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# A Tale of Podcasts and DNA Lab Failures – Was Queensland’s Double Jeopardy Law Reform the Answer?

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*The double jeopardy rule protects persons from being tried and punished twice for the same offence. In Queensland, limited exceptions to this rule have been in operation since 2007. For example, an acquitted person can be retried for murder, where there is “fresh and compelling evidence”, and the re-trial is in the interests of justice. In 2023, after the discovery of DNA testing failures at a state-run Queensland forensic DNA laboratory, the Queensland government introduced a bill expanding these exceptions to additional offences. The bill became law in March 2024. This article ponders whether double jeopardy law reform was needed to respond to the DNA lab shortfalls. It considers the problem, how the new double jeopardy law reform responds to it and whether the introduced law is an appropriate remedy.*

## I. INTRODUCTION

In criminal law, the double jeopardy rule generally prevents a person from being tried and punished twice for the same offence. The rule is recognised under Australian common law and has been enshrined in Queensland in ss 16 and 17 of the *Criminal Code (Qld) (QCC)*. In 2007, legislation was first introduced in Queensland, which amended the *QCC* by setting out exceptions to the double jeopardy rules and allowing re-trials in limited cases.<sup>1</sup> According to the legislation, the re-trial of an acquitted person is possible for murder, where “fresh and compelling evidence” becomes available, and the re-trial is in the interests of justice.<sup>2</sup> In addition, an acquitted person may be retried for a 25-year offence if the original acquittal was tainted.<sup>3</sup> In 2014, further law reform made these exceptions applicable retrospectively.<sup>4</sup> Since their introduction, the laws have found sparse application in Queensland.<sup>5</sup>

After DNA testing failures by a state-run Queensland forensic DNA laboratory came to light in 2022 with further testing issues identified in 2023, Queensland adopted the *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2024 (Qld)* in March 2024, which is expected to commence operation later the same year. The Act enshrines further exceptions to the double jeopardy rule by allowing an acquitted person to be retried in case of an additional ten offences, so-called prescribed offences. These offences include attempted murder, manslaughter, unlawful striking causing death, killing an unborn child, rape, incest and repeated sexual conduct with a child.

After analysing the state of the double jeopardy rules in Queensland prior to March 2024, the below ponders whether double jeopardy law reform was needed in Queensland to respond to the DNA lab shortfalls. It does so by considering the problem, how the new double jeopardy law responds to the problem and whether the law is an appropriate remedy. The article concludes that the benefits of the law

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<sup>1</sup> *Criminal Code (Double Jeopardy) Amendment Act 2007 (Qld)* introducing Ch 68 “Exceptions to Double Jeopardy Rules” into the *Criminal Code Act 1899 (Qld)* Sch 1.

<sup>2</sup> *Criminal Code Act 1899 (Qld)*s 678B.

<sup>3</sup> *Criminal Code Act 1899 (Qld)*s 678C.

<sup>4</sup> *Criminal Law Amendment Act 2014 (Qld)* introducing s 733 into the *Criminal Code Act 1899 (Qld)*

<sup>5</sup> The only reported case which has tested the double jeopardy exceptions in Queensland is *Director of Public Prosecutions (Qld) v TAL* (2019) 3 QR 1; 280 A Crim R 160; [2019] QCA 279.

appear limited in practice making it doubtful that the law reform was indeed needed in Queensland to respond to the DNA lab failure.

## II. DOUBLE JEOPARDY IN QUEENSLAND PRIOR TO MARCH 2024

### A. Double Jeopardy

That a person should not be subject to double jeopardy is a general common law principle,<sup>6</sup> which some trace as far back as the 12th century.<sup>7</sup> In Queensland, the double jeopardy principle is set out in ss 16 and 17 of the *QCC*. While s 16 protects persons from being twice punished for the same act or omission, s 17 states that it is a defence to a particular charge to show that the defendant has already been convicted or acquitted of the offence with which the person is charged. The principle of double jeopardy is further enshrined in s 34 of the *Human Rights Act 2019* (Qld) setting out that a person must not be “tried or punished more than once for an offence” which they have already been convicted or acquitted of.

In 2002, the High Court of Australia was called upon in the Queensland case of *R v Carroll (Carroll)*<sup>8</sup> to decide on appeal whether Carroll could be tried for perjury for lying under oath during his original murder trial. Carroll had been tried and, on appeal, acquitted in 1985 of the murder of a 17-months old child in 1973.<sup>9</sup> The girl had been strangled to death and found with teeth marks on her legs. During the proceedings Carroll denied being involved in the death of the young girl. After new evidence, including evidence based on developments in forensic dental science, came to light, Carroll had been tried and found guilty of perjury in 2000 for lying under oath during his original trial. He subsequently appealed his conviction to the Supreme Court of Queensland which upheld the appeal finding that the proceedings constituted an abuse of process.<sup>10</sup> The prosecution in turn appealed to the High Court which dismissed the appeal finding that the trial for perjury was an abuse of process as it contravened the original murder acquittal in that it ultimately concerned the same issues and thus violated the double jeopardy rules.<sup>11</sup>

Due to the nature of the case, it attracted much media and political attention at the time.<sup>12</sup> The subsequent public outcry<sup>13</sup> led to the introduction of exceptions to the double jeopardy rule in Queensland in 2007 with subsequent law reform in 2014 making the exceptions applicable retrospectively.

### B. 2007 and 2014 Law Reform

After the High Court upheld in *Carroll* that a re-trial for perjury violated the double jeopardy rule in Queensland as it undermined the original acquittal, law reform was initiated resulting in the insertion of Ch 68 into the *QCC* titled “Exceptions to Double Jeopardy Rules”. According to s 678B of the *QCC* the Court of Appeal, upon application by the director of public prosecutions (DPP), can order a re-trial for murder of an acquitted person if there is “fresh and compelling evidence” and the re-trial is in the interests of justice. Moreover, as per s 678C, upon application, the Court of Appeal may order the re-trial

<sup>6</sup> Eric Colvin et al, *Criminal Law in Queensland and Western Australia Cases and Commentary* (LexisNexis, 9<sup>th</sup> ed, 2021) 873.

<sup>7</sup> See discussion in Jill Hunter, “The Development of the Rule against Double Jeopardy” (1984) 5(1) *Journal of Legal History* 3, 4; see also Kenneth G Coffin, “Double Take: Evaluating Double Jeopardy Reform” (2010) 85(2) *Notre Dame Law Review* 771, 776 (tracing the first recorded use of the rule back to 1201).

<sup>8</sup> *R v Carroll* (2002) 213 CLR 635; 136 A Crim R 167; [2002] HCA 55.

<sup>9</sup> *R v Carroll* (1985) 19 A Crim R 410.

<sup>10</sup> *R v Carroll* [2001] QCA 394.

<sup>11</sup> *R v Carroll* (2002) 213 CLR 635, [114]; 136 A Crim R 167; [2002] HCA 55; for further analysis of the case and discussion of the rules against double jeopardy see: Michael Kirby, “Carroll, Double Jeopardy and International Human Rights Law” (2003) 27 *Crim LJ* 231.

<sup>12</sup> See, eg, “Carroll Case Questions Double Jeopardy, But Single Issue of a Media Stunt Is in No Doubt”, *The Sydney Morning Herald*, 13 December 2002 <<https://www.smh.com.au/opinion/carroll-case-questions-double-jeopardy-but-single-issue-of-a-media-stunt-is-in-no-doubt-20021213-gdfyio.html>>; Heather Douglas et al, *Criminal Process in Queensland* (Lawbook Co, 2<sup>nd</sup> ed, 2017) 175.

<sup>13</sup> Charles Parkinson, “Double Jeopardy Reform: The New Evidence Exception for Acquittals” (2003) 16(3) *UNSW Law Journal* 603, 621.

of an acquitted person for a 25-year offence, meaning an offence punishable by imprisonment for life or for 25 years or more, if the original acquittal was tainted and it is in the interests of justice to do so. An acquittal is tainted if the accused or another person has been convicted of an administration of justice offence in regard to the original proceedings, and without the commission of the offence a conviction would have been more likely.<sup>14</sup>

The 2007 reform in the context of re-trials in case of fresh and compelling evidence was strictly limited to the offence of murder and did not attempt to include other homicide offences. The Explanatory Notes to the *Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld)* justified the introduction of the legislative exceptions by noting that “there is considerable public concern over the prospect that a person may escape conviction due to an earlier acquittal, despite the emergence of new evidence that may prove their guilt, or despite the person having secured an acquittal by interfering with the administration of justice”.<sup>15</sup> Moreover, the Explanatory Notes set out that limiting offences warranting a possible re-trial to murder avoids “adversely impacting on the rights of the vast majority of acquitted accused”.<sup>16</sup> The law’s impact was considered particularly limited due to the “scope of the Bill and the fact that the reforms will not operate retrospectively”.<sup>17</sup> A previously introduced 2006 Bill had attempted to change the Queensland double jeopardy rules and to allow re-trials for all offences which attract a life sentence.<sup>18</sup> That Bill, however, was ultimately withdrawn and one focusing exclusively on murder was introduced in order to avoid making exceptions for a large number of offences.<sup>19</sup> In addition, as per the legislation, the exceptions only applied to persons acquitted after 25 October 2007, when the laws commenced operation.

Subsequent law reform in 2014, however, while maintaining the narrow offence focus on murder, expanded the exceptions to the rules against double jeopardy further by making them applicable retrospectively.<sup>20</sup> Consequently, the exceptions are applicable irrespective of when the offence was committed and when the acquittal occurred. As per the Explanatory Notes of the *Criminal Law Amendment Bill 2014 (Qld)* the expansion was justified not the least because of the “extremely serious and dangerous nature of the offences covered by the double jeopardy exception regime” as well as the “strong public interest in pursuing convictions for the most heinous unsolved crimes, most often murder in this context”.<sup>21</sup>

Colvin et al comment that while the introduced exception for murder qualifies the double jeopardy rules it only applies in “exceptional circumstances” where “the public interest in convicting offenders” clearly outweighs the values protected by the double jeopardy rules.<sup>22</sup>

Additional reforms to the double jeopardy rules had never been contemplated in Queensland until shortfalls in DNA testing practices of a state-run Queensland forensic lab were discovered and reported on in 2022/2023.<sup>23</sup> This led the Queensland government to introduce a double jeopardy amendment bill in 2023 which became law in 2024. The merits of this law reform are analysed below.

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<sup>14</sup> *Criminal Code Act 1899 (Qld)* s 678E.

<sup>15</sup> Explanatory Notes, *Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld)* 1.

<sup>16</sup> Explanatory Notes, *Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld)* 2.

<sup>17</sup> Explanatory Notes, *Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld)* 3.

<sup>18</sup> See Queensland, *Parliamentary Debates*, Legislative Council, 19 April 2007, 1387 (Peter Wellington).

<sup>19</sup> Queensland, *Parliamentary Debates*, Legislative Council of Queensland, 19 April 2007, 1387 (Peter Wellington).

<sup>20</sup> *Criminal Code Act 1899 (Qld)* s 678A(1).

<sup>21</sup> Explanatory Notes, *Criminal Law Amendment Bill 2014 (Qld)* 5.

<sup>22</sup> Colvin et al, n 6, 877.

<sup>23</sup> See also Queensland Legal Affairs and Safety Committee, Parliament of Queensland, Public Hearing – Inquiry into the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (Transcript of Proceedings, 29 January 2024) 6 (Dominic Brunello, Chair, Criminal Law Committee, Queensland Law Society) <<https://documents.parliament.qld.gov.au/com/LASC-C96E/CCOLDJESAA-4F77/Public%20Hearing%20-%20Brisbane%20-%2029%20January%202024.pdf>>.

### III. WAS WIDENING THE DOUBLE JEOPARDY EXCEPTIONS THE ANSWER TO THE DNA TESTING FAILURE?

In the context of United Kingdom double jeopardy law reform, Roberts notes that the merits of criminal law reform:

ultimately turn on the answers to three very basic, and deceptively simple, questions: (1) What is the nature of the problem?; (2) What, if anything, can be done to remedy it?; (3) Is the remedy appropriate, taking into account both the seriousness and prevalence of the problem, and any foreseeable side-effects of reform?<sup>24</sup>

The below considers these three questions in the context of the recent Queensland double jeopardy law reform to address its merit in responding to the identified problem.

#### A. What Is the Problem?

Since their introduction in 2007, no issues reportedly arose from the operation of the double jeopardy exceptions in the Queensland justice system warranting law reform. Indeed, apart from issues relating to retrospectivity, the need for reform was never discussed. This changed suddenly when shortfalls in DNA testing practices of a state-run Queensland DNA lab were discovered and reported on.

In 2021, Dr Kirsty Wright, a leading DNA expert, reviewed certain forensic evidence reports during the production of Hedley Thomas' podcast "Shandee's Story" for the Australian newspaper *The Australian*.<sup>25</sup> The podcast was concerned with the murder of Shandee Blackburn in Mackay, Queensland, in 2013 and the subsequent acquittal of her former boyfriend of her murder. During the investigation, DNA swabs had been taken from the deceased's body as well as from the crime scene and the defendant's vehicle. The state-run Queensland Health Forensic and Scientific Services laboratory was unable to locate DNA on some of the samples,<sup>26</sup> including a sample containing blood.<sup>27</sup> Upon her review, Dr Wright noted general concerns about the DNA testing practices at the lab.<sup>28</sup> Two subsequent government-ordered inquiries into the lab's DNA testing practices in 2022 and 2023 identified serious issues and raised concerns that these shortfalls may have led to reduced prospects of convictions in past criminal trials in Queensland.

The first commission, Commission of Inquiry into Forensic DNA Testing in Queensland, found in its final report in December 2022<sup>29</sup> that "serious problems have existed within the laboratory for many years, some of them amounting to grave maladministration involving dishonesty"<sup>30</sup> noting that "the methods, systems and processes used at the forensic DNA laboratory do not, in many ways, measure up to best practice".<sup>31</sup> The report concluded 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".<sup>32</sup> The report called upon the government to "retrospectively review" a number of cases to identify whether these "samples should be subject to further testing, analysis or interpretation".<sup>33</sup>

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<sup>24</sup> Paul Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65(3) *The Modern Law Review* 393, 413.

<sup>25</sup> For more information on the podcast see "Shandee's Story", *The Australian* <<https://www.theaustralian.com.au/podcasts/shandees-story>>.

<sup>26</sup> "Double Jeopardy: Chance of Shandee Retrial", *The Australian*, 30 November 2023.

<sup>27</sup> Hedley Thomas, "Shandee Blackburn, Hedley Thomas and Queensland's DNA Lab Inquiry: 'It's a Disgraceful Cover-up'" *The Australian*, 31 October 2023.

<sup>28</sup> Thomas, n 27.

<sup>29</sup> Walter Sofronoff KC, *Queensland Commission of Inquiry into Forensic DNA Testing in Queensland* (Final Report, 13 December 2022) <[https://www.health.qld.gov.au/data/assets/pdf\\_file/0036/1196685/final-report-coi-dna-testing-qld-dec-2022.pdf](https://www.health.qld.gov.au/data/assets/pdf_file/0036/1196685/final-report-coi-dna-testing-qld-dec-2022.pdf)>.

<sup>30</sup> Sofronoff, n 29, Foreword [7], v.

<sup>31</sup> Sofronoff, n 29, Foreword [31], xii.

<sup>32</sup> Sofronoff, n 29, Foreword [33], xii.

<sup>33</sup> Sofronoff, n 29, 55 (Recommendation 13).

A second commission, the Commission of Inquiry to Examine DNA Project 13 Concerns, was established to exclusively report on Project 13, an automated DNA extraction method used in the lab between 2007 and 2016. The Commission reported in November 2023 that the automated method relied upon had not been scientifically validated with the consequence that “the evidence available for criminal trials may thus have been compromised and convictions that could otherwise have been secured did not occur”.<sup>34</sup>

It has been reported further that failures in testing were partially related to the introduction of a 2018 testing threshold to improve the turnaround time of results to police ultimately leading to specific evidence being overlooked.<sup>35</sup> It was reported that the emphasis on turnaround times was due to underfunding, which was an issue known by the Queensland government.<sup>36</sup> Moreover, a testing method called Y-STR, which allows the detection of very small amounts of male DNA, and which is available in most Australian labs, had not been available in the Queensland lab.<sup>37</sup> While the lab was able to send out samples for Y-STR testing to other facilities, this reportedly happened infrequently.<sup>38</sup> It has been reported that 100,000 samples from 37,000 different criminal cases are currently being considered for retesting.<sup>39</sup>

The problem resulting from this is that since 2007 a currently unknown number of defendants may have been acquitted in cases where DNA evidence was relevant but was either not tested or not tested by the lab applying best practice. If retested using different scientific methods and processes the DNA evidence may yield different results. Yet, due to the double jeopardy laws currently in operation those who have been acquitted can only be retried in Queensland for murder. Consequently, an unknown number of defendants who have been tried and acquitted cannot be retried for other offences even if new DNA evidence becomes available in their cases. Having no avenue to remedy these acquittals may cause public mistrust in the justice system. The below considers the Queensland government approach to addressing this problem resulting in the 2024 double jeopardy law reform, including the merits of this response.

## B. What Can Be Done to Address the Problem?

### 1. 2024 Double Jeopardy Exceptions Legislation

In front of this backdrop, in November 2023, the Queensland government introduced the *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (Qld) (2023 Bill)* which aimed to broaden the exceptions to the double jeopardy rules in Queensland to an additional 10 offences, so-called prescribed offences.<sup>40</sup> All prescribed offences have in common that they are punishable by up to life imprisonment and are concerned with interferences regarding the life or sexual integrity of another. The new prescribed offences are manslaughter,<sup>41</sup> attempted murder,<sup>42</sup> unlawful striking causing death,<sup>43</sup> killing an unborn child,<sup>44</sup> engaging in penile intercourse with a child under 16,<sup>45</sup>

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<sup>34</sup> Annabelle Bennett, *Queensland Commission of Inquiry to Examine DNA Project 13 Concerns* (Final Report, 17 November 2023) 2 <<https://www.dnaproject13inquiry.qld.gov.au/assets/DNA%20Project%2013%20Report.pdf>>.

<sup>35</sup> Lydia Lynch, “DNA Lab-Linked Retrial Plan A Risk, Says Queensland Law Society”, *The Australian*, 27 December 2023.

<sup>36</sup> Lynch, n 35.

<sup>37</sup> “State Still behind on DNA Test Method”, *The Australian*, 2 January 2024.

<sup>38</sup> “State Still behind on DNA Test Method”, n 37.

<sup>39</sup> “Double Jeopardy: Chance of Shandee Retrial”, n 26.

<sup>40</sup> The Bill also aimed to establish a framework to allow subsequent appeals against convictions. This aspect of the Bill and subsequently the Act is not considered in this article.

<sup>41</sup> *Criminal Code Act 1899* (Qld) s 303.

<sup>42</sup> *Criminal Code Act 1899* (Qld) s 306.

<sup>43</sup> *Criminal Code Act 1899* (Qld) s 314A.

<sup>44</sup> *Criminal Code Act 1899* (Qld) s 313.

<sup>45</sup> *Criminal Code Act 1899* (Qld) s 215.

abuse of persons with an impairment of the mind,<sup>46</sup> rape,<sup>47</sup> sexual assault,<sup>48</sup> incest<sup>49</sup> and repeated sexual conduct with a child.<sup>50</sup> On 6 March 2024, Queensland Parliament passed the *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2024 (Qld) (2024 Act)*, which is expected to commence operation later the same year.

The *2024 Act* does not change the current law setting out that the double jeopardy exceptions operate retrospectively in Queensland. Thus, applications to re-trial acquitted persons for prescribed offences can be made regardless of when the crime or the acquittal occurred. The Court of Appeal may order a re-trial of an acquitted person for a prescribed offence if there is fresh and compelling evidence, and the re-trial is in the interests of justice. The Act amends the current definition of fresh evidence in the *QCC* by providing that evidence is fresh if it was not and could not have been adduced in the original 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”.<sup>51</sup> The definition of compelling in this context remains unchanged. In addition, no amendments have been made to the requirement that a re-trial must be in the interests of justice. While the Act was introduced in the aftermath of the DNA lab failure, its operation is not limited to acquittals after trials possibly impacted by incorrectly or not tested DNA samples. Rather the new legislation applies to any case concerning a prescribed offence where fresh and compelling evidence becomes available, and the re-trial is in the interests of justice. Lastly, the new law does not change the current requirement that only one application for a re-trial is permissible.<sup>52</sup>

As per the Statement of Compatibility, the Bill’s objective in the context of double jeopardy is to “enhance criminal justice system responses” to possible “unjust acquittals” by “expanding the fresh and compelling evidence double jeopardy exception to 10 prescribed offences in addition to murder”.<sup>53</sup> The Queensland Department of Justice and the Attorney General consider the additional 10 offences to be “of a kind that a possible unjust acquittal would sufficiently damage the integrity of the criminal justice system so as to justify overriding the double jeopardy rule”.<sup>54</sup> The consequences of the prescribed offences are seen as particularly serious “for victims or for society as a whole”.<sup>55</sup> Explanatory Notes to the *2023 Bill* reiterate that the proposed law reform is justified as it enhances “the ability of the criminal justice system to respond to possible unjust acquittals by expanding the offences to which the fresh and compelling evidence double jeopardy exception applies”.<sup>56</sup> Similarly, during the Bill’s explanatory

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<sup>46</sup> *Criminal Code Act 1899 (Qld)* s 216.

<sup>47</sup> *Criminal Code Act 1899 (Qld)* s 349.

<sup>48</sup> *Criminal Code Act 1899 (Qld)* s 352(3).

<sup>49</sup> *Criminal Code Act 1899 (Qld)* s 222.

<sup>50</sup> *Criminal Code Act 1899 (Qld)* s 229B.

<sup>51</sup> See *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2024 (Qld)* cl 32(2).

<sup>52</sup> *Criminal Code Act 1899 (Qld)* s 678G(1).

<sup>53</sup> Yvette D’Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023* “Statement of Compatibility” 1 <[https://documents.parliament.qld.gov.au/bills/2023/3176/Criminal-Code-and-Other-Legislation-\(Double-Jeopardy-Exception-and-Subsequent-Appeals\)-Amendment-Bill-2023---Statement-of-Compatibility-78f6.pdf](https://documents.parliament.qld.gov.au/bills/2023/3176/Criminal-Code-and-Other-Legislation-(Double-Jeopardy-Exception-and-Subsequent-Appeals)-Amendment-Bill-2023---Statement-of-Compatibility-78f6.pdf)>.

<sup>54</sup> Queensland Legal Affairs and Safety Committee, *Inquiry into the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 – Department of Justice and Attorney General (DJAG) Response to Submissions* 7 (QLS-5) <<https://documents.parliament.qld.gov.au/com/LASC-C96E/CCOLDJESAA-4F77/Department%20of%20Justice%20and%20Attorney-General.pdf>>.

<sup>55</sup> Queensland Department of Justice and Attorney General, *Parliamentary Committee Briefing Note Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023* 15 <<https://documents.parliament.qld.gov.au/com/LASC-C96E/CCOLDJESAA-4F77/Departmental%20written%20brief%20by%20Department%20of%20Justice%20and%20Attorney-General.pdf>>.

<sup>56</sup> Explanatory Notes, *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (Qld)* 2.

speech the Hon YM D’Ath, Attorney General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, noted that “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”.<sup>57</sup> She further explained that strict adherence to the double jeopardy rule means not being able to retry an acquitted person “even where significant fresh evidence is later discovered which may undermine the legitimacy of the acquittal and public confidence in the criminal justice system”.<sup>58</sup>

The question arises as to whether the Act has the potential to achieve its purpose, namely to enhance criminal justice system responses to possible unjust acquittals in order to uphold public confidence in the system.

## 2. Does the Law Have the Potential to Achieve Its Purpose?

An acquittal may be considered unjust where shortfalls in DNA lab testing impacted on trial evidence and subsequently retested evidence produces different forensic results. Yet, this does not mean that a re-trial is guaranteed. Rather a re-trial will only be permitted, where the safeguards enshrined in the double jeopardy exception legislation can be met.<sup>59</sup>

### (a) Fresh Evidence

The first safeguard regarding re-trials for prescribed offences is that the evidence must be fresh. In 2023, Vicki Blackburn, mother of Shandee Blackburn, raised concerns as to whether evidence discovered during retesting could be considered “fresh” in cases like her daughter’s given that it had already been available during the trial but was potentially not tested to the required standard due to lab failures.<sup>60</sup> As pointed out above, this was addressed in the *2024 Act* which includes that evidence is fresh if it was not and could not have been adduced in the original 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”. The failure of a DNA lab does not fall under the diligence of police officers or prosecutors thus ensuring that retested evidence can nevertheless be considered “fresh” in this context. The hurdle that evidence has to be “fresh” would therefore not prevent re-trials based on retested DNA samples.

### (b) Compelling Evidence

Yet, in addition to being fresh, evidence must also be compelling to warrant a re-trial. The *2024 Act* does not change the current definition of compelling. Section 678D of the *QCC* considers evidence to be compelling when it is reliable, substantial, and highly probative. The burden of proof that the fresh evidence is compelling falls onto the state. When evidence can be considered compelling in the context of the exception to the double jeopardy rules has only been reportedly contemplated once by Queensland courts since the 2007 law reform.<sup>61</sup>

In 2019, in *Director of Public Prosecutions (Qld) v TAL (TAL)*,<sup>62</sup> the Court of Appeal refused an application by the DPP for a re-trial order. The case concerned the 1980s murder of a woman who

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<sup>57</sup> Queensland, *Parliamentary Debates*, Explanatory Speech, Parliament, 29 November 2023, 3803, 3804 (YM D’Ath, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence) <[https://documents.parliament.qld.gov.au/events/han/2023/2023\\_11\\_29\\_WEEKLY.pdf#page=31](https://documents.parliament.qld.gov.au/events/han/2023/2023_11_29_WEEKLY.pdf#page=31)>.

<sup>58</sup> Queensland, *Parliamentary Debates*, Explanatory Speech, Parliament, 29 November 2023, 3803, 3804 (YM D’Ath, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence) <[https://documents.parliament.qld.gov.au/events/han/2023/2023\\_11\\_29\\_WEEKLY.pdf#page=31](https://documents.parliament.qld.gov.au/events/han/2023/2023_11_29_WEEKLY.pdf#page=31)>.

<sup>59</sup> For an overview on the use of DNA evidence in criminal trials in general see Marcus Smith, *DNA Evidence in the Australian Legal System* (LexisNexis, 2016).

<sup>60</sup> “Justice ‘in Jeopardy’ If Reform Lost”, *The Australian*, 30 October 2023.

<sup>61</sup> In April 2023 it was reported that Queensland police were applying to the Court of Appeal to retry a man for a 2009 murder. Nothing further, however, has been reported on the application and its possible outcome. See Cloe Read, “Double Jeopardy: Qld Police Charge Man with Murder for a Second Time”, *Brisbane Times*, 24 April 2023.

<sup>62</sup> *Director of Public Prosecutions (Qld) v TAL* (2019) 3 QR 1; 280 A Crim R 160; [2019] QCA 279.

had been found dead in the bedroom of her flat with stab wounds to her chest and back.<sup>63</sup> While police investigations quickly led them to the respondent, who was a co-worker of the deceased and at some stage romantically involved with her, he was acquitted of the murder after a 1988 trial. After new DNA testing of original evidence collected from the bedroom in 2015<sup>64</sup> showed a match to the respondent, the DPP in 2018 applied to the Court of Appeal to order a re-trial of the respondent for murder based on fresh and compelling evidence. While the Court found the evidence to be fresh it did not find it compelling noting that it did not prove that the respondent was the killer but only that his DNA was on the pillow found at the crime scene.<sup>65</sup> The respondent, however, had told police at the time that he had been to the deceased's apartment including her bedroom on one or more occasions.<sup>66</sup> The Court concluded that "[t]here is simply no evidence from which it could be inferred that the respondent's deposited some of his DNA onto the pillow in a way associated with the act of murder".<sup>67</sup> For this reason the Court did not find the evidence highly probative.

The Court further questioned whether the evidence could be considered reliable due to storage issues and changing protocols in DNA handling over time:

The evidence of DNA comparison in this case cannot be regarded as reliable having regard to inability of any person to testify from direct evidence about the provenance and the handling of the various samples and having regard to the ways in which, having regard to the lapse in time, the prosecution was compelled to fashion its evidence.<sup>68</sup>

In future, in the context of applications to re-trial acquitted persons based on DNA evidence, including in cases where DNA samples have been retested in the context of the Queensland lab failure, the DPP would have to satisfy the court that the evidence sample is reliable and thus compelling. Where the DNA result in question is challenged by the respondent, establishing the reliability of a retested evidence sample may require proving the chain of custody of the DNA sample.<sup>69</sup> This includes demonstrating that each handler of the evidence sample at each stage prior to the finalised result, in more than one lab in the case of retested evidence, complied with the required best practice protocols for storing, handling and processing DNA samples.<sup>70</sup> Each person who handled the evidence sample may have to be available to testify on when and how they handled, processed and analysed the evidence and whether they applied best practice in doing so.<sup>71</sup> Proving reliability may be a particularly difficult task for evidence samples originally handled and tested in the state-run lab, and subsequently retested, due to the general laboratory shortfalls documented in the two commission inquiry reports questioning the integrity of the applied processes. This includes, for example, contamination in the processing of samples in a systemic way during a particular time period.<sup>72</sup>

Even in cases where a DNA sample is considered reliable, it may still not be compelling in the context of it being highly probative as its value depends on the facts of each particular case. As in *TAL*, the DNA

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<sup>63</sup> See also discussion in Kelley Burton et al, "Double Jeopardy Exceptions in Queensland – One Bite at the Cherry" (2023) 179 *Precedent* 21, 22.

<sup>64</sup> The evidence had been retested previously in 1990, 1999 and 2000; see *Director of Public Prosecutions (Qld) v TAL* (2019) 3 QR 1, [14]; 280 A Crim R 160; [2019] QCA 279.

<sup>65</sup> *Director of Public Prosecutions (Qld) v TAL* (2019) 3 QR 1, [62]; 280 A Crim R 160; [2019] QCA 279.

<sup>66</sup> *Director of Public Prosecutions (Qld) v TAL* (2019) 3 QR 1, [5]; 280 A Crim R 160; [2019] QCA 279.

<sup>67</sup> *Director of Public Prosecutions (Qld) v TAL* (2019) 3 QR 1, [62]; 280 A Crim R 160; [2019] QCA 279.

<sup>68</sup> *Director of Public Prosecutions (Qld) v TAL* (2019) 3 QR 1, [67]; 280 A Crim R 160; [2019] QCA 279.

<sup>69</sup> See also Jane Moira Taupin, *Introduction to Forensic DNA Evidence for Criminal Justice Professionals* (CRC Press, 2014) 149.

<sup>70</sup> See Amit Kumar et al, *Handbook of DNA Forensic Applications and Interpretation* (Springer, 2022) 41; see also Kelley Burton, "Reform of the Double Jeopardy Rule on the Basis of Fresh and Compelling DNA Evidence in New South Wales and Queensland" (2004) 11 *James Cook University Law Review* 85, 105.

<sup>71</sup> See *R v Sing* (2002) 54 NSWLR 31; [2002] NSWCCA 20 noting that the "correct carrying out of testing procedures" concerning DNA samples should not be proved "merely by evidence of the existence of the procedures and the giving of instructions, and otherwise left to inference": [35]; see also *R v Ryan* [2002] VSCA 176.

<sup>72</sup> Sofronoff, n 29, 353. As per the *Final Report* the issue with contamination occurring between October 2007 and mid-2008 was identified and the lab's response to this issue was considered to be in accordance with best practice.

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evidence may only demonstrate that a person was physically present at a crime scene at some stage but not that they committed an offence or had a specific intent.<sup>73</sup> The simple existence of DNA evidence, even if uncovered during retesting, may thus not warrant a re-trial.

Due to the Queensland lab’s approach of not using the Y-STR testing method in house,<sup>74</sup> and only infrequently sending out samples for Y-STR testing to other facilities,<sup>75</sup> particularly DNA samples from sexual offence trials may be impacted and be subject to retesting. Yet, even if male DNA is detected in retested evidence this may not be compelling to order a re-trial in all cases. The retested DNA evidence may be considered probative in rape cases where identity is in question. Yet, DNA evidence may not be probative for rape trials where consent and the defendant’s belief whether the victim was consenting are the main issue.<sup>76</sup>

The above shows that due to the safeguards enshrined in the double jeopardy exception legislation, and despite the expansion of the prescribed offences, limited cases, including cases associated with retested DNA samples, may actually meet the required threshold for a re-trial.<sup>77</sup> In *TAL*, the Court explained in regards to the safeguards that:

[t]he 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.<sup>78</sup>

Due to the stringent safeguards likely resulting in a limited number of re-trials, the *2024 Act* does not seem to have the potential to reach its objective of enhancing the criminal justice response to unjust acquittals and upholding public trust in the system especially in the context of the DNA lab shortfalls. The limited practical impact of double jeopardy reform in general has led some to conclude that its importance “lies predominately in its symbolic significance in reasserting the legitimacy of the criminal justice system, rather than its practical impact”.<sup>79</sup> Yet, it is easy to imagine that an unsuccessful application for a re-trial order could undermine public confidence in the criminal justice system more so than the double jeopardy rule itself. The law reform initiated by the Queensland government to address the lab failures has been met with media headlines such as “Justice ‘in jeopardy’ if reform lost”,<sup>80</sup> “Qld sex offenders to be brought to justice under double jeopardy changes to go to parliament”,<sup>81</sup> and “Acquitted rapists, pedophiles face retrial from DNA retests”.<sup>82</sup> Based on these headlines, the public may perceive the reform as a guarantee for re-trials while in practice it is not.

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<sup>73</sup> See also Tersia Oosthuizen and Loene Howes, “The Development of Forensic DNA Analysis: New Debates on the Issue of Fundamental Human Rights” (2022) 56 *Forensic Science International: Genetics* 1, 4.

<sup>74</sup> “State Still behind on DNA Test Method”, n 37.

<sup>75</sup> “State Still behind on DNA Test Method”, n 37.

<sup>76</sup> See discussion in David Hamer, “Wrongful Convictions, Appeals, And the Finality Principle: The Need For A Criminal Cases Review Commission” (2014) 37(1) *UNSW Law Journal* 270, 293.

<sup>77</sup> Arguing in the UK context that the safeguards are not as “strict as they might appear” is David Hamer, “The Expectation of Incorrect Acquittals and the ‘New and Compelling Evidence’ Exception to Double Jeopardy” (2009) 2 *Criminal Law Review* 63, 78. On the argument that the safeguards are working in Australia as all applications have been unsuccessful see Queensland Legal Affairs and Safety Committee, Parliament of Queensland, n 23, 13 (Andrew Hoare, KC, Chair, Criminal Law Committee, Bar Association of Queensland).

<sup>78</sup> *Director of Public Prosecutions (Qld) v TAL* (2019) 3 QR 1, [68]; 280 A Crim R 160; [2019] QCA 279.

<sup>79</sup> Parkinson, n 13, 611.

<sup>80</sup> *The Australian*, 30 October 2023.

<sup>81</sup> *Courier Mail*, 27 November 2023.

<sup>82</sup> *The Australian*, 7 March 2024.

## C. Is the Remedy Appropriate?

When pondering whether a particular law reform is appropriate, Roberts points out the importance of considering the seriousness and prevalence of the problem as well as the side-effects of the reform.<sup>83</sup> The below first considers the seriousness of the problem prior to contemplating its possible impact on defendants and the criminal justice system as a whole.

### 1. *Seriousness and Prevalence of the Problem*

Ensuring that a person who is guilty of a serious offence does not avoid prosecution is an important aspect of the criminal justice system. That a person whose acquittal of a serious crime seems unjust after new evidence comes to light cannot be dealt with in the criminal justice system can be a serious issue for individual victims and society more broadly. How prevalent the problem of unjust acquittals is in Queensland in general and how prevalent the problem is due to the Queensland DNA lab failure is currently unclear. No estimates exist as to how many inaccurate acquittals there may be.<sup>84</sup> In addition, no figures are available as to how many acquittals may be impacted by the DNA lab failure.<sup>85</sup> Some speculate, however, that these will be many.<sup>86</sup> Yet, while it has been reported that 100,000 samples from 37,000 different criminal cases are currently being considered for retesting,<sup>87</sup> it is unclear how many of these samples, if any, relate to cases where an acquittal occurred as opposed to cases which have not been yet tried, are currently in front of the courts or did not result in an acquittal.

To address whether the law reform was an appropriate remedy, the below analyses the possible impact of the law on the defendant and the criminal justice system as a whole.

### 2. *Side-effects of the Reform*

While the law aims to enhance criminal justice responses to unjust acquittals with the aim of upholding public confidence, the *2024 Act* may also have an impact on due diligence in investigations, finality of proceedings and increasing political pressure to re-trial.

#### (a) *Due Diligence in Investigations*

One argument opponents advance in the context of double jeopardy law reform is that the possibility of applying for a re-trial order may negatively influence the work ethic of police officers and prosecutors knowing that they may be able to have a second chance at prosecuting.<sup>88</sup>

One of the safeguards enshrined in the *2024 Act* is that evidence can only be considered fresh where it was not adduced and could not have been adduced in the original 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”.<sup>89</sup> Where this safeguard operates effectively re-trials will unlikely take place in cases where police officers and prosecutors were not applying due

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<sup>83</sup> Roberts, n 24, 413.

<sup>84</sup> See also discussion in Hamer, n 77, 66–67.

<sup>85</sup> Queensland Legal Affairs and Safety Committee, Parliament of Queensland, n 23, 2 (Dominic Brunello, Chair, Criminal Law Committee, Queensland Law Society); Queensland Legal Affairs and Safety Committee, Public Hearing – Inquiry Into The Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (Transcript of Proceedings, 1 February 2024) 3 (Jo Hughes, Acting Director, Strategic Policy and Legislation, Department of Justice and Attorney-General).

<sup>86</sup> Andrew Messenger, “Queensland Police Chief Suggests ‘a Lot of Cases’ Could Be Retried under Double Jeopardy Changes”, *The Guardian*, 29 November 2023.

<sup>87</sup> “Double Jeopardy: Chance of Shandee Retrial”, n 26.

<sup>88</sup> See discussion in Mirko Bagaric and Luke Neal, “Double Jeopardy in Australia: The Illusion of an Absolute Protection and the Prosecution Process As Punishment” (2005) 8 *Canberra Law Review* 87, 100.

<sup>89</sup> Explanatory Notes, *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023* (Qld) 17.

diligence in their work.<sup>90</sup> Thus the expansion of double jeopardy exceptions will unlikely impact the quality of investigations by police officers and the prosecution of offences by prosecutors in practice.<sup>91</sup>

*(b) Finality of Verdicts and Preventing Harassment through Multiple Prosecutions*

Colvin et al explain that the double jeopardy principle reflects different values including the value of finality which is “important for any system of justice”.<sup>92</sup> This is so, the scholars point out, as finality “avoids oppression by a system in which it is never known whether a matter is at an end”.<sup>93</sup> Roberts explains that there is a “psychological dimension” to finality which is concerned with the ability of the defendant to rest in the knowledge that a traumatic event has ended.<sup>94</sup>

Prior to 2007, finality of verdicts was an absolute value in Queensland as no exceptions to the double jeopardy rules existed and an acquitted defendant could never be retried. This changed with the 2007 law reform. The Explanatory Notes to the *Criminal Code (Double Jeopardy) Amendment Bill* state that the Bill’s narrow focus limits the “exposure to double jeopardy provided by the Bill” which is why it “can be justified in the public interest”.<sup>95</sup> It explains further that the “Bill contains a number of safeguards to ensure that the reforms do not impact adversely on the vast majority of acquitted accused” noting that the Bill only applies in exceptional cases. In their submission on the *2023 Bill* to the Queensland Legal Affairs and Safety Committee in their *Inquiry Into the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023*, the Queensland Law Society argued that further extending exceptions to the double jeopardy rule to additional offences did not strike “an appropriate balance” between public confidence in the justice system and trust in the finality of verdicts.<sup>96</sup> The Law Society noted that an exception to the double jeopardy rules for murder was justified as it stood out from all other offences<sup>97</sup> and was “qualitatively different to other serious offences that attract a life sentence”.<sup>98</sup> No other offence included in the *2023 Bill*, however, so they argued, had the same quality which is why the exception should not be expanded to other offences as not to undermine the finality of verdicts.

Hand-in-hand with finality goes the double jeopardy rationale of preventing unwarranted harassment of an accused by the state by way of subjecting them to multiple prosecutions.<sup>99</sup> The Queensland Law Society submitted in this context that expanding the double jeopardy exceptions would “limit the ability to keep the power and resources of the state in proper check”.<sup>100</sup>

While the finality of verdicts and the prevention of harassment may not have been heavily impacted by the 2007 law reform in Queensland due to its limitation to one offence this may be different after the introduction of the *2024 Act*. Once the law commences operation later in 2024, re-trials could occur for

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<sup>90</sup> See also Queensland Legal Affairs and Safety Committee, n 85, 2 (Sakitha Bandaranaike, Acting Assistant Director-General, Strategic Policy and Legislation, Department of Justice and Attorney-General).

<sup>91</sup> See also findings in Queensland Parliamentary Community Safety and Legal Affairs Committee, *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023*, Report No 1 (2024) 15 <<https://documents.parliament.qld.gov.au/tp/2024/5724T218-9FCE.pdf>>.

<sup>92</sup> Colvin et al, n 6, 873.

<sup>93</sup> Colvin et al, n 6, 873.

<sup>94</sup> Roberts, n 24, 405; see also discussion in Michelle Edgeley, “Truth or Justice? Double Jeopardy For Queensland: Rights in Jeopardy” (2007) 7(1) QUTLJ 108, 122-123.

<sup>95</sup> Explanatory Notes, *Criminal Code (Double Jeopardy) Amendment Bill 2007* (Qld) 3.

<sup>96</sup> Queensland Law Society, Submission No 5 to Queensland Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry Into The Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023* (21 December 2023) 4.

<sup>97</sup> Queensland Law Society, Submission No 5 to Queensland Legal Affairs and Safety Committee, Queensland Parliament, n 96, 5.

<sup>98</sup> Queensland Law Society, Submission No 5 to Queensland Legal Affairs and Safety Committee, Queensland Parliament, n 96, 6.

<sup>99</sup> *Pearce v the Queen* (1998) 194 CLR 610, [10]; 103 A Crim R 372; [1998] HCA 57, citing *Green v United States*, 355 US 184, 187–188 (1957).

<sup>100</sup> Queensland Law Society, Submission No 5 to Queensland Legal Affairs and Safety Committee, Queensland Parliament, n 96, 6.

a total of 11 prescribed offences. Yet, judging from the experiences in other Australian jurisdictions, even with an expansion to a total of 11 offences, it does not appear that the new law will necessarily have a radical impact on the finality of verdicts in practice. Reforms expanding the double jeopardy rules occurred in all Australian States and Territories between 2006 and 2016 except in the Northern Territory.<sup>101</sup> Queensland was the only jurisdiction which limited re-trials based on fresh and compelling evidence to one offence. While all other jurisdictions allow applications for re-trials for more offences than one, the permitted offences vary, with some states including drug offences and non-fatal nonsexual offences against the person.<sup>102</sup> Despite these reforms, which have already been in operation for 18 years in some Australian jurisdictions, thus far only two decisions based on applications for a re-trial have been reportedly made in Australia. At the time of writing, no application for a re-trial has been successful.<sup>103</sup> Considering the low numbers of possible cases which would qualify for a re-trial, some already predicted in 2003, and well before the first law reform in Australia, that “this significant law reform will in all probability have a negligible impact on the criminal justice system”.<sup>104</sup>

The numbers are also low in the United Kingdom, where double jeopardy law reform commenced operation in 2005.<sup>105</sup> While no official current statistics are available, research published in 2014 shows that between 2005 and 31 December 2013 a total of 13 applications for a re-trial had been made.<sup>106</sup> In nine of the 13 cases re-trials were ordered.<sup>107</sup> The higher number of applications and re-trials may be to do with the fact that approximately 41.7 million fewer people live in Australia,<sup>108</sup> and that more than 20 offences qualify as exceptions to the double jeopardy rule in the United Kingdom.<sup>109</sup>

The situation in Queensland may have to be distinguished from that in other jurisdictions due to the unique DNA lab shortfalls referred to by some as a “core failure” in Queensland which had been occurring for a period of time.<sup>110</sup> However, it is currently speculative only that this failure will lead to a series of applications for re-trials. As pointed out above, even if a large number of applications were made based on retested DNA evidence this does not automatically mean that applications for re-trials will be successful. Similarly, the Queensland Parliament Community Safety and Legal Affairs Committee when reviewing the proposed *2023 Bill* concluded that it sees “no reason that the number of double jeopardy exception retrials would be significantly different in Queensland” than in other jurisdictions.<sup>111</sup>

While the impact of the double jeopardy reform on the finality of verdicts may seem severe in theory, due to the included safeguards the law’s actual impact in practice may be much more limited.

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<sup>101</sup> For an overview of the development of double jeopardy law reform in Australian States see Andrew Hemming et al, *Criminal Procedure in Australia* (LexisNexis, 3<sup>rd</sup> ed, 2023) 756.

<sup>102</sup> For an overview of the different offences see Government of Western Australia, Department of Justice, *Statutory Review of Part 5A of the Criminal Appeals Act 2004 (WA)* (Final Report, 2021) 20–25.

<sup>103</sup> By 2021 there had only been two applications for leave to re-trial, see Government of Western Australia, Department of Justice, n 102, 7. As discussed, in *Director of Public Prosecutions (Qld) v TAL* (2019) 3 QR 1; 280 A Crim R 160; [2019] QCA 279 the Court did not consider the evidence compelling. In *Attorney General (NSW) v XX* (2018) 98 NSWLR 1012; 274 A Crim R 30; [2018] NSWCCA 198 the Court did not find the evidence fresh.

<sup>104</sup> Parkinson, n 13, 611.

<sup>105</sup> See Benjamin Leach, “The Success of the Double Jeopardy Provisions” (2016) 4(1) *North East Law Review* 7, 11.

<sup>106</sup> Marilyn McMahon, “Retrials of Persons Acquitted of Indictable Offences in England and Australia: Exceptions to the Rule against Double Jeopardy” (2014) 38 *Crim LJ* 159, 174.

<sup>107</sup> McMahon, n 106, 174.

<sup>108</sup> See UK Population <<https://www.worldometers.info/world-population/uk-population/>>; Australian Bureau of Statistics, *Population* <<https://www.abs.gov.au/statistics/people/population>>. McMahon, n 106, 182–183.

<sup>109</sup> Queensland Parliamentary Community Safety and Legal Affairs Committee, n 91, 15.

<sup>110</sup> Queensland Legal Affairs and Safety Committee, Parliament of Queensland, 23, 14 (Andrew Hoare, KC, Chair, Criminal Law Committee, Bar Association of Queensland).

<sup>111</sup> Queensland Parliamentary Community Safety and Legal Affairs Committee, n 91, 15.

(c) *Politically Targeted Prosecutions*

The Queensland Law Society pointed out that expanding the exceptions to the double jeopardy rule may result in “politically targeted or ill-intentioned prosecutions”<sup>112</sup> with the re-trial possibly being used to wear down a defendant.<sup>113</sup>

As pointed out above, the thresholds for a re-trial to be ordered are high. Even if an application for a re-trial was politically targeted or ill-intentioned the safeguards in the legislation would nevertheless have to be met. That means the Court of Appeal would have to find that there is fresh and compelling evidence, and the re-trial is in the interests of justice. As pointed out above, it seems unlikely that many applications for a re-trial, let alone ill-intentioned or politically-motivated applications, could clear this threshold. On this basis the risk of politically targeted re-trials does not appear high in practice.

## VI. CONCLUSION

The above considered the merits of the *2024 Act* reforming the double jeopardy rules in Queensland. It identified that the problem motivating the recent double jeopardy law reform is the discovery of the state-run Queensland DNA lab failures and the possible impact this may have on criminal cases which resulted in acquittals and involved DNA samples tested in the lab. While the scope of the problem is unclear, in 2023 the Queensland government attempted to address the issue by introducing a Bill expanding the exceptions to the double jeopardy rule to 10 additional offences so that a larger number of acquitted defendants in potentially impacted cases can be retried. The Bill became law in 2024. Despite the DNA lab situation likely being the impetus for the attempt at law reform, the law is not limited to cases associated with evidence from the DNA lab but is applicable to all cases based on prescribed offences, where fresh and compelling evidence is available, and a re-trial is in the interests of justice.

The Act’s objective in the context of double jeopardy is to enhance criminal justice responses to “unjust acquittals” in an attempt to uphold public confidence in the justice system. Based on the arguments advanced above, it is submitted that the safeguards enshrined in the Queensland double jeopardy exception legislation ensure that only a limited number of cases will likely meet the re-trial threshold in practice. It is therefore doubtful that the law has the potential to meet its objective and to constitute a response to unjust acquittals in a way that can uphold public confidence in the justice system. It seems more likely that unsuccessful applications for a re-trial could erode the previously build up public confidence in the newly introduced double jeopardy exceptions even further. On the other hand, as limited cases will be retired if the safeguards operate efficiently, the proposed reform seems unlikely to negatively impact due diligence in investigations and finality in verdicts as well as increase the risk of politically targeted applications for re-trials in practice as feared by some.

While the new law’s benefits seem limited, and at this point mostly speculative as it is unclear how many criminal cases resulting in an acquittal are indeed impacted by the lab failures, its introduction does not come without risks. First, the law was introduced in an attempt by the government to rectify potential issues it partially contributed to at the expense of fundamental trial principles. During parliamentary debate of the Bill speakers highlighted that the “bill is here entirely because this government, the now Miles and formerly Palaszczuk government, comprehensively failed Queenslanders when it came to the operations and functions of the DNA lab”<sup>114</sup> concluding that “as a result, a cherished and longstanding principle of law has to be overturned because quite simply this government could not get its act together”.<sup>115</sup> Another speaker noted that the law reform creates “significant shifts in the core doctrine of double jeopardy, illustrating the extreme measures the government is forced to go to

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<sup>112</sup> Queensland Law Society, Submission No 5 to Queensland Legal Affairs and Safety Committee, Queensland Parliament, n 96, 6.

<sup>113</sup> Queensland Law Society, Submission No 5 to Queensland Legal Affairs and Safety Committee, Queensland Parliament, n 96, 6–7. See further on this objection to double jeopardy exception expansions Seith F. Kreimer, “Truth Machines and Consequences: The Light and Dark Sides of ‘Accuracy’ in Criminal Justice” (2005) 60 *NYU Annual Survey of American Law* 655, 673.

<sup>114</sup> Queensland, *Parliamentary Debates*, Parliament, 5 March 2024, 378 (Tim Nicholls) <[https://documents.parliament.qld.gov.au/events/han/2024/2024\\_03\\_05\\_WEEKLY.pdf](https://documents.parliament.qld.gov.au/events/han/2024/2024_03_05_WEEKLY.pdf)>.

<sup>115</sup> Queensland, *Parliamentary Debates*, Parliament, 5 March 2024, 378 (Tim Nicholls).

mitigate the consequences that stem from its DNA lab failures”.<sup>116</sup> In this context, the Queensland Law Society rightly points out 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”.<sup>117</sup> Expanding on this further Rebecca Fogerty, President of the Queensland Law Society, explained that the law reform ultimately changes a “fundamental legal precept in response to what was a bureaucratic or managerial failure”.<sup>118</sup> Passing the law against this backdrop may set a dangerous precedent for the future, particularly in relation to departures from established trial principles.

Second, the new law intends to address exceptional circumstances. Yet, the newly introduced exceptions are applicable to all cases not just to those arising from the DNA testing failures. In this context Legal Aid Queensland explained that “considering the specificity of the circumstances these amendments are intended to address” they were “concerned as to the long-term ongoing need for the expanded double-jeopardy provisions”.<sup>119</sup> On this basis, Legal Aid advocated for the inclusion of a review mechanism to ensure any amendments are necessary and do not lead to unintended consequences.<sup>120</sup> Such a review mechanism, however, was not considered necessary when developing the Bill and therefore never incorporated into the legislation.<sup>121</sup> If the operation of the new law leads to unforeseen circumstances remains to be seen.

Whether the reform of the double jeopardy rules was the answer to the problem of state-run DNA lab failures or not, the new law expanding exceptions to the double jeopardy rule in Queensland is here to stay. Its impact and any possible unforeseen circumstances will become evident as time goes on.

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<sup>116</sup> Queensland, *Parliamentary Debates*, Parliament, 5 March 2024, 391 (Laura Gerber).

<sup>117</sup> Queensland Law Society, Submission No 5 to Queensland Legal Affairs and Safety Committee, Queensland Parliament, n 96, 6.

<sup>118</sup> Queensland Legal Affairs and Safety Committee, Parliament of Queensland, n 23, 2 (Rebecca Fogerty, President, Queensland Law Society).

<sup>119</sup> Legal Aid Queensland, Submission No 4 (Amended) to Queensland Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023* (23 January 2024) 1.

<sup>120</sup> Legal Aid Queensland, Submission No 4 (Amended) to Queensland Legal Affairs and Safety Committee, Queensland Parliament, n 120, 1.

<sup>121</sup> Queensland Legal Affairs and Safety Committee, n 85, 4 (Trudy Struber, Principal Legal Officer, Strategic Policy and Legislation, Department of Justice and Attorney-General).