Parliamentary Committees



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

Report No. 1, 57th Parliament
Community Safety and Legal Affairs Committee
February 2024

Community Safety and Legal Affairs Committee[1]

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Acknowledgements

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All web address references are current at the time of publishing.

[1] The Community Safety and Legal Affairs Committee was established as a portfolio committee of the Legislative Assembly on 13 February 2023, at which time it took on legislative scrutiny responsibilities of the former Legal Affairs and Safety Committee, which was discharged on the same date. The committee is also aided by the fact that 5 of the 6 members of the former committee are also members of the Community Safety and Legal Affairs Committee. The former committee consisted of Mr Peter Russo MP, Member for Toohey and Chair, Ms Laura Gerber MP, Member for Currumbin and Deputy Chair, Mr Stephen Andrew MP, Member for Mirani, Ms Jonty Bush MP, Member for Cooper, Mr Jason Hunt MP, Member for Caloundra and Mr Jon Krause MP, Member for Scenic Rim.

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Chair's foreword

This report presents a summary of the Community Safety and Legal Affairs Committee's examination of the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

In expanding exceptions to the double jeopardy rule and providing an avenue for subsequent appeals, this Bill modernises core aspects of Queensland's criminal justice system by enhancing how we respond to unjust acquittals and wrongful convictions.

The rule of double jeopardy and the principle of finality provide important safeguards against procedural abuse, and should undoubtedly be preserved. However, it is often necessary to update fundamental civic principles as community expectations evolve. I believe this Bill strikes an appropriate balance between reform in the spirit of justice, and the preservation of the protections enshrined in these long-established principles.

In every other Australian jurisdiction, double jeopardy exceptions encompass serious offences such as rape, attempted murder, and certain sexual offences against children. In Queensland, the exception applies only to murder. This broad application of the principle of double jeopardy has resulted in the acquittal of those accused of the most abhorrent of crimes – when the evidence indicates their guilt.

The Bill's provision for a subsequent appeals framework is an equally significant reform for Queensland. Just as the community has an expectation that guilty parties are convicted of crimes when evidence points to their guilt, the community expects that those convicted of serious crimes are given the opportunity to have these convictions overturned when evidence emerges indicating their innocence.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the department. I also thank the former Legal Affairs and Safety Committee, and in particular, former Deputy Chair Laura Gerber MP, for their tireless efforts in conducting this inquiry.

I commend this report to the House.

Peter Russo MP

Chair

Recommendations

The committee recommends the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 be passed.

Executive Summary

On 29 November 2023, the Hon Yvette D'Ath MP, Attorney-General, Minister for Justice and Minister for the Prevention of Domestic and Family Violence, introduced the Criminal Code and other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (Bill) into the Queensland Parliament. The Bill was referred to the Legal Affairs and Safety Committee (committee) for detailed consideration.

The Bill amends the *Criminal Code Act 1899* (Criminal Code) and the *Appeal Costs Fund Act 1973* (Appeal Costs Fund Act). The objectives of the Bill are to enhance criminal justice system responses to possible wrongful convictions and unjust acquittals by:

- establishing a statutory framework to allow a person convicted on indictment or of a summary offence under section 651 of the Criminal Code to make, with the leave of the Court of Appeal, a subsequent appeal against the conviction; and
- expanding the fresh and compelling evidence double jeopardy exception to 10 prescribed offences in addition to murder.

Stakeholders and subscribers were invited to make written submissions on the Bill and the committee received 5 submissions. A public hearing was held on 29 January 2024 in Brisbane to speak with submitters and stakeholders. A public briefing was also held with representatives from the Department of Justice and Attorney-General on 1 February 2024.

The key issues raised during the committee's examination of the Bill included:

- risks of increased numbers of litigants applying to the Court of Appeal or for public legal services
- processes to filter frivolous or vexatious appeal applications
- different tests based on the type of evidence brought for an appeal
- a commission to review wrongful convictions
- the purpose of the double jeopardy principle
- exceptions to the double jeopardy and the rationale of expanding these exceptions
- safeguards to prevent the abuse of the double jeopardy exception by the prosecution
- in-built legislative review
- provisions operating retrospectively.

The committee is satisfied that the Bill gives sufficient regard to the rights and liberties of individuals and the institution of Parliament, and that any limitations of human rights, as set out in the *Human Rights Act 2019*, are reasonable and justifiable.

The committee recommends the Bill be passed.

1 Introduction

1.1 Referral

Attorney-General, Introduction speech

The principle of finality—that decisions made by the court should not be reopened—and the principle of justice—the conviction of the guilty and acquittal of the innocent—are pillars of our criminal justice system. However, a dynamic tension can exist between the competing demands of these two principles…

The reforms in the bill enhance the operation of the criminal justice system through mechanisms to correct possible erroneous outcomes and maintain balance in the criminal justice system, helping to ensure the guilty are convicted and the innocent are set free.[2]

On 29 November 2023, the Hon Yvette D'Ath MP, Attorney-General, Minister for Justice and Minister for the Prevention of Domestic and Family Violence, introduced the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (Bill) into the Queensland Parliament. The Bill was referred to the former Legal Affairs and Safety Committee (former committee) for detailed consideration. The former committee was discharged by a motion of the House on 13 February 2024 and the Community Safety and Legal Affairs Committee (committee) was established as a portfolio committee of the Legislative Assembly on the same day. The Bill was transferred to the committee which has taken carriage of all evidence provided to the former committee.

1.2 Policy objectives of the Bill

The objectives of the Bill are to enhance how the criminal justice system responds to possible wrongful convictions and unjust acquittals by:

- establishing a statutory framework to allow a person convicted on indictment or of a summary offence under section 651 of the *Criminal Code Act 1899* (Criminal Code) to make, with the leave of the Court of Appeal, a subsequent appeal against the conviction; and
- expanding the 'fresh and compelling evidence' double jeopardy exception to 10 prescribed offences in addition to murder.[3]

1.3 Consultation

According to the explanatory notes, consultation occurred when drafting the amendments with the following stakeholders:

- Chief Justice of the Supreme Court of Queensland
- Chief Judge of the District Court of Queensland
- Chief Magistrate of the Magistrates Court of Queensland
- President of the Court of Appeal of Queensland
- legal stakeholders
- victim support services
- First Nations stakeholders
- other interested stakeholders.

2 Record of Proceedings, 29 November 2023, p 3804.

3 Explanatory notes, p 1.

The explanatory notes state that feedback received during the consultation process was taken into account in finalising the amendments in the Bill.[4]

1.4 Legislative compliance

The committee's deliberations included assessing whether or not the Bill complies with the Parliament's requirements for legislation as contained in the *Parliament of Queensland Act 2001*, *Legislative Standards Act 1992* (LSA) and the *Human Rights Act 2019* (HRA).

1.4.1 *Legislative Standards Act 1992*

Fundamental legislative principles require that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament.[5]

The committee's assessment of the Bill's consistency with the LSA considered potential issues relating to following fundamental legislative principles (FLPs) raised by the Bill:

- regarding rights and liberties of individuals:
  - general rights and liberties of individuals
  - principle of retrospectivity
- sufficient regard to the institution of Parliament.

Committee comment

The committee is satisfied that the Bill gives sufficient regard to the rights and liberties of individuals and the institution of Parliament. Any relevant considerations of FLPs are discussed in section 2 of this report.

1.4.2 *Human Rights Act 2019*

A law is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable.[6]

The committee's assessment of the Bill's compatibility with the HRA considered the potential issues and limitations relating to the following human rights raised by the Bill:

- freedom of expression (HRA, section 21)
- best interests of the child (HRA, section 26(2))
- right to liberty and security of person (HRA, section 29)
- right to a fair hearing (HRA, section 31)
- rights in criminal proceedings (HRA, section 32)
- right not to be tried or punished more than once (HRA, section 34)
- retrospective criminal laws (HRA, section 35).

4 Explanatory notes, p 9.

5 LSA, s 4(2).

6 HRA, s 8.

Committee comment

The committee is satisfied that any potential limitations on human rights proposed by the Bill are demonstrably justified. Any relevant considerations of human rights issues are discussed in section 2 of this report.

A Statement of Compatibility was tabled with the introduction of the Bill as required by section 38 of the HRA. The statement contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

1.5 Should the Bill be passed?

The committee is required to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 be passed.

2 Examination of the Bill

This section discusses key issues raised during the committee's examination of the Bill. It does not discuss all consequential, minor or technical amendments.

2.1 Subsequent appeal framework

2.1.1 Current law

Attorney-General, Introduction speech

Currently a person convicted of an indictable offence, or a summary offence in certain limited circumstances, may appeal their conviction to the Court of Appeal. However, a convicted person may only appeal their conviction once. After the appeal is determined, the matter is closed and there is no further right to make another appeal even if evidence later emerges that has the potential to exonerate the convicted person. While wrongful convictions are rare, the criminal justice system is not infallible and there is a risk that an innocent person may be convicted.[7]

The Criminal Code provides that appeals against convictions can be made following:

- a trial on indictment, or
- after conviction of a summary offence under section 651 of the Criminal Code.

The Court of Appeal hears criminal appeals. Once the Court of Appeal has heard and decided an appeal against a conviction, the court has no jurisdiction to hear more appeals against the same conviction.[8]

If an appeal to the Court of Appeal is unsuccessful, the convicted person may make an application to the High Court of Australia (High Court) for special leave to appeal, however:

- there is no automatic right to have an appeal heard
- the High Court has no jurisdiction to receive fresh evidence.

A convicted person's right of appeal is exhausted once they have been afforded the opportunity to have their appeal considered on the merits, regardless of whether or not all of the appellant's submissions were heard or determined.

After exhausting the right of appeal, the only remaining avenue available to a convicted person is to petition the Governor for a pardon. A person cannot make a subsequent appeal against the conviction to the Court of Appeal even if evidence later emerges indicating the person is innocent.[9]

2.1.2 Proposed amendments

The Bill amends Chapter 67 of the Criminal Code to introduce a framework for subsequent appeals against conviction with the leave of the Court of Appeal.[10] The Bill establishes a right of subsequent appeal for convicted persons who made an appeal, or applied for leave to appeal, where the Court of Appeal has:

- dismissed the original appeal in whole or in part
- determined the appeal subject to the special provisions under section 668F (substitute a new verdict or sentence)
- or refused to grant leave to appeal.

7 Record of Proceedings, 29 November 2023, p 3805.

8 Criminal Code, s 668D.

9 Explanatory notes, p 1.

10 Explanatory notes, p 2.

There is no limit on the number of subsequent appeals a convicted person may make under the new subsequent appeal framework, however they must obtain the leave of the Court of Appeal. The Court of Appeal must be satisfied that a subsequent appeal has a reasonable prospect of success.[11]

The explanatory notes state that:

- obtaining the leave of the Court of Appeal acts as a filter for vexatious or untenable appeals
- an appeal that lacks merit may be referred to the Court of Appeal for summary determination
- if the Court of Appeal considers an appeal or application to be frivolous or vexatious, the court may dismiss it summarily without calling any person to attend a hearing.[12]

The Bill provides that the right of subsequent appeal applies retrospectively to convictions, original appeals and applications for leave to appeal that have occurred prior to the Bill's commencement.[13]

The Bill provides that a person may make a subsequent appeal against the conviction on the ground that there is:

- fresh and compelling evidence, or
- new and compelling evidence.

Whether evidence is considered to be fresh and compelling or new and compelling will be decided by the Court of Appeal on a case-by-case basis considering a range of factors, including:

- whether the evidence existed or was reasonably discoverable by the defence leading up to and at the time of the trial
- whether the evidence is credible and provides a trustworthy basis for fact finding
- whether the evidence is of real significance or importance in relation to a matter to be proved on the appeal or proof of the appellant's guilt.[14]

2.1.2.1 Fresh evidence

There are two categories of *fresh* evidence in the subsequent appeal framework:

- evidence that:
    - was not adduced in proceedings, and
    - it could not have been adduced with the exercise of reasonable diligence by the defence.
- evidence that:
    - was not adduced in proceedings, and
    - it could have been adduced with the exercise of reasonable diligence by the defence, but was not because of the incompetence or negligence of a lawyer acting for the defendant in the trial.[15]

The Bill clarifies that the defence will not have failed the test of reasonable diligence if the prosecution fails to comply with its disclosure requirements, and that this was the only reason the defence did not

11 Explanatory notes, p 3.

12 Explanatory notes, p 3.

13 Explanatory notes, p 3.

14 Explanatory notes, p 4.

15 Explanatory notes, p 3.

discover the relevant evidence. This is to acknowledge the fact that the defence is entitled to assume that the prosecution has complied with their disclosure requirements.[16]

Fresh evidence could include:

- forensic evidence that has become available because of advances in science or technology
- evidence discrediting expert evidence relied on at trial
- new information about a person's capacity to engage and understand criminal proceedings
- a new piece of evidence that undermines a circumstantial case and strongly suggests the convicted person could not have committed the offence.[17]

2.1.2.2 New evidence

Evidence is defined to be *new* if:

- it was not adduced in the proceedings in the court of trial, and
- it could have been adduced with the exercise of reasonable diligence by the defence.

The Bill provides that if evidence is both fresh and new, it is taken to be fresh evidence.[18]

2.1.2.3 Compelling evidence

Under the subsequent appeal framework there are two bases on which fresh or new evidence may be *compelling*:

- Firstly, evidence will be compelling if it is reliable, substantial, and highly probative for the issues that were in dispute at trial. Evidence will be highly probative if it has a real or material bearing on the determination of a fact that may affect what is to be proved in the case.
- Secondly, evidence will be compelling if it is reliable, substantial, and would have substantially weakened the case for the prosecution at trial. This acknowledges that fresh or new evidence may disclose an issue or a line of defence that was not apparent at the time of the trial, and may not have been in dispute in the proceedings, but that bears on the outcome of the case and substantially weakens the case against the appellant.[19]

2.1.2.4 Determination of a subsequent appeal

The threshold required for a subsequent appeal to be successful differs depending on whether the ground of the subsequent appeal is *fresh and compelling evidence* or *new and compelling evidence*.

For a subsequent appeal on the ground of *fresh and compelling evidence*, the Bill provides that:

- the Court of Appeal must allow the subsequent appeal if there was a miscarriage of justice
    - if the Court of Appeal allows a subsequent appeal, the court must quash the conviction and enter a verdict of acquittal, or
    - order a new trial.
- the Court of Appeal may dismiss a subsequent appeal if no substantial miscarriage of justice has occurred.

16 Explanatory notes, p 4.

17 Explanatory notes, p 4.

18 Explanatory notes, p 4.

19 Explanatory notes, p 4.

For a subsequent appeal on the ground of *new and compelling evidence*, the Bill provides that:

- the Court of Appeal must allow the subsequent appeal if, on the balance of probabilities, the appellant was not guilty of the offence[20]
    - if the Court of Appeal allows a subsequent appeal on the ground of new and compelling evidence, the court must quash the conviction and direct a judgment and verdict of acquittal be entered.[21]

2.1.3 Stakeholder feedback

2.1.3.1 General

The Queensland Law Society (QLS) stated its support for a 'another legislative pathway for defendants who have already unsuccessfully appealed to the Court of Appeal but then come into possession of further evidence'.[22] QLS added that '[d]efendants can have defective trials and appeals which are effectively no fault of their own'.[23]

QLS stated there is a risk in enlarging appeal rights, which may lead to 'endless attempts by often self-represented prisoners to claim they have found new and compelling evidence'. QLS suggested this be addressed with a filtering process between an application and a full hearing. Such a filter could be an application for leave to be decided by a single judge on the papers (without a hearing).[24]

The Queensland Council of Civil Liberties (QCCL) welcomed the amendments providing for a subsequent right of appeal on the grounds that there is fresh and compelling evidence or new and compelling evidence. The QCCL recommended the government introduce:

> … a miscarriage of justice unit (or a Criminal Cases Review Commission as it is known in the United Kingdom) as previously recommended by the Fitzgerald inquiry to deal with the many people who are detained in our criminal justice system even though they are innocent… we would suggest that the Attorney-General should take a proposal to the Standing Committee of Attorneys General to establish a national Criminal Cases Review Commission.[25]

Legal Aid Queensland (LAQ) noted in its submission that the amendments are likely to result in increased numbers of litigants before the courts, as well as contact from convicted persons seeking legal advice for an application for leave for a subsequent appeal. However, LAQ noted that it 'is not expected to present significant additional costs based on the information available regarding the experience in other jurisdictions'.[26]

2.1.3.2 Determination of a subsequent appeal on the basis of fresh evidence and new evidence

QLS noted that different tests apply depending on if the appellant brings an appeal on the basis of *fresh evidence* versus an appeal on the basis of *new evidence*.

QLS stated the test requiring an appellant prove their lack of guilt on the balance of probabilities (which applies for appeals on the basis of new evidence) was a 'completely new concept', adding QLS

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20 The explanatory notes state that this is a higher threshold than a subsequent appeal for fresh and compelling evidence because it acknowledges that the new evidence could have been adduced in the proceedings in the court of trial.

21 Explanatory notes, p 5.

22 Public hearing transcript, 29 January 2024, Brisbane, p 1.

23 Public hearing transcript, 29 January 2024, Brisbane, p 3.

24 QLS, submission 5, p 8.

25 QCCL, submission 3, p 2.

26 LAQ, submission 4, p 3.

does 'not see any reason for a distinction in the test between the bases upon which the application is brought'.[27]

QLS recommended that the miscarriage of justice test (which applies in appeals with fresh evidence) also apply for appeals brought on the basis of new evidence, and be the only test that applies whenever there is an appeal that involves further evidence for the court.[28]

The Bar Association of Queensland (BAQ) did not support the appellant bearing the burden of proof for a subsequent appeal based on new evidence, stating such a test is 'contrary to how the criminal law has operated' and that it does not reflect tests in other jurisdictions.[29] The BAQ stated:

> It is sufficient to adopt the need to demonstrate a miscarriage of justice [with] 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.[30]

BAQ went on to add that a miscarriage of justice test would also cover situations of incompetence or negligence by the defence counsel.[31]

Women's Legal Service Queensland (WLSQ) also referred to the two tests, stating 'it does appear to be a curiosity to introduce a new test'.[32]

2.1.4 Departmental response

2.1.4.1 General

DJAG noted QLS' support of the subsequent appeal framework. Regarding the risk of large numbers of self-represented litigants, DJAG stated the Bill adequately addressed these concerns by having appeals only occur with the leave of the Court of Appeal.[33]

DJAG added that, under the framework, the registrar may refer a subsequent appeal or application to make a subsequent appeal to the court for summary determination if it appears that there is no substantial ground. If the court considers the subsequent appeal or application to be frivolous or vexatious, the court may dismiss it summarily without a hearing.[34]

DJAG noted the QCCL's support for a subsequent appeal framework and stated that the proposal for a Criminal Cases Review Commission is outside the scope of the Bill.[35]

DJAG noted the comments from LAQ regarding increased litigants and convicted persons contacting LAQ for assistance. DJAG noted that, based on data from other jurisdictions, 'there will not be a significant number of applications for leave to make a subsequent appeal or requests for advice or assistance'.[36]

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27 Public hearing transcript, 29 January 2024, Brisbane, pp 3-4.

28 Public hearing transcript, 29 January 2024, Brisbane, p 4.

29 Public hearing transcript, 29 January 2024, Brisbane, pp 11-12.

30 Public hearing transcript, 29 January 2024, Brisbane, p 12.

31 Public hearing transcript, 29 January 2024, Brisbane, p 15.

32 Public hearing transcript, 29 January 2024, Brisbane, p 9.

33 DJAG, correspondence, 12 January 2024, p 4.

34 DJAG, correspondence, 12 January 2024, p 4.

35 DJAG, correspondence, 12 January 2024, p 1.

36 DJAG, correspondence, 12 January 2024, p 2.

DJAG noted that:

- approximately 3 per cent of matters dealt with by the District or Supreme Courts are appealed to the Court of Appeal
- of the matters appealed, the majority are appeals against sentence
- of the 312 original appeals in 2021-22, 41% (127) were appeals against conviction
- on average, seven convicted persons lodge a petition for pardon in Queensland each year
- DJAG also notes that very few subsequent appeal applications are made under the frameworks of other jurisdictions (on average, less than one per year). The exception is Victoria, where a large number of appeals have been lodged, however this this is largely the result of the Lawyer X situation, which has drawn into question a number of criminal trials.[37]

2.1.4.2 Determination of a subsequent appeal on the basis of fresh evidence and new evidence

Regarding concerns about the appellant being required to prove their lack of guilt on the balance of probabilities, DJAG stated that this test, as proposed by the Bill, is currently applied by the courts. DJAG stated this higher threshold applies for new evidence because it is evidence that the defence could have adduced at trial but chose note to, stating:

DJAG, public briefing transcript, 1 February 2024, p 7.

> [T]he defence had an opportunity to present that evidence at trial, and generally with the strategy and the tactics that are employed by the defence in trial they are bound by that decision. You cannot have an appeal on the basis of, 'I'll withhold that evidence and have another go,' or, 'I'll withhold that evidence because it might inculpate me in another crime and I'll take the risk.'[38]

DJAG added that the test for appellants with new evidence does exist in other jurisdictions, specifically Western Australia, who passed legislation in 2023.[39]

Committee comment

The committee notes the broad support from stakeholders for a subsequent appeals framework that brings Queensland into alignment with other Australian jurisdictions. The committee believes that individuals who have been wrongfully convicted deserve as many opportunities as reasonable to have their case reheard, especially if it involves evidence that did not exist, or was not available, during the original trial.

The committee notes the concerns that these provisions may 'open the floodgates' for self-representing litigants who believe they have additional evidence relevant to their case. The committee considers that the requirement to obtain leave from the Court of Appeal, and the registrar's ability to refer cases for summary judgement, are adequate mechanisms to prevent an extraordinary increase in hearings and a burdensome increase to the Court of Appeal's workload. The committee also notes the evidence from DJAG that only a small amount of subsequent appeals are lodged every year in other jurisdictions.

The committee notes the concerns regarding the different tests for an appellant on the basis of whether the evidence they base their appeal on is *fresh and compelling* or *new and compelling*. The committee notes that the miscarriage of justice test applies for fresh and compelling evidence, a test that is well known to the courts.

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37 DJAG, correspondence, 12 January 2024, p 2.

38 Public briefing transcript, 1 February 2024, Brisbane, p 7.

39 Public briefing transcript, 1 February 2024, Brisbane, p 8.

The committee notes that a higher test of proving the lack of guilt on the balance of probabilities applies for new and compelling evidence. The committee believes this is a fair and reasonable measure to prevent the defence from withholding evidence at trial in the hope of presenting a stronger case on appeal.

2.2 Double jeopardy exception

2.2.1 Current law

The Criminal Code provides that it is a defence against a criminal charge if the person has been charged (and convicted or acquitted) previously with that same offence.[40] The Criminal Code provides two exceptions to this rule and allows the court to order a retrial if:

- the charge is murder and there is fresh and compelling evidence against the acquitted person (fresh and compelling evidence double jeopardy exception)
- the charge is for a 25-year offence and the acquittal is tainted.[41]

2.2.2 Proposed amendments

The Bill amends the Criminal Code to expand the fresh and compelling evidence double jeopardy exception to 10 prescribed offences in addition to murder. The prescribed offences are all serious offences punishable by life imprisonment. The offences are:

- engaging in penile intercourse with a child under 16, when the child is:
    - under the age of 12
    - under the age of 16 and is not the lineal descendant of the offender but the offender is the guardian or has the child under their care, or the child is a person with an impairment of the mind[42]
- abuse of persons with an impairment of the mind where the person is not the lineal descendant of the offender but the offender is the guardian or has the person under their care[43]
- incest[44]
- repeated sexual conduct with a child[45]
- manslaughter[46]
- attempted murder[47]
- killing an unborn child[48]
- unlawful striking causing death[49]

40 Criminal Code, s 17.

41 Criminal Code, ss 678B and 678C. Criminal Code, s 678E(2) provides a definition of 'tainted acquittal'

42 Criminal Code, s 215.

43 Criminal Code, s 216.

44 Criminal Code, s 221.

45 Criminal Code, s 229B.

46 Criminal Code, s 303.

47 Criminal Code, s 306.

48 Criminal Code, s 313.

49 Criminal Code, s 314A.

- rape[50]
- sexual assaults where:
    - the offender is, or pretends to be, armed with a dangerous or offensive weapon, or is in company with another person
    - the offence is an indecent assault that includes the assaulted person penetrating the offender's vagina, vulva or anus with a thing or a part of the assaulted person's body other than their penis
    - the offender procures another person to commit an act of gross indecency that includes the procured person penetrating their own vagina, vulva or anus, or the vagina, vulva or anus of another person, with a thing or a part of the procured person's body other than their penis.[51]

The Bill provides that the Court of Appeal may order an acquitted person to be retried for a prescribed offence if:

- the court is satisfied there is fresh and compelling evidence against the acquitted person in relation to the offence, and
- it is in the interests of justice for the order to be made.

The Bill also clarifies that for the purpose of the double jeopardy exception, evidence is *fresh* if it was not adduced at trial and could not have been adduced in those proceedings with the exercise of reasonable diligence:

- by a police officer in relation to the investigation of the commission of the offence, or
- a prosecutor in relation to the prosecution of the offence.[52]

2.2.3 Stakeholder feedback

2.2.3.1 Principle of double jeopardy

The QLS stated it did not support the amendments to the double jeopardy exception, stating that the existing exception for murder strikes the appropriate balance 'between the need to maintain public confidence in our criminal justice system and upholding fundamental civic principles'.[53]

During public hearings, QLS referred to the principle of double jeopardy being a constraint on the state's power to prosecute. QLS stated that there is a 'fundamental inequality in arms' with the state having 'all of its resources and facilities such as the investigative power of the police', and that to constrain that power, the state only gets 'one shot at the prosecution'.[54]

QLS added that the question is about 'balancing of principles', saying:

Queensland Law Society, public hearing transcript, 29 January 2024, p 3.

> 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

50 Criminal Code, s 349.

51 Criminal Code, s 352(3).

52 Explanatory notes, p 6.

53 Public hearing transcript, 29 January 2024, Brisbane, p 1.

54 Public hearing transcript, 29 January 2024, Brisbane, pp 2-3.

> 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.[55]

QLS noted that the definition of fresh and compelling evidence includes the requirement of due diligence on behalf of the police and the prosecution, saying '[w]e are encouraged by that and to some extent our original concern has been alleviated by that clause'.[56]

QCCL opposed the changes to double jeopardy, noting that it is a principle designed to protect the innocent, not the guilty, and the principle 'reflects the proposition that the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual'.[57]

QCCL added that the power imbalance between the accused and the state is not just one of resources, but also of perception, and that jurors will assume the case has merit by virtue of it being brought against the individual in the first place. QCCL noted that, if the amendments are to pass, then the amendments to section 678D of the Criminal Code are a welcome measure to 'ameliorate against the risk of the police, knowing these laws exist, adopting a less than thoroughly rigorous approach to investigations'.[58]

The BAQ noted that the Bill 'largely reflects the position in other states' and that 'there is some merit for that type of replication in Queensland'. BAQ also noted 'there is a strict test and relatively high bar before the Crown can make an application to set aside the acquittal of a person'.[59] However, the BAQ noted that double jeopardy has survived for many years, and that while the principle has been abrogated in Queensland 'it should be abrogated to the least amount necessary for the purpose of legislation'.[60]

The BAQ endorsed the protections that an acquitted person has when the state wishes to prosecute them again, stating:

> [W]e 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 [BAQ] 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.[61]

WLSQ supported 'the broadening of offences to which the [double jeopardy] exception applies, specifically to sexual offences'.[62] At the public hearing, WLSQ stated that the amendments are designed as a 'safeguard' and 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'.[63]

WLSQ added that while double jeopardy does exist to encourage efficient investigations and prosecutions, 'the law does not operate in a vacuum; nor should laws be made without reference to

55 Public hearing transcript, 29 January 2024, Brisbane, p 3.

56 Public hearing transcript, 29 January 2024, Brisbane, p 3.

57 QCCL, submission 3, p 1.

58 QCCL, submission 3, p 1.

59 Public hearing transcript, 29 January 2024, Brisbane, p 11.

60 Public hearing transcript, 29 January 2024, Brisbane, p 13.

61 Public hearing transcript, 29 January 2024, Brisbane, p 11.

62 WLSQ, submission 1.

63 Public hearing transcript, 29 January 2024, Brisbane, p 7.

the societal context in which they operate' and '[p]olice investigations and prosecutions generally are influenced by a huge number of factors'.[64]

WLSQ also added that while the accused has fewer resources than the state, 'victims have fewer resources still and do not even have legal standing in the proceedings for the offences against them'. WLSQ stated that expanding 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'.[65]

DVConnect noted the reports by the Women's Safety and Justice Taskforce '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'.[66]

WLSQ also noted that these provisions are similar to those enacted in Western Australia in 2012, stating Western Australia 'changed their double jeopardy provisions to expand from simply murder to other serious offences, including sexual offences'. WLSQ added that making murder an exception to double jeopardy in Queensland did not 'open any floodgates' and it is their hope that the provision 'is implemented as a safeguard and certainly used to the least extent possible'.[67]

2.2.3.2 Review of the provisions

At the public hearing, WLSQ and DVConnect commented on reviewing the provisions of the Bill for unintended consequences. WLSQ noted that there are many stakeholders in the criminal justice system to include for a meaningful review, while DVConnect was of the opinion that a review was unnecessary as it brought Queensland into alignment with the rest of Australia.[68]

LAQ expressly urged in its submission that a legislated review mechanism be added to the Bill in order to analyse the expansion of the exception provisions, and ensure there have been no unintended consequences arising.[69]

2.2.3.3 Retrospectivity

QLS noted that broadening the exceptions to double jeopardy and applying them to any cases arising from the review recommended by the Commission of Inquiry into Forensic DNA Testing in Queensland would offend the principle of retrospectivity, 'given that it would necessarily need to apply to acquittals occurring after any reforms have commenced'.[70]

WLSQ referred to retrospectivity in the public hearing, stating that retrospectivity is based on a person knowing what is and is not lawful to conduct their business and affairs. WLSQ said that retrospectivity does not affect the relevant behaviours, as they 'are and always have been criminal behaviours'.[71]

2.2.4 Departmental response

2.2.4.1 Principle of double jeopardy

DJAG noted the various concerns from the QLS with broadening the exception to the rule against double jeopardy, including that it may offend the principle of retrospectivity. DJAG stated that the broadening of the double jeopardy exception has been restricted to 'offences that are of a kind that a

64 Public hearing transcript, 29 January 2024, Brisbane, p 7.

65 Public hearing transcript, 29 January 2024, Brisbane, p 7.

66 Public hearing transcript, 29 January 2024, Brisbane, p 10.

67 Public hearing transcript, 29 January 2024, Brisbane, p 8.

68 Public hearing transcript, 29 January 2024, Brisbane, p 8.

69 LAQ, submission 4, p 7.

70 QLS, submission 5, p 7.

71 Public hearing transcript, 29 January 2024, Brisbane, p 10.

possible unjust acquittal would sufficiently damage the integrity of the criminal justice system so as to justify overriding the double jeopardy rule'.[72]

DJAG added that there are several procedural safeguards, including:

> [A] retrial must be in the interests of justice, only one application for a retrial may be made, and the police may only reinvestigate an offence in relation to a possible retrial if authorised by the Director of Public Prosecutions, will apply to the prescribed offences.[73]

DJAG noted QCCL's opposition to expanding the exceptions to double jeopardy. DJAG acknowledged that double jeopardy is a 'fundamental tenet of the criminal justice system and that the retrial of an acquitted person is an extraordinary proceeding'. DJAG added that the Bill aims to protect the integrity of acquittals unless there is fresh and compelling evidence and it is in the interest of justice to override such an acquittal.[74]

DJAG added that safeguards exist when the double jeopardy rule is overridden, with the requirement that an indictment be laid within two months and that only one application for a retrial can be made, stating '[o]nce that process has occurred, if further fresh evidence later emerges, there is no second or third retrial. There is only one that is able to be brought'.[75]

DJAG noted WLSQ's support for expanding the double jeopardy exceptions.[76]

2.2.4.2 Review of the provisions

DJAG stated in the public briefing that a review mechanism was considered in the development of the Bill but it was not considered necessary for the following reasons:

- the amendments to the double jeopardy exception are largely based on an existing framework and a framework that has been in place since 2007
- the use of double jeopardy exception provisions is incredibly rare
- when Western Australia introduced their double jeopardy exception in 2012, it included a statutory review, and the review concluded that it could not discern anything meaningful because the provisions were so rarely used.[77]

Committee comment

The committee recognises, as many stakeholders in this inquiry have done, the fundamental importance of the principle of double jeopardy. No democratic government subject to the rule of law should be able to make endless attempts to convict a person of an offence.

The prosecution should be required to put their best case forward and there should be checks and balances to account for the difference in resources between the prosecution and the defence. The best way to achieve this is to give the prosecution a single chance to bring their case.

It is equally important to recognise that the criminal justice system is not an omnipotent and infallible process that achieves justice in every situation. It is an institution run by people who work with the information available at the time. If new, relevant and substantive information arises, and that information did not exist at the time of the first trial, it is not unreasonable to allow the prosecution another opportunity to bring charges, with appropriate safeguards.

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72 DJAG, correspondence, 12 January 2024, p 7.

73 DJAG, correspondence, 12 January 2024, p 7.

74 DJAG, correspondence, 12 January 2024, pp 6-7.

75 Public briefing transcript, 1 February 2024, Brisbane, p 5.

76 DJAG, correspondence, 12 January 2024, p 6.

77 Public briefing transcript, 1 February 2024, Brisbane, p 4.

The committee notes that the Bill does propose several safeguards, including the provision that fresh evidence must be evidence that could not be adduced with the exercise of reasonable diligence by the prosecution or the police. This will act to prevent poor quality investigations by police. Further, the prosecution only gets one more chance to make their case after obtaining this fresh evidence. The state cannot use the double jeopardy amendments in this Bill to repeatedly bring charges against an individual.

The committee notes that these reforms are not unprecedented. The United Kingdom expanded the number of offences that are exceptions to double jeopardy back in 2003. Currently, over 20 offences are exempt from the double jeopardy rule in the United Kingdom, including drug, arson, conspiracy and terrorism offences. The current Bill only proposes to expand the list of offences that are exempt from double jeopardy to 10 violent and immoral sexual offences, less than half of the number of offences exempt in the United Kingdom.

The committee notes the comments regarding a review of legislation and considers that statutory reviews, especially those that affect individual legal rights, is good practice. However, the committee is satisfied that the number of retrials that have occurred under double jeopardy exception provisions in other jurisdictions is too small to warrant a review. The committee sees no reason that the number of double jeopardy exception retrials would be significantly different in Queensland.

Appendix A – Submitters

Sub #	Submitter
1	Women's Legal Service Queensland
2	Hannah Pocock
3	Queensland Council for Civil Liberties
4	Legal Aid Queensland
5	Queensland Law Society

Appendix B – Officials at public departmental briefing

1 February 2024

Department of Justice and Attorney-General

- Sakitha Bandaranaike, Acting Assistant Director-General
- Jo Hughes, A/Director, Strategic Policy and Legislation
- Trudy Struber, Principal Legal Officer, Strategic Policy and Legislation

Appendix C – Witnesses at public hearing

29 January 2024

Queensland Law Society

- Rebecca Fogerty, President
- Dominic Brunello, Chair, Criminal Law Committee

Women's Legal Service Queensland

- Nadia Bromley, Chief Executive Officer

DVConnect

- Michelle Royes, Director Clinical Governance

Bar Association of Queensland

- Andrew Hoare KC, Chair, Criminal Law Committee
- Anna Cappellano, Member, Criminal Law Committee