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

Submission No:	5
Submitted by:	Queensland Law Society
Publication:	Making the submission and your name public
Attachments:	No attachment
Submitter Comments:	

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Office of the President

21 December 2023

Our ref: [LP:CLC]

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane QLD 4000

By email: LASC@parliament.qld.gov.au

Dear Committee Secretary

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

Thank you for the opportunity to provide feedback on the Criminal Code (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on these important amendments.

This response has been compiled with the assistance of QLS's Criminal Law Committee, whose members have substantial expertise in this area.

At the outset, QLS opposes any further weakening of the rule against double jeopardy because the current exception for murder only, on the basis of fresh and compelling evidence and in the interests of justice, strikes the appropriate balance for the need to maintain public confidence in the criminal justice system while upholding fundamental legislative principles.

Furthermore, it is also important to acknowledge that the current rule against double jeopardy does not affect the prosecution's ability to bring a charge in circumstances where charges against a person have never been laid or charges against a person were laid but then later discontinued.

In respect of the insertion of the new Chapter division 3 Subsequent appeals provisions, in principle, QLS supports the introduction of another independent and accessible avenue of appeal for defendants who have already unsuccessfully appealed to the Queensland Court of Appeal, but subsequently come into possession of further evidence that establishes a miscarriage of justice has occurred.

The Bill introduces significant legislative reforms in the context of the post-conviction review landscape in Queensland. The reforms are a legislative response to the significant findings of the Forensic DNA Commission of Inquiry. We note however that it is also important to evaluate the consequences of the proposed reforms with respect to its application outside the purview of the Commission's findings and recommendations.

Broadening of exceptions to double jeopardy rules

The Commission of Inquiry into DNA Testing in Queensland

Adverse publicity surrounding Queensland Health Forensic and Scientific Services **(QHFSS)** arose in response to the podcast about the murder of Shandee Blackburn. This was followed separately by a written submission from the Queensland Police Service **(QPS)** to the Women's Safety and Justice Taskforce which asserted that the QPS lacked confidence in QHFSS. The QPS submission 'amounted to a public denunciation of the laboratory's integrity by an unimpeachable authority' and, coupled with significant public interest in potential errors at QHFSS, led the Government to establish the Commission of Inquiry into DNA Testing in Queensland (**Inquiry**).

The Commissioner, Walter Sofronoff KC, made a number of observations and findings relevant to the consideration of any reform of Chapters 67 and 68 of the Criminal Code. Importantly, it was found that 'the methods, systems and processes used at the forensic DNA laboratory do not, in many ways, measure up to best practice.'[1] The Commissioner highlighted that this was the result of a myriad of failings, chief among them QHFSS' focus on 'quick reporting of results to the detriment of high-quality science.'[2] The laboratory's focus on turnaround times was driven, in large part, by chronic underfunding. The Commissioner observed that these issues of underfunding were well known at the highest levels of Queensland Health and the Queensland Government as far back as early 2005.[3]

Various experts engaged to assist the Inquiry also identified that the client service-provider funding model employed by QHFSS and QPS risked undermining the laboratory's scientific integrity: '[A] funding model where police specifically pay for forensic services...can focus the attention of the forensic service provider solely to services and processes required by the police and not the broader justice system. In doing so it can reduce the independence of the decision making of the laboratory.'[4]

This misaligned funding model, at times, 'led to outcomes which prioritised some QPS priorities (such as turnaround times) over broader criminal justice system priorities such as obtaining all forensic evidence relevant to a case, and explaining clearly the uncertainties and caveats that should properly be placed on results reported by the laboratory.'[5] QHFSS' failures were also attributed to: the location of the laboratory as an appendage of the Department of Health; mismanagement and dishonesty by senior managers; and, the culture of the laboratory as ineffective at allowing scientific disagreement to be ventilated.[6]

As the Commissioner identified, the totality of these failings have serious negative ramifications for the criminal justice system:

> I do not doubt that the failure to obtain all of the evidence available from samples has affected some cases. In most cases that will have reduced the prospects of conviction by a failure to obtain evidence which could support a complaint. It is possible, but unlikely that the failures could have resulted in a wrong conviction. ... The number of cases

[1] Walter Sofronoff KC, Commission of Inquiry into Forensic DNA testing in Queensland (Final report, 13 December 2022) xii [32].
[2] Ibid xii [32].
[3] Ibid 12-13 [90].
[4] Ibid 467 [1537].
[5] Ibid 473 [1563].
[6] Ibid xii [34]

actually affected, and whether with different processes those cases would have resulted in different outcomes, cannot be quantified.[7]

The Commissioner's final report recommends that the Queensland Government retrospectively review two specific categories of cases to determine which cases or samples should be subject to further testing, analysis or interpretation, and that such review should be conducted 'in accordance with a set of principles developed by the Queensland Government in consultation with stakeholders in the criminal justice system and made publicly available'.[8] This review will eliminate the relevant samples which do not require re-testing; for example, where the case 'has been resolved in the criminal justice system in a way that the DNA result would have had no effect on outcome or decision-making of the Crown or accused.'[9]

As the recommended set of principles and case review are yet to be finalised, the number of cases materially affected by QHFSS' failings remains unquantified. Nonetheless, this process may identify cases which call into question an acquittal, in circumstances where the proper provision of accurate expert DNA evidence would now increase the prosecution's chances of a conviction were the person to be re-tried for the same offence. It is important to highlight, however, that such a situation arises through no fault of the acquitted person, but rather due to the various failings outlined above.

The rule against double jeopardy

Presently, the rule against double jeopardy prohibits successive prosecutions for the same offence in Queensland, with the exception of murder and some tainted acquittals. There are various reasons of legal principle and policy which underpin the double jeopardy rule, including that 'a person should not be harassed by multiple prosecutions about the same issue, the need for finality in proceedings, the sanctity of a jury verdict, the prevention of wrongful conviction and the need to encourage efficient investigations.'[10]

The rule against double jeopardy works hand in hand with the principle of finality in criminal law, which is important to the proper and economical allocation of public resources. At its core, however, the rule against double jeopardy is also a fundamental control on state power, given that in every case, the power and resources of the state will be greater than those of an individual accused of a crime.[11] The rule is central to the accusatorial character of Australia's criminal trial process. This process is not, by its very nature, a search for the truth of what occurred, but rather a search for whether the prosecution (as a representative of the Crown) is able to prove the accused's guilt to the requisite standard.[12] The accusatorial system maintains the integrity of the investigative process and 'enshrines the principle that confines police and prosecution authorities to one chance to put their case against an accused'.[13]

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[7] Ibid xii [33].
[8] Ibid, recommendations 13 – 14.
[9] Ibid 52 [221].
[10] Criminal Code (Double Jeopardy) Amendment Bill 2007, Explanatory Notes, 1 https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2007-1293>. See also The Hon Michael Kirby AC CMG in 'Carroll, Double Jeopardy and International Human Rights Law' (2003) 27 Criminal Law Journal 1, 14-21.
[11] Kirby (n 10) 14.
[12] Ibid 15
[13] Ibid 32-3.

The fundamental nature of the rule against double jeopardy within Australia's criminal justice system is recognised by s 34 of the Human Rights Act 2019 (Qld), which provides: 'A person must not be punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law'.

In this way, the rule against double jeopardy encourages efficient police investigations, safeguards against the use of prosecutions as a tool of state oppression, and acts as a bulwark against repeated attempts to subject an accused to the criminal justice process.

Murder as an exception to the double jeopardy rule

In Queensland, the only exceptions to the rule against double jeopardy are for murder, when 'fresh and compelling evidence' is discovered, and tainted acquittals. These exceptions were introduced in 2007 by way of the Criminal Code (Double Jeopardy) Amendment Bill 2007 (**Double Jeopardy Bill**), which modified the application of the double jeopardy rule (in relation to murder) 'to enable a person acquitted of murder or a lesser offence to be retried for murder if there is fresh and compelling evidence of guilt'.[14] Importantly, the Court can only order a retrial if it is satisfied that in all the circumstances it is in the interests of justice to do so.

The Bill seeks to expand the scope of s 678B of the Criminal Code to allow applications for retrials on the basis of fresh and compelling evidence for serious offences other than murder. While we acknowledge that other Australian jurisdictions have further diluted the principle against double jeopardy beyond the current exception for murder only, we urge the Government to maintain the current position because it strikes an appropriate balance between the need to maintain public confidence in the criminal justice system while upholding fundamental legislative principles.

We note, in particular, the significant work done by the Law Commission of England and Wales (**Law Commission**), whose findings and recommendations have laid the foundation for laws limiting the rule in the UK and in other jurisdictions. Relevantly, the Law Commission observed:

> It is, of course, always the case that the law (and particularly the criminal law) should represent the prevailing values of society, and it is important to recognise that such values can and do change. Even so, double jeopardy serves to maintain confidence in the criminal justice system in a way that is too easily underestimated. The reaction to a particular case can be vocal, powerful and immediate. In a highly charged atmosphere which might understandably arise it may be all too easy to discount the reassurance gained by reflecting, in less emotive circumstances, on long-standing traditional bulwarks of individual liberty.[15]

The Law Commission went on to note:

> That does not necessarily mean that no exception can be justified. Any exception must, however, be limited to those types of case where the damage to the credibility of the criminal justice system by an apparently illegitimate acquittal is manifest, and so serious that it overrides the values implicit in the rule against double jeopardy. The boundaries of any such

[14] Criminal Code (Double Jeopardy) Amendment Bill 2007, Explanatory Notes, 1 <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2007-1293>.

[15] The Law Commission, *Double Jeopardy and Prosecution Appeals* (Final Report, Law Com No 267, March 2001) 39 [4.18] <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc267__Double_Jeopardy_Report.pdf>.

> exception must be clear cut and notorious. Thus the question whether there should be an exception at all is inextricably bound up with the scope of any exception. Is it possible to identify a category of cases in respect of which the objective of achieving accurate outcomes clearly outweighs the justifications underlying the rule against double jeopardy?[16]

On this basis, the Law Commission considered whether there was a specific category of cases, within the larger category of offences potentially attracting a life sentence, which are serious enough to justify the application of a new evidence exception to the rule against double jeopardy. The Law Commission concluded that the only offence justified to come within the scope of any exception to the rule is murder. Importantly, the Law Commission identified the widespread perception 'that murder is not just more serious than other offences but qualitatively different', where the effect of this difference is that a manifestly illegitimate acquittal for murder 'sufficiently damages the reputation of the criminal justice system so as to justify overriding the rule against double jeopardy'.[17]

In this way, murder continues to be regarded as a crime standing out from all others because its consequences are so final as to be irreversible:

> The harm caused by homicide is absolutely irremediable, whereas the harm caused by many other crimes is remediable to a degree. Even in crimes of violence which leave some permanent physical disfigurement or psychological effects, the victim retains his or her life and, therefore, the possibility of further pleasures and achievements, whereas death is final. This finality makes it proper to regard death as the most serious harm that can be inflicted on another ...[18]

This was, in effect, the position taken by the Queensland Government in its previous consideration of exceptions to the rule against double jeopardy. Explanatory notes to the Double Jeopardy Bill highlighted that a key safeguard of the Bill was its application only to a charge of murder where fresh and compelling evidence was identified.[19] Further, the Government recognised the risks attending to any further watering down of the rule against double jeopardy in the Queensland context vis-a-vis its New South Wales counterpart:

> In this bill I have tried to draw the balance between the two principles – that the guilty should be convicted and that acquitted persons should not live the rest of their lives under threat of retrial – more finely. The earlier bill provided for a retrial where 'fresh and compelling evidence' had come to light in any case where the accused was to be tried for a 'life sentence offence'. That applies only to a few very serious offences in New South Wales, but it means rather more offences here. In this bill I propose that the fresh evidence retrial should only apply to prosecutions for murder. ... If this bill is passed, we will be largely following the English and New South Wales examples, but we will be modifying them to suit the local criminal law...[20]

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[16] Ibid 40 [4.22].
[17] Ibid 41-2 [4.29-30].
[18] Andrew Ashworth, *Principles of Criminal Law* (3rd ed, 1999) 263, as quoted in Law Commission (n 16) 42 [4.31].
[19] Criminal Code (Double Jeopardy) Amendment Bill 2007, Explanatory Notes, 4.
[20] Queensland, *Parliamentary Debates*, Legislative Council of Queensland, 19 April 2007, 1387 (Peter Wellington).

<u>Proposed inclusion of sex offences as exceptions to the rule against double jeopardy</u>

The Bill expands the fresh and compelling evidence double jeopardy exception to 10 prescribed offences, comprised of four unlawful killing offences and six sex offences.

As outlined above, the double jeopardy rule is founded on long-standing fundamental principles and should only be used as an exceptional remedy. QLS holds the strong view that deficiencies in funding and government processes should not be used as a justification for expanding offences to be included in the exceptions to the rule against double jeopardy.

QLS holds specific offence based objections to the inclusion of sex offences as prescribed offences, on the basis that the evidentiary matrixes for sex offences involve a gamut of facts and outcomes, and, ultimately, the victim's life is preserved. In particular, QLS opposes the inclusion of sexual assault as an exception, as the factual matrixes of this type of offence are very broad and constitute a somewhat less serious form of sexual offending.

If the rules against double jeopardy are to be relaxed, QLS holds a strong view that the exceptions to the rule against double jeopardy should be reserved for offences resulting in the death of a person as there is a higher likelihood that these might include miscarriages of justice and false convictions. As the Law Commission made clear, murder is an offence that is qualitatively different to other serious offences that attract a life sentence. QLS's contends that the Government has not justified going beyond the Law Commission's views.

<u>Risks associated with broadening the exceptions to the rule against double jeopardy</u>

There are significant risks associated with any further broadening of the exceptions to the rule against double jeopardy. These risks are heightened in the present landscape of intense media scrutiny and public interest, where QHFSS' failings (as a Government-funded authority) are ultimately the result of a quest for 'quick reporting of results to the detriment of high-quality science',[21] the consequences of which should not be borne by individual defendants who have answered a charge in the usual course of criminal justice proceedings according to law.

We set out, briefly, the risks associated with expanding the scope of s 678B of the Criminal Code to allow applications for retrials on the basis of fresh and compelling evidence for serious offences other than murder.

First, weakening the rule against double jeopardy undermines the basal accusatorial character of our criminal justice system and substitutes, in its place, an inquisitorial "search for truth". The Hon Michael Kirby AC CMG highlights this 'would alter, in a fundamental way, the relationship between the state, police and prosecution agencies and the individual. The change would not be one conducive to liberty. Such a fundamental disconformity should not be introduced without a serious re-examination of its compatibility with the accusatorial form of criminal trial that is basic to the Australian criminal justice system.'[22]

Second, it would further limit the ability to keep the power and resources of the state in proper check and raises the possibility of politically targeted or ill-intentioned prosecutions. As the Supreme Court of the United States of America have stated, 'to permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high

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[21] Sofronoff (n 1) xii [32].
[22] Kirby (n 10) 33.

risk that the Government, with its vastly superior resources, might wear the defendant down so that even though innocent he may be found guilty.'[23]

Third, broadening the exceptions and applying them to any cases arising from the review recommended by the DNA Inquiry would offend the principle of retrospectivity, given that it would necessarily need to apply to acquittals occurring *after* any reforms have commenced. In this respect, we note a key safeguard provided in the 2007 Double Jeopardy Bill was that the exceptions to the double jeopardy rule applied only to acquittals occurring *after* its commencement.

Further, in relation to a retrial for murder there must be 'fresh and compelling evidence against the acquitted person in relation to the offence'.[24] However, evidence will only be fresh if it 'was not adduced in the proceedings in which the person was acquitted'; and 'could not have been adduced in those proceedings with the exercise of reasonable diligence.'[25] As the Queensland Court of Appeal recently stated in *Director of Public Prosecutions v TAL*, this fresh evidence test engages the principles relating to the finality of judgments and the conclusiveness of jury verdicts:

> Because of the significance accorded to a jury verdict as conclusive and inscrutable, and because of the operation of the principle of finality, the power to order a second trial on this ground has been limited. First, there is the requirement for the evidence to be "fresh" in the technical sense of that term. The reason for that requirement is obvious. In many cases, perhaps in most contested cases, it will be possible, by means of further efforts after a guilty verdict, to add to and strengthen a case as originally conducted. To permit a retrial because more evidence has emerged *when it could reasonably have been obtained for the first trial* would offend the principle of finality which requires each party to put forward their best case once and for all. Second, there is the requirement that the new evidence could have led (with a defined level of probability) to a different result. This requirement ensures that due deference is given to a jury's verdict as a true verdict even in hindsight. The satisfaction of these two requirements demonstrates that there has been a miscarriage of justice.[26]

As regards the DNA evidence in that case, the Court went on to state:

> The *Criminal Code* establishes a stringent series of conditions that must be met before a person can be tried again for murder after a jury's acquittal because the presumption is that the jury's verdict was a true verdict. The stringency is there because the legislature has recognised that, while circumstances might arise that justify a second trial, and while advances in techniques of proof will give rise to new forms of proof that satisfy the strict statutory requirements, a retrial of an acquitted person is an extraordinary proceeding.[27]

In this way, the law sets a high threshold for any retrial for murder to appropriately account for the extraordinary circumstances that must exist to justify putting a person in double jeopardy. Accordingly, we oppose any further weakening of the rule against double jeopardy in the present circumstances. Such circumstances 'are not always well suited to the adoption of sound law

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[23] *United States v Scott* (1978) 437 US 82, 98 Ct 2187.
[24] *Criminal Code Act 1899* (Cth) s 678B.
[25] *Criminal Code Act 1899* (Cth) s 678D(2).
[26] *Director of Prosecutions v TAL* [2019] QCA 279, [24] (emphasis added).
[27] Ibid [68].

reform that challenges fundamental principles that have existed for hundreds of years.'[28] If such change is to be seriously and properly considered, there is a strong argument for referring it to a law reform body for thorough impartial consideration.

In our view, the exception for murder only on the terms of the current provisions (fresh and compelling evidence and in the interests of justice) strikes the appropriate balance between the need to maintain public confidence in the criminal justice system while upholding fundamental legislative principles.

Additional appeal rights

Clause 14 – Insertion of new Chapter division 3 Subsequent appeals

The proposed insertion of new subsequent appeal provisions will, if enacted, expand the appeal rights of convicted persons who have exhausted their existing judicial avenues of appeal. There is a manifest distinction between the proposal to weaken the rule against double jeopardy and this proposal, which would ultimately afford a defendant an additional appeal right where there is fresh and compelling evidence that their conviction may have been a miscarriage due to an omission or error on the part of the state. In such circumstances this evidence would be fresh and compelling, given the defendant would not have been provided the DNA evidence at the time of the trial and would not have had any control over QHFSS' or QPS' dealing with the DNA evidence.

Additional appeal rights

Currently in Queensland, an appellant's right to appeal is determined solely by statute. It is commonly accepted that an appellant is only entitled to one post-conviction appeal.[29] Once an appeal has been conducted, the Queensland Court of Appeal has upheld the view that it is limited in being able to hear any subsequent further appeals.[30] Similarly, the High Court of Australia has determined it has no original jurisdiction regarding criminal appeals.[31]

We have previously advocated for the introduction of another independent and accessible avenue of appeal for defendants who have already unsuccessfully appealed to the Queensland Court of Appeal, but subsequently come into possession of further evidence that establishes a miscarriage of justice has occurred. We are supportive of a procedure for a convicted person to put new, compelling evidence before the Court.

However, we acknowledge the risk in enlarging appeal rights and the possibility this may lead to endless attempts by often self-represented prisoners to claim they have found new and compelling evidence. We suggest this could be dealt with by way of a filtering process between an application and a full hearing; for example, an application for leave on the papers to be decided by a single judge.

We note also the difficulties that a post-conviction appellant would face in mounting an appeal on the basis of fresh and compelling evidence. Such appellants are often lacking adequate legal representation. Additionally, the onus of proof reverts where the applicant is required to prove how a conviction is unsafe or cannot be supported having regard to the evidence. This is difficult to do having regard to the fact that the appellant is incarcerated and without the financial and

[28] Kirby (n 10) 34.
[29] *R v Edwards* (No 2) [1931] SASR 376.
[30] *R v Stanley* [2014] QCA 116; *R v Cockrell* [2015] QCA 73.
[31] *Mickelberg v R* (1989) 167 CLR 259, 267.

other resources required to conduct an examination of the case. Further, the appeal process is constrained in most instances to examining the original trial. Issues associated with the conduct of the investigation, scientific evidence, or witness identification are almost impossible to consider, research and articulate within the confines of the correctional services environment. Accordingly, there would need to be appropriate processes and funding put in place to support appellants whose conviction comes into question in the face of fresh and compelling evidence.

Clause 14 - Inclusion of 'by the defence'

We do not support the phrase *'by the defence'* in the drafting in Clause 14.

The mischief in this passage of drafting is to wrongly place an onus on the defendant alone to exercise due diligence to tender the relevant evidence at the original trial, and thereby absolve the Crown of any responsibility to do so.

Members' concerns regarding this passage arise by virtue of its implications when applied outside the purview of the findings of the recent forensic DNA inquiries. While the circumstances that underpin the draft provisions containing this passage may be intended to enhance the overall fairness of the appeal process, it is crucial to underscore the role of the Crown in safeguarding the principles of justice at every stage of the criminal justice system. This responsibility is particularly pronounced when considering legislative changes that impact the rights and liberties of individuals.

Whatever the conduct of the defence, the proposed inclusion of *'by the defence'* will limit the particular draft provisions applicability to the conduct of the defence alone. However, it is conceivable that the conduct of the Crown could naturally influence an assessment when considering whether to allow a conviction to stand.

Simply put, the introduction of *'by the defence'* overlooks the Crown's duty to be fair. It is our members' experience that this has frequently underpinned appeals upheld on the basis that the original proceedings were marred by a miscarriage of justice. This is of particular importance when considered in conjunction with the broadening of the exceptions to the rule against double jeopardy in Queensland.

This concern is held on the basis that it is the Crown that has the resources. The Crown controls the investigation and the witnesses to be proofed and called in its case. The Crown has the duty to place before the jury in its case all relevant evidence in order to discharge its duty to be fair. This is more than an obligation of the Crown to disclose to the defence the relevant evidence, if it is in its' possession. Rather, the obligation extends to the Crown actually tendering the evidence in its case. Members rely on the matters of *R v Apostilides*[32] and *R v Gibson*[33] in this regard and, more recently, the Queensland Court of Appeal decision in *R v Manning*[34].

QLS reiterates its acknowledgement of the context within which the amendments are being proposed. While QLS encourages the Government's commitment to addressing the consequences of the respective Forensic DNA Commissions, the contemplation and development of legislative amendments to criminal appeal pathways should reflect the Crown's

[32] (1984) 154 CLR 563.
[33] [2002] NSWCCA 401.
[34] [2017] QCA 23.

duty to be fair. To limit the definition of 'fresh evidence', which is a pre-condition of the additional appeal right for a defendant, to evidence that could not have been adduced with due diligence *by the defence* wrongly limits the fundamental precept that it is the Crown's obligation to be fair. Accordingly, QLS strongly urges the words 'by the defence' are removed from the drafting in Clause 14.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

Chloé Kopilović
President