accused under the age of 18. If so, explain the rationale and amend the Bill so as to make clear and put beyond doubt, the Executive's intent.

Furthermore that the Bill be amended to make clear and put beyond doubt, the Executive's intention with regard to how this law will be applied against an acquitted accused under the age of 18 at the time of the original offence who is later, as an adult, charged with a "*serious*" or "*administration of justice*" offence.

Page 26

Recommendation 9: The Committee recommends that clause 4 of the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 be amended in the following manner:

Page 17, line 22 — To insert —

46N. Review of amendments made by Criminal Appeals Amendment (Double Jeopardy) Act 2011

(1) The Minister must review the operation of the amendments made to this Act and The Criminal Code by the Criminal Appeals Amendment (Double Jeopardy) Act 2011 (the amendment Act) as soon as is practicable after 5 years after the date on which the amendment Act receives the Royal Assent.

(2) The Minister must prepare a report based on the review and, as soon as practicable after the report is prepared and in any event not more than 18 months after the expiry of the period referred to in subsection (1), cause it to be laid before each House of Parliament.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO

THE CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

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1 REFERRAL

1.1 On 8 September 2011, Hon Michael Mischin MLC, Parliamentary Secretary representing the Attorney-General, introduced the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (**Bill**) into the Legislative Council.

1.2 Following its Second Reading, the Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 230A. Under Temporary Standing Orders of the Legislative Council, the Committee must report to the Legislative Council within 45 days of referral of a bill. The policy of the Bill was not referred.

2 INQUIRY PROCEDURE

2.1 The Committee's Inquiry was advertised in *The West Australian* on 17 September 2011 and details of the Inquiry were published on the Committee's webpage. The Committee wrote to stakeholders inviting submissions. The list of stakeholders may be seen at **Appendix 1**. The Committee extends its appreciation to those who made submissions.

2.2 The Committee held a hearing on 28 September 2011 with Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. Answers to questions taken on notice at the hearing were provided on 6 October 2011.

3 UNIFORM LEGISLATION

3.1 The Bill does not precisely fit any of the identified structures of uniform legislation listed in **Appendix 2**, which is not unusual given the dynamic nature of uniform scheme legislation. There is some resemblance to *Structure 2 - Model legislation*. Also known as mirror legislation, the objective of this structure is that it will be enacted in participating jurisdictions with any local variations that are necessary to achieve the agreed uniform national policy when the legislation forms part of the local law.

3.2 When scrutinising uniform legislation, the Committee considers various 'fundamental legislative scrutiny principles' as a convenient scrutiny framework. These principles are set out in **Appendix 3**.

4 SUPPORTING DOCUMENTS

Summons

4.1 A summons for supporting documents was served on the Director General, Department of the Attorney General as the documents had not been received within the requisite, three business days of referral of the Bill. Details of the summons are in **Appendix 4**.

Supporting Documents

4.2 The documents reveal that there is no Intergovernmental Agreement reduced to written form, Memorandum of Understanding or Model Bill. Extracts of two Council of Australian Governments (**COAG**) *Communiques* were provided. The first is the April 2006 *Communique* on the merits of double jeopardy reform and the second in April 2007 on the agreement to implement reforms (referred to at paragraph 6.8).

4.3 A third document was provided titled the *Double Jeopardy Law Reform: Model Agreed by COAG* which is a set of agreed principles for reform. Of this document, the Attorney General said it was up to each jurisdiction to determine how and when the principles are to be applied.[5] The principles are replicated in **Appendix 5**.

4.4 The Attorney General advised that as at December 2010, four States[6] had enacted the reform with the Commonwealth, Victoria[7] and the Northern Territory considering their positions whilst the Australian Capital Territory does not intend to enact.

---

5 Tabled Paper by the Attorney General, 15 September 2011, p1.

6 New South Wales enacted the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 (NSW)*. It applies to three administration of justice offences, life sentence offences meaning 'murder or any other offence punishable by imprisonment for life; '15 years or more sentence offence' meaning an offence punishable by imprisonment for life or for a period of 15 years or more. It is retrospective. Queensland's Criminal Code (Double Jeopardy) Amendment Bill 2007 proposed the Bill apply to 25 year offences and is not retrospective. Tasmania's legislation is also retrospective. (See section 391(1) of the *Criminal Code Amendment Act 2008 (Tas)* which is titled "*Application of Chapter XLIV- Exceptions to Double Jeopardy Rules*: "*This Chapter applies if, before or after the commencement of this Chapter, a person is acquitted of a crime, whether the crime is committed before or after the commencement of this Chapter.*" South Australia passed its Criminal Law Consolidation (Double Jeopardy) Amendment Bill 2008 amending its *Criminal Law Consolidation Act 1935 (SA)* where section 334(1) titled "*Application of Part*" states: "*This Part applies whether the offence of which a person is acquitted, is alleged to have occurred before or after the commencement of this Part.*"

7 The push for change in Victoria has been linked to suggestions the 1988 Walsh Street murders, and the acquittal of the accused left a strong sense of unfinished business. According to *The Age*, 3 June 2011, the legislation will be put before the Victorian Parliament in late 2011.

5 BACKGROUND TO THE BILL

5.1 The Bill contains 11 clauses in three Parts. The most significant clause is in Part 3 where clause 5 proposes to amend section 17 of *The Criminal Code* which has lain substantively undisturbed for the past century.[8] Section 17 of *The Criminal Code* gives statutory expression to the fundamental common law rule against double jeopardy by way of a defence. It states:

> ***17. Former conviction or acquittal a defence***
>
> *It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment or prosecution notice on which he might have been convicted of the offence with which he is charged, or has already been convicted or acquitted of an offence of which he might be convicted upon the indictment or prosecution notice on which he is charged.*

5.2 Clause 5 proposes to amend section 17 of *The Criminal Code* to state that it will be subject to proposed subsections 46M(4)(b) and (c) of the *Criminal Appeals Act 2004*. Proposed subsection (b) denies an acquitted accused of the entitlement to plead on a new charge in relation to certain "*serious offences*" and "*administration of justice*" offences that he or she has already been acquitted; or to prove or refer to that acquittal.

5.3 Other significant clauses are located in Part 2 of the Bill - to the *Criminal Appeals Act 2004*. Clause 4 proposes that the current double jeopardy rule should remain but prescribes exceptions. Thus, persons acquitted of 128 "*serious*" offences such as murder, manslaughter and aggravated sexual assault as well as 13 "*administration of justice*" offences such as bribery of a public officer[9] and witness tampering can no longer avail themselves of the defence against double jeopardy in section 17 of *The Criminal Code*. Those persons will be able to be re-tried by various authorised officers.[10]

---

8 One hundred years ago, on 22 December 1911, the Legislative Council and Legislative Assembly directed the compilation, with its amendments, of the *Criminal Code Act 1902***.** Scheduled to that enactment is *The Criminal Code*.

9 In Submission No 6 from the Public Sector Commission, 4 October 2011, p2, the Public Sector Commissioner said the inclusion of this offence found in section 82 of *The Criminal Code* will "*provide a platform for further generating an increase in public confidence in the integrity and conduct of public officers*."

10 These are the Attorney General, the Solicitor General, the State Solicitor, the Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions under proposed new section 46A(1).

6 OVERVIEW OF THE BILL

Impetus for the Bill

6.1 The impetus for the Bill was the 2002 High Court of Australia (**High Court**) decision in *R v Carroll*.[11] Carroll was convicted of murdering Deidre Kennedy, a 16 month old toddler in 1985 but was later acquitted on appeal. In 2000 Carroll was convicted of perjury based on his denial of the murder charge on oath at his initial trial, but later was acquitted of this charge by the Queensland Court of Appeal. The High Court upheld this decision, finding that trying Carroll for perjury triggered the double jeopardy rule.

6.2 The rule provides that:

> *No man is to be brought into jeopardy of his life, more than once, for the same offence. If the prosecution attempts to do so, the accused may plead that he has already been convicted (autrefois convict*[12]*) or acquitted (autrefois acquit*[13]*) of the same matter*.[14]

6.3 There was public outrage over the *R v Carroll* decision but it was not the first occasion of public disquiet with the double jeopardy rule. There has been significant media coverage of public concern over perceived guilty persons being freed by the courts and in international public inquiries. For example:

- the Western Australian Leon Robinson Case;[15]
- *R v Moore*;[16] and
- the *Stephen Lawrence Enquiry* in the United Kingdom.[17]

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11 (2002) 213 CLR 635.

12 Meaning, 'I have already been convicted'.

13 Meaning, 'I have already been acquitted'.

14 (2002) 213 CLR 635 at paragraph 128 per McHugh J.

15 Leon Robinson's accused attackers were acquitted in June 2005 on a charge of manslaughter (the first trial having been aborted in 2004). Subsequent charges laid in the Magistrates Court were assault occasioning bodily harm. These were dismissed by the Magistrate as an abuse of process as it was held that those charges could have been presented against the accused as alternative charges on the manslaughter indictment, and it was unfairly burdensome to prosecute those charges subsequently and separately.

16 (1999) 3 NZLR 385. Here the accused was acquitted of murder, only to be convicted later of conspiracy to defeat the course of justice because he procured a witness in the first trial to provide the Court with a false alibi. A report by the New Zealand Law Commission following this case recommended a tainted acquittal exception to the double jeopardy rule in order to maintain public confidence in the justice system: Law Reform Commission in Acquittal Following Perversion of the Course of Justice (NZLC Report 70, March 2001).

6.4 The Committee noted that every Australian jurisdiction has an *R v Carroll* equivalent.[18]

The drive for reform

6.5 The Acting Solicitor General told the Committee that legislation implementing the *Double Jeopardy Law Reform: Model Agreed by COAG* is far from uniform in Australia.[19] This is because the *Double Jeopardy Law Reform: Model Agreed by COAG* did not include legislative text and it was left to each jurisdiction to engage its own drafting approach in translating the principles. The Acting Solicitor General said "*in drafting the Bill policy decisions considered most appropriate for Western Australia were obviously made*."[20]

6.6 After the decision in *R v Carroll*, Premiers and Attorneys-General of the various jurisdictions stated that some reform was necessary, but a nationally consistent approach was desirable. In 2003, the (then) Queensland Attorney-General, Hon Rod Welford, referred the matter to the Standing Committee of Attorneys-General (**SCAG**).

6.7 SCAG referred the issue of double jeopardy reform to the (then) Model Criminal Code Officers Committee (**MCCOC**) for review and to consider possible reforms that would militate against any injustices flowing from a strict operation of the double jeopardy principle.[21]

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17 Sir William MacPherson of Cluny, *The Stephen Lawrence Enquiry: Report of an Inquiry*, February 1999. Stephen Lawrence was stabbed to death in front of eye witnesses. No-one was ever convicted. The Crown Prosecution Service brought a case against two suspects but dropped it on 29 July 1993 after deciding that there was insufficient evidence. Three of the five suspects in the Lawrence case were acquitted of the murder. In April 1996, Stephen's family initiated a private prosecution against those two and three other suspects. Charges against the original two suspects were dropped before the trial and the others were acquitted at trial when the judge disallowed eyewitness testimony. In a report into the bungled police investigation, Sir William Macpherson found that the police were institutionally racist and made a total of 70 recommendations for reform in his report dated 24 February 1999. Recommendation 38 states "*That consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented.*" The Home Secretary told the House of Commons that he would ask the Law Commission to consider the proposal: http://www.archive.officialdocuments. co.uk/document/cm42/4262/sli-00.htm (viewed on 29 September 2011). In 2003, the law was changed in the United Kingdom, Wales and Northern Ireland. In 2011, Scotland is considering a revision.

18 Most recently, *The Age* commented on how the Victorian government has relaxed its 2006 opposition to double jeopardy reform and is linked to suggestions the Walsh Street murders of Constables Steven Tynan and Damian Eyre might be the subject of a new trial for the same defendants on fresh evidence. See: "*Tread carefully, lest vindictiveness place justice in jeopardy*", *The Age* (Melbourne), 6 June 2011, by Julian Burnside QC.

19 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p2

20 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p2.

21 *http://www.lawlink.nsw.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_double* (viewed on 13 September 2011).

6.8 At its November 2003 meeting, SCAG approved the release for public consultation of MCCOC's Discussion Paper on *Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, incorporating model provisions.[22] On 14 April 2006 COAG decided that reform of the rule against double jeopardy was an important criminal law policy reform that "*merited national consistent treatment*".[23] On 13 April 2007, the *Double Jeopardy Council of Australian Governments Law Reform Working Group* presented its recommendations. COAG then formally agreed:

> *That jurisdictions will implement the recommendations of the Double Jeopardy Law Reform COAG Working Group on double jeopardy law reform, prosecution appeals against acquittals, and prosecution appeals against sentence, noting that the scope of reforms will vary amongst jurisdictions reflecting differences in the particular structure of each jurisdiction's criminal law.*[24]

6.9 The Committee noted that COAG's agreement is a less uniform approach than that suggested by the April 2006 resolution. That is, reform could take place but the scope of reform could vary amongst jurisdictions. This is relevant for *Code* States like Western Australia and Queensland. NSW was the first jurisdiction to implement the reform (a common law jurisdiction supplemented by statute) followed by Queensland (a *Code* state). Queensland failed to reach consensus on its first attempt at reform over whether its proposed legislation should be retrospective or prospective in operation and accounts for why the reform stalled in 2006.

6.10 The first round of reform for Western Australia was in March 2007 when the Criminal Law and Evidence Amendment Bill 2006 introduced a limited prosecution right of appeal against acquittal verdicts in trials heard by Judge and jury in the *Criminal Appeals Act 2004*.[25] The Bill is the second round of reform specifically on double jeopardy by further amendments to the *Criminal Appeals Act 2004*.

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22 In March 2004.

23 Tabled Paper by the Attorney General dated 15 September 2011 enclosing an Extract of a COAG Communique.

24 http://www.coag.gov.au/meetings/130407/index.htm#jeopardy (viewed on 13 September 2011) noting at that time, Victoria and the Australian Capital Territory reserved their positions in relation to the recommendations.

25 A former Legislation Committee scrutinised the Criminal Law and Evidence Amendment Bill 2006 noting a tendency for other jurisdictions and inquiries to consider both double jeopardy reform and the extension of prosecution rights of appeal together. Similarly, that committee heard evidence for and against the proposition that the relevant Part of the bill either infringed, abrogated, eroded, modified or indirectly reformed the rule against double jeopardy. The former Legislation Committee found that the bill did not reform double jeopardy, it overturned the High Court's entrenched principle in *R v Snow* (1915) 20 CLR 315, that the Crown does not have a right of appeal against a verdict of acquittal. See: Western Australia, Legislative Council, Legislation Committee, Report 9, Criminal Law and Evidence Amendment Bill 2006, 30 August 2007, pp75-76.

Differences between the principles in the *Double Jeopardy Law Reform: Model Agreed by COAG* and clauses in the Bill

6.11 The Acting Solicitor General identified the following differences.[26]

COAG principles	The Bill
The 'fresh and compelling' evidence exception to the double jeopardy rule applies to acquittals for only the most serious categories of offences. The 'tainted acquittals' exception to apply to a broader range of serious indictable offences and the 'administration of justice' exception would apply to all indictable offences.	Opts for consistency between the three categories of exception with regard to the kinds of offences which may be the subject of a new charge following an acquittal.
'Serious offences' to which the tainted acquittals exception relates carrying a penalty of more than 15 years imprisonment.	Provides for 14 years.[27] This leaves a range of middle indictable offences that are too serious for Magistrates but not serious enough to have a 14 years penalty for which the common law rule remains intact.
The 'administration of justice' exception requires fresh evidence of the commission of an 'administration of justice' offence by the acquitted person as well as the Court of Appeal being satisfied that it is in the interests of justice that a re-trial occurs.	Only requires that the Court of Appeal be satisfied that it is in the interests of justice that the acquitted accused be charged with an 'administration of justice' offence
Only the Director of Public Prosecution's authorisation for police re-investigation of an acquitted accused.	Other senior legal officers can give authorisation.
The Court of Appeal may grant leave to prohibit publication of any matters if it appears that such publication would give rise to a substantial risk of prejudice to the administration of justice at a re-trial.	Provides automatic restriction on publications which may identify the acquitted accused as the subject of proceedings unless the Court otherwise orders or until the proceedings or re-trial are complete.
The acquitted person can be charged with a relevant offence before leave is granted	Provides for the Court of Appeal to grant leave for a person to be charged with a new charge.

[26] Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, pp2-3.

[27] The Law Society of Western Australia argues for 20 years or more. See Submission No 2 from The Law Society of Western Australia, 29 September 2011, p1.

6.12 Legal Aid Western Australia stated that there is no reference to indictable offences for the 'fresh and compelling' evidence exception in the *Double Jeopardy Law Reform: Model Agreed by COAG*, whereas the Bill applies the 'fresh and compelling' evidence exception to indictable offences. [28]

7 SELECTED CLAUSES

Part 2: Clause 4 amending the *Criminal Appeals Act 2004*

Clause 4 - Inserting a proposed section 46A – administration of justice offences

7.1 Proposed subsection 46A(2) takes 13 offences from *The Criminal Code* and inserts them into a Table of administration of justice offences. The Acting Solicitor General advised that the Table is based on the collected list in Chapter 16 of the *Criminal Code of Queensland*.[29] Proposed subsection 46A(1)(b) states that an administration of justice offence means:

> *an offence under the law of a place outside this State that is substantially similar to an administration of justice offence listed* [in the Table]…

7.2 The Committee considered whether differences in other jurisdictions' administration of justice offences might be problematic for an authorised officer applying for leave to charge an acquitted accused.

7.3 The Acting Solicitor General said the identification of an interstate administration of justice offence as one which is 'substantially similar' to a Western Australian offence accommodates regional differences of this kind and while there may be cases where the sufficiency of the degree of similarity is open to debate, that debate will be resolved by the Court of Appeal on an application for leave.[30]

7.4 The first step in the process for leave is when an authorised person makes an application under proposed section 46E which the Committee noted may be made without giving notice of it to the acquitted accused. However, "*it cannot be determined at that point*".[31] The Acting Solicitor General advised the following subsequent steps:

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28 Submission No 8 from Legal Aid Western Australia, 10 October 2011, p1.

29 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p3. The Chapter is titled *Offences relating to the Administration of Justice*

30 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, pp4-5.

31 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p9.

> *After the application is made the Court of Appeal issues either a summons or an arrest warrant to have the acquitted accused brought before the Court, under proposed section 46F. The Court does not deal with the merits of an application made without notice to the acquitted accused at this time.*
>
> *When following the issue of a summons or warrant, the acquitted accused appears or is brought before the Court, the Court considers whether the acquitted accused should be released unconditionally, granted bail or kept in custody.*
>
> *The acquitted accused is entitled to be present at the hearing and determination of the application for leave to charge the acquitted accused with a new charge.*[32]

7.5 The Committee noted that because the application for leave may be made without giving notice, the acquitted accused is thereby denied an opportunity to argue before being summonsed or arrested, that the administration of justice offence is 'substantially dissimilar'. The Committee understands that the proposed procedure is designed to ensure the acquitted accused does not flee the jurisdiction.

7.6 The Committee acknowledges that proposed subsection 46A(1)(b) denies an acquitted accused the opportunity to argue, before being summonsed or arrested, that the administration of justice offence is substantially dissimilar. This reflects a policy decision of the Executive.

Clause 4 - Inserting a proposed subsection 46A(1) - the definition of serious offence

7.7 This defines "*serious offence*" in the following manner.

> ***serious offence*** *means an indictable offence the statutory penalty for which is —*
>
> *(a) life imprisonment; or*
>
> *(b) imprisonment for 14 years or more;*

7.8 The Acting Solicitor General provided a list of 125 serious offences under *The Criminal Code* and three under the *Misuse of Drugs Act 1981* for which the defence in section 17 of *The Criminal Code* against double jeopardy will no longer be available. The list is replicated at **Appendix 6**.

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[32] Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p9.

Clause 4 - Inserting a proposed subsection 46B(1)(b)(ii)

7.9 This clause states:

> *(1) For the purposes of this Part a person is an **acquitted accused** if the person, in this State or elsewhere —*
>
> > *(a) is tried on a charge (**charge A**) of a serious offence (**offence A**); and*
> >
> > *(b) at the trial (**trial A**), or on appeal from a conviction in trial A, is acquitted, other than on account of unsoundness of mind, of —*
> >
> > > *(i) charge A; and*
> > >
> > > *(ii) any other offence of which, on charge A, the acquitted accused might have been convicted instead of offence A.*

7.10 The clause provides that for the purposes of proposed part 5A of the *Criminal Appeals Act 2004*, a person is defined as an acquitted accused if they have been tried on a charge of a serious offence and at the trial, acquitted of the charge and "*any other offence*" of which they might have been convicted instead of the charge. This suggests that the "*any other offence*" may be a less serious offence than the "*serious offence*", hence preserving the rule against double jeopardy for the benefit of that person on that less serious offence.

7.11 The Acting Solicitor General said that where a person is charged on indictment with an offence, it is often open to the trial court to convict the person of a less serious offence although not specified in the indictment.[33] For example with murder, various alternative verdicts are available, running from manslaughter to dangerous driving causing death or grievous bodily harm. Some of those are serious offences and some of them are not.

7.12 The Acting Solicitor General said

> *To be an acquitted accused, the person must be acquitted of all the charges open on the indictment. So, if a person … is charged with murder but convicted of ordinary dangerous driving causing death, then they will not be an acquitted accused; they will have been convicted of something. Of course, if the person is acquitted of all of*

[33] Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p5.

the offences, then the possibility exists under this bill for an application to be made for leave to charge them again with a serious offence. So, they could be, for example, charged again with murder or they could be charged with manslaughter, with the leave of the court. They could not be charged with ordinary dangerous driving causing death because that would not be a serious offence.

***The CHAIRMAN**: But could they be charged with the serious offence but the jury return a verdict of dangerous driving?*

***Mr Mitchell**: Of the lesser offence?*

***The CHAIRMAN**: Yes.*

***Mr Mitchell**: That is a good question and I have noted that the bill does not seem to provide an express answer to it. I think you would have to say that the question would arise as to whether, if the person was again charged with murder for example, all of the alternatives would be available or only be alternatives which amounted to a serious offence. I suspect the answer is that all the alternatives would be available, but I would not be certain of that.*

7.13 In answering a question on notice, the Acting Solicitor General said:

> *In my view there is uncertainty as to whether an alternative verdict for an offence, which was not a serious offence, would be available on an indictment for a serious offence filed following the grant of leave.*[34]

7.14 Given this uncertainty, the Committee makes the following recommendation.[35]

Recommendation 1: The Committee recommends that the Parliamentary Secretary representing the Attorney General amend the Bill to make it clear and put beyond doubt whether an alternative verdict for an offence, which was not a *"serious offence"*, would be available on an indictment for a serious offence filed following the grant of leave.

34 Answer to Question on Notice answered by Mr Robert Mitchell SC, Acting Solicitor General, 6 October 2011, p2.

35 Answer to Question on Notice answered by Mr Robert Mitchell SC, Acting Solicitor General, 6 October 2011, p2.

Clause 4 - Inserting a proposed subsection 46B(2)

7.15 Proposed subsection 46B(2) has retrospective effect and is consistent with Item 28 of the *Double Jeopardy Law Reform: Model agreed by COAG* which states that the "*fresh and compelling evidence*" and "*tainted acquittals*" exceptions should apply retrospectively.[36] This raises that fundamental legislative principle the Committee routinely considers: *Does the Bill adversely affect rights and liberties or impose obligations retrospectively*? The proposed subsection states:

> *(2) For the purposes of subsection (1)* (that is, that the accused is either in Western Australia or elsewhere) *it does not matter if the acquittal occurred before or after the commencement of this Part.*[37]

7.16 The Committee noted that the double jeopardy rule would have prevented the acquitted accused from being charged again before the commencement of the Part when the acquittal occurred. From another perspective, as the Acting Solicitor General said: "*the Bill may be seen as creating a new opportunity for a person to be convicted of a serious offence and affecting a vested right which was established prior to the commencement of the provisions*."[38] Similarly, it was against the law to try again the acquitted accused before the commencement of the Part.

7.17 Queensland has not made its enactment retrospective and is the only jurisdiction to differ in this important deviation from the retrospectivity principle in Items 28 and 29 of the *Double Jeopardy Law Reform: Model agreed by COAG*. Queensland's *Criminal Code (Double Jeopardy) Amendment Act 2007* further differs from Western Australia in that it modifies the application of the double jeopardy rule for offences which carry the maximum penalty of 25 years or more.

7.18 Legislation is normally prospective, not retrospective[39] and of this, the Council for Civil Liberties in Western Australia Inc described the retrospective nature of the Bill as "*repugnant*".[40] The Acting Solicitor General said:

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36 As was said in the South Australian Parliament debate on their equivalent bill, the whole idea of the reform entails revisiting what has gone before and the reform does not entail changing the law of liability - merely exposure to it. In addition, the safeguards include a requirement for the court to consider 'the length of time since the acquitted person allegedly committed the offence' in determining whether a retrial would be in the interests of justice. This safeguard strikes an appropriate balance between ensuring that retrials for past crimes can proceed (the public interest in bringing guilty parties to justice) and potential cases where an alleged crime occurred so far in the past that a fair trial would not be possible and a retrial would not be in the interests of justice.

37 The "Part" here is Part 2 amending the *Criminal Appeals Act 2004*.

38 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, pp6-7.

39 The common law, as stated in *Rodway v R* (1990) 169 CLR 515, is that a statute which changes procedural aspects of law is not regarded as breaching the presumption against retrospectivity, even though it may be applied in a trial that relates to conduct that occurred before the statute commenced and have consequences for the rights of the accused.

> *An argument in favour of the Bill applying to acquittals prior to its commencement is that the Bill only enables the re trial of a person for a serious offence which was provided for at the time the charged conduct occurred. The existence of fresh and compelling evidence to show that the person committed a serious offence such as murder, or evidence establishing that the acquittal was obtained through the commission of an administration of justice offence, means that there is a public interest in having the offender again brought to trial. That public interest may be seen to outweigh the public interest in not depriving a person of a benefit of an acquittal obtained before the Bill commenced.*
>
> *The argument against applying the Bill to those acquittals is that the Bill may be said to go beyond making purely procedural provisions by creating a liability to conviction which was previously extinguished by the acquittal.*[41]

7.19 The Committee considered the arguments for and against retrospectivity noting that it is a feature of the *Double Jeopardy Law Reform: Model agreed by COAG* with Queensland taking a different position. As the only other *Code* State, the Committee is of the view that this is a significant difference from the position taken by Western Australia and reflects a policy decision of the Executive.

7.20 The Committee makes the following recommendation.

Recommendation 2: The Committee recommends that the Parliamentary Secretary representing the Attorney General explain the reason for the position taken with respect to retrospectivity in the Bill given the position taken by Queensland.

7.21 The Committee also noted that statutory provisions, especially those imposing criminal penalties, are presumed to operate only for the future.[42] However, an Act will operate retrospectively if the Parliament has made that intention unmistakably

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40 Submission No 4 from the Council for Civil Liberties in Western Australia Inc, 3 October 2011, p3.

41 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, pp6-7.

42 Patrick Layden QC, Witness to the Scottish Parliament Justice Committee argued that acquitted accused currently had a right, by virtue of their acquittal, not to be tried again. "*They are innocent people: they have had a full, proper trial according to the rules of evidence and have been found not guilty. They currently enjoy a right that is set up by the courts in the teeth of opposition from the Executive, and if we make the provision retrospective, we take that away.*" 26 January 2011, *3rd Report, 2011 (Session 3) Stage 1 Report on the Double Jeopardy (Scotland) Bill* viewed on 16 September 2011. http://www.scottish.parliament.uk/s3/committees/justice/reports-11/jur11-03.htm - _ftn93#_ftn93

clear. The High Court[43] and other courts[44] have warned that general enactments do not abolish fundamental common law rights, rules, principles, privileges and immunities.[45] Thus, legislation empowering retrospectivity in criminal matters will not be read as allowing retrospective application unless the language is unmistakeable. General words are insufficient, there must be language which is specifically directed to abolish or erode fundamental principles.[46]

7.22 The Committee has concluded that the statutory language in the proposed provision is sufficiently clear to abrogate the double jeopardy defence in section 17 of *The Criminal Code* for "*serious*"; and "*administration of justice*" offences.

Finding 1: The Committee finds that proposed subsection 46B(2) has a retrospective effect and clearly abrogates the defence against double jeopardy in section 17 of *The Criminal Code* for "*serious*"; and "*administration of justice*" offences.

Clause 4 - Inserting a proposed subsection 46C(4)(b)(ii)

7.23 This provision prevents an authorised officer from authorising the investigation of a "*serious*" or "*administration of justice*" offence (called here a "*relevant offence*") unless the officer is satisfied it is in the "*public interest*" to investigate. The Committee noted a lack of specificity in the Bill for what may constitute the "*public interest*." Given its breadth, the Acting Solicitor General advised of the following factors that an authorised officer would take into account when assessing the public interest:

- the circumstances of the previous trial and acquittal;
- matters which will be relevant to the Court of Appeal's determination of an application for leave to charge the acquitted accused with a new charge, such as the interests of justice;
- matters referred in the Director of Public Prosecution's prosecution guidelines concerning the institution of prosecutions generally;
- the steps likely to be involved in the investigation and the effect that the taking of those steps may have on the rights of the acquitted person; and

43 For example, *Coco v The Queen* (1994) 179 CLR 427 at p437; and *Bropho v Western Australia* (1990) 171 CLR 1 at pp17-18.

44 For example, the New South Wales Supreme Court of Appeal in *Regina v Cheng* [1999] NSWCCA 373.

45 *Coco v The Queen* (1994) 179 CLR 427 at p437.

46 *Davern v Messel* (1983) 155 CLR 21 at p63 per Murphy J.

- the cogency and freshness of the evidentiary material giving rise to the request for authorisation.[47]

Clause 4 - Inserting a proposed subsection 46E(1)

7.24 Western Australia Police point out that the Bill is silent in the scenario 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 because a new witness comes forward.[48]

7.25 Western Australia Police argue it is unclear whether the new charge can be amended or substituted; or whether such amendment or substitution is precluded by the fact that the leave given is only for a particular new charge. Given the ambiguity, the Committee makes the following recommendation.

Recommendation 3: The Committee recommends that the Parliamentary Secretary representing the Attorney General amend the Bill to make clear and put beyond doubt, whether a further leave application is required in circumstances where a new charge requires amendment or substitution and the extent to which an amendment or substitution can be made.

Clause 4 - Inserting a proposed subsection 46E(2)

7.26 Proposed subsection 46E(2) states:

> *(2) An application cannot be made under subsection (1)*[49] *if —*
>
> > *(a) the acquittal in trial A … of the acquitted accused occurred on a charge for which leave had been given under this Part; and*
> >
> > *(b) that leave was given because, ... , the Court of Appeal was satisfied that fresh and compelling evidence … existed against the acquitted accused in relation to the charge.*

7.27 This proposed subsection raises the question of how many times an acquitted accused can be re-tried following a successful application for leave. Both the Explanatory Memorandum and Item 18 of the *Double Jeopardy Law Reform: Model agreed by*

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47 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p8.

48 Submission No 9 from the Western Australia Police, 10 October 2011, p2.

49 The opening phrase states: "*An authorised officer may apply to the Court of Appeal for leave to charge an acquitted accused with a new charge*."

COAG state "*not more than one application for a retrial may be made in relation to an acquittal*." However, the Committee noted that Items 19 and 20 of the *Double Jeopardy Law Reform: Model agreed by COAG* qualify Item 18.

7.28 Item 19 states: "*An application based on fresh and compelling evidence **cannot** be made in relation to an acquittal resulting from a retrial under these laws*." However, Item 19 states: "*An application based on a tainted acquittal **can** be made in relation to an acquittal resulting from a retrial under these laws, if a person has been convicted of an administration of justice offence in connection with the retrial*". As was explained by the Acting Solicitor General:

> *The effect of proposed new section 46E(2) is that where leave is given to re-try a person on the basis of fresh and compelling evidence, an application cannot be made for leave to re-try the charge a third time. However, this provision does not prevent an application for leave being made to retry for a third time a person who has been re-tried on the basis of a tainted acquittal*.[50]

7.29 The Committee finds that the Items 19 and 20 of the *Double Jeopardy Law Reform: Model agreed by COAG* between an application for leave to:

- re-try an acquitted accused on the basis of fresh and compelling evidence; and
- re-try on the basis of tainted acquittals;

results in an important distinction between the two types of acquittal. The Committee recommends that the Parliamentary Secretary confirm the distinction and explain the rationale for the difference.

7.30 The Committee finds that the statutory language of the Bill is unclear in respect of the number of times an acquitted accused can be retried. This may be contrasted with the position in South Australia, where for example, it is clearly stated that only one application for a retrial is available in relation to category A offences (such as murder or trafficking). Section 337 of the *Criminal Law Consolidation Act 1935 (SA)* states that an application "*(b) may only be made once in respect of the person's acquittal of the Category A offence*." A 'Note' then states: "*An application cannot be made under this section for a further retrial if the person is acquitted of the Category A offence on being retried for the offence (but an application may be made under section 336 if the acquittal resulting from the retrial is tainted).*"

7.31 The Committee makes the following two recommendations.

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[50] Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p9.

Recommendation 4: The Committee recommends that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of a tainted acquittal may result in more than one retrial. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.

Recommendation 5: The Committee recommends that that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of fresh and compelling evidence is only available once. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.

Clause 4 - Inserting a proposed subsection 46E(5)

7.32 This proposed subsection states:

> *(5) An application made under subsection (1)* [for leave to charge an acquitted accused with a new charge] *may be made without giving notice of it to the acquitted accused.*

7.33 The Acting Solicitor General confirmed that unlike some other jurisdictions,[51] the authorised officer's application may be made before the acquitted accused is charged with the new offence, rather than afterwards.[52] This raises that fundamental legislative principle the Committee routinely considers: *Does the legislation have sufficient regard to the rights and liberties of individuals*?

7.34 An accused has a right in all legal proceedings to a hearing which is fair and public before an independent and impartial tribunal.[53] Further, the proposed subsection raises another fundamental legislative principle the Committee routinely considers - *Is the Bill consistent with principles of natural justice*? - in this case, the right to face one's accusers and be heard. The importance of this cannot be understated given that personal liberty is at stake as an arrest warrant can be issued immediately after a leave application is made.

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51 For example, South Australia pursuant to section 336(2) of the *Criminal Law Consolidation Act 1935 (SA)*.

52 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p9.

53 *Jago v District Court of New South Wales* (1989) 168 CLR 23.

Finding 2: The Committee finds that proposed subsection 46E(5) denies an acquitted accused the right to be heard in circumstances where the right to personal liberty is at risk. This reflects a policy decision of the Executive.

7.35 The Committee therefore makes the following Recommendation.

Recommendation 6: The Committee recommends that the Parliamentary Secretary representing the Attorney-General provide justification for why an acquitted accused is denied the opportunity to attend the leave application in proposed subsection 46E(5).

Clause 4 - Inserting proposed section 46G titled "Hearing leave applications"

7.36 This is the first opportunity an acquitted accused can be heard and the Court of Appeal may treat the application as if it were a prosecution appeal. Proposed subsection (4) refers to the Court of Appeal being satisfied that the acquitted accused "*received adequate notice of the hearing*". The Committee is concerned at the lack of a definition in the Bill for the term "*adequate notice*" in order for the acquitted accused to access counsel and prepare for the new charge, especially given that the Bill allows two months for the prosecution on the new charge to commence.

7.37 The Committee queried whether regulations could (instead) define the term. The Acting Solicitor General stated that the Department has no intention of making a regulation to define adequate notice and that the Court of Appeal would determine whether notice is adequate in all the circumstances under proposed subsection 46G(4).[54]

Clause 4 - Inserting a proposed section 46L titled Restrictions on publicity

7.38 Proposed subsection 46L(2) states:

> *A person must not publish any information that conveys or has the effect of conveying that a person whom the information identifies directly or indirectly is the subject of any of these —*
>
> *(a) an application made under section 46C;*[55]

[54] Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p9. Subsection (4) states: "*If the Court of Appeal 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.*"

[55] Titled "*Criminal investigations of acquitted accused that need authorised officer's authority*".

(b) an investigation authorised under section 46C;

(c) a leave application;

(d) leave given under section 46H;[56]

(e) a new charge laid pursuant to leave given under section 46H.

7.39 Item 21 of the *Double Jeopardy Law Reform: Model agreed by COAG* states: "*The court may prohibit publication of any matter, if it appears to the court that such publication would give rise to a substantial risk of prejudice to the administration of justice in a retrial.*" Arguably, proposed subsection 46L(2) infringes the freedom of the press to comment on such applications and investigations.[57]

7.40 The Acting Solicitor General stated the proposed subsection will restrict the capacity of the press to report on applications for leave that identify the acquitted accused. This has been done so as to ensure that the trial on the new charge is not prejudiced. In other words, it is protective of the acquitted accused.

7.41 The Western Australian Journalists' Association (**WAJA)** has deep concerns about the restraint on publicity as no rationale is provided in the Explanatory Memorandum.[58] WAJA said the media plays an important role in exposing injustice and inequity and that it should continue to have the ability to bring to light any impropriety, wrongdoing or injustice.[59] The restraint takes an acquitted accused-centric approach but the media's concerns are not necessarily confined to the acquitted accused's interest.

7.42 According to WAJA, the media must be able to roam freely to take on board a wide range of concerns and interest, including those of the victims of crime. WAJA said the restraint on publicity may be unworkable given contemporary challenges in controlling publicity. Merely controlling publication by mainstream media only serves to drive discussion underground. [60]

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56 Titled: "*Deciding leave applications*".

57 Australia does not have explicit freedom of speech in any constitutional or statutory declaration of rights, with the exception of political speech which is protected from criminal prosecution at common law per *Australian Capital Television Pty Ltd v Commonwealth (No. 2)* (1992) 177 CLR 106; and *Nationwide News Pty Ltd v Willis* (1992) 177 CLR. In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights. Article 19 affirms the right to free speech.

58 Submission No 7 from the Western Australian Journalists' Association, 6 October 2011, p7.

59 Submission No 7 from the Western Australian Journalists' Association, 6 October 2011, p9.

60 Submission No 7 from the Western Australian Journalists' Association, 6 October 2011, p10.

Finding 3: The Committee finds that proposed subsection 46L(2) protects the identity of an acquitted accused from publication during a leave application. However, this restraint on the freedom of the press is lifted if, at a retrial, the Court of Appeal exercises a discretion under proposed subsection 46L(4) to make an order authorising publication of some or all of the information to which proposed subsection 46L(2) applies. This order can only be made if it is in the interests of justice. These proposed subsections will assist in a fair retrial of the acquitted accused.

Clause 4 - Inserting a proposed subsection 46M(1)

7.43 Proposed subsection 46M(1) deals with who may commence a prosecution of a new charge after leave has been given by the Court of Appeal. It states:

> ***46M. Leave for new charge, effect of***
>
> *(1) If under this Part the Court of Appeal gives leave to charge an acquitted accused with a new charge, only the person given leave, or another authorised person, may commence a prosecution of the new charge.*

7.44 Western Australia Police point out that the term "*authorised person*" is not defined in proposed subsection 46M(1) or elsewhere in the Bill. In contrast, the person given leave in the same subsection is an "*authorised officer*" - a term which is defined.[61] Western Australia Police argue that it is unclear whether, after leave is given to charge, it is a police officer who should be laying the fresh charge. Western Australia Police said:

> *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*.[62]

7.45 Given the ambiguity, the Committee makes the following recommendation.

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61 By implication in proposed subsection 46E(1).

62 Submission No 9 from the Western Australia Police, 10 October 2011, p2.

Recommendation 7: The Committee recommends that the Parliamentary Secretary representing the Attorney General:

(1) confirm the persons that are intended to fall within the term "*authorised person*" in proposed subsection 46M(1); and

(2) amend the Bill so as to make clear and put beyond doubt, the Executive's intent with respect to those persons.

Part 3: Clause 5 titled *Criminal Code* amended

7.46 Clause 5 is without doubt the most significant amendment to *The Criminal Code* in the past century. By selecting 128 "*serious*" and 13 "*administration of justice*" offences, clause 5(3) will have the anomalous effect of leaving a range of middle indictable offences that are too serious for Magistrates but not serious enough to have a 14 years penalty for which the common law rule against double jeopardy remains intact.

The Double Jeopardy Rule

7.47 The following commentary on double jeopardy is extracted from the former *Legislation Committee's* 2007 Report into the Criminal Law and Evidence Amendment Bill 2006 which considered the rule against double jeopardy in detail.

7.48 In *R v Carroll*[63] the High Court referred to the rule as a fundamental underpinning of the criminal law in Australia.[64] Its primary purpose is to ensure that no person is tried twice for the same offence.[65] This prevents:

> *The unwarranted harassment of the accused by multiple prosecutions. Policy considerations that go to the heart of the administration of justice and the retention of public confidence in the justice system reinforce this rationale.*
>
> *Judicial determinations need to be final, binding and conclusive if the determinations of courts are to retain public confidence.*

63 (2002) 213 CLR 635.

64 (2002) 213 CLR 635, paragraph 128 per McHugh J.

65 *R v Police Complaints Board, ex parte Madden* and *R v Police Complaints Board, ex parte Rhone* [1983] 2 All ER 353 per McNeill J, p367.

> *Consequently, the decisions of the courts, unless set aside or quashed, must be accepted as incontrovertibly correct. In addition, the double jeopardy principle conserves judicial resources and court facilities.*[66]

7.49 In *Pearce v The Queen*[67] the High Court described the rule as arising "*from a basic repugnance against the exercise of the State's power to put an accused person in repeated peril of criminal punishment*".[68] The rule reinforces the principle of finality in criminal proceedings for an acquitted person. Finality is a fundamental characteristic of our criminal justice system.

History of Double Jeopardy

7.50 Legal relief against double jeopardy was known to the laws of ancient Greece and Rome as well as ecclesiastical law in the 12th century. In *Pearce v The Queen*, the High Court referred to Old Testament writings of the prophet Nahum and how, in AD 391, St Jerome drew from those writings "*that God does not punish twice for the same act*".[69]

7.51 The rule was published in the 1876, fourth edition of Blackstone's Commentaries on the Laws of England.[70] In 1964, the House of Lords in *Connelly v Director of Public Prosecutions*[71] provided the "*first judicial statement of coherent general principle on the rule*"[72] when it held that a person should not be tried twice on substantially the same facts because it is an abuse of process. *Connelly v Director of Public Prosecutions* was approved in the seminal Australian case on double jeopardy - *R v Carroll*.[73]

Arguments for Reform of the Rule

7.52 Although the rule has long-standing origins, law reform has been justified on the grounds that:

> *in a changing world there is a need to make adjustments in order to ensure that an acceptable balance between truth and justice is maintained. There is danger that public confidence in the criminal*

66 (2002) 213 CLR 635 at paragraph 128 per McHugh J.

67 [1998] HCA 57.

68 [1998] HCA 57, paragraph 73 per Kirby J.

69 [1998] HCA 57, paragraph 73 per Kirby J.

70 Johns, R, New South Wales Parliamentary Library Research Service, *Double Jeopardy, Briefing Paper No 16/03*, p2.

71 [1964] AC 1254.

72 Justice RG Atkinson, Queensland Supreme Court, Speech Given at Australian Law Students'Association Double Jeopardy Forum, 9 July 2003, Brisbane, p3.

73 *R v Carroll* (2002) 213 CLR 635.

justice system will be lost if it ignores the weight of new evidence offered by new technology and investigative techniques.[74]

7.53 Other justifications include:

- convicting those who are guilty serves justice and fosters public confidence in the legal system;[75]
- victims or the families of deceased victims have the right to expect offenders to be punished;[76]
- the law is not static and should evolve. The double jeopardy principle originated in a less sophisticated era when defendants had few protections and could receive the ultimate (death) penalty;[77]
- the community has every right to expect that justice is done. The fact that nothing can be done to correct an obvious wrong (because the law is absolute and final) simply holds the justice system up for ridicule. It weakens the community's confidence in the law;[78] and
- strict adherence can at times serve to pervert justice.[79]

Arguments against Reform of the Rule

7.54 In *R v Carroll*[80] the High Court cited the following arguments against law reform of the rule:

- there is public interest in concluding litigation through judicial determinations which are final binding and conclusive;
- there is the need for orders and other solemn acts of the courts to be treated as incontrovertibility correct. This reduces the scope for conflicting judicial decisions which would tend to bring the administration of justice into disrepute; and

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74 Hall, S, 'Truth v Justice: Reconsidering the rule against double jeopardy', *Brief*, April 2003, p10.

75 Johns, R, New South Wales Parliamentary Library Research Service, *Double Jeopardy, Briefing Paper No 16/03*, p14.

76 Johns, R, New South Wales Parliamentary Library Research Service, *Double Jeopardy, Briefing Paper No 16/03*, p14.

77 Johns, R, New South Wales Parliamentary Library Research Service, *Double Jeopardy, Briefing Paper No 16/03*, p14.

78 Submission No 3 from Mr Mark Trowell, QC, 30 September 2011, p1.

79 Submission No 8 from Legal Aid Western Australia, 10 October 2011, p1.

80 (2002) 213 CLR 635.

- there is the interest of the individual in not being twice vexed for one and the same cause.[81]

7.55 Other justifications raised in evidence before the Committee include:

- Reforming the rule will add another layer of disadvantage to Aboriginal people who are disproportionately targeted by police and experience structural discrimination at every stage of their contact with the justice system.[82]

- The 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.*"[83]

7.56 The Committee noted that double jeopardy is a principle recognised in Article 14(7) of the *International Covenant on Civil and Political Rights*[84] and entrenched in various constitutions.[85]

7.57 The Committee noted that the abrogation of the rule against double jeopardy for "*serious*"; and "*administration of justice*" offences, is a significant shift in Western Australian criminal law. This reflects a policy decision of the Executive

8 OTHER MATTERS

8.1 The Commissioner for Children and Young People queried whether a child, acquitted of a serious offence and then later retried under the Bill, would be retried as an adult or as a child, if they were, at that time, an adult.

8.2 The Acting Solicitor General said under subsection 19(2) of the *Children's Court of Western Australia Act 1988*, the exclusive jurisdiction of the Children's Court extends to the trial of a person who has attained the age of 18 in respect of an offence

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81 *R v Carroll* (2002) 213 CLR 635, paragraph 86 per Gaudron and Gummow JJ.

82 Submission No 1 from The Aboriginal Legal Service of Western Australia Inc, 28 September 2011, p2.

83 Submission No 4 from the Council for Civil Liberties in Western Australia Inc, 3 October 2011, p2.

84 This Article states: "*No-one shall be liable to be tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*" However, the covenant has not been incorporated into Australian municipal law. In *Mabo v Queensland [No 2*] (1992) 175 CLR 1 at 42, the High Court commented that "*where international law influences the elaboration of Australian common law, where there is doubt or ambiguity, it is not as such part of that law.*"

85 In *Pearce v The Queen* (1998) 194 CLR 610 at p613, McHugh, Hayne and Callinan JJ refer to the United States of America Constitution where part of the 5th Amendment states "*Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*". It is also constitutionally entrenched in Canada, Germany, India, Japan and South Africa.

committed, or allegedly committed, by the person before the age of 18.[86] An acquitted accused minor can elect to be tried on indictment by the Supreme Court or District Court and if over 18 at the date of the new charge, the Children's Court may order the transfer of the prosecution notice to the Magistrates Court having regard to the seriousness of the offence.

8.3 The Committee is of the view that the Acting Solicitor General's advice does not address the concerns of the Commissioner for Children and Young People. The advice does not clarify whether the Bill is intended to apply to an acquitted accused under the age of 18 years.

8.4 The Committee draws to the attention of the House that arguably, it may be in the best interests of the child that the double jeopardy defence be retained for an acquitted accused child. The Committee therefore makes the following recommendation.

Recommendation 8: The Committee recommends that the Parliamentary Secretary representing the Attorney General advise the Legislative Council whether it is the intent of the Executive to remove the double jeopardy defence for an acquitted accused under the age of 18. If so, explain the rationale and amend the Bill so as to make clear and put beyond doubt, the Executive's intent.

Furthermore that the Bill be amended to make clear and put beyond doubt, the Executive's intention with regard to how this law will be applied against an acquitted accused under the age of 18 at the time of the original offence who is later, as an adult, charged with a "*serious*" or "*administration of justice*" offence.

9 REVIEW OF THE *CRIMINAL APPEALS ACT 2004* AND *THE CRIMINAL CODE*

9.1 The Committee noted that there is no provision in the Bill for a review of the proposed amendments to the *Criminal Appeals Act 2004* or *The Criminal Code.* The Committee is of the view that the significant nature and scope of the proposed amendments to the criminal justice system in Western Australia warrant a review within a reasonable time. Therefore the Committee recommends that the proposed amendments to the *Criminal Appeals Act 2004* and *The Criminal Code* be reviewed within five years.

[86] Answer to Question on Notice answered by Mr Robert Mitchell SC, Acting Solicitor General, 6 October 2011, p1.

Recommendation 9: The Committee recommends that clause 4 of the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 be amended in the following manner:

Page 17, line 22 — To insert —

46N. Review of amendments made by Criminal Appeals Amendment (Double Jeopardy) Act 2011

(1) The Minister must review the operation of the amendments made to this Act and The Criminal Code by the Criminal Appeals Amendment (Double Jeopardy) Act 2011 (the amendment Act) as soon as is practicable after 5 years after the date on which the amendment Act receives the Royal Assent.

(2) The Minister must prepare a report based on the review and, as soon as practicable after the report is prepared and in any event not more than 18 months after the expiry of the period referred to in subsection (1), cause it to be laid before each House of Parliament.

10 FURTHER AMENDMENTS TO THE BILL

10.1 The Committee was advised that no further amendments to the Bill are contemplated.[87]

11 CONCLUSION

11.1 The Bill implements the *Double Jeopardy Law Reform: Model agreed by COAG* principles with some regional variations.

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Hon Adele Farina MLC

Chairman

1 November 2011

87 Tabled Paper by Mr Robert Mitchell, SC, Acting Solicitor General, Department of the Attorney General. 28 September 2011, p11.

APPENDIX 1

LIST OF STAKEHOLDERS

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LIST OF STAKEHOLDERS

Stakeholders
The Hon Wayne Martin, Chief Justice of Western Australia, Supreme Court of Western Australia
His Honour Judge Peter Dominic Martino, Chief Judge, District Court of Western Australia
Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police
Hylton Quail, President, The Law Society of WA
Philip Urquhart, President, The Criminal Lawyers Association (Inc)
Mary Anne Kenny, Chair, The Law Reform Commission of Western Australia
Grant Donaldson SC, President, Western Australian Bar Association
Russell Armstrong, General President, WA Police Union of Workers
Mal Wauchope, Public Sector Commissioner, Public Sector Commission
Associate Professor Frank Morgan, Director, Crime Research Centre
Dennis Eggington, Chief Executive Officer, Aboriginal Legal Service of Western Australia
Peter Weygers JP, President, Council for Civil Liberties in Western Australia Inc
Pauline Bagdonavicius, Public Advocate, Office of the Public Advocate
Neil Morgan, Inspector of Custodial Services, Office of the Inspector of Custodial Services
Peter Sirr, Executive Director, Outcare
Dr Dorothy Goulding, Spokesperson, The Prison Reform Group of Western Australia
Mary-Anne McKay, Chairperson, Deaths in Custody Watch Committee (WA) Inc
Associate Professor Ian Dadour, Director, Centre for Forensic Science
Mark Herron, Acting Commissioner, Corruption and Crime Commission

Stakeholders
George Turnbull, Director, Legal Aid Western Australia
Joseph McGrath, Director of Public Prosecutions, Office of the Director of Public Prosecutions
Cheryl Cassidy-Vernon, Director, Youth Legal Service
Myles Kunzly, Executive Director, The Community Legal Centres Association (WA)
Professor Stuart Kaye, Dean , Faculty of Law, University of Western Australia
Associate Professor Jane Power, Executive Dean, Schools of Law, University of Notre Dame
Dr Pamela Henry, Head of School, School of Law and Justice Edith Cowan University
Professor Gabriel Moens, Dean of Law, School of Law, Murdoch University
Hon Cheryl Edwardes, Chair, The Victims of Crime Reference Group
Margaret Hunter, Convenor, Homicide Victims' Support Group Western Australia (Inc)
Tom Percy QC, WA Director, Australian Lawyers Alliance
His Honour Judge Dennis Reynolds, President, Children's Court of Western Australia
Michelle Scott, Commissioner, Commissioner for Children and Young People
Steven Heath, Chief Magistrate, Magistrates Court of Western Australia
WA Police Strategic Crime Prevention Division
Brian Wooler, Chairperson, Youth Affairs Council of Western Australia
Mr Martin Turner, President, The Western Australian Journalists' Association
Mr Mark Trowell QC, Albert Wolff Chambers

APPENDIX 2

IDENTIFIED STRUCTURES OF UNIFORM LEGISLATION

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IDENTIFIED STRUCTURES OF UNIFORM LEGISLATION

The Committee has adapted the following five structures from the Protocol on *Drafting National Uniform Legislation* by the national Parliamentary Counsel's Committee, 2008 Third Edition. Further detail of these structures may be found at: http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf or in the Committee's sixty fourth report titled *Information Report on Uniform Scheme Structures* tabled in August 2011.

Structure 1 - Applied laws. Also know as template, cooperative and complementary legislation, here legislation is enacted in one jurisdiction and applied (as in force from time to time) by other participating jurisdictions as a law of those other jurisdictions.

Structure 2 - Model legislation. Also know as mirror legislation, this legislation is enacted in participating jurisdictions with any local variations that are necessary to achieve the agreed uniform national policy when the legislation forms part of the local law. It is drafted in either non-jurisdictional specific terms, or as the law of a particular jurisdiction.

Structure 3 - Legislation of the States referring legislative power to the Commonwealth. Legislation can either confer general authority to legislate with respect to a general matter described in the referral legislation or confer specific authority to legislate in the terms set out in the referral legislation.

Structure 4 - Legislation of the States adopting a Commonwealth law. The *Commonwealth Constitution* at paragraph 51 (xxxvii) enables a State, as an alternative to referral, to "adopt" a Commonwealth law enacted in reliance on a referral by other States. A referral of power gives the Commonwealth greater flexibility to make future changes and to ensure that those changes commence at the same time in all jurisdictions.

Structure 5 - A combination of structures. Here some provisions of a legislative project may be dealt with by way of an applied law scheme and other provisions by way of national model scheme. Those jurisdictions that are currently prepared to use an applied law model to achieve future consistency by delegation of legislative changes to the Parliament of another jurisdiction (the template jurisdiction) may also be prepared to enact national model legislation and delegate legislative changes that are agreed by government nationally to the executive of their own jurisdiction, subject to a power of the local Parliament to disallow the changes in the same way as they may disallow subordinate legislation made by the executive.

APPENDIX 3

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

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FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?

2. Is the Bill consistent with principles of natural justice?

3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.

4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?

6. Does the Bill provide appropriate protection against self-incrimination?

7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?

9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?

10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?

11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?

13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?

14. Does the Bill allow or authorise the amendment of an Act only by another Act?

15. Does the Bill affect parliamentary privilege in any manner?

16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament

APPENDIX 4

DETAILS OF THE SUMMONS

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DETAILS OF THE SUMMONS

This was the first occasion a Committee resolution on the subject of issuing a summons had been used. The Director General was summonsed because under Standing Order 423 of the Legislative Council, Members of the Legislative Assembly cannot be summonsed.[88]

The Bill was introduced into the Legislative Council without the Committee's prior knowledge. This was despite the internal audit process between the Committee and agencies which identifies bills that may come before the Committee for inquiry.

The standard request for documentation pursuant to the Committee's resolution was faxed to the Minister's office at 10.14 am on Friday, 9 September 2011 with a confirmation of receipt slip received. The original of the request for documentation was couriered to the Minister's office. At 10.58am on Friday, 9 September 2011 the courier contacted the Committee Secretariat to advise that the original of the request for documentation had been delivered. The Committee Secretariat requested written proof of delivery, which the courier emailed at 11.18am on Friday, 9 September 2011.

The faxed request indicated that the Supporting Documents had to be received by 5pm Wednesday, 14 September 2011 pursuant to the Committee's resolution dated 13 April 2011. It states:

> *Issuing a Summons*
>
> *If the supporting documents are not received within 3 business days of faxing the standard "Request for Supporting Documents", then, at the Chairman's discretion, to issue a summons to the Head of the Department.*

On Wednesday, 14 September 2011, at 9.45am the Committee Clerk contacted the Correspondence Officer at the Attorney General's office who said the Attorney General was aware of the timeframe.

At 4.40pm on Wednesday, 14 September 2011, the Chairman, by SMS to the Committee Clerk, authorised the request for a summons be sent to the Clerk of the

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88 It states: ***When attendance of Member or Officer of Assembly required 423***. *When the attendance of a Member of the Assembly or any officer of that House is desired, to be examined by the Council or any committee thereof (not being a committee on a Private Bill), a Message shall be sent to the Assembly to request that the Assembly give leave to such Member or officer to attend, in order to his being examined accordingly*.

Legislative Council (**Clerk**) in the event the documents were not received at 5pm on Wednesday, 14 September 2011. The Clerk was notified by email at 5.02pm on Wednesday, 14 September 2011 that the Supporting Documents had not been received. At 6pm on Wednesday, 14 September 2011 and by email, the Clerk indicated he would make the arrangements for a summons to be prepared and served on Thursday, 15 September 2011.

On Thursday, 15 September 2011, the Usher of the Black Rod (**Usher**) served the summons at 11.32am to the Director General's Personal Assistant. As the Usher was in the process of serving the summons, the Usher missed a call from the Deputy Clerk at 11.34am on Thursday, 15 September 2011 which was to advise the Usher to desist from the serving, as the Committee Clerk had been advised by telephone that the documents were en-route. The Committee Clerk did not note the time this call was received but immediately contacted the Deputy Clerk, who in turn immediately called the Usher. The documents arrived at Parliament House at Noon on Thursday, 15 September 2011. At 3.15pm on Thursday, 15 September 2011 the Advisory Officer advised the Clerk Assistant (Committees) that the Supporting Documents provided were compliant with the summons. The Clerk of the Legislative Council subsequently advised the Director General that the Director General was released from the summons.

APPENDIX 5

DOUBLE JEOPARDY LAW REFORM: MODEL AGREED BY COAG

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DOUBLE JEOPARDY LAW REFORM: MODEL AGREED BY COAG

DOUBLE JEOPARDY LAW REFORM: MODEL AGREED BY COAG[1]

1. The rule against double jeopardy should be reformed so that a person acquitted of an offence would not be protected by the rule of double jeopardy from:
   a. retrial of the original offence or prosecution for a similar offence where there appears to be fresh and compelling evidence (in circumstances further outlined below);
   b. retrial of the original offence or prosecution for a similar offence where the acquittal is "tainted" (in circumstances further outlined below); or
   c. prosecution for an administration of justice offence where that offence is connected to the original trial (in circumstances further outlined below).

"Fresh and Compelling Evidence" Exception

2. This exception should apply to acquittals for only the most serious categories of offences, including murder, manslaughter, the trafficking or manufacture of large commercial quantities of drugs, and the most aggravated forms of rape and armed robbery.

Definitions

3. Fresh and compelling evidence:
   a. Evidence is "fresh" if it was not adduced in the proceedings in which the person was acquitted, and it could not have been adduced in those proceedings with the exercise of reasonable diligence.
   b. Evidence is "compelling" if it is reliable, substantial, and highly probative of the case against the acquitted person (in the context of the issues in dispute in the original proceedings).
   c. Evidence is not precluded from being fresh and compelling merely because it would have been inadmissible in the earlier proceedings against an acquitted person.

"Tainted Acquittal" Exception

4. This exception should apply to acquittals for serious offences, being the offences in each jurisdiction corresponding to the offences outlined at Appendix B to the Model Criminal Code Officers' Committee discussion paper of November 2003 (see Appendix (i)).

Definitions

5. An acquittal is "tainted" if:
   a. the accused person or another person has been convicted (in this jurisdiction or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted; and
   b. it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

"Administration of Justice Offences" Exception

6. This exception should apply to acquittals for all indictable offences.

[1] Victoria and the ACT reserved their positions on these recommendations.

Definitions

7. This exception should apply if there is fresh evidence of the commission of an administration of justice offence by an acquitted person in connection with the proceedings in which the person was acquitted.
8. An "administration of justice offence" includes any of the following:
   a. bribery of, or interference with, a juror, witness or judicial officer;
   b. perversion of (or conspiracy to pervert) the course of justice; and
   c. perjury.
9. In circumstances which would admit of a prosecution for an administration of justice offence (where double jeopardy would otherwise have been an impediment to prosecution) or an application for retrial under these laws, the prosecution would only be able to bring one of those two proceedings.

Safeguards

"Interests of justice" test

10. A court may only order a retrial if it is satisfied that "in all the circumstances it is in the interests of justice for the order to be made".
11. An order for a retrial is not in the interests of justice unless the court is satisfied that a fair retrial is likely in the circumstances.
12. In determining whether it is in the interests of justice for an order for a retrial to be made, the court must have regard in particular to:
   a. the length of time since the acquitted person allegedly committed the offence; and
   b. whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for a retrial of the acquitted person.

Requirement for DPP authorisation before police can reinvestigate an acquitted person

13. A police officer is not to carry out or authorise a police reinvestigation of an acquitted person unless the Director of Public Prosecutions (DPP) has:
   a. advised that in his/her opinion the acquittal would not be a bar to the trial of the acquitted person in this jurisdiction for an offence; and
   b. given his/her written consent to the investigation.
14. In this context, "police reinvestigation" means any investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence, that involves:
   a. any arrest, questioning or search of the acquitted person (or the issue of a warrant for the arrest of the person); or
   b. any forensic procedure carried out on the person or any search or seizure of premises or property of or occupied by the person;

   whether with or without the consent of the acquitted person.
15. The DPP must not give his/her consent to a police reinvestigation unless satisfied that:
   a. there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation; and
   b. it is in the public interest for the investigation to proceed.
16. There should be an "urgency" exception to the requirement for DPP authorisation of police reinvestigation, to allow a police officer to take investigative action without DPP consent if:

a. the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced; and
b. it is not reasonably practical to obtain DPP consent before taking the action.

17. Further safeguards should apply to this urgency exception:
    a. the DPP must be advised as soon as practicable of any investigative action taken on the basis of urgency; and
    b. the DPP's consent is required for the continuation of a reinvestigation commenced under the urgency exception.

Prohibition against further retrials

18. Not more than one application for a retrial may be made in relation to an acquittal.
19. An application based on "fresh and compelling evidence" cannot be made in relation to an acquittal resulting from a retrial under these laws.
20. An application based on a "tainted acquittal" can be made in relation to an acquittal resulting from a retrial under these laws, if a person has been convicted of an administration of justice offence in connection with the retrial.

Restrictions on publication

21. The court may prohibit publication of any matter, if it appears to the court that such publication would give rise to a substantial risk of prejudice to the administration of justice in a retrial.

Time limits on applications for retrials

22. An application for a retrial is to be made not later than 28 days after the acquitted person is charged with the offence or a warrant has been issued for the person's arrest in connection with such an offence.
23. The court may extend this period with good cause.
24. An indictment for the retrial of a person that has been ordered by the court cannot, without the leave of the court, be presented after the end of the period of two months after the order was made.
25. The court must not give leave unless it is satisfied that:
    a. the prosecutor has acted with reasonable expedition; and
    b. there is good and sufficient cause for the retrial despite the lapse of time since the order was made.

Prohibition on referring to court's findings in ordering a retrial

26. At the retrial of the accused person, the prosecution is not entitled to refer to the fact that the court has found that (as the case may be):
    a. there appears to be fresh and compelling evidence against an acquitted person; or
    b. more likely than not, the accused person would have been convicted but for the commission of the administration of justice offence.

Coverage of Acquittals from Other Jurisdictions

27. The exceptions to the rule against double jeopardy should apply to acquittals in other jurisdictions (subject to Constitutional limitations).

Retrospectivity

28. The "fresh and compelling evidence" and "tainted acquittals" exceptions should apply retrospectively.
29. The "administration of justice offence" exception should apply retrospectively.

APPENDIX 6

LIST OF OFFENCES UNDER *THE CRIMINAL CODE* THAT CARRY A PENALTY OF 14 YEARS OR MORE

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LIST OF OFFENCES UNDER *THE CRIMINAL CODE* THAT CARRY A PENALTY OF 14 YEARS OR MORE

List of offences under *The Criminal Code* that carry a penalty of 14 years or more

Section Number	Description	Penalty
s. 67(2)	Rioters causing damage by fire	14 years
s. 77	Conduct intended to incite racial animosity or racist harassment	14 years
s. 79(a)	Possession of material written/pictorial that's threatening or abusive	14 years
s. 79(b)	Possession of material for display or intention to publish to harass a racial group.	14 years
s. 121(1)	Judicial Officer receiving benefit on account of anything done.	14 years
s. 121(2)	Corruptly offers benefit of any kind on account of unlawful act.	14 years
s. 122(1)	Being a Justice not acting judicially or a public servant and interfere with due administration of Justice	14 years
s. 122(2)	Being a Justice corruptly gives/confers/promise/offer benefit/property	14 years
s. 125	Perjury	14 years
s. 134	Conspiracy to bring False Accusation on a person if convicted, is liable for a term less than life	14 years
s. 297(2)	Grievous Bodily Harm when stealing motor vehicle.	14 years
s. 297(3)	Grievous Bodily Harm Aggravated	14 years
s. 297(4)	Grievous Bodily Harm Public Officer etc	14 years
s. 318A	Assaults on aircraft's crew	14 years
s. 321(2)	Sexually penetrated a Child over 13 and under 16.	14 years
s. 321(3)	Procures, incites or encourages a Child over 13 and under 16 to engage in Sexual Behaviour.	14 years
s. 325	Sexual Penetration without consent.	14 years
s. 327	Sexual coercion.	14 years
s. 330(2)	Sexually penetrated incapable person.	14 years
s. 330(3)	Procure, encourages, incites an incapable person into Sexual Behaviour.	14 years
s. 331B	Sexual servitude	14 years
s. 338B(a)	Threat to kill generally with racial aggravation	14 years
s. 378(5)(a)	Stealing from person of another.	14 years
s. 378(5)(b)	Stealing from dwelling and threaten to use violence.	14 years
s. 378(5)(b)	Stealing from dwelling and over $10000.	14 years
s. 378(5)(c)	Stealing from vessel, vehicle or place of deposit used for custody of goods in transit.	14 years
s. 378(5)(d)	Stealing from vessel in distress or wrecked/stranded.	14 years
s. 378(5)(e)	Stealing from a Public Office where item is kept or deposited.	14 years
s. 378(5)(f)	Stealing by opening locked room, box or other receptacle by means of a key or other instrument	14 years
s. 379	Concealing registers.	14 years
s. 380	Concealing wills.	14 years
s. 392(e)	Robbery	14 years
s. 393(d)	Armed or aggravated assault with intent to rob	14 years
s. 397(1)	Demanding property by written threats.	14 years
s. 397(2)	Demanding property by oral threats.	14 years

s. 398(1)	Accusation or threat of accusation of indictable offence with intent to extort	14 years
s. 398(3)	Knowing contents of writing causes person to receive accusation/threat.	14 years
s. 399	Procuring execution of deeds etc. by threats	14 years
s. 401(1)(c)	Burglary	14 years
s. 401(2)(c)	Commission of crime in other person's place w/o consent	14 years
s. 414	Receiving stolen property	14 years
s. 444(a)	Wilfully & unlawfully destroy or damage any property by fire	14 years
s. 444(b)	Wilfully & unlawfully destroy or damage any property other than by fire (w racial aggravation)	14 years
s. 455(1)	Did an act with intent to cause explosion likely to do serious injury to property.	14 years
s. 455(2)	Make or possess explosive with intent to cause injury.	14 years
s. 455(3)	Attempting to cause explosion likely to do serious injury to property.	14 years
s. 510	Personation in general/with intent to defraud	14 years
s. 552(1)	Attempt to commit indictable offence	14 years
s. 553(1)	Incite another person to commit principal indictable offence punishable by life imprisonment	14 years
s. 557	Making or possession of explosives under suspicious circumstances.	14 years
s. 557	Conspiracy to possess explosives under suspicious circumstances	14 years
s. 558(1)(a)	Conspiracy to commit indictable (principal) offence where punishment is life imprisonment	14 years
s. 562	Accessories after the fact to indictable offence where punishment is life imprisonment	14 years
s. 331C	Conducting business involving sexual servitude	14years
s. 401(1)(b)	Burglary (of place ordinarily used for human habitation)	18 years
s. 401(2)(b)	Commission of crime in other person's place w/o consent (if place ordinarily used for human habitation)	18 years
s. 47(1)	Administered Unlawful Oath to commit a crime punishable with life imprisonment	20 years
s. 47(2)	Took Unlawful Oath to a commit crime punishable with life imprisonment	20 years
s. 47(3)	Induced Unlawful Oath to commit a crime punishable with life imprisonment	20 years
s. 134	Conspiracy to bring false accusation on a person if convicted would be liable for life imprisonment	20 years
s. 144	Attempt Forcibly free, or attempts to free offenders	20 years
s. 186(1)(b)	Sentenced or charged with an offence punishable by life imprisonment or 20 years or more Occupier or owner allowing a child under 13 year to be on premises for unlawful carnal knowledge	20 years
s. 187(1)(a)	Facilitating Sexual Offences against Children under 16 outside of WA	20 years
s. 187(2)(a)	Act for the purpose of Enabling or Aiding another person to engage in prohibited conduct against children outside WA	20 years
s. 187(2)(b)	Aid another person to engage in prohibited conduct	20 years
s. 187(2)(c)	Counsel or procure another person to engage in prohibited conduct	20 years

s. 280	Manslaughter	20 years
s. 292	Renders person incapable of resisting with violence	20 years
s. 293	Stupefying in order to commit an indictable offence.	20 years
s. 294(1)	Wounds another with intent to do Grievous Bodily Harm	20 years
s. 294(2)	Attempt to Strike a Person with any kind of projectile.	20 years
s. 294(3)	Unlawfully causes any explosive substance to explode.	20 years
s. 294(4)	Send/Deliver Explosive Substance/Dangerous Noxious thing to any Person	20 years
s. 294(5)	Caused Substance to be Taken/Received with intent to Cause GBH.	20 years
s. 294(6)	Puts any Corrosive Fluid/Destructive/Explosive Substance in any Place.	20 years
s. 294(7)	Unlawfully Casts/Throws any such Fluid/Substance on any Person.	20 years
s. 294(8)	Commit act likely result in serious disease to prevent/resist arrest.	20 years
s. 295(1)	Preventing Escape from a wrecked vessel	20 years
s. 295(2)	Obstructing any person in his endeavour to save the life of any Person	20 years
s. 304(2)(a)	Acts or omissions causing bodily harm when duty exists	20 years
s. 304(2)(b)	Acts or omissions causing danger when duty exists	20 years
s. 306(1)	Female Genital Mutilation	20 years
s. 320(2)	Sexual Penetration of a Child under 13.	20 years
s. 320(3)	Procure, encourage or incite a Child under 13 years to engage in sexual behaviour	20 years
s. 321(2)	Sexually Penetrated a Child over 13 and under 16. (Care or supervision of the offender)	20 years
s. 321(3)	Procures, incites or encourages a Child over 13 and under 16 to engage in sexual behaviour (Care or supervision of the offender)	20 years
s. 321A	Persistent engagement in sexual behaviour with a child under 16	20 years
s. 326	Aggravated Sexual Penetration without consent.	20 years
s. 328	Aggravated Sexual Coercion.	20 years
s. 329(2)	Knowingly Sexually Penetrated a Child who was a Lineal/De-facto Relative (under 16)	20 years
s. 329(3)	Procures Child to engage in Sexual Behaviour who was a Lineal Relative (under 16)	20 years
s. 330(2)	Sexually Penetrated Incapable Person. (in care of offender)	20 years
s. 330(3)	Procure, encourages, incites an Incapable Person into Sexual Behaviour. (in care of offender)	20 years
s. 331B	Sexual servitude (child or incapable victim)	20 years
s. 331C	Conducting business involving sexual servitude (child or incapable victim)	20 years
s. 331D	Person who offers a child or incapable person employment to provide sexual services	20 years
s. 332(2)(a)	Detained another with intent to gain a benefit.	20 years
s. 332(2)(b)	Detained another with intent to cause detriment.	20 years
s. 332(2)(c)	Detained another with intent to prevent/hinder person doing act.	20 years
s. 332(2)(d)	Detained another with intent to compel the doing of an act.	20 years
s. 343(1)	Person forcibly/fraudulently takes/entices away/detains a Child under 16.	20 years

s. 343(2)	Person receives/harbours Child knowing it has been taken/enticed away.	20 years
s. 392(d)	Aggravated Robbery	20 years
s. 398	Accusation or threat of accusation of particular indictable offence with intent to extort In the dwelling with intent to commit and commits	20 years
s. 401(1)(a)	Aggravated burglary	20 years
s. 401(2)(a)	Aggravated burglary	20 years
s. 444(a)	Wilfully & unlawfully destroy or damage any property by fire (with racial aggravation)	20 years
s. 449(1)	Casting away ships.	20 years
s. 449(2)	Casting away ships (tending to destruction).	20 years
s. 449(3)	Casting away ships (vessel into danger).	20 years
s. 451(1)	Obstructing and injuring railways.	20 years
s. 451A	Endangering the safe use of an aircraft	20 years
s. 454	Causing explosion likely to do serious injury to property.	20 years
s. 511	Personation of owner of shares.	20 years
s. 563A	Property laundering	20 years
s. 563B	Dealing with property used in connection with an offence	20 years
s. 279	Murder.	20 years/ Life imprisonment
s. 283	Attempt to Murder.	Life imprisonment
s. 125	Perjury for another for an offence with life imprisonment penalty	Life imprisonment
s. 288(1)	Aiding suicide - Procures another to kill himself.	Life imprisonment
s. 288(2)	Aiding suicide - Counsel & Induce Person to Suicide.	Life imprisonment
s. 288(3)	Aiding suicide - Aids another in Killing himself	Life imprisonment
s. 290	Killing Unborn Child.	Life imprisonment
s. 392(c)	Armed Robbery	Life imprisonment
s. 393(c)	Aggravated armed assault with intent to rob	Life imprisonment

List of offences under *the Misuse of Drugs Act* that carry a penalty of 14 years or more

Section Number	Description	Penalty
s. 34(2)	Conspiring with another to commit a crime under s. 6(1) or s. 7(1).	20 years
s. 6(1)	Intent to sell or supply; Manufactures or prepares; or Sells or supplies, or offers to sell or supply, a non-cannabis prohibited drug.	25 years
s. 7(1)	In possession of, or cultivates, a prohibited plant with intent to sell or supply; or Sells or supplies, or offers to sell or supply, a non-cannabis prohibited plant	25 years