Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023

Submission No: 4

Submitted by: Legal Aid Queensland (AMENDED)

Publication: Making the submission and your name public

Attachments:

Submitter Comments:

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Amended Submission by Legal Aid Queensland

23 January 2024

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023*.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997,* LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ is the largest criminal law practice in Queensland and regularly provides legal advice and representation services to people in proceedings in the Court of Appeal both via a dedicated specialist team of in-house practitioners, and its network of preferred suppliers.

Submission

LAQ acknowledges the significant impact of the findings of Commission of Inquiry into Forensic DNA Testing in Queensland and the Commission of Inquiry to examine DNA Project 13 concerns (the DNA Inquiries), and the need for the criminal justice system to effectively respond to possible unjust outcomes arising as a result.

Considering the specificity of the circumstances these amendments are intended to address, LAQ is concerned as to the long-term ongoing need for the expanded double-jeopardy provisions. 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.

Additional costs

The implementation of the subsequent appeal provisions in Clause 14 in particular is likely to result in an increase in numbers of litigants before the courts, as well as contact by convicted persons with LAQ seeking legal advice and assistance in relation to an application for leave for a subsequent appeal. While the Explanatory Notes to the Bill acknowledge there will be additional administrative and operational costs[1] and that the number of these matters cannot be predicted, it is noted this is not expected to present significant additional costs based on the information available regarding the experience in other jurisdictions.[2] Nonetheless, LAQ envisages the subsequent appeal provisions to require additional services, including an increase in the provision of legal advice irrespective of whether an application for leave for a subsequent appeal, as well as grants of legal assistance to both asses merit and provide representation. This in turn will see the incurring of additional costs.

For example, LAQ provides grants of legal assistance for appellants appearing in the Court of Appeal who meet both the means and merits tests. Application of the merits test requires consideration of the complete transcript of the court proceedings, documentary exhibits, transcripts of interviews and audio-visual recordings, where required, and for advice to be provided by a barrister as to whether an application for legal assistance meets the merits test (a 'merit assessment').[3]

An application for leave for a subsequent appeal, by its nature, is likely to be a more complex form of appeal. Therefore, such appeals will not only require a consideration of the aforementioned material but will also require the collation and significant analysis of the fresh or new compelling evidence, which will most likely incur costs in excess of the current standard grant of legal assistance available for existing appeals.

Drafting of the provisions

LAQ notes draft provision s.671AB in Clause 14 and the amendment of s.678D in Clause 32 contain elaborations on the principles of fresh and new evidence which it considers are unnecessary. Namely, the underlined sections of the below:

> **Clause 14 671AB Fresh and compelling evidence and new and compelling evidence—meanings**
>
> 1) This section applies for the purpose of deciding under this chapter division whether there is fresh and compelling evidence or new and compelling evidence.
>
> 2) Evidence is fresh if—
>
> a. the evidence was not adduced in the proceedings in the court of trial before which the appellant was convicted; and
>
> b. either—
>
> i. the evidence could not have been adduced in the proceedings in the court of trial with the exercise of reasonable diligence by the defence; or
>
> ii. the evidence could have been adduced in the proceedings in the court of trial with the exercise of reasonable diligence by the

[1] Explanatory Notes, Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (Qld), 6.
[2] Explanatory Notes, Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (Qld), 7.
[3] Legal Aid Queensland, Grants Handbook, Criminal Law Appeals – Court of Appeal.

defence but was not because of the incompetence or negligence of a lawyer acting for the appellant in those proceedings.

3) For subsection (2)(b)(i), the defence is taken not to have failed to exercise reasonable diligence in relation to the evidence if—

   a. the prosecution failed to comply with the prosecution's obligation mentioned in section 590AB(1) in relation to the evidence; and the defence did not discover

   b. the evidence only because of the failure to comply with that obligation.

4) Evidence is new if—

   a. the evidence was not adduced in the proceedings in the court of trial before which the appellant was convicted; and

   b. the evidence could have been adduced in the proceedings in the court of trial with the exercise of reasonable diligence by the defence.

5) Under this chapter division, evidence that is both fresh evidence and new evidence is taken to only be fresh evidence.

6) Evidence is compelling if—

   a. the evidence is reliable; and

   b. the evidence is substantial; and

   c. the evidence

      i. is highly probative in the context of the issues that were in dispute in the proceedings in the court of trial before which the appellant was convicted; or

      ii. would have substantially weakened the case for the prosecution in the proceedings in the court of trial.

7) Evidence that would be admissible under this chapter division is not precluded from being fresh and compelling evidence or new and compelling evidence merely because it would have been inadmissible—

   a. in the proceedings in the court of trial before which the appellant was convicted; or

   b. in earlier proceedings in the Court for an appeal or subsequent appeal against the appellant's conviction.

8) In this section, the defence is the appellant or a lawyer acting for the appellant in proceedings in the court of trial before which the appellant was convicted.

Clause 32 Amendment of s 678D (Fresh and compelling evidence – meaning

1) Section 678D(1), after 'murder'—

   insert—

   or a prescribed offence

2) Section 678D(2)(b), 'diligence.'—

   omit, insert—

   diligence by—

      i. a police officer in relation to the investigation of the commission of the offence; or

      ii. (ii) a prosecutor in relation to the prosecution of the offence.

Judicial consideration of the admission of fresh and new evidence in appeal proceedings has a lengthy history in Australian courts.[4] The principles are consistently espoused in the following general terms;

- Fresh evidence is evidence which either did not exist at the time of the trial or which could not then with reasonable diligence have been discovered.
- New or further evidence is evidence on which a party seeks to rely in an appeal which was available at trial or could with reasonable diligence then have been discovered.

As identified in *Roberts v the Queen* (2020) 60 VR 431 at [43]:

> *…..Fourth, the notion of fresh evidence as against new evidence reflects an underlying concept commonly applied by intermediate appellate courts in this country*. (emphasis added)

Subsequent Appeals – Clause 14 s.671AB

A review of equivalent interstate legislation relating to subsequent appeals reveals the underlined words and provision in Clause 14 and Clause 32 as extracted above, are not existent elsewhere, and depart from a long line of judicial consideration of the principles of 'fresh' and 'new' evidence, creating a marked difference from comparable legislation.

LAQ considers it is unnecessary to further clarify the provisions as drafted. It risks unduly limiting the application of the provisions, and is apt to create disparity and unfairness in the admission of fresh or new evidence amongst appellants/applicants.

LAQ identifies three categories of appellants/applicants who under current laws may wish to adduce fresh or new evidence in their appeals:

1. Appellants/applicants who have filed their notice of appeal but have not yet had their matter finalised in the Court of Appeal, who may file an application for leave to adduce evidence in accordance with Rule 108 *Criminal Practice Rules 1999* (Qld).

2. Appellants/applicants who have not previously filed an appeal against their conviction but who may file a Form 28 – Notice of application for extension of time within which to appeal with their appeal notice, along with an application for leave to adduce evidence in accordance with Rule 108 *Criminal Practice Rules 1999* (Qld).

   R v Tait [1999] 2 Qd R 667 articulates the relevant considerations for determining whether an application to extend time for filing an appeal should be granted:

   - Whether there is any good reasons shown for the delay, and
   - Whether it is in the interests of justice to grant the extension (often necessitating a provisional assessment of the general merits of the appeal and any prejudice to the respondent).

[4] see, for example *Ratten v The Queen* (1974) CLR 510, *Lawless v The Queen* (1979) 142 CLR 659, *Gallagher v The Queen* (1986) 160 CLR 392, *Mickelberg v The Queen* (1989) 167 CLR 259, and in Queensland, *R v Katsidis; ex parte Attorney-General* [2005] QCA 229 and *R v Spina* [2012] QCA 179.

Conceivably this category could also include an appellant who previously abandoned their appeal. If the court considers it necessary in the interests of justice, it may set aside the abandonment and re-instate the appeal (see rule 70 *Criminal Practice Rules 1999* (Qld) and considered in *R v Marriner* [2007] 1 Qd R 179).

3. Applicants who have previously had their appeal against conviction dismissed by the Court of Appeal, whose only recourse should fresh or new evidence emerge, is to currently make an application for pardon, but who would be able to make an application for leave for a subsequent appeal under the proposed new subsequent appeals provisions.

The first two categories of appellants/applicants would have their applications to adduce fresh or new evidence determined by the common law as identified above. The third falls to have their application determined by reference to the legislation which is drafted in different terms. The addition of "by the defence", and s.671AB(3) for example, is a departure which may require judicial consideration.

Additionally, while LAQ notes the intent of the additions of "by the defence" and s.671AB(3) is to clarify that the defence will not have failed to exercise reasonable diligence if the prosecution fails to comply with its disclosure obligations, LAQ is concerned the further amendments proposed in this Bill risk the intent of these amendments not being realised as a result of the prescriptive language used which is not consistent with long-standing common law.

It should also be noted that the subsequent appeal provisions will also be of benefit to convicted persons not impacted by the DNA Inquiries – see for example *Van Beelan v The Queen* (2017) 262 CLR 565, *Ames v The King* [2023] SASCA 85, and *Roberts v The Queen* (2020) 60 VR 431. Caution should be exercised to ensure a consistent approach is afforded to an applicant who seeks to overturn a possible unjust outcome, irrespective of its source.

Double Jeopardy Exception – Clause 32 s.678D

LAQ further considers the amendment contained in Clause 32 to s.678D(2)(b) is also unnecessary.

Despite several jurisdictions within Australia introducing double jeopardy exception provisions, LAQ is aware of only two decisions where courts of appeal have applied them; *Director of Public Prosecutions v TAL* [2019] QCA 279, and *Attorney General for New South Wales v XX* [2018] NSWCCA 198.[5] In *Director of Public Prosecutions v TAL* it was not necessary for the court to consider whether the evidence was 'fresh' – it was accepted by all parties that it was.[6]

Attorney General for New South Wales v XX [2018] NSWCCA 198 provided significant analysis of the development of the double jeopardy exception legislation, and consideration as to whether the evidence could be considered 'fresh'.

[5] The matter was subject to a special leave application to the High Court of Australia with respect to whether the evidence was 'fresh' within the meaning of the statute. Special leave was refused: *Attorney General for New South Wales v XX* [2019] HCA Trans 052 (22 March 2019).
[6] *Director of Public Prosecutions v TAL* [2019] QCA 279, [20].

The High Court on hearing the application for special leave to appeal from the New South Wales Court of Criminal Appeal in that case noted "[E]vidence which is available to a party is not fresh evidence.".[7]

Double jeopardy exception provisions are already being interpreted with the due diligence consideration. Therefore LAQ does not believe the existing provisions in the Criminal Code require clarification in the way proposed. The underlined passages from Clause 32 as outlined above are in effect, in LAQ's view, unnecessary.

LAQ notes that with the exception of Western Australia, such a clarification is not present in comparable interstate legislation relating to double jeopardy exceptions.

As outlined at the beginning of this amended submission, LAQ urges the insertion of a legislated review mechanism to analyse the necessity of the expansion of the exception provisions, and to ensure there have been no unintended consequences arising.

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[7] *Attorney General for New South Wales v XX* [2019] HCA Trans 052 (22 March 2019).