LEGAL AFFAIRS AND SAFETY COMMITTEE

Members present:
Mr PS Russo MP—Chair
Mrs LJ Gerber MP
Mr SSJ Andrew MP (videoconference)
Ms JM Bush MP
Mr JE Hunt MP (videoconference)
Mr JM Krause MP

Staff present:
Mrs K O'Sullivan—Committee Secretary
Mr R Pelenyi—Assistant Committee Secretary

PUBLIC BRIEFING—INQUIRY INTO THE CRIMINAL CODE AND OTHER LEGISLATION (DOUBLE JEOPARDY EXCEPTION AND SUBSEQUENT APPEALS) AMENDMENT BILL 2023

TRANSCRIPT OF PROCEEDINGS

Thursday, 1 February 2024

Brisbane

THURSDAY, 1 FEBRUARY 2024

The committee met at 11.02 am.

CHAIR: Good morning. I declare open this public briefing for the committee's inquiry into the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023. My name is Peter Russo. I am the member for Toohey and chair of the committee. I would like to respectfully acknowledge the traditional custodians of the land on which we meet today and pay our respects to elders past and present. We are very fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander peoples, whose lands, winds and waters we all share. With me here today are: Laura Gerber MP, member for Currumbin and deputy chair; Jonty Bush MP, member for Cooper; Jon Krause MP, member for Scenic Rim; Stephen Andrew MP, member for Mirani, via teleconference; and Jason Hunt MP, member for Caloundra, via videoconference.

The purpose of today's briefing is to assist the committee with its inquiry. This briefing is a proceeding of the Queensland parliament and is subject to the parliament's standing rules and orders. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence. I remind committee members that departmental officers are here to provide factual or technical information. Any questions seeking an opinion about policy should be directed to the Attorney-General or left to debate on the floor of the House.

These proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and are subject to the committee's media rules and my direction at all times. You may be filmed or photographed during the proceedings and images may also appear on the parliament's website or social media pages. I ask everyone present to turn your mobiles phones off or to silent mode. Thank you.

BANDARANAIKE, Ms Sakitha, Acting Assistant Director-General, Strategic Policy and Legislation, Department of Justice and Attorney-General

HUGHES, Ms Jo, Acting Director, Strategic Policy and Legislation, Department of Justice and Attorney-General

STRUBER, Ms Trudy, Principal Legal Officer, Strategic Policy and Legislation, Department of Justice and Attorney-General

CHAIR: I now welcome representatives from the Department of Justice and Attorney-General. I invite you to make a brief opening to the committee, after which the committee will have some questions for you.

Ms Bandaranaike: Thank you, Chair. In opening, I would like to acknowledge the traditional owners and custodians of the land on which we meet this morning and pay my respects to elders past and present. Thank you for the opportunity to brief the committee today about the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023. As you mentioned, Chair, my name is Sakitha Bandaranaike. I am the Acting Assistant Director of Strategic Policy and Legislation in the Department of Justice and Attorney-General. Joining me to assist with the briefing, also from Strategic Policy and Legislation, is Jo Hughes, Acting Director, and Trudy Struber, Principal Legal Officer. I will use the opening statement to briefly outline the reforms in the bill and to address some key issues raised in the submissions and in the public hearing. I note that the department provided a detailed brief to the committee on 14 December 2023 and further information and response to the submissions on 12 January 2024.

The bill contains two reforms to improve the operation of the criminal justice system through mechanisms to correct possible erroneous outcomes and maintain balance in the criminal justice system. First, the amendments in the bill expand the application of the fresh and compelling evidence double jeopardy exception to 10 prescribed offences in addition to murder. The prescribed offences are serious offences punishable by life imprisonment and involving direct interference with another person's life or sexual or bodily integrity. The amendments recognise that there may be cases where,

despite the exercise of appropriate diligence by police officers and prosecutors, not all of the evidence was available at the time the person was tried for a prescribed offence and provide a mechanism for persons acquitted of a prescribed offence to be retried if compelling fresh evidence of their guilt later emerges.

It is acknowledged that stakeholders who have made submissions to the committee and appeared at the public briefing had divergent views regarding amendments around the double jeopardy exception. Some stakeholders were supportive of the amendments, while others raised concerns about the expansion of the exception to additional offences and about the amendments to make it clear that the requirement for the exercise of reasonable diligence applies to the police and prosecution.

In relation to the expansion of the exception, the department recognises that the rule against double jeopardy is a fundamental tenet of the criminal justice system and the retrial of an acquitted person is an extraordinary proceeding. It is for this reason that the exception is expanded only to serious offences punishable by life imprisonment and involving direct interference with another person's life or sexual or bodily integrity. The amendments are also consistent with the 'fresh and compelling' exception in other jurisdictions. All other jurisdictions, with the exception of Northern Territory, have a fresh and compelling evidence exception that applies to more offences than murder. This is also the case in the United Kingdom.

In relation to the clarification regarding the exercise of reasonable diligence, the department acknowledges the submissions that the amendments are unnecessary. While the amendments are not intended to alter the substantive operation of the provisions, the department considers that the clarification of the provisions is beneficial. The principles underpinning the rule against double jeopardy focus on the conduct of police and prosecution. The rule encourages police and prosecutors to be diligent and careful in their investigation, to gather as much evidence as possible and to put forward the best case. The amendments ensure that the provisions and what will constitute fresh evidence are also focused on the conduct of the police and prosecution.

The second reform in the bill are amendments to introduce a right of subsequent appeal for persons convicted of an indictable offence or a summary offence in limited circumstances. The bill establishes a subsequent appeal framework if there is fresh and compelling evidence or new and compelling evidence. Under the new framework, the court must allow a subsequent appeal if satisfied that it meets the threshold for a successful appeal. For fresh and compelling evidence, the court must allow the subsequent appeal if it is satisfied that there has been a miscarriage of justice. For new and compelling evidence, the court must allow the subsequent appeal if, on the balance of probabilities, it is of the opinion that, considering all the evidence, the appellant was not guilty of the offence.

The bill recognises that, while wrongful convictions are rare, there is a risk that an innocent person may be convicted and provides a mechanism for convicted persons to seek leave for the court to consider fresh and compelling evidence or new and compelling evidence that may indicate a person has been wrongfully convicted.

Stakeholders who made submissions to the committee and who appeared at the public hearing were generally supportive of the introduction of a right of subsequent appeal. However, the department acknowledges that some stakeholders raised concerns about some of the provisions, particularly in relation to the definition of 'fresh evidence' and 'new evidence' and the threshold tests for a successful appeal.

In relation to the definitions of 'fresh evidence' and 'new evidence' in the subsequent appeal framework, the department considers that the definitions are generally consistent with the common law conceptualisations of these terms, so they are used for original appeals and are consistent with judicial consideration of equivalent subsequent appeal provisions in other jurisdictions. The amendments ensure that the provisions and what will constitute fresh evidence or new evidence are focused on the conduct of the defence and what they could reasonably expected to have done in the circumstances leading up to and including the trial. Evidence that could have been adduced in the trial with the exercise of reasonable diligence by the prosecution, but not with the exercise of reasonable diligence by the defence, such as if the evidence was not disclosed to the defence, should not be precluded from being fresh evidence for the purpose of a subsequent appeal. The inclusion of 'by the defence' in the provisions regarding the exercise of reasonable diligence focuses the court's attention on the actions or inactions of the appellant rather than placing an onus on the defendant alone to exercise diligence during the trial. The provisions ensure that the appellant is not disadvantaged by the conduct of the prosecution.

In relation to the threshold test for a successful appeal, appellate courts have long recognised the distinction between fresh evidence and new evidence. The distinction recognises that it is not in the public interest for a conviction to stand where evidence that did not exist or was not reasonably

discoverable at the time of the trial suggests that a wrongful conviction has occurred but that it is equally against the public interest for defendants to hold back evidence in the trial so that if they are convicted they can use the withheld evidence to appeal and obtain a new trial.

In original appeals, the court currently distinguishes between fresh evidence and new evidence and applies different tests when deciding an appeal. For fresh evidence, the test is whether there is a significant possibility that the jury would have acquitted the applicant if the fresh evidence had been adduced in the trial; that is, the jury might have had a reasonable doubt if the evidence had been adduced. For new evidence, the test is whether the new evidence shows that the convicted person is innocent or makes their guilt too doubtful for the conviction to stand; that is, the jury must have had a reasonable doubt if the evidence had been adduced.

The new framework proposed by the bill preserves the distinction between fresh evidence and new evidence when determining subsequent appeals. The different threshold tests for a successful appeal proposed by the bill are also consistent with the approach taken in Western Australia, which is the only Australian jurisdiction that allows a subsequent appeal on the ground of new and compelling evidence. I thank you for the opportunity to brief the committee on the bill and we are happy to take questions the committee may have, Chair, thank you.

Mrs GERBER: Thank you very much for your time and for that very comprehensive oral submission. We have the department's response to the written submissions as well. I expect this legislation in this form will be used in relation to the failures of the DNA lab and some prosecutions or some cases that might evolve out of that. I wanted to ask about whether the department has any knowledge or any idea about the backlog of cases as a result of the testing or the delays in the justice system. Other stakeholders were not able to answer this question, so if you do not have an idea about the backlog of cases, the delays in the criminal justice system as a result of the backlog in testing?

Ms Hughes: Are you asking about the number of case that may be affected from the DNA commission of inquiry?

Mrs GERBER: Yes.

Ms Hughes: The short answer is that that is unknown at the moment. There is a large number of cases affected by the findings of the DNA commission of inquiry of course, but those affected cases are at various different phases of prosecution. The cases that will be potentially affected under this legislation will be ones that have either been the subject of an acquittal for the double jeopardy side of things and/or a conviction for the subsequent appeal side of that framework.

It is not known how many of the cases that have been affected by the DNA commission of inquiry are in that category. There are a lot of cases that have been the subject of charge that has not made its way through the prosecution, there will be matters that are actually the subject of charge that are currently before the court and yet to be finalised, and there may be a large volume of cases also in which no charges have been laid. The short answer really is that we do not know how many cases, if any, may come out of the DNA commission of inquiry that will come under the new reform frameworks.

Mrs GERBER: Your answer may be the same to the second part of that question: delays to the justice system as a result of the backlog in testing. Has the department done any modelling on that?

Ms Hughes: No, but certainly the government has committed a significant amount of funding to matters flowing from the DNA commission of inquiry. Almost $200 million of that funding has gone to implementing the recommendations, including the retesting of affected samples. Also, that funding is directed towards the flow-on effects through the criminal justice system, and included in that are the impacts upon the courts, the Queensland Police Service, the Office of the Director of Public Prosecutions and Legal Aid Queensland.

Mrs GERBER: On Legal Aid Queensland—and I will turn to the substance of the bill—I hope the department has had an opportunity to see Legal Aid Queensland's updated submission—maybe not. Legal Aid Queensland provided a small amendment to its submission. Essentially, it was to address the concern they raised in relation to the perhaps longer term unintended consequences of the double jeopardy amendments. I might read it word for word, if that is okay. Legal Aid Queensland said—

> To that end, LAQ encourages the insertion of a review mechanism surrounding the necessity of this expansion of the fresh and compelling evidence exception. Such a review mechanism would be well placed to analyse the utilisation of the provisions and identify any misuse or unintended consequences arising from both the expansion and the specific wording of the provisions.

Have the department turned their mind to a review mechanism within the bill and the reform as proposed?

Ms Struber: A potential for a review mechanism was considered in the development of the bill. However, as the amendments to the double jeopardy exception are largely based on an existing framework and a framework that has been in place since 2007, it was not considered necessary. It is also noted that the use of these provisions is incredibly rare. When Western Australia introduced their double jeopardy exception in 2012, they did include a statutory review, which was subsequently undertaken, and the outcome of that review was that they could not ascertain anything meaningful from it because they are so rarely used.

Mrs GERBER: WA did not have a DNA lab failure, did they, and they did not have an expectation of cases coming forward as a result of that?

CHAIR: Can you just let Ms Struber answer the question and then ask another question if you have a follow-on.

Ms Struber: They did not have the unique situation that has occurred in Queensland; however, the general operation of the provisions would not differ depending on the type of evidence. The fundamental change is the offences that are captured by the double jeopardy exception. Whether the fresh and compelling evidence relates to DNA that is affected by the past testing practices, whether the fresh evidence relates to DNA that was not affected but subsequent advances in technology now allow a person to be identified, or whether the evidence is completely unrelated to DNA, the foundational structure and operation of how the provisions operate would not alter. Obviously, we would still consider how the provisions are implemented and operating without necessarily the need for a mandated statutory review mechanism.

Mrs GERBER: But WA did have a review mechanism in theirs and Queensland is choosing not to.

Ms Struber: They did; however, WA's mechanism was when their provisions were first introduced.

Mrs GERBER: Our provisions are first being introduced as well.

Ms Struber: Our provisions currently exist. The framework that is being utilised by the amendments exists and has existed for some time. The way that the exception operates will not be different under the amendments proposed in the bill; it will just apply to different offences. The fundamental operation will not vary under these amendments.

Mrs GERBER: I guess both Legal Aid Queensland and the Queensland Law Society have a differing view in relation to the way some of those provisions are going to operate and they have expressed their concern in their submissions and oral submissions. One way to perhaps ensure there are not unintended consequences would be to have a review mechanism, but I take the department's submission in that regard.

CHAIR: I think it has been sufficiently explained.

Mr ANDREW: I wondered if there was ever of a summary of the whole debacle—whether cases have and have not been heard, what we have to go back retrospectively to have a look at. Do we know when it all started, when it all collapsed and what we have to go back and look at to make it right?

CHAIR: I am not sure—

Ms Bandaranaike: I was just going to say—sorry to interrupt—that it is probably outside the scope of the bill.

CHAIR: That is what I was going to say, too.

Ms Bandaranaike: Without stating the obvious, there has been a lot of reference this morning to the DNA commission of inquiry, but obviously the proposed amendments in the bill are broader than that.

CHAIR: If those answers are not readily available, you could go back to the inquiry and have a look at the findings. That would probably be the place to start.

Mr ANDREW: Thank you.

Ms BUSH: Good morning. Thank you so much for the work on the bill and for coming this morning. Whilst I understand the importance of the bill and the historic nature of double jeopardy in Queensland, I have found these hearings to be quite technical in nature and I just wonder if, without interrupting the standing order around hypotheticals, you could perhaps step us through what it could look like in practice. There are two appeals frameworks, as I understand it: one for potential wrongful convictions and one for acquittals. Can you step us through maybe that framework and that subsequent appeals framework a little bit. It would be a bit of a hypothetical, but take me through the colour and movement of what it would look like.

Ms Struber: Are you asking in relation to both the double jeopardy exception and the subsequent appeals?

Ms BUSH: If that is okay, yes.

Ms Struber: In relation to the double jeopardy exception, as witnesses have said, it is a foundational principle of the law that a person cannot be tried more than once for the same offence. An existing exception exists in the framework that allows a person to be retried only for the offence of murder if after they are acquitted of the offence fresh evidence later emerges that warrants that.

In terms of how it could occur, there could be an offence that occurs and the person is acquitted and, as has actually occurred in Queensland in the one case that has gone to application, after the person was acquitted forensic testing advanced and DNA was able to be identified in relation to that offence. An application was then made for that person to be retried because there was fresh evidence that they thought would substantiate the person being retried in that circumstance.

There are safeguards around that. If it comes to light that there may be fresh and compelling evidence that would justify a retrial, the police must make an application to the DPP for permission to investigate. That is one of the safeguards: they cannot just investigate, because the matter has already been dealt with. If the DPP then gives approval for the investigation to occur then that investigation occurs. If that evidence is identified then the person will be charged or an arrest warrant issued and then the Director of Public Prosecutions has 28 days to make an application to the Court of Appeal for an order that the person be retried. If the application is not brought within 28 days, there needs to be some reasonably compelling reasons for the court to grant an extension of that time; otherwise, it would generally not proceed.

If the application is brought to the court, the court will consider that new evidence—or that fresh evidence; the distinction in terms is quite important. It will consider the fresh evidence to ascertain whether the police or the prosecution could at the time of the trial have reasonably discovered that evidence. If it was a matter that it was available and it could have been discovered but the police were negligent in the conduct of the investigation then that would not constitute fresh evidence. It needs to be something that the police and the prosecution acting diligently could not have discovered. It may be that the technology did not exist at the time. It may be that a witness was unknown and had not come forward and later presents. It may be, as has occurred in some cases, that the person later confesses to the offence after they have been acquitted. There are a range of different types of evidence that could give rise to an application under the double jeopardy exceptions.

The court must also consider that it is in the interests of justice for the person to be retried. Relevant considerations are whether the person would have a fair trial if it did go to retrial. Things that the court must consider in that process include the length of time that has passed, because obviously if there has been a significant length of time potentially defence witnesses may no longer be available and it may affect the person's ability to defend themselves in a subsequent trial. Another is what the conduct of the police and prosecution has been, both in the original trial and in the subsequent investigation process leading up to the application. When the police became aware of that fresh evidence, how diligently did they act to resolve the matter? Was there an extended delay or was it dealt with in an appropriate manner?

If the court is convinced that there is fresh and compelling evidence—and it does need to be compelling; in the matter that has been decided by the court in Queensland it was DNA evidence that the court held was fresh but it held that it was not compelling. Because the person who had been acquitted was known to the victim—this was a murder case—and had been in the victim's apartment, there was a reasonable explanation for the presence of the DNA in the apartment. It did not necessarily prove or take the case any further in terms of proving their guilt so the court held in that case that, while it was fresh, it was not compelling and a retrial was not ordered in that matter. The evidence would need to be fresh and compelling and it must be in the interests of justice.

If all of those things occur, the court can order a retrial and then the indictment must then be laid within two months. There are safeguards within the framework to ensure it is dealt with in a reasonably timely manner to allow it to be brought to conclusion, and there is the further safeguard that only one application for a retrial may be made. Once that process has occurred, if further fresh evidence later emerges there is no second or third retrial. There is only one that is able to be brought.

Ms BUSH: That is on the framework around acquittals. Then there is the framework around the subsequent appeal for those convicted. There is the section in there that the defendant must prove on the balance of probabilities that they are likely to have been not guilty. That is a different section again.

Ms Struber: Yes, that is a separate framework in relation to appeals. At the moment, a person convicted of indictment has a right to appeal to the court but they only have one. They make their appeal—and it could be on the grounds of evidence or it could be on the grounds of an error of law, so a wrong direction was made in the original case—and the court will consider that. If that is decided—and there may or may not be an appeal to the High Court—once that first appeal is held, there is no further right of appeal. If fresh evidence or new evidence later emerges, there is no right of appeal. The only option is to petition for a pardon.

Ms BUSH: Fresh evidence that the defendant believes could help acquit them?

Ms Struber: Yes. At the moment, even if fresh evidence emerged—it could be that someone else confesses—there is no appeal mechanism for that to be brought back before the court. What the subsequent framework does is introduce a mechanism for that fresh or new evidence to be put back before the Court of Appeal on a second or subsequent basis.

There are two grounds of appeal under the subsequent appeal framework. It is fresh and compelling evidence or new and compelling evidence. An example might be useful in terms of distinguishing between them. The evidence may be an alibi witness. There is somebody who saw the person somewhere else at the time the offence was committed and they may even have video footage of it. If at the time of the original trial the defence did not know about that person—they were completely unknown to them—then that would be fresh. They could not reasonably have adduced it. If that same evidence was known but it was not put before the court because of the negligence or incompetence of the person's defence lawyer, that will still be fresh. That is still fresh because it is no fault of their own that the evidence was not put before the court.

However, if that same evidence was known to the person and they chose not to adduce it in the trial for strategic reasons—it could be that their alibi witness is actually that they were committing a different offence at the time that offence occurred and they choose not to put that before the court for strategic reasons and run the trial on that basis—then that would be new evidence but it would not be fresh. It is because of the differences in the circumstances for how that evidence arises and whether or not it was known to the person that the different tests are applied in the subsequent appeal framework.

For a subsequent appeal on the basis of fresh evidence—so they did not know about it or there was negligence—the test is whether there was a miscarriage of justice—that is a lower threshold—whereas for the evidence that they could have adduced but chose not to, that is a higher test and it is on the balance of probabilities that the person was innocent. That is consistent with Western Australia. Western Australia is the only other jurisdiction that allows an appeal on the basis of new evidence, and that provision is modelled on the Western Australian provision. The two jurisdictions that allow a subsequent appeal on the basis of new evidence will have the same test applied.

As Sakitha outlined, the different tests are also currently in the principles that the court applies when considering appeals. While the court considers appeals generally or often on the basis of a miscarriage of justice—whether a miscarriage of justice has occurred—the court considers different things based on whether the evidence is fresh or new. The court currently will allow an appeal on the basis of fresh evidence if that evidence, had it been adduced, might possibly have resulted in the acquittal. They currently apply a different test for whether there has been a miscarriage of justice with new evidence, and that test is the evidence shows the person was innocent—or not guilty is another way of saying that—or it is just too doubtful. So if that evidence had been put before the jury, they must have had a reasonable doubt and it would have resulted in the acquittal. The provisions in the bill essentially preserve the current principles that are applied by the court in determining appeals on the basis of fresh or new evidence.

Ms BUSH: Thank you, Trudy. That was excellent for my mind. I have further questions but I am happy to pass it around.

Mr KRAUSE: I will follow on from the balance of probabilities question. The Bar Association and I think the Law Society raised concerns about that provision as it relates to new evidence for a subsequent appeal framework. You touched on it at the end there—that, when it comes to new evidence through a subsequent appeal, if it shows that there might have been a reasonable doubt created in the jury's mind then a subsequent appeal would be allowed. Doesn't the balance of probabilities test make it a higher threshold than that—in fact, that evidence shows on the balance of probabilities that there would have been a conviction? Can you explain that a bit more clearly please, especially addressing the Law Society's concerns? They said it was a novel test that they had not seen before in similar jurisdictions. Also I think they had concerns that it raised the bar higher than it should be for new evidence. Can you talk to that, please?

Ms Struber: In relation to the standard that must be met, the balance of probabilities is actually a lower threshold than would apply normally in a criminal proceeding, so that is beyond reasonable doubt. Balance of probabilities is just fifty-fifty. Beyond reasonable doubt takes it up to a higher level. The standard that has been applied is actually lower than would normally occur in a criminal proceeding.

Mr KRAUSE: I understand that when you are trying to convict someone that is a lower standard of proof, but when you are trying to overturn a conviction on a piece of new evidence, if you have to show on the balance of probabilities that it would result in acquittal rather than a lower threshold—there is a difference between a piece of evidence showing on the balance of probabilities that it might lead to an acquittal, compared to a piece of evidence that might in someone's mind create a reasonable doubt and lead to an acquittal. I think that might be the concern that the Law Society was getting at. Can you answer those concerns? I understand the difference between the balance of probabilities and beyond reasonable doubt, but it is different when you are talking about trying to overturn a conviction.

Ms Struber: It is. The test that is currently applied by the courts is essentially the test that is proposed in the bill. At the moment, for new evidence—and it is only in relation to new evidence—the court treats it differently because the defence had an opportunity to present that evidence at trial, and generally with the strategy and the tactics that are employed by the defence in trial they are bound by that decision. You cannot have an appeal on the basis of, 'I'll withhold that evidence and have another go,' or, 'I'll withhold that evidence because it might inculpate me in another crime and I'll take the risk.' The court currently treats that differently and does apply a higher threshold test for evidence that could have been presented in the trial and the person chose not to. So, yes, it is a higher threshold that must be met in relation to new evidence and that is what the court does currently.

Mr KRAUSE: Thank you for explaining that. On the other matter of an application for a retrial, when it gets to the stage where police or the DPP are applying to the Court of Appeal, does the accused person, so to speak, have an opportunity to appear in that hearing?

Ms Struber: Yes.

Mr KRAUSE: You mentioned before that there is not going to be a second or a third trial or opportunity to retry. Does this framework for another trial lead to only one extra shot?

Ms Struber: Yes. There is only one opportunity for a retrial once, so it is exhausted. There are no further opportunities for a retrial.

Mr KRAUSE: I will move to a different note in relation to consultation about the bill. I asked a question of the Law Society around whether some of their concerns would be allayed with the provisions that are here if they were limited in scope to errors or possible miscarriages of justice arising from failures in the DNA testing that has been well evidenced in the media and also in two commissions of inquiry. I think they said that, yes, it would be less bad in their view. When it comes to consultation for the bill, I note you have set out some consultation that went on. Was it as thorough as you would see for other provisions like this? For example, when the exception was put in place for murder, did it go off to the Law Reform Commission or another more extended process than this one? I think there is a concern that this has arisen only because of the DNA failures and that perhaps it has not been as thoroughly consulted on and examined like it otherwise would have been.

Ms Struber: There was a consultation process that was undertaken. It was not, unfortunately, as long as would have been ideal. However, I think it is important to note that the purpose of the reforms is not solely to address the issues that have arisen from the DNA commission of inquiry. It is about aligning Queensland with other jurisdictions. All other Australian states and territories have an exception that applies more broadly than to murder.

I note that the Queensland Law Society in its submissions was referencing a law reform commission in the UK that undertook a review and recommended that it apply only to murder. There have been a number of different reviews that have been undertaken in relation to double jeopardy exceptions. In the UK, for example, there was that law reform commission that was conducted. At the same time, a separate review was undertaken by another eminent person in the UK and the outcome of their review was that it should apply to all offences that are punishable by life imprisonment. The outcome in the UK was that they applied the exception to 28 offences in addition to murder. I think a lot of it is that, while there was not extensive consultation, because the provisions essentially mirror those that exist in other jurisdictions and that have been in place for a number of years that have not created significant issues and the frameworks are essentially the same, there should not be unintended consequences arising from it in that way.

Mrs GERBER: I am interested in the answer to the member for Scenic Rim's question around whether or not previous tranches were sent to the Law Reform Commission, whether or not there were reviews—so if this had happened in the first instance, whether others were sent to reviews and Queensland's hasn't. I am interested in that first part of his question.

Ms Struber: So in relation to this or in relation to when they were first—

Mr KRAUSE: In relation to the murder provisions.

Ms Struber: The double jeopardy exception in Queensland arose as a result initially of a private member's bill. A private member's bill was introduced following the introduction in New South Wales. That private member's bill then formed the model for what was introduced. It was subsequently withdrawn and a government bill was introduced with some modifications. As far as I am aware, the original introduction of the exceptions back in 2007 was not the subject of a Queensland Law Reform Commission consideration.

Mrs GERBER: And in the other jurisdictions, did they go off?

Ms Struber: I am not aware. I think New South Wales did. I think there was some consideration at the national level with some consideration for model laws, but then New South Wales was the first one to introduce it and it has been a staggered approach in the jurisdictions since then.

Mrs GERBER: Thank you.

Mr HUNT: First of all, I would like to thank you and congratulate you for the depth of your responses today. The quality of the responses and the way in which you have framed your responses has been very helpful and very instructive. That sort of leads into my question. Are there any training and educational preparations in train for these changes as they start to roll out?

Ms Struber: There are no specific training and educational activities that are currently in train. However, the provisions in the bill will commence on a date to be fixed by proclamation and that is to allow implementation activities to be undertaken—such as awareness and training and the development of forms—and some subordinate legislation needs to be made in order to facilitate the subsequent appeal framework. There are a number of activities that will need to be undertaken before they are introduced.

Mrs GERBER: I want to better understand the department's response to Legal Aid Queensland's submission around where they provided those three categories of applicants or appellants who may wish to adduce fresh or new evidence and appeal. In Legal Aid Queensland's articulation of their concerns in relation to clause 14, they have identified three scenarios. In those three scenarios, they have said that the first two categories of appellants or applicants would have their applications to adduce fresh or new evidence determined by the common law, and the third category would have their application determined in reference to this bill. As I understand the department's response—well, I do not think I really do understand the department's response, so I would like some clarity. Are you saying that Legal Aid Queensland is wrong in relation to those three scenarios and that it will be interpreted the same as it has always been? Is that the purpose of providing those citations or those case laws?

Ms Struber: No. The case laws deal with a separate issue that is raised in the Legal Aid Queensland submission. In relation to the three categories of possible appellants, they will be treated differently. In relation to the first and second categories, they are people who have not yet had their original or their first right of appeal determined by the court. If it has not gone through that original appeal process, the current framework that applies to them will continue to apply. It is only the third category, where they have had that original appeal process finalised, where the subsequent appeal framework will apply, so they will be treated differently between those.

Mrs GERBER: Then what is the department's response to Legal Aid's concern there that the intent of the amendment—that is the last paragraph—will not be realised 'as a result of the prescriptive language used which is not consistent with long-standing common law'.

Ms Struber: That concern relates to the addition of 'by the defence' in the—

Mrs GERBER: Which is the third example, yes?

Ms Struber: Yes. It is the prescriptive language that only applies in the subsequent appeal framework. However, while the prescriptive language is used in the subsequent appeal framework, that concept of reasonable diligence by the defence is currently applied by the courts. When the court is considering whether fresh evidence could have been adduced in an original appeal, they will look at what the appellant could reasonably have done. Taking all reasonable actions, could the defence have found that evidence and adduced it in the trial? That is the current test that is applied in relation to

original appeals. That is the current test that is applied in other jurisdictions that have a subsequent appeal framework. That has been replicated with specificity in the provisions.

Mrs GERBER: My understanding of what Legal Aid Queensland and the Law Society are saying is that they disagree with that.

Ms BUSH: I feel fairly satisfied with everything I have heard today. I just want to go back to the questions around section 671AE and the balance of probabilities test. I think, yes, the QLS had mentioned that they were not aware of anything like that existing in other pieces of legislation, but in fact it does exist in Western Australia. When did they introduce that in Western Australia?

Ms Struber: It is recent—2023. It is not unreasonable that they would not have been aware of it.

Ms BUSH: So we are not in a position to really understand how that has impacted on—

Ms Struber: No. No subsequent appeals have been brought in Western Australia that we are aware of, so that framework has not been tested.

Ms BUSH: It is fairly similar, almost identical, wording I think to their legislation. I was interested—and you may not be able to comment on this—in the use of the word 'innocent' rather than 'not guilty'. I recognise that they are two different things.

Ms Struber: They are two different words that essentially mean the same thing. It is a drafting convention rather than an intention to have an alternative view.

Mr KRAUSE: I agree with Jason: thank you for your evidence. It has been very good. It is like being back at criminal law lectures.

CHAIR: There being no further questions, thank you very much for coming along. Thank you for your evidence today. That concludes this public briefing. Thank you for your attendance here today. Thank you to our Hansard reporters. A transcript of these proceedings will be available on the committee's webpage in due course. I declare this public briefing closed.

The committee adjourned at 11.48 am.