LEGAL AFFAIRS AND SAFETY COMMITTEE

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

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

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

TRANSCRIPT OF PROCEEDINGS

Monday, 29 January 2024

Brisbane

MONDAY, 29 JANUARY 2024

The committee met at 12.12 pm.

CHAIR: I declare open this public hearing 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, 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, member for Currumbin and deputy chair; Stephen Andrew, member for Mirani, who is on the phone at the moment but will join us later via videoconference; Jonty Bush, member for Cooper via videoconference; Jason Hunt, member for Caloundra via videoconference; and Jon Krause, member for Scenic Rim.

This hearing 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 or affirmation, but I remind witnesses that intentionally misleading the committee is a serious offence. I also remind members of the public that they may be excluded from the hearing at the discretion of the committee.

These proceedings are being recorded 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. Please turn your mobiles phones off or to silent mode.

BRUNELLO, Mr Dominic, Chair, Criminal Law Committee, Queensland Law Society

FOGERTY, Ms Rebecca, President, Queensland Law Society

CHAIR: Good afternoon. Thank you for joining us. I invite you to make an opening statement of up to five minutes, after which committee members will have some questions for you.

Ms Fogerty: Thank you for inviting the Law Society to appear at the public hearing today. In opening, I would like to respectfully recognise the traditional owners of the land on which this meeting is taking place.

We do not support the amendment in relation to double jeopardy. Our strong view is that the current exception for murder only strikes the appropriate balance—the balance between the need to maintain public confidence in our criminal justice system and upholding fundamental civic principles. We do, however, support the introduction of another legislative pathway for defendants who have already unsuccessfully appealed to the Court of Appeal but then come into possession of further evidence. I am joined today by Dominic Brunello, Chair of the Queensland Law Society Criminal Law Committee, and we welcome any questions.

CHAIR: Thank you.

Mrs GERBER: Thanks for that brief opening statement. I would like you to expand a little bit more—and you have said it in your submission at page 3. The process for expanding the avenue has obviously come out of the failings in the DNA lab and the notion that there may be a need for retrials. That is noted at page 3. I was also very interested in page 6 of your submission, where you talk about the reasons for the double jeopardy exception. You said that one of the reasons it is important to maintain it for murder only is to limit the possibility of a prosecution being perhaps politicised or wearing the defendant down for political motives. I understand how that might happen in America given the way their prosecutorial system is set up. However, in terms of Australia, could you expand on the risk you have identified there and give us a practical example of how that might eventuate?

Ms Fogerty: Our objection in relation to double jeopardy is fundamentally a principled one, because it is one of those fundamental precepts of law that operates to protect individuals from the state. That is the cornerstone; that is the reason it exists.

The point you make about political prosecutions is a really interesting one, particularly in the last decade where you could say there has been, particularly in relation to sex offences, a very different approach being taken—pressure of governments across lots of countries and states of Australia to make changes to the way in which the criminal justice system deals with sexual matters. Some of those matters have carried with them a level of politicisation and media coverage that is relatively unprecedented and people obviously have strong feelings about that. I do not think one could say that governments of the day are not under political pressure by the media in relation to how they respond to criminal law reform and justice issues.

Mrs GERBER: The reason I raise it is because of the way this proposed change has arisen. I have two further questions. I want to get the Law Society's perspective as to whether or not you have done any analysis on how many cases might need to be reviewed or might come about as a result of this change, particularly in reference to the DNA lab and the expansion to sexual offences.

Ms Fogerty: Are you talking about double jeopardy?

Mrs GERBER: I was focusing on double jeopardy, yes.

Ms Fogerty: Could you repeat your question, unless Dom has an answer?

Mr Brunello: I do not think the data from Queensland Health is in yet. If the question is directed towards the cases that might arise from fresh or new evidence emanating from DNA retesting consequent upon the findings of the Sofronoff inquiry, what we know—the limit to what the society knows at the moment—is: the information being released through the court via the Department of Health is that there are tens of thousands of cases capable of being affected and the department is laboriously working its way through them to retest in the correct manner. It is not yet known how many of those may give rise to Crown applications to retry already acquitted people.

Mrs GERBER: My last question is around the nature of this reform or this bill and it unfolding because of—

Mr Brunello: Can I add one thing to that? Of course the reforms that are being proposed will not just apply to applications to retry emanating from DNA evidence resulting from the inquiry; they will apply to every application in any matter within the ambit of the offences that engage the provision. Our point of the Law Society's major concern is function creep: you initiate a reform that interferes with a fundamental precept of the system in response to one episode of failure of an expert evidence unit and it affects thereafter every case. Every defendant who is acquitted will have the spectre hanging over them that 'it's not over'.

Mrs GERBER: That is where I was going to go with my next question. Do you foresee this having to perhaps be wound back once they deal with the DNA debacle because of unforeseen consequences in relation to the broader impact it might have on other cases?

Mr Brunello: Do we see there would be a consequential amendment to remove it?

Mrs GERBER: Perhaps.

Mr Brunello: It is always nice to be optimistic.

Ms Fogerty: The slippery slope—our long experience is that once the gate is open, it stays open.

Mrs GERBER: It is very difficult to wind it back.

Mr Brunello: It would be very difficult, yes. Again, the concern is how much of a fundamental principle this is. Once essential precepts begin to be diminished, confidence in the system fades.

Ms Fogerty: Particularly because of the extent that the DNA inquiry is relevant to this proposed legislative change—I am sorry if I am being repetitive, but it is changing a fundamental legal precept in response to what was a bureaucratic or managerial failure.

Mr KRAUSE: Chair, do you mind if I ask a question or two?

CHAIR: No, we will get to you. Steve, do you have any questions?

Mr ANDREW: In your submission you state that weakening the rules of double jeopardy undermines the basic accusatorial character of our criminal justice system and such a change would not be conducive to liberty. Could you elaborate on this with reference to the relationship between the state and the individual, please?

Mr Brunello: It is that criminal prosecutions are brought on behalf of the state with all of its resources and facilities such as the investigative power of the police, the Office of the Director of Public Prosecutions. There is a fundamental inequality in arms, even with the most well represented and well

funded defendant. To constrain that power, there is this longstanding principle—that power that the state has, the power imbalance—that they only get one shot at the prosecution to ensure there is not an exercise which is oppressive. That is really at the heart of that aspect of the rationale for the rule: it is the power imbalance. It is one reason the Law Society supports the introduction of a further appeal right for a defendant but opposes the relaxation of the rule for the Crown, because there is a different set of considerations at play. Defendants can have defective trials and appeals which are effectively no fault of their own, whereas the Crown should be bound by its forensic decisions, its approach and its efforts at trial because they are in a better position and the other side is a single individual against the might of the Crown.

Ms BUSH: Thank you so much for coming in. I absolutely understand the tension between allowing defendants to have a point in time when they can reasonably expect to be able to move on with their life versus the tension of wanting to make sure that violent perpetrators who perhaps have committed violent crimes are held to account. With us, it is going to be an issue of principle. I was around also for the Deidre Kennedy case, which led to the introduction of double jeopardy exceptions for homicide, and recognise that there are times when science does catch up. If there are violent perpetrators out there who objectively it looks like have committed a crime, what is the harm in being able to pursue that again?

Ms Fogerty: It is an intellectual argument and it is a balancing of principles. The system of justice has to work for the whole of the community. The balance that democratic governments have struck is that sometimes there might be individual cases where someone who has committed a crime walks free. That is because that approach is what protects all of society. It protects against the prospect of an innocent person being convicted and going to jail, which we as a society have always traditionally said was the worse outcome, the worse ill, compared to a guilty person being out in the community. That is traditional liberal, Westminster parliamentary democratic principles at play. They are not easy questions, but that has always been where the point has been set.

Mr Brunello: If we just zero in the focus to where we are at the moment, there is an exception. The principle has been qualified for murder, and there are very good reasons in high principle as to why it should go no further. The Law Society prayed in aid of the analysis of the UK commission that looked at this question in depth in England that in a very erudite, comprehensive, careful analysis reached a conclusion that in this balancing act, like all legislation often involved in criminal law, the appropriate balance is to create an exception for homicide cases, which are qualitatively different in the eyes of the community because the consequence is so final for the victim, but not go further than that to open the floodgates for the Crown to retry acquitted people, with all the risk that has to the system as a whole. Finality has a lot of limbs to it. One is respecting the jury's verdict. This has been looked at overseas in the common law system on which ours is based in great detail and that was the conclusion reached there.

Ms BUSH: With respect to the jury decision, I agree. I guess the jury can only make a determination based on the information they have in front of them at the time. If there is fresh and compelling evidence that does become clear as technology and science advances, the argument can be made that that should be revisited. I think you had some issues with the definition of 'fresh evidence' as well. Is that something that I saw in your submission?

Mr Brunello: The original draft consultation bill as we apprehended it sought to do away with the requirement that to satisfy that criteria there not be due diligence. We see that in the bill that has come out for discussion today, clause 32 does make an effort to confine the definition of 'fresh evidence' to still include a due diligence requirement on behalf of the police and the Crown. We are encouraged by that and to some extent our original concern has been alleviated by that clause.

I want to say something, if I could, to provide some scope here. I do not know whether you will ask us about the defendant's further appeal right which is brought in via this proposed legislation. As we understand, it is a check and balance against giving it to the Crown. Again, the draft consultation bill—to the bill now published—has been amended in an important respect, we think. The proposed section 671AE imposes a different test depending upon whether the defendant is applying for leave based upon fresh or new evidence. The test on fresh evidence is a miscarriage of justice, which is a test that is well known to the appeal courts. There has been a lot of judicial ink spilt over what it means. It allows scope because the categories of miscarriage are not closed. It is really a duty of the court to determine whether there has been one.

Where a defendant brings an application for leave to appeal on a second or subsequent occasion on the basis of new evidence, there is this test in subsection (3) to the balance of probabilities that they are not guilty. I have consulted with people prior to this hearing and that is not a legal test on appeal

that the Law Society is aware has any precedent. It is a completely novel test. It was not in the draft, and we do not see any reason for a distinction in the test between the bases upon which the application is brought by the defendant.

At the end of the day, this provision is there to address error in an innocent person having been convicted on the basis of further evidence that is compelling and probative, and we say there should just be one test: miscarriage of justice. That test in subsection (3) of section 671AE is unprecedented. It is a completely new concept that an applicant has to establish to the civil standard a negative that they are not guilty. Would the committee like something short from us in writing on that after today, to focus minds on that particular technical question of law, because it is concerning to us?

CHAIR: Are you happy that we take on notice your suggestion for your help?

Mr Brunello: Absolutely. The offer is there from the Law Society if the committee feels it will assist.

CHAIR: We will gladly accept that offer. We will take it as a question on notice. Are you able to get it to the committee by Thursday, 1 February?

Ms Fogerty: That is fine.

CHAIR: Thank you, and thanks for your suggestion.

Mrs GERBER: To follow up on you taking that question on notice, I will draw your attention to DJAG's response in relation to your submission so that you can focus on that as well, so you can see what they have said about why they have done what they have done.

Ms Fogerty: We were disappointed with the department's response to what we thought was a comprehensive, detailed submission. It was disappointing that the department response did not engage with those substantive issues.

Mr KRAUSE: My question is to either of you. I note the concern you expressed about chipping away at a fundamental tenet in relation to finality for a whole range of new offences arising from an administrative or managerial error primarily. Do you see any issue or problem with the legislation being limited in scope for its operation to errors or cases that arise from errors from the DNA testing in this case—that the range of offences could be as is set out but the circumstances in which the exception applies would be limited?

Ms Fogerty: I think, consistent with what is a principled objection, we would not support, if I have understood your question correctly, an ad hoc kind of widening of the exception.

Mr Brunello: I think that being said, that would be less harmful from our perspective than what is now envisaged that does not have that stricture.

Mr KRAUSE: Yes, and I have taken on board your concern that once the gate is opened sometimes it is not shut ever or potentially for a very long time. In relation to the 'on balance of probabilities' matter that you just spoke about in relation to a defendant's additional right of appeal, do you have any idea where that arose from?

Mr Brunello: No.

Mr KRAUSE: Have you ever seen it in any jurisdiction or writing or academic literature anywhere?

Mr Brunello: I have never seen an appeal test of that sort in crime. Miscarriage of justice is a very well known test. To place an onus on the applicant to prove to the civil standard a negative that they are not guilty is not reflected in any current law I am aware of in Australia.

Mr KRAUSE: The UK or any other common law jurisdiction?

Mr Brunello: Not that I am aware of.

Mr KRAUSE: Going back to the first one about limiting the scope—and I acknowledge the principled arguments made by the Law Society about not expanding the exceptions to the finality of double jeopardy—do you acknowledge there is significant community concern about the failures in the DNA labs and the fact that people who should have been convicted have not been because of no fault of the victim, possibly no fault of the prosecution even, and can you acknowledge a need for that to be addressed?

Ms Fogerty: We are here to talk about—

CHAIR: Rebecca, before you answer the question, that is seeking an opinion, is it not? I do not think—

Ms Fogerty: That said, a criminal justice system has to have buy-in from the community. People need to have trust in the criminal justice system and trust in the laws behind it for it to be successful, and, consistent with Dominic's point earlier, we say that expanding double jeopardy works to erode trust in the system.

Mr Brunello: I suppose one problem is solved but another is created, and it is a much more long-term one.

Mr HUNT: A very simple question: if not this, then what? Is the status quo satisfactory? Do you have another solution if the Crown does not put its best foot forward?

Ms Fogerty: What is the problem you are trying to address? We say that the Crown gets one shot, for reasons we outlined earlier in our evidence. Are you saying that the DNA is the justification—

Mr HUNT: Sorry, Rebecca, I am not saying anything. I just asked the question: if not this, then do you see the need for another solution?

Ms Fogerty: No. Our submission is that the double jeopardy rule as it currently is, with the murder exception, strikes the appropriate balance.

Mr HUNT: The status quo is satisfactory at the moment?

Ms Fogerty: There is an assumption behind your question that perhaps it is not.

Mr HUNT: No.

Ms Fogerty: I think we have answered it.

CHAIR: Steve, if I heard you correctly, you were waiting for some information?

Mr ANDREW: Yes, I missed a bit. The QLS is up now; am I correct in saying that? What is the QLS's position on the idea that the state-run DNA testing laboratory should be turned into a statutory body independent of the Department of Health and QPS?

Ms Fogerty: It is beyond the scope of our evidence today. Excuse me, Dominic has a relevant point.

Mr Brunello: Is the question whether the laboratory should be removed from Queensland Health?

Mr ANDREW: What is your position on the idea that a DNA laboratory should be turned into a statutory body? Would that be independent of the Department of Health and QPS?

Mr Brunello: I believe that was one of the recommendations or at least the issues that Mr Sofronoff KC addressed, and independence of experts is always essential. The inquiry found that independence had been compromised by various factors. If a statutory body structure would enhance independence, I cannot see why the society would ever do anything but support that.

Mr ANDREW: Fair enough. What role do you think DNA would play in the determination of proving someone's guilt during a criminal trial? Is it common for people to be convicted on the basis of DNA test results alone?

Ms Fogerty: Each case turns on its own. Most matters do not go to trial. The starting point is that in the vast majority of matters people plead guilty. Where a person decides to plead not guilty, DNA evidence, depending on the type of case, may or may not be present in it, and because of the sanctity of the jury verdict we can never know whether that evidence played a determinative role or not.

Mr Brunello: As a matter of law, the High Court has held that a jury is entitled to convict where the only evidence of guilt is DNA evidence.

Ms Fogerty: Those are uncommon cases, though.

Mr Brunello: That was the subject, if my memory is working, of an appeal some time ago. So it can be very prominent.

Mr ANDREW: I suppose my question goes to the fact of whether there were a lot of false acquittals under the current system—that is all I am trying to get at—using particularly just DNA evidence.

Ms Fogerty: What do you mean by a 'false acquittal'?

Mr ANDREW: Is there evidence that the government provided to establish that there has in fact been a significant number of false acquittals under the current system of what is happening with the DNA labs?

CHAIR: That is a question that I think is not possible for anyone to answer, Steve.

Mr ANDREW: The way it all is, there is a lot up in the air. We do not know if there were acquittals made. Anyway, it was just a question I wanted to ask.

CHAIR: Steve, that is a question that will unfold in time as the retesting takes place.

Mr ANDREW: It is no good if you are behind bars waiting for it to unfold, Pete. That is all.

CHAIR: It has to take a process. There is time for one last question. Laura?

Mrs GERBER: I want to go back to what the member for Caloundra raised because it triggered with me a thought process. If we were to carve out and put to one side the DNA debacle, is there any matter in law, anything that has come through to the society's attention, as to why the double jeopardy rule needs to be changed? Is there anything outside the DNA debacle that has come up that might have instigated this, other than that? Has it been deficient in any way in legal precedent? Is there anything else?

Mr Brunello: Not to our knowledge sitting here today. The reason this committee has been set up and this legislation is being considered is as a result of an inquiry that flowed from a podcast into a particular case which, when examined in detail—if there were defects in that particular case, it was not referable only to the lab imposing the wrong thresholds on the test; it was referable to the conduct of the investigation. That is the difficulty in responding with legislation to one episode of error.

Ms Fogerty: We are aware, obviously, that other submitters, on behalf of victims, submit that there are some victims and people in the community who say that changes to the law of double jeopardy will assist victims to obtain justice. The difficulty we have with that as an intellectual proposition, and as a policy proposition, is that the prosecution are independent. It is fundamental to our system that the prosecution are independent. They do not act for the victim; they act for the state. Prosecutions must be brought as a result of a prosecutor bringing their mind to whether or not there is a proper issue. It is not about individuals, as awful as that can sound. We are talking at the level of principle here.

CHAIR: Thank you, Rebecca and Dominic. That brings to a conclusion this part of our hearing this afternoon. As stated earlier in relation to the offer of additional information, I understand there will not be an issue getting to it the secretariat by 1 February.

Ms Fogerty: No.

CHAIR: Thank you for your time today and thank you for your detailed submission.

Ms Fogerty: Thank you for the opportunity to appear.

BROMLEY, Ms Nadia, Chief Executive Officer, Women's Legal Service Queensland

ROYES, Ms Michelle, Director Clinical Governance, DVConnect

CHAIR: Welcome. Thank you for joining us today. I invite you to make an opening statement of up to five minutes, after which committee members will have some questions for you.

Ms Bromley: I would like to acknowledge the traditional custodians of the lands on which we meet today and pay my respects to elders past and present. I pay particular respect to First Nations women and the traditions they carry. I am grateful for the opportunity to contribute to the committee's consideration of this bill. Our service supports thousands of women every year, the overwhelming majority of whom are experiencing domestic, family and sexual violence. This inquiry has not had the benefit of a large volume of submissions—there are only a few, fewer still which actively support the broadening of the exemption to the rule against double jeopardy.

This provision is designed as a safeguard. It is proposed to be governed by the discretion of the court and only to operate in limited circumstances where it is found to be in the interests of justice to do so. The Queensland Law Society noted that the rule against double jeopardy encourages efficient police investigations. While that is conceptually true, the law does not operate in a vacuum; nor should laws be made without reference to the societal context in which they operate. Police investigations and prosecutions generally are influenced by a huge number of factors. We have the benefit of the information in the report from the Commission of Inquiry into Forensic DNA Testing in Queensland. We also are aware of all of the information obtained from the Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence which found evidence of under-resourcing and a culture of misogyny, sexism and racism. It is against this backdrop of systemic failure that this safeguard is being considered.

The submission of the Queensland Law Society talked to the principle of finality and the need to have appropriate controls on state power. We agree that these are important principles and ought to be preserved, however hold the view that the proposed changes are likely to have an impact on them in such a limited way while offering significant comfort to those who have experienced harm that it is in the interests of justice as a whole to implement the proposed changes.

What the Queensland Law Society submission does not talk to is the experience of victims, other than to say that the sexual offences proposed to be included are less serious than the offence of murder because the victim's life is preserved. Our experience is that, while victims may continue to live, their lives are seldom maintained in their original state. In a meaningful way, this safeguard is for victims, not the state. It is undeniably true that the resources of the state are greater than those of an individual accused of a crime. It is also true that victims have fewer resources still and do not even have legal standing in the proceedings for the offences against them except when they are called on to defend their right to protect their privileged counselling records. The expansion of the rule against double jeopardy will not change the fundamental nature of prosecutions nor create an inquisitorial system; it will merely provide victims with the comfort of the potential availability of a safeguard. Thank you.

Ms Royes: I would like to acknowledge the traditional custodians of this land, the Yagara and Turrbal people, and pay respects to elders past, present and emerging. I would also like to acknowledge those with lived experience as a victim of crime, which includes people who have experienced domestic family violence and sexual assault. I am here today representing DVConnect as the statewide crisis response service for domestic and family and sexual violence as well as the statewide helpline for victims of crime. I stand here beside Women's Legal Service to acknowledge our lack of legal expertise when it comes to bills such as this. That, in part, is why we did not offer a submission when called for. Also, the timing of that submission was during one of our busiest periods when I am sure you can appreciate our large workforce also needs to take opportunity for leave. However, I am very glad to be here today because I have had a chance to look at the submissions that have been made and they very much lack the voice of the victim-survivor.

We see human rights as universal. We acknowledge that in our values. We know that we have to be accountable not just to the clients we work with but also to the larger community, because it is through the community being robust and connected and upholding their human rights that we are able to move forward as a functional society. Therefore, we are not blind to the matters that have been raised about the impact on people who have been accused, who have been through the court process and who have been found not guilty. We definitely acknowledge that and the finality of it as being important, as Nadia has spoken to.

We acknowledge other legal issues that may resolve with this matter as well. However, the importance of this is two key things. No. 1, victims of sexual violence need to know that the state sees them; that the state sees the harm that has been done to them, which the commission of inquiry has highlighted twice; and that there is hope and opportunity of cases being re-examined under this new light. We know that there will be legal protections in place to ensure this does not have unintended consequences on the wider community but does offer hope to victim-survivors if this can be applied to their matter. We also know that we need to make reparation for the years and years of harm that have been caused from the systemic response to victim-survivors of sexual violence and assault. The commission of inquiry outlines this. Some of the commission of inquiry actually highlights particular DNA failings that were specific only to sexual violence cases. We also know that the volume of sexual violence cases is great—larger than the volume of murder and homicide cases—and we know that the enduring impact is significant. There is so much data on that. Therefore, we do stand here to say that we are in full support of the double jeopardy laws being widened.

Mrs GERBER: I want to ask a similar question to what I asked the Queensland Law Society. Is DVConnect or Women's Legal Service aware of the volume of cases that might be presented, either through contact that you have had with your clients or through your service?

Ms Royes: No, we have no indication. In fact, we have the forensic support helpline which was stood up by the government specific to this case and working closely alongside police and the relevant bodies that have come out of the commission of inquiry, and we have no clear data. Even though we are confident that they do have that information, we have no guiding information of how many matters we would be considering.

Mrs GERBER: Do you know when you might expect to get that?

Ms Royes: No.

Mrs GERBER: I will also ask you a similar question to what I asked the Queensland Law Society, and it probably does flow on from what the member for Scenic Rim raised as perhaps an alternative proposition. This reform has come about as a result of what has happened with the DNA lab and the inquiry and some of what is anticipated will be needed to correct that debacle.

Mr HUNT: Chair, the term 'debacle' is a clear imputation. I think we can lift above that for this hearing, can we not?

Mrs GERBER: Is that a point of order?

CHAIR: It is a point of order.

Mrs GERBER: I will use the word 'failure' then—as a result of the failures of the DNA lab. Do you foresee that these changes perhaps might need to be changed again down the track or, going back to what the member for Scenic Rim raised, is there perhaps a way that this could be carved out so that it does actually deal with the issue that it is meant to deal with, which is the failings of the DNA lab and victim-survivors having potentially their perpetrators not prosecuted as a result of the failings of that lab?

Ms Bromley: While it may be the case that the failings, particularly in the DNA lab, are the genesis of the proposal, it is not at odds with other jurisdictions. Perhaps our closest jurisdiction is Western Australia in terms of the structure of its criminal law. They made changes back in 2012 to similarly amend their double jeopardy laws to expand them to offences such as these. There are other drivers. While that might be the reason it is occurring now in Queensland, our view would be that it is perhaps just good law and ought to stay, as is, I believe, every other state and territory—except the Northern Territory—in Australia.

Mrs GERBER: I am actually not familiar with the WA double jeopardy changes. Are you able to give the committee some information on that? Can you talk us through those?

Ms Bromley: Certainly. As I understand it, Western Australia moved to make similar changes to Queensland back in 2012. They changed their double jeopardy provisions to expand from simply murder to other serious offences, including sexual offences.

Ms Royes: We would agree that this is something that is generally required. The impact that sexual violence has on people—that is enduring and impactful and absolutely does change lives—requires the opportunity for the matters to be reviewed when new information does come to light, acknowledging all of the safeguards that are in place for that to occur.

Ms BUSH: Thank you for coming along. Double jeopardy has been in Queensland for some time. I was actually one of the advocates who pushed to get it over the line in the case of homicide and have long argued, beyond recent events, that we should look at expanding it, so it is great to have that now

in front of us here in Queensland. I do not know if you are able to comment on this. I wanted to ask the QLS but was not able to get it in on time. The experience of allowing for retrials and double jeopardy for homicide: in practical terms, what has been the impact in Queensland? Are you aware of how that has changed, how many cases have been tried and what has been the outcome? Is that something you can comment on or not?

Ms Bromley: Certainly. Even the material before this commission has suggested that perhaps, certainly in the case of murder, it did not open any floodgates. We could see even in the response from the department that when they were looking for like cases they found two—one in Queensland and one in New South Wales, and those laws have been around for a very long time. The bar is very high and one would hope, in the event that this exception is introduced, it is used very rarely because, as much as we advocate for victims to have an opportunity, we also acknowledge that the criminal justice process is an incredibly arduous and traumatic one. One can barely imagine the prospect of having one trial, let alone two, as a victim-survivor. Our hope is that this is implemented as a safeguard and certainly used to the least extent possible.

Mr ANDREW: You are obviously in favour. What is the organisation's position on the impact that the bill's expanded right to appeal might have on victim-survivors of sexual violence or the families of victims?

Ms Bromley: What is our view on the impact of the bill? Like the Queensland Law Society, obviously as custodians of the law we respect the need for symmetry and, as is appropriate, for there to be retrials. When there have been acquittals that were based on insufficient evidence then it is certainly appropriate that the same test be applied for convictions. That is the symmetry of our justice system. It is the case that the QLS were supporting one and not the other. That is not our position.

Mr ANDREW: Would you support the idea that the bill's changes should be reviewed at a certain point in time to check if any unintended consequences have arisen down the track? If so, what sort of time frame would you consider to be a smart way of moving toward that?

Ms Bromley: My colleague may have some views on this as well. I think perhaps it is typical for bills to be reviewed perhaps in a five-year period, but perhaps what is more important than when is how. The challenge with this bill is that, unlike other bills where there are expected but undesired collateral consequences, the unintended consequences, as I understand them, are simply unintended. One does not know what effect it might have on the prosecution process, the way a trial is run. It would be important in any review that it be holistic and engage all of the stakeholders. There are so many agencies and organisations that contribute to the criminal justice process and one would hope that any review was holistic enough to get all of their views such that any unintended consequences were made visible.

Ms Royes: I would think that a review would have to be as Nadia has highlighted, but also the time frame needs to be considerate of how long these matters will take to possibly get to court for us to have information to then review the impact. We are looking at a number of DNA cases that just need to have their DNA retested in the first instance, which will take many years. If a matter has been to court, we know that that will take a significant period to be heard again because of the way that this process must be followed. Any review would need to be quite a period to give people opportunity to review its impact in this instance. While we acknowledge that this is the genesis of the calls for this bill, we see it as being in line with the rest of Australia and appropriate for this type of crime and the seriousness of it. Therefore, we do not really consider that a review in a formal way may be required.

Mrs GERBER: This probably follows on a little from your answer in response to the member for Mirani. The QLS took issue with the provision of double jeopardy for the defendant—the way it applies and the new test or, essentially, a novel 'on the balance of probabilities' test applying. Did either of your organisations have a view on that?

Ms Bromley: No, other than to say that I certainly concur that it does appear to be a curiosity to introduce a new test. Perhaps I could make one more observation. The other issue that the Queensland Law Society took, I believe, was with the principle of retrospectivity. The observation I would make in relation to that is: as the committee knows, there is no absolute prohibition on laws operating retrospectively. The principle that they do not is largely based on the idea that one's behaviour ought to be predictable. One ought to know what is and what is not lawful to conduct one's business and affairs. In this case, the retrospectivity does not actually affect behaviours. The behaviours we are talking about—the alleged behaviours—are and always have been criminal behaviours. Rape is rape. It is simply a prosecutorial matter. While that is still a consideration that the committee and the government ought to keep in mind, the harm done by retrospectivity is simply a criminal justice process. Therefore, in terms of community awareness and community behaviours, there is no harm in retrospectivity because no different choice could be made.

Ms BUSH: Another comment made by the QLS that I wanted to pick up on is the notion that it is the Crown and the state versus the defendant. Actually, the Crown and the state are there representing a victim who is sitting behind that, and their need for justice is very real. I want to get some comments on that. You mentioned in your opening statement that there are safeguards built into the bill. Can you give a reflection on some of those?

Ms Bromley: Yes, that is certainly true. I had the benefit of listening to the evidence of the Queensland Law Society and they made the observation that the criminal justice system is not about individuals. That is painfully clear to those involved in the process. As I said, they do not even have standing in the matters. They are not a party to the proceedings. For someone who is a victim of rape, it is not their proceeding; it is a matter for the King, yet no harm, I believe, is done corporally to the King and much harm to the victim. That is absolutely the criminal justice system that we operate and that is the structure we are bound by. That is not to say that there cannot be safeguards in place to give comfort to victims that when the might of the state fails—when procedures that are put in place designed to allow for just prosecutions do not work—there is some remedy available to them. That is very much what this law is about: a simple safeguard to acknowledge particularly the genesis of this legislation—systemic failure—but also that other failures exist and may exist in future, hence the safeguard is a necessary precaution.

Ms Royes: I do think that, whilst it was a particular instance and a series of processes that brought about this commission of inquiry, this commission of inquiry, the Women's Safety and Justice Taskforce and the *A call for change* report have shown again and again how systemically flaws can occur, processes can fail people they are supposed to support and we can be unaware of those consequences for very many years. I think this is an opportunity to show victim-survivors that we, as the state of Queensland, hear them, we acknowledge them and we stand behind them in a really simple way.

This change in legislation is significant because of how important it is to the structure of our criminal justice approach, but also it is really easy. It is a simple thing that is part of a much larger process that says we will give opportunity to see this as a significant major crime, like they consider murder, and to know that when new information comes to light there is opportunity to do something around that. The very real and practical impact of that will probably be less legal and more emotional and therapeutic for victim-survivors out there to know that the state has stood alongside them. I think in the legal sense we suspect—I suspect; I speak only for myself—that many cases will get to court. We have looked at the background across the state and for Queensland itself. Cases are not really making it there, but it does give that chance of hope. It says, 'We hear you and we see you as part of this process because you are very much part of this process. This process is in place to protect you and, therefore, it should protect you.' I appreciate that we are responding to questions, but can I make one more statement?

CHAIR: Of course.

Ms Royes: In our service we work alongside people who have been perpetrators of crime, who are on the other side of the criminal justice system as well. Whilst I am speaking for victim-survivors, many victim-survivors have also been offenders and the accused in criminal justice systems. Therefore, we have given really balanced consideration to the impact this has on both sides of the fence and we truly believe that this law should be implemented.

CHAIR: That brings to a conclusion this part of the hearing. Thank you for your attendance and thank you for your written and oral submissions that have been made today. It is all very helpful to the committee.

CAPPELLANO, Ms Anna, Member, Criminal Law Committee, Bar Association of Queensland

HOARE, Mr Andrew KC, Chair, Criminal Law Committee, Bar Association of Queensland

CHAIR: Good afternoon. Thank you for joining us. I invite you to make an opening statement, after which committee members will have some questions for you.

Mr Hoare: If I may begin, thank you for the opportunity of speaking here this afternoon. It is noted that there was initial resistance to the amendment of the double jeopardy laws, and that was made out in the first response to the invitation for submissions. That position has altered by reference to the last bill that we saw before being brought here today, and we note that the bill in its present form largely reflects the position in other states and there is some merit for that type of replication in Queensland also. We note also that there is a strict test and relatively high bar before the Crown can make an application to set aside the acquittal of a person and a person who has been acquitted by a jury.

We note also that there is a degree of protection offered to the person who is the subject of the application, firstly by the test which is applied to the prosecution as distinct from the test which is applied to the accused person. Lastly, we note that diligence will include the investigation by a police officer as well as a prosecutor who was involved in the prosecution of the offence. The reason the bar is endorsing those matters is that we are acutely aware of circumstances which may arise where forensic decisions have been made by a prosecutor at first instance and there is a need to prevent an ability by a further prosecutor upon review to seek out the review merely because they disagree with how another prosecutor might have run that prosecution. In that regard, there were no particular issues which the bar takes with the bill in its form.

There is one matter I did wish to raise, and that is in respect of—and this, I think, is distinct from the bill which was sent to the bar in September of last year—the amendment of 671AE, 'Determination of subsequent appeal', and in particular proposed subsection (3) of that section. The first proposed subsections deal with matters which are quite known to law, which are miscarriages of justice and then in proposed subsection (2) the application of a proviso should no substantial miscarriage of justice having actually occurred. Proposed subsection (3), however, reverses the onus on a person making an application in circumstances where it is new rather than fresh evidence and requires a burden of proof upon that person. That is contrary to how the criminal law has operated and in circumstances where we are dealing with, in that case, new evidence which may in fact be predicated by some degree of failure in the trial process due to the negligence of a defendant, of their representative or by some other feature of the trial process to then create this burden upon the defendant to prove on balance, which was not a proof which would have been employed at first instance, nor on an appeal at first instance considering that appellant's appeal that it should engage at this tertiary stage. The first point is that we do not agree with that and I do not believe it reflects a test in other jurisdictions, but I will be corrected on that.

The other matter which is raised is that it is noted that this is in addition to the general right of the executive to pardon a subject and does not interfere with that as an additional right. Aside from that, the Bar Association is largely in support of the bill with that caveat identified.

CHAIR: Do you have anything to add, Anna?

Ms Cappellano: No, nothing further, thank you.

Mrs GERBER: Just for clarity, the Bar Association in relation to the application of the double jeopardy rule when we are looking at section 671AD and proposed subsection (3) does not support—

Mr Hoare: 671AE proposed subsection (3). If it is determination of the subsequent appeal, and I apologise: I want to make sure I am looking at the finalised bill, so I am at page 14 of the most recent bill that I have reviewed—that is, section 671AE, 'Determination of subsequent appeal', and in particular proposed subsection (3).

Mrs GERBER: Yes, the test of balance of probabilities—

Mr Hoare: The test of balance of probabilities.

Mrs GERBER: The novel test that does not appear to have been used in Australian jurisdictions before for the application of this rule to a defendant.

Mr Hoare: Yes.

Mrs GERBER: So is it the Bar Association's view that they do not support that?

Mr Hoare: They do not support that.

Mrs GERBER: What would you like to see instead?

Mr Hoare: It is sufficient to adopt the need to demonstrate a miscarriage of justice and then the secondary point, which is employed by courts of appeal frequently and at the highest level—a rejection of that appeal if no substantial miscarriage of justice has occurred. Those phrases and those tests are known to the law and the subject of restatement by the High Court and by the courts of appeal and there is effectively unanimity even at the intermediate appellate courts.

Mrs GERBER: So can the Bar Association, just for the benefit of the committee, perhaps expand upon what might be the implications for the courts in relation to a brand new legal test and something that has not been considered?

Mr Hoare: The courts can well apply a test of balance of probabilities.

Mrs GERBER: Yes, I understand that.

Mr Hoare: They can well apply that.

Mrs GERBER: I am talking about in the context of this bill.

Mr Hoare: In the context of this bill, the concern is to the applicant. So the applicant who had an appeal rejected is then bringing, in this case, new evidence, and because it is new evidence it is normally a function of there being a failure at an earlier stage in the trial process which has led to—because that evidence has not been presented—an incomplete record. So you have at the starting point a failure of process which meant that that evidence was not led at trial. You then have logically an incomplete record upon which the appellate court is reconsidering the appeal, and added to that is an additional onus which is never placed on an accused at any other stage. I am leaving aside here specific defences which may arise, but at any other stage an accused does not need to prove their innocence or, in this case, that they are not guilty. That is not something they need to prove at any other stage and that concept, introduced at this stage, is foreign to what we think our accusatorial process looks like and foreign to what we think an accused ought to do. It is contrary to some fundamental principles.

Mrs GERBER: The department has responded to the Queensland Law Society's objection to that and the Queensland Law Society in their oral submission to the committee today have taken issue with the fact that—

Mr Hoare: And I should say that I spoke to Mr Brunello about those matters so that the committee understands that there is some unanimity in our stated position.

Mrs GERBER: Okay. Thank you.

Mr ANDREW: Does the Bar Association know of any statistical studies done on what the likely wrongful conviction rates are in Queensland and how this compares with Australian or international jurisdictions?

Mr Hoare: Do you mean a wrongful conviction in the sense that there has been a—I am sorry, member for Mirani; I just want to clarify what you are asking of me. You are not speaking about merely successful appeals; you are speaking about wrongful convictions which have survived the scrutiny of an appeal? That appeal has been rejected and then subsequently, by pardon or otherwise, a conviction has been overturned?

Mr ANDREW: Yes.

Mr Hoare: I simply do not have a statistical answer to that, but I can make inquiries as to whether, firstly, there has been some statistical determination, and by that I do know that Griffith has an Innocence Project and it may actually have some statistical measure and we could provide that to the committee if that was helpful.

Mr ANDREW: That would be great. Can you speak to any risks that you believe might be associated with the bill's broadening of the exceptions to the rule against double jeopardy as well as the principle of retrospectivity?

Mr Hoare: There was an initial resistance to any expansion of the prohibition against double jeopardy. That was determined against the Bar Association position and we now have this legislation in place. There then is a safeguard to the utilisation by prosecution authorities in respect of retrospective convictions in two ways: firstly, they only get one opportunity to make such an application; and, secondly, it must be on fresh evidence rather than new evidence, so fresh evidence which means, by example—and I think this is the most pertinent example—a retesting of DNA evidence which leads to a different forensic result which cannot have been in the contemplation of either a police officer or a

prosecutor at the time of initial trial. Lastly, it needs to be objectively material, so it has to go to a central part of the case for it to be utilised and for the prosecution to be successful in retrying a person who has been previously acquitted.

The Bar Association is really in a position now where it has accepted that this is legislation which has been put in place in all other jurisdictions in Australia, that the safeguards which have been put in place in the other jurisdictions have been replicated in this legislation and, despite its resistance, there is, to a degree, an acceptance of the government's position in respect of it and the Bar Association ensuring that the unfairness which is consequent to the existence of an abrogation of the double jeopardy prohibition is abrogated to the least possible extent within the purpose of the legislation. I have spoken probably a lot then and I hope I am answering your question.

Mr ANDREW: Yes. With the safeguard side of it, there is not something that you think we have missed, even looking at other jurisdictions? Nothing can be abused either by the state or by individuals within that whole situation? You have not seen that in other jurisdictions?

Mr Hoare: When it was first on for review there was consideration by the committee of the safeguards which were in place in the other jurisdictions. We were satisfied then that the safeguards which were in place in the other jurisdictions have in all respects been replicated in the present legislation. The difficulty is that, despite its existence over a number of years, it is relatively untested legislation. There have been very few applications made and the applications that have been made, I believe—and I may be corrected—have all been unsuccessful. The fact that they have been unsuccessful demonstrates that the safeguards are in fact working. It is not something which is given just by asking.

I must say that the committee's involvement has been limited to the legislative formalities—that is, what the legislation looks like; the experiences within this jurisdiction rather than within other jurisdictions; and acknowledgement within that that there may be potential for injustice to be a consequence of this legislation, which is why the double jeopardy laws existed. There are many reasons for that policy—I should say 'rule'—surviving for centuries, but that rule has now been abrogated. The position is that it should be abrogated to the least amount necessary for the purpose of legislation.

Mr ANDREW: By expanding the right to appeal laws, the government might introduce a miscarriage of justice unit—

Mr Hoare: That was proposed—I am sorry, member. I did not mean to speak over you. In the initial response to the legislative change, that was proposed by the Bar Association. I might have a date of that letter. That was in February 2023. The reason for the existence of those types of units is to displace the overwhelming resources of the Crown to somehow be ameliorated in respect of a person who has been wrongfully convicted. Those models exist in many common law jurisdictions including England and New Zealand. In direct answer to what you asked me, member for Mirani, that is an additional safeguard—that type of institutional or government body which is resourced specifically to look at those issues and then to advance a defendant's case.

Mr ANDREW: In relation to resources, have you done an assessment as to the cost and workload to the courts as a consequence of the amendments?

Mr Hoare: No. That has not been done and I would not be the person to ask. The present equivalency is the pardon power. That is sparingly used. In fact, it is rare for the Court of Appeal to become engaged in the consideration of a pardon. The simple answer as to the reason these miscarriages of justice are exposed is normally the actions of pro bono lawyers and investigators giving of themselves for free to advance a person's case. That is inherently unfair.

It would be possible for the committee to consider the costings in other common law jurisdictions and similar jurisdictions—for example, how much it costs in New Zealand—if the member is speaking about simple dollars and cents. I do know that the New Zealand model has existed for at least two years. They should have costings as to how much it practically costs and also the performance indicators which are set out in that jurisdiction. I am quite prepared to undertake that task, if it is of any use to the committee, and provide that to you.

CHAIR: It may not be when I tell you when we need it by.

Mr ANDREW: I would appreciate it.

CHAIR: I am going to move on now. Jonty or Jason?

Ms BUSH: If I hear you correctly, despite a historical rule of law here in Queensland, there have been amendments to legislation to allow for double jeopardy cases to occur in limited cases, and in other jurisdictions domestically and overseas we have shifted in that direction—and the sky has not fallen in. It has been tested and proven to still uphold and promote the principles of justice as we know them. Do you have any comments about the efficacy of similar laws in other jurisdictions or in Queensland as they have been applied to homicide cases?

Mr Hoare: The reason I pause is that there is an expectation that there will be a groundswell of retesting of DNA and, consequent to that retesting, a series of applications being made on the basis of that retesting. This jurisdiction must be distinguished from other jurisdictions because we have had a core failure which we necessarily have had for a period of time an increase in such applications, but that can be linked to a singular failing which has now been the subject of two inquiries. In other jurisdictions there are thankfully imperfections in how people are investigated and prosecuted or acquitted but there is a robust model of criminal justice all through Australia. You use the term the 'sky has not fallen in'. That is an indication of the robustness of the system, not necessarily the efficacy of or a need to abrogate the rule or principle against double jeopardy. That is how I qualify the member's comments without disagreeing with them necessarily.

Ms BUSH: I understand. Do you have any comments, suggestions or feedback on Queensland's capacity to implement these amendments from both the legal and the community legal sector perspective?

Mr Hoare: The strictures which are put in place are relatively well known as to what needs to be demonstrated—the idea of fresh and new evidence. The pinch point now will be the consequences of the retesting of DNA. I am aware that there are delays within the court processes in respect of serious crimes when DNA is an issue. It is on a case-by-case basis, but it is not unremarkable for DNA to become an issue in serious cases, particularly in homicide and unknown perpetrators. When we are speaking about capacity, we are speaking about a pinch point which, again, can be put upon a single failure. That is going to take considerable court resources to overcome and considerable delays in the process which would ordinarily be considered to be unseemly and unconscionable delays, but they are brought on by this simple seismic event.

Ms BUSH: As long as there is sufficient resourcing to get us through this churn point, that is probably the main concern.

Mr Hoare: Yes. I hesitate to think what that resourcing looks like in what was always, and historically has always been, an essential part of the society which is already really pushed to its limits in terms of the capacity of the courts and the capacity of those who service the courts. There is always a call for more money, I suspect. We understand that there is a finite ability to fulfil those requirements.

Mr KRAUSE: In relation to the present exception to double jeopardy, applications can be made on the basis of fresh and compelling evidence as well as new and compelling evidence?

Mr Hoare: Let me just have a moment. There is no additional appeal by an accused person. The limitation on my review of the act for the Crown was that it would need to be fresh evidence—so evidence which could not have been obtained at trial with reasonable diligence.

Mr KRAUSE: Sorry, I should have been more specific about what I was talking about.

Mr Hoare: To be plain, the defining point is that they can often coalesce in the same set of facts as being both new and fresh or fresh and new in part, which is why I think in the bill they have acknowledged that problem in language. So far as the prosecution is concerned—I will confirm that I am right about that—it requires the prosecution to demonstrate that it is fresh and compelling, and it incorporates the idea that reasonable diligence would have uncovered that evidence. For example, new DNA evidence is that. Sorry, I am disrupting you from asking a question.

Mr KRAUSE: I was actually asking about the subsequent appeal provisions—section 671AE and subsection (3), which you have expressed some reservations about. At the moment there are no subsequent appeal provisions in the Criminal Code?

Mr Hoare: At the moment that is correct.

Mr KRAUSE: There is a distinction, though, between fresh and new evidence in jurisprudence, in court decisions?

Mr Hoare: That is right.

Mr KRAUSE: Why would you see there would be a different test before fresh and compelling and new and compelling when it comes to a subsequent appeal? Is there a different threshold for raising new evidence or fresh evidence?

Mr Hoare: Ultimately, it will come to the effect of the evidence. If the consequence of the evidence which was not put before the tribunal is that it will lead to a miscarriage of justice, that will be sufficient for its admissibility.

Mr KRAUSE: As new or fresh?

Mr Hoare: Yes, on appeal. There are some limitations to that. The limitations come from a deliberate withholding of evidence, a tactical withholding of evidence, with knowledge that the evidence has consequences and so on. That comes from within the ambit of finality of litigation.

The ultimate point which is made is that for a person to have the grounds for a further appeal means that at some stage the trial process has failed that person—that is, for there to be an intervention at an appellate level there needs to have been a failure in the trial process such that that evidence was not available to them at trial because it did not exist or, on the other hand, it was not put before the tribunal because of a failure in representation. On neither basis should a person who has suffered that injustice be closed off from an appeal. I am talking about the conduct of third parties. There is a general rule that you are bound by the forensic decisions of your counsel or representative, but when you are talking about evidence which is either fresh or new but is compelling, I do not see a useful distinction.

Mr KRAUSE: The concept of miscarriage of justice is adequate to deal with cases where counsel fails?

Mr Hoare: Yes, it is. In fact, the negligence of counsel is not a separate ground of appeal. It falls within the rubric of a miscarriage of justice.

CHAIR: How many questions did you take on notice?

Mr Hoare: What offers did I make? I will make sure I fulfil them.

CHAIR: It is not like you to make an offer! There are statistics on applicants who lost their appeal but later—

Mr Hoare: Succeeded in either a pardon or demonstrated—

CHAIR: Pardons are as rare as hen's teeth.

Mr Hoare: We are speaking in the context of wrongful convictions, which I think would incorporate pardons or otherwise some type of—

CHAIR: What was the other one?

Ms Cappellano: The potential costing of other jurisdictions' criminal cases review units.

CHAIR: The clincher is: can you get that to the secretariat by 1 February?

Mr Hoare: In respect of the first, I will make inquiries now of the people I know who run the Innocence Project at Griffith. In respect of the second, I will get my best people on it.

CHAIR: Thank you for your evidence today.

The committee adjourned at 1.45 pm.