CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

First Reading

Bill read a first time, on motion by **Mr C.C. Porter (Attorney General)**.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR C.C. PORTER (Bateman — Attorney General) [3.18 pm]: I move —

That the bill be now read a second time.

This bill is a major reform to the Western Australian legal system that will help bring the criminal law of this state into the twenty-first century. The bill is, in part, responding to changes in forensic science, helping to ensure that the guilty are convicted and the innocent are set free, and maintaining balance in the criminal justice system.

This bill provides one of the most significant reforms to the criminal law enacted in Australia in recent times. The ancient rule against "double jeopardy" provides, in essence, that a person may not be tried for the same offence twice. Its purpose is to ensure that criminal proceedings can be brought to a conclusion, and the result in a trial can be regarded as final. It protects individuals against repeated, oppressive, attempts by the state to prosecute. The rule encourages police and prosecutors to be diligent and careful in their investigation and to gather as much evidence as possible against an accused. In this sense, it promotes fairness to an accused and the proper administration of justice for the victim and the community. However, the strengths of the double jeopardy rule also bring certain weaknesses, and too rigid an adherence to the rule may result in offenders escaping justice and so bring the law into disrepute.

There will sometimes be cases in which, notwithstanding the diligence of police and prosecutors, not all the evidence will be available at the time an accused is charged and tried. It may be that the evidence was deliberately concealed from them or associations, or it may be that advances in forensic technology subsequently reveal new evidence or permit new conclusions to be drawn from the available evidence. In such cases, there may well be grounds to bring the accused back to trial. In fact, not to do so risks perpetrating a major injustice by allowing an offender to walk free even when there is compelling evidence of his or her guilt. Such circumstances can cause public disquiet and can bring the criminal law and the criminal justice system into disrepute as facilitating an offender who is escaping—rather than being brought to—justice. There are other cases in which an acquittal may be obtained by subverting the trial by threatening witnesses, by tampering with the jury or through the perjury of witnesses. Where such cases come to light the rule against double jeopardy can defeat the interests of justice. It is for these reasons that the government is proposing measured reforms to the double jeopardy rule by creating exceptions framed with precision and containing appropriate safeguards. These reforms are calculated to ensure that justice can be done in our courts. The need for these reforms has been shown by the case of R v Carroll. Carroll was originally tried on a charge of murdering a young girl in Queensland over 30 years ago. He was convicted at trial but that conviction was set aside on appeal. Subsequently, new dental evidence was found casting doubt on that acquittal. As it happened, Carroll had given testimony in his defence at his trial, so the prosecution charged him with perjury, using the new evidence, and Carroll was convicted. However, in 2002, the High Court upheld the Queensland Court of Appeal's decision overturning this secondary conviction on the ground of the rule against double jeopardy. It found the prosecution for perjury had effectively amounted to trying Carroll twice for the same offence. This bill would overcome this problem in Western Australia because a similar case here could potentially be retried on the basis of fresh and compelling evidence.

In 2007, the Council of Australian Governments agreed to implement uniform exceptions to the double jeopardy rule in relation to serious offences and subject to a number of safeguards. A COAG working group was established, jointly chaired by the commonwealth and New South Wales. The COAG working group considered a number of models, including a model proposed by the Model Criminal Code Officers Committee.

In drafting this bill, the government has considered all these models as well as pioneer reforms already enacted in the United Kingdom, particularly Part 10 of the UK Criminal Justice Act 2003 dealing with retrials for serious offences. Legislation providing for retrials of serious offences has already been enacted in New South Wales, Queensland, South Australia and Tasmania. New South Wales developed its own double jeopardy law reform and Queensland did not fully implement the COAG recommendations, but South Australia and Tasmania have both fully implemented the COAG model. This bill adopts the exceptions to the double jeopardy rule and safeguards recommended by COAG.

I would like now to address the main clauses of the bill and explain its scope and effect. The first point to note is that the bill amends the Criminal Appeals Act 2004. The first key provision is proposed new section 46E. This section allows an authorised officer—defined in proposed section 46A to be the Attorney General, the Solicitor

General, the State Solicitor or the commonwealth or state Directors of Public Prosecutions—to apply to the Court of Appeal for permission to retry an acquitted person if there is fresh and compelling evidence relevant to the offence. "Fresh and compelling evidence" is defined in proposed section 46I. The Court of Appeal can order a retrial under this section if it finds that there is fresh and compelling evidence and it determines that it is in the interests of justice to do so. The matters to be considered relevant to the interests of justice are set out in proposed section 46K. They include the time that has elapsed since the offence was alleged to have been committed and whether there was any failure to act with due diligence on the part of the police or the prosecution. The court must also reach the view that a fair trial is likely. These tests will ensure that only strong cases proceed to a retrial.

The power to order a new trial is confined to the most serious offences under Western Australian law; namely, indictable offences, the statutory penalty for which is life imprisonment or imprisonment for 14 years or more.

The second group of cases that may be retried are cases of tainted acquittals. The term "tainted acquittal" is defined in proposed section 46J. Under that section a tainted acquittal arises when any person has been convicted of an offence against the administration of justice in respect of the original trial. These offences include bribery or interference with a witness, juror or judicial officer; perversion or conspiracy to pervert the course of justice; and perjury. They are listed in proposed section 46A(2). The court must also be satisfied that a retrial is in the interests of justice. The scope of the matters that can be considered recognises the fact that interference in a trial brings the administration of justice into disrepute and offenders should not be able to profit from perversion of the course of justice.

Safeguards apply to retrials on other grounds. Re-investigations of acquitted persons cannot be undertaken by police without the permission of an authorised officer. In most cases this will be the commonwealth or state Directors of Public Prosecutions. No more than one application for a retrial may be made in relation to an acquittal. Further, there are restrictions on publishing any information about a re-investigation, including proceedings to seek permission to retry and the retrial itself, unless the court orders otherwise. This is intended to protect the integrity of the process so as to not qualify the presumption of innocence and subvert the benefits of an acquittal unless, and until, it becomes necessary. I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman**.