"Restrictions on Publicity in the *Criminal Appeals Amendment (Double Jeopardy) Bill 2011*: A Submission from the Western Australian Journalists' Association (WAJA)"

(This submission is made in response to the invitation to make a submission addressed to Mr Martin Turner, President of the Western Australian Journalists' Association, by the Standing Committee on Uniform Legislation and Statutes Review, dated 16 September 2011).

TO:

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Chairperson

Standing Committee on Uniform Legislation and Statutes Review

Parliament House

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FROM:

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Date: ……

(Hardcopy of this submission sent by mail to the address above;
electronic copy sent by email to Hon Adele Farina via email:
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1. Introduction

This submission is made in response to the invitation to the WA Journalists' Association to provide a written submission to the Inquiry into the *Criminal Appeals Amendment (Double Jeopardy) Bill 2011* (**the Bill)** by the Standing Committee on Uniform Legislation and Statutes Review. The invitation was addressed to Mr Martin Turner, President of the WA Journalists' Association on 16 September 2011. In that invitation, the Committee's chairperson, Hon Adele Farina MLC, identified the following as the scope of the submission that WAJA was being invited to make:

(i) matters relating to the scope, purpose and structure of the Bill; and

(ii) matters of interpretation of the Bill as drafted, or the likely or possible extent and application of the Bill's provisions.

In particular, the Committee drew WAJA's attention to page 14 of the Bill, and the proposed new section 46L in the *Criminal Appeals Act 2004* entitled *Restrictions on Publicity*. As this submission focuses on the *Restrictions on Publicity* provision in the Bill (section 46L), this provision is set out in full below.

2. The *Restrictions on Publicity* provision in the Bill

The *Restrictions on Publicity* provision in the Bill, section 46L(2) of the *Criminal Appeals Act 2004*, provides as follows:

> *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 –*
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> *(a) an application made under section 46C;*
>
> *(b) an investigation authorised under section 46C;*
>
> *(c) a leave application;*
>
> *(d) leave given under section 46H;*
>
> *(e) a new charge laid pursuant to leave given under section 46H.*

3. Background to the Bill

The background, briefly stated, is the move by the Council of Australian Governments (COAG) to introduce exceptions to the 'double jeopardy rule'.[1] The principle underlying the *double jeopardy* rule is that "no person should be twice placed in jeopardy of conviction or punishment for the same offence, or for a difference (sic) offence covering the same factual evidence".[2] This *double jeopardy* rule is a fundamental legal and human right. It is enshrined in many instruments, including the International Covenant on Civil and Political Rights.[3] It is

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[1] Explanatory Memorandum and Clause Notes, *Criminal Appeals Amendment (Double Jeopardy) Bill 2011*.

[2] Explanatory Memorandum and Clause Notes, above n 1.

[3] Article 14(7). Other examples of such protection include the New Zealand Bill of Rights Act 1990, section 26(2); Canadian Charter of Rights and Freedoms 1982, section 11(h); US Constitution, Fifth Amendment; and the Charter of Fundamental Rights of the European Union 2000, Article 50.

aimed at protecting an accused person from the oppressive might of the state and serves as a procedural safeguard to protect the integrity of judicial verdicts.[4] It serves the interests of finality and certainty under the law, which are rightly regarded as fundamental to any fair and just system of law.[5] It also promotes the efficient investigation and prosecution of offences in that the authorities know that there will be no second "bite of the cherry".[6] The move to introduce exceptions to the *double jeopardy* rule through the Bill follows high profile cases where the rule was upheld despite new and reliable evidence of the acquitted person's guilt. One such high profile case, referred to in the Explanatory Memorandum, is the *Carroll* Case.[7] As the Explanatory Memorandum states:

> It was considered grossly unfair that the rule prohibits a further trial in circumstances where advances in forensic science (for example, DNA) or fresh evidence has emerged that was unavailable at the time of the initial trial directly points to the guilt of an acquitted person.[8]

WAJA does not propose to fully address the merits or otherwise of the proposed exceptions to the *double jeopardy* rule in the Bill, as it is beyond the scope of the present submission. There is abundant literature on the subject[9] and many criticisms have been made about moves elsewhere to introduce exceptions to the rule.[10] Among the questions raised in the debate elsewhere is whether the *Carroll* Case should have been the impetus for reform. For instance, one submission in respect of a similar *double jeopardy* Bill stated:

> [We are] greatly disturbed by the way this [*Carroll*] case has been used by the media to create the political pressure being brought to bear for reform of the rule against double jeopardy.[11]

WAJA will confine the scope of this submission to section 46L in the Bill, as this provision impacts very directly on the interests of WAJA members. This submission will refer tangentially to the related sections.

4. The Explanatory Memorandum on *Restrictions on Publication*

The Explanatory Memorandum makes only the following statement concerning the *restrictions on publication*:

> 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.[12]

This statement does not *explain* the rationale for this restriction. It should also be noted that this statement concerning the *restrictions on publication* is set out under the heading

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[4] Explanatory Memorandum and Clause Notes, above n 1.

[5] Acting Justice Jane Mathews, Advice to the Attorney General, entitled 'Safeguards in Relation to Proposed Double Jeopardy Legislation', Criminal Law Review Division, NSW A-G's Department, 27 November 2003, p. 5.

[6] Acting Justice Jane Mathews, Advice to the Attorney General, above n 5, p. 5.

[7] Explanatory Memorandum and Clause Notes, above n 1.

[8] Explanatory Memorandum and Clause Notes, above n 1.

[9] See, for instance, Acting Justice Jane Mathews, Advice to the Attorney General, above n 5; and Rowena Johns, 'Double Jeopardy', Briefing Paper No 16/03, NSW Parliamentary Library Research Service, 2003.

[10] See generally Roslyn Cook, Sharona Coutts, David Poole et al, Submission of the University of New South Wales Council for Civil Liberties to the NSW Attorney General's Community Consultation of the Draft *Criminal Appeal Amendment (Double Jeopardy) Bill*, 15 October 2003.

[11] Roslyn Cook, Sharona Coutts, David Poole et al, above n 10, p. 7.

[12] Explanatory Memorandum and Clause Notes, above n 1.

"Safeguards", where five other 'points' are set out. These 'safeguards' appear to be a reference to safeguards to the *double jeopardy* rule agreed upon by COAG, so that the rule is not unduly undermined.[13] That is, it appears that the *restrictions on publicity/publication* are intended to serve as a safeguard to the *double jeopardy* rule. The safeguards are aimed at ensuring that an acquitted person is not twice placed in jeopardy of conviction or punishment for the same offence.

5. Section 46L of the Bill

The restrictions on publicity set out in section 46L may, on the one hand, be argued as being an ordinary feature of the tension between the interests of the proper administration of justice and the interests of transparency in the administration of justice. On closer inspection, however, it is not clear that the provisions (46L(2)(a) – 46L(2)(e)) strictly qualify to be considered under the umbrella of 'administration of justice' given that the restrictions apply before the process of the administration of justice formally commences. These sections, respectively, provide that a person must not publish any information that conveys or effectively conveys that the person identified is the subject of "an application made"[14] or "an investigation authorised"[15] under section 46C. Section 46C is a long section and the Explanatory Memorandum does not explain the purpose of this section, other than state as follows in part, in respect of subsection 46C(2):

> Proposed subsection 46C(2) provides that a law enforcement officer must not investigate, or authorise another person to investigate, whether an acquitted accused may have committed a relevant office unless an authorised officer has authorised the investigation **or** the law enforcement officer believes, on reasonable grounds, an investigation needs to be done urgently to prevent it being substantially and irrevocably prejudiced and it is not reasonably practicable to obtain an authorised officer's authority before doing the investigation (emphasis added).

The term *law enforcement officer* is defined broadly to mean a *police officer* or another person who has powers to investigate offences. The purpose of the bold text in the above extract is to draw attention to the dispensability of authorisation from an authorised officer. More is said about this in the discussion under heading 7(a) below.

Sections 46L(2)(c), (d) and (e), respectively, prohibit the publication of information in relation to a "leave application"; "leave given under section 46H"; and "a new charge laid pursuant to leave given under section 46H". Section 46H contains provisions pertaining to the *granting of leave* or the *refusing of leave* to charge the acquitted accused person with the new charge. The Explanatory Memorandum does not explain the rationale for these prohibitions on publication.

6. Tension between the administration of justice and work of the media

As eluded to in Item 5 above, in the context of the present submission it may be argued that the proposed restriction on publicity envisaged by section 46L is somewhat removed from the

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[13] The Explanatory Memorandum and Clause Notes, above n 1, states:

> In March 2007, COAG agreed to implement the following uniform exceptions to the double jeopardy rule in relation to serious offences such as murder, manslaughter and the most aggravated forms of sexual assault. COAG also agreed to the implementation of a number of safeguards.

[14] Section 46L(2)(a).

[15] Section 46L(2)(b).

'administration of justice' arena because the rule pertains to activity in the run-up to the administration of justice. Given the close nexus between the immediate area of section 46L's scope and the administration of justice by the courts, it is useful to consider the courts' general approach to the question of publicity impinging on the administration of justice. The tension between the administration of justice and the work of the media is a serious and constant one and it is well recognised. In the context of the present submission, it is also useful to consider the approach to 'controls' on publication in the administration of justice sphere to highlight the importance placed on the ideals of openness and transparency.

Many rules are in place to regulate the flow of information where such information intersects with the work of the courts. These rules include those governing *sub judice* contempt (the publication of material that could prejudice pending court proceedings); actions to prevent the scandalising of the courts; actions that deal with publication involving juries; actions involving closed court proceedings and suppression orders.[16] Against these rules lie the ideals of openness and transparency in keeping with the principle that our system of justice is founded on an *open justice* system, where trials are conducted in full public view, with transparency and with public accountability. The following extracts capture those ideals:

> One of the most fundamental and deeply-rooted characteristics of the common law tradition is that judicial proceedings are normally conducted in open court.[17]

According to 19th century legal philosopher Jeremy Bentham:

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate…Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself, while trying, under trial. It is to publicity, more than to everything else put together that the English system of procedure owes its being the least bad system as yet extant, instead of being the worst.[18]

The principle of equality before the law, fairness and openness in a trial are further enshrined in the International Covenant on Civil and Political Rights:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[19]

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[16] For a convenient discussion of these rules see, for example, Des Butler and Sharon Rodrick (2007), *Australian Media Law*, Chapter 6.

[17] Des Butler and Sharon Rodrick (2007), above n 16, p. 161.

[18] Cited in Australia's *Right to Know* Coalition, Report of the Independent Audit into the State of Free Speech in Australia, 31 October 2007, p. 185. See also Bowring (ed), *Works of Jeremy Bentham*, cited in Des Butler and Sharon Rodrick (2007), above n 16, above n 16, p. 162.

[19] Article 14(1). Further, Article 10 *Universal Declaration on Human Rights* enshrines the individual's right to a fair "and public" hearing.

In *Marsden v Amalgamated Television Services Pty Limited* [1999] NSWSC 1099 (12 November 1999), Levine J, at Para 66, citing Wigmore on Evidence, said:

> [T]he publicity of the judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony. Its operation tends to "improve" the quality of testimony especially in the modern era where publicity given by media reports of trials is often the means of securing useful evidence. The openness of the trial would discourage false testimony, might induce people to come forward once the identity of witnesses is disclosed (and this can operate in the defendant's favour as well as the plaintiff's) and it would increase public respect for the trial process…

In *Russell v Russell* (1976) 134 CLR 495, Gibbs J, observed:

> It is the ordinary rule of the [courts] that proceedings shall be conducted 'publicly and in open view'…This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected…The fact that courts of law are held openly and not in secret is an essential aspect of their character.[20]

The above authorities and propositions amply illustrate the ideals of openness and transparency that underpin the justice system. A curtailment of public access may be justifiable on very limited occasions but where they depart from the principle of open justice and restrict freedom of speech these rules should be interpreted narrowly. As observed in the *Herald & Weekly Times* case:

> The operation of [the principle of open justice] is reflected in the entitlement of the media to report fully, fairly and accurately on proceedings which are before our courts. Consequently any order detracting from the right of the media to report court proceedings must be regarded as exceptional. It follows that any statutory provision which entitles a court to exclude the public from its proceedings, or to restrict or prohibit publication of its proceedings, must be construed strictly and narrowly, and in light of the overriding principle of open justice.[21]

The challenges presented to the media as a result of inroads being made into the principles of open justice was more recently captured in a report commissioned by the country's foremost media organisations. Australia's *Right To Know* Coalition has stated:

> Despite its explicit acceptance by governments, the judiciary, the media and the public, the principle of open justice has been eroded over recent years.[22]

According to the chief executive officer of a major Australian media organisation, that organisation had logged more than 500 suppression orders in the twelve months to February 2011 and that covered only "the ones we knew about".[23]

7. WAJA's Position on the proposed *restrictions on publicity*

(a) *Media's Watchdog Role*

WAJA has deep concerns about the restraint on 'publicity' imposed by section 46L. The Explanatory Memorandum does not provide any rationale for this restraint. The choice of the term 'publicity' itself pre-supposes a degree of gratuitousness.[24] While the work of the media does, to a large extent, entail 'publicity', the media also does important work that goes beyond merely giving a person, matter or thing 'publicity'. WAJA notes that the expression used in the Explanatory Memorandum is "restrictions on publication". In WAJA's view the latter expression is more ideologically neutral and should be preferred, if such a rule is to come about.

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[20] *Russell v Russell* (1976) 134 CLR 495, p. 520.

[21] *Herald & Weekly Times Pty Ltd v DPP* [20087] VSC 71, Para [18]. See also Para [22] (authorities omitted).

[22] Australia's *Right to Know* Coalition, Report of the Independent Audit into the State of Free Speech in Australia, 31 October 2007, p. 183.

[23] Media, Entertainment and Arts Alliance Report, *Public Good, Private Matters: The State of Press Freedom in Australia 2011*, p. 47, quoting News Limited CEO John Hartigan's address at the 'Courts and the Media in the Digital Era' conference at Bond University.

[24] Webster's *Everyday Dictionary*, Random House, 2002, for instance, defines "publicity" as: *extensive mention in the news or other media* (underlining added).

Views prepared in the context of similar rules contemplated by another jurisdiction some years ago may provide some insight as to why such a restraint is being considered in the present instance. In advice given to the New South Wales Attorney General in 2003, Acting Justice Jane Matthews said:

> Great concern was expressed in a number of submissions relating to the effect of media publicity upon jurors at any subsequent retrial…Widespread media publicity could be given to the fact that police investigation of an acquitted person had been authorised, and that an application had been made to the Court of Criminal Appeal seeking a retrial of the acquitted person. All this would have taken place well before any application could be made to the Court for a restriction on publication…[25]

Against that backdrop, Acting Justice Matthews agreed with the submissions tendered and said:

> [A]ll possible steps should be taken to ensure that potential jurors are not exposed to media publicity about any police investigation of an acquitted person, any application for retrial, or any further steps in the legal processes until such time as the retrial, if there is one, is concluded. I therefore recommend that there be *a total prohibition on publication* in relation to: any authorisation of a police investigation; any application to the [court] seeking an order than an acquitted person be retried; and any resulting retrial (italics added).[26]

If Acting Justice Matthews are relevant in the present instance, it should be pointed out that while the interests of protecting potential jurors from exposure to prejudice in the event of a retrial, another significant public interest may be compromised – the role that the media plays in exposing injustice, wrongdoing and inequity generally. The draft Bill allows for a broad range of officers to carry out investigations. Speaking in the context of a similar provision in another Bill, Acting Justice Jane Matthews said a number of submissions were "highly critical of the proposition that the police could take the type of intrusive investigative action envisaged under [that] draft Bill without proper authority".[27] Acting Justice Jane Matthews' indicated her "strong view that there should be no police investigation of the type envisaged under [that] draft Bill *without proper authorisation from an independent person or body*".[28] WAJA echoes this position in light of the broad range of law enforcement officers who may be able to carry out an investigation without proper authorisation.[29] A report tabled in the WA Parliament recently revealed that 381 "excessive force allegations" were made against the WA Police.[30] The same report records an observation by the Corruption and Crime Commission that "there was a noticeable jump in serious misconduct excessive force allegations, including WAP, in 2010/2011 and that the CCC had itself been "testing the

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[25] Acting Justice Jane Mathews, Advice to the Attorney General, above n 5, p. 20.

[26] Acting Justice Jane Mathews, Advice to the Attorney General, above n 5, pp. 20-21.

[27] Acting Justice Jane Mathews, Advice to the Attorney General, above n 5, p. 22.

[28] Acting Justice Jane Mathews, Advice to the Attorney General, above n 5, p. 23 (italics added). See also p. 22, where she notes:

> "I am strongly of the view that no such [urgent] steps should be taken without prior authorization. If a situation is truly urgent, then no doubt steps can be taken to obtain the appropriate consent at very short notice."

[29] Section 46C(2); and Explanatory Memorandum and Clause Notes, above n 1. Well known wrongful conviction cases further illustrate this concern: see *Button v R* (2002) 25 WAR 382; *Beamish v R* [2005] WASCA 62; and *Mallard v R* [2005] HCA 68.

[30] Joint Standing Committee on the Corruption and Crime Commission (WA), *Parliamentary Inspector's Report Concerning the Procedures Adopted by the Corruption and Crime Commission When Dealing With Complaints of the Excessive Use of Force by Police*, Report No 18, 2011, p. 31.

hypothesis that much WA Police use of force goes unreported".[31] The media plays an important role in exposing injustice and inequity and WAJA has serious concerns about any further restraint on the media's ability to play this role. In WAJA's view, regardless of the range of law enforcement officers who are authorised to carry out investigations in *double jeopardy* cases, the media should continue to have the ability to maintain an oversight and bring to light any impropriety, wrongdoing or injustice. Any cloak of secrecy – as offered by the present provision – especially seen against what has been described as "the serious potential for the misuse of this power to reinvestigate"[32] – would create fertile ground for impropriety, wrongdoing and injustice. Such a guarantee would also fly in the face of our experience involving investigations by law enforcement officers and cases of wrongful conviction. While the section provides for a consideration of the interests of justice before approving publication, the presumption against publicity contained in section 46L(2) makes the provision an onerous one for the media. In WAJA's view, the starting point must be the absence of any restraint on publication (other than those already in place) and that any rule seeking to reverse this presumption must be couched in strict terms so as to limit the scope of such an application. This can be done, for example, by placing the onus of an application to restrain publication on the party seeking such a restriction on publication.

(b) *The Bill's 'safeguard' objective*

The Bill purports to enshrine 'safeguards' aimed at ensuring that "no person should twice be placed in jeopardy of conviction or punishment for the same offence".[33] In the absence of a clear enunciation of the objectives of the restriction on publicity provided in section 46L it is difficult to formulate a comprehensive response in this submission. An earlier consideration of 'safeguards' in this area noted as follows:

> One of the challenges of any proposal to relax the double jeopardy rule is how to maintain fairness for the accused, given the adverse publicity that is likely to have been generated. Furthermore, the need for the application to be approved by the Director of Public Prosecutions and a superior court, and the requirements that have to be met for a retrial to be granted, are likely to create an impression in the minds of the jurors that the case would only be re-opened if the authorities believed the accused to be guilty. Reporting restrictions are one of the strategies that can be employed to reduce the impact of publicity.[34]

The concern about the risk of prejudice to the accused person from pre-trial publicity is well known. And in the case of a potential retrial of an accused person, it is argued that the risk would be made worse in the following circumstances:

> The risk would presumably be amplified if the jury became aware that the retrial had the Court of Appeal's imprimatur, or that the Court had found new evidence to be compelling or that the accused had been earlier acquitted because of an administration of justice offence.[35]

In any event, if the assumption is that publicity concerning the 'second investigation' of an acquitted person will be unfair to the acquitted person, we must not ignore another reality - there are inherent difficulties with the pursuit of fairness for the acquitted person in such cases:

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[31] Parliamentary Inspector's Report No 18, above n 30, p. 31.

[32] See Roslyn Cook, Sharona Coutts, David Poole et al, above n 10, p. 21.

[33] Explanatory Memorandum and Clause Notes, above n 1.

[34] Rowena Johns, above n 9, p. 12.

[35] Michelle Edgely, 'Truth or Justice: Double Jeopardy Reform for Queensland: Rights in Jeopardy', [2007] QUTLawJJl 7, text accompanying footnote 282: see www.austlii.edu.au

> It would be very difficult for the accused to get a fair second trial because of public knowledge of the case from the first trial. It is likely that people form an opinion about a case that has been covered by the media over a long period of time. Notorious cases would have also attracted political comment.[36]

One solution to the problem of jury bias is to hear the trial without a jury.[37] That is, of course, if the popular notion that juries are invariably prejudiced by media coverage is correct. This notion has been questioned in one study, where one of its 'principal findings' was:

> Juries were equally successful in identifying the relevant issues regardless of whether the publicity was negative or positive towards the accused. Also, the quantity of negative publicity did not seem to make a difference to the proportion of verdicts that were 'safe'.[38]

In any event, WAJA shares the view expressed in a previous submission in response to a similar rule, where the submitting organisation said it does not believe that "any safeguard" could render fair a retrial of an acquitted person.[39]

(c) *Restraint on court in granting a publicity ban order*

WAJA notes that the Bill provides in section 46L(6) that a court "must not make an order under subsection (4) unless it is satisfied it is in the interests of justice to do so". Subsection 4 allows the court to make an order that authorises publication in respect of section 46L(2). While such a provision suggests that a ban on publicity will only be granted if the court is satisfied that it is in the interests of justice to do so, WAJA notes that the media's experience with the tendency of the courts in Australia to grant suppression orders, as noted in item 6 above, is not a satisfactory one for the media.

(d) *Contemporary challenges in controlling publicity*

In an age of instant, convenient and mass circulation of information through multiple platforms and potentially by every individual with access to a computer or other communications device, WAJA is concerned that the proposed restriction on publicity in section 46L may be unworkable in reality and pose an undue burden on mainstream media. Merely controlling publication by mainstream media – as this will be the most likely practical effect of the provision – may only serve to drive discussion 'underground'.

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[36] Rowena Johns, above n 9, p. 14.

[37] Rowena Johns, above n 9, p. 12.

[38] Michael Chesterman, Janet Chan and Shelley Hampton, 'Managing Prejudicial Publicity: An empirical study of criminal jury trials in New South Wales', Law and Justice Foundation of NSW, 2001, p. *xvi*.

[39] Roslyn Cook, Sharona Coutts, David Poole et al, above n 10, p. 24.

(e) *Reconciling the double jeopardy exceptions and the media's role*

Given that it is an express objective of the Bill to introduce exceptions to the rule in relation to serious offences such as murder, manslaughter and the most aggravated forms of sexual assault a further conundrum arises for the media. This can be illustrated by considering the observation of Lord Neill, former chairperson of the UK Press Council:

> [W]hat will be the consequence of abolition of the double jeopardy rule? My prediction is that there will be hounding in the media of people who are acquitted in sensational, high-profile cases. The acquittal will not be final, and it will be up to anybody, including the press, to see what additional evidence they can rootle out so that there can be a second prosecution of the person who has been acquitted.[40]

Implicit in that observation is that the media has no role to play in the unearthing of additional evidence or drawing attention to miscarriages of justice. Such a position runs counter to the media's investigatory role and WAJA objects to such a brake on its ordinary functions.

8. Conclusion

As noted earlier, the focus of this submission has been the Bill's provisions in section 46L and its related provisions. In so far as the reach of these provisions is concerned, WAJA opposes any further encroachment into the media's right and ability to perform its routine functions. In the absence of any guarantee that the 'second bite at the cherry' process envisaged in the Bill will be flawless, the removal of the check-and-balance role played by the media must be resisted. The Bill's section 46L provisions take an acquitted person-centric approach. The media's concerns are not necessarily confined to the acquitted person's interests. The media must be able to roam freely to take on board a wide range of concerns and interests, including those of the victims of crime.

[40] Lord Neill cited in Roslyn Cook, Sharona Coutts, David Poole et al, above n 10, p. 21.