Treasurer; Attorney General

Our Ref: 35 17781

Hon Adele Farina MLC
Chair
Legislative Council Standing Committee on
Uniform Legislation and Statute Review
Parliament House
PERTH WA 6000

Dear Ms Farina

CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

Thank you for your letter dated 2 November enclosing a copy of the report of the Legislative Council Standing Committee on Uniform Legislation and Statutes Review into the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (WA).

The Bill has passed all stages in the Legislative Council and a message has been sent to the Legislative Assembly but the Bill has not yet been second read in the Assembly.

The Committee made a total of nine recommendations regarding the Bill which are dealt with under.

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.

Government response: The Government has noted the Recommendation but does not propose to make any amendments in regard to this Recommendation.

After the completion of the process of filtering, the granting of leave and the determination as to whether there ought to be a retrial, what then happens is that the charge for which leave has been given is remanded to a court of competent jurisdiction, and that court is then seized of that charge, essentially as if it was an original matter.

The principles and provisions in this bill effectively fall away and are irrelevant. Once the court is seized of that charge, the charge proceeds in the same manner as any other charge would proceed. That is in accordance with the *Criminal Code* and the *Criminal Procedure Act 2004,* and the person will be tried for that serious offence, whether it is the original offence or another serious offence for which leave is given under the usual processes of the court.

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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.

Government response: In New South Wales, South Australia, and Tasmania, similar double jeopardy laws apply to a person acquitted of offences both before and after the commencement of the legislation.

In Queensland, the double jeopardy laws apply only to a person acquitted after the commencement of the provisions, although the offence for which the person was acquitted may concern conduct that occurred prior to the commencement of the provisions.

Care has to be taken with respect to use of the term "retrospective". A retrospective law is usually regarded as a law which creates a new norm of conduct, and which applies that norm to conduct that occurred before the law was enacted, and provides new penalties for a breach of that law. For example, if the Parliament was to pass an Act that created an offence that had not existed prior to the passage of the act, and that Act said that conduct that fell within the ambit of that offence was punishable, that would be a retrospective law. In relation to this Bill, all that is happening is a procedural change to allow for a further avenue of appeal.

The Bill is not creating a new offence, and it is not making a retrospective law. Rather the procedure is altered. Procedural laws dealing with the manner in which criminal charges are determined ordinarily apply to future trials of charges for offences alleged to have been committed prior to the enactment of the procedural law. By way of another illustration, if a person is this year charged with a sexual offence committed in the 1970s, they may be charged with the offence that was current at that time, not with an offence that is current at this time. They would be subject, by and large, to the penalties that were available at that time, provided that those penalties are still applicable at the time of his or her conviction. But the trial will not be conducted by 1970s rules, and the rights of appeal that the person and the prosecution would have would be the rights of appeal current at the time of conviction, that is now, not what was available in 1970.

There is no real retrospectivity involved in this law at all, and the point of proposed section 46B(2) is simply to make it clear and remove all doubt that somehow there is an alteration to the law and that somehow these procedures should only apply to acquittals occurring after the passage of the Criminal Appeals Amendment (Double Jeopardy) Bill 2011.

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.

Government response: The Government has considered the recommendation and does not believe an amendment is necessary. The rules and law that would ordinarily apply to any charge of which a court is properly seized would apply to a charge for which leave has been given by the Court of Appeal.

The decision as to whether an amendment or substitution ought to be allowed to that charge would be one for the trial judge who would be very conscious and sensitive to the fact that the matter was a retrial based on very narrow circumstances for which leave had been given by the Court of Appeal after it had been persuaded that all the criteria had been satisfied and the stringent requirements had been met, and it may be a charge that had already been further investigated, or should have been further investigated, for which further evidence had been provided or there had been some change in the circumstance.

The court would be sensitive to all those matters, and sensitive as to whether the amendment or substitution of the charge would amount to an abuse of process in the circumstances. If it did amount to an abuse of process by the prosecution trying to slip in an alternative charge or, at the last minute, amending a charge having secured leave for a particular offence, appropriate orders could be made to stay those proceedings.

There is nothing unusual about that process, and it is currently in place. There are other checks and balances beyond the procedure for obtaining leave for a retrial set out in this bill. The Government is of the view that that is a necessary and inevitable consequence of a court of competent jurisdiction being seized with a charge on the basis of leave having been given, and no further elucidation of the ability to do that is necessary.

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.

Government response: Two circumstances are contemplated and affected by the Bill. One is a serious charge that has gone to trial, the person has been acquitted and subsequent fresh evidence emerges. There is then a retrial, if leave is granted, on that charge. Another circumstance is an acquittal of a serious charge and, down the track, it emerges that it is the result of a tainted acquittal and an administration of justice offence is charged in respect of it. The reason for having the administration of justice offence option is that it may be the only available avenue to pursue.

It may be, because of the tainted acquittal that the prospects of re-prosecuting the original charge are lost because of the suborning of witnesses and the destruction of evidence. The proof of the original charge is impossible, but the only way to do justice is to look at whether perjury or some other administration of justice offence has been committed. In the way the act is structured, there can be only one retrial of the original offence. Theoretically, if that offence cannot be retried and an administration of justice offence avenue is pursued, then if there is an acquittal of that and fresh evidence emerges after that and the Court of Appeal is convinced that all the other stringent requirements are satisfied, that administration of justice offence can be the subject of retrial leave and recommittal. The prospects of that happening are very, very remote and unlikely.

Recommendation 5: 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 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.

Government response: This recommendation relates to proposed section 46E(2). The effect of the section is that, when leave is given to retry a person on the basis of fresh and compelling evidence, an application cannot be made for leave to retry the charge a third time. That is sufficiently clear from the terms of the section. However, this provision does not prevent an application for leave being made to retry, for a third time, a person who has been retried on the basis of a tainted acquittal.

In practical terms the Court of Appeal would be unlikely to grant leave to retry a person more than once. That would be, very arguably, an abuse of process.

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).

Government response: The application for leave is simply to initiate the process, and it will be noted from proposed section 46F that as soon as practicable after a leave application is made, the Court of Appeal without dealing with the merits of the application, and unless it is satisfied that the application is an abuse of process must either issue a summons requiring the acquitted accused to attend court, or issue an arrest warrant to ensure that the acquitted accused is given notice of the leave application and is brought before the court.

That reflects the current practice in the case of an acquitted accused who is the subject of an appeal by the prosecution against a directed acquittal. There has to be some mechanism by which an accused is brought to the court and the process commenced. I may be wrong about that, but it is not dissimilar to the need to initiate something and get an accused to be brought along, so that he or she is aware of the proceedings. It is at that stage, after they are either arrested or summonsed, that they then have knowledge of the proceedings and are able to argue their case. The first step in the process is for the authorised officer to make the application for leave, which may be done without giving notice to the accused.

The merits of the application cannot be determined at that point; it is after the application is made that the Court of Appeal issues either the summons or the arrest warrant to have the acquitted accused brought before it under proposed section 46F. The court at no time deals with the merits of the matter without the accused being aware and having been given notice of it. When the acquitted accused is brought before a court following the issue of a summons or warrant, the court will consider whether the acquitted accused should be released unconditionally, granted bail, or kept in custody pursuant to proposed section 46F(4).

The procedure is used in response to a concern expressed by the Director of Public Prosecutions that an acquitted accused might very well flee the jurisdiction on getting notice that an application has been made to issue a new charge. This is to ensure that he or she is brought within the control of the court.

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.

Government response: The Government has amended the words "authorised person" to "authorised officer". This was a typographical error. The "authorised officers" that proposed section 46M will apply to are therefore those listed in proposed section 46A.

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.

Government response: The exclusive criminal jurisdiction of the Children's Court of Western Australia extends to the trial of a person who has attained the age of 18 years in respect of an offence allegedly committed by the person before attaining the age of 18 years. Section 19(2) of the *Children's Court of Western Australia Act 1988* (WA) applies. That provision will apply in relation to a serious charge for which leave is given under the Bill.

There are exceptions to the general rule. For example:

- a child charged with an indictable offence may elect to be tried on indictment by the Supreme Court or the District Court under section 19B of the *Children's Court of Western Australia Act 1988* (WA);

- in certain circumstances where a child and an adult are charged with the same offence and the adult is to be indicted the matter may be tried in the Supreme or District Courts (section 19C); and

- where the person is over 18 at the time of the charge the court may order transfer of the matter to the Magistrates Court having regard to the seriousness of the offence, the existence of an adult co-offender, the time since the offence occurred or any other good cause.

Therefore, a child who is an acquitted accused and later is re-tried as a result of the Bill, where the trial is held will depend on the circumstances of the case. There is no need to amend the Bill.

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

(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.

Government response: This amendment is agreed and an amendment has been made to add a new section 52 to the *Criminal Procedure Act 2004* (WA).

Yours sincerely

Hon C. Christian Porter MLA
TREASURER; ATTORNEY GENERAL

2 FEB 2012