

Hong Kong Bar Association's comments on
Consultation Paper on Double Jeopardy

Introduction

1. The Hong Kong Bar Association (“HKBA”) generally supports the recommendations contained in the consultation paper (“CP”) whereby the rule against double jeopardy should be retained, but relaxed in exceptional circumstances.
2. In particular it supports the principle that a reputable justice system in which there is public confidence should provide robustly for the pursuance and conviction of the guilty. Where there exists a “tainted acquittal” or where “fresh and compelling evidence” has become available then the criminal justice system should allow for appropriate procedures provided relevant safeguards are established and enforced.

Exceptional Circumstances that Warrant the Relaxation

3. The HKBA agrees with the recommended codification of exceptional circumstances by virtue of either a “tainted acquittal” or “fresh and compelling circumstances”. This appears to be consistent with the approach adopted in the various common law jurisdictions studied.

Relevant Safeguards

4. The HKBA notes that the forum for quashing an acquittal is recommended to be as high a body as the Court of Appeal and that, consistent with the approach in overseas jurisdictions, the quashing of an acquittal must be “in the interests of justice” having regard to a legislative list of non exhaustive factors.
5. The HKBA has the following comments on particular aspects of the safeguards:

5.1. Police's Powers of Investigation After Acquittal

(a) The HKBA queries whether it is appropriate that the Director of Public Prosecutions be the arbiter as to whether the police's powers to further investigate should be invoked. This would seem to be an undesirable blurring of the respective roles of the Department of Justice and the investigating body.

(b) Further, even if the DPP is felt to be an appropriate person the HKBA raises the issue as to whether the rank of Superintendent is sufficiently senior to warrant the involvement of urgent investigative powers.

5.2. Retrospective Effect

The HKBA notes with some concern that the recommendations are proposed to apply on a retrospective basis, meaning that some persons who today are protected by the "autrefois acquit" principle may have that protection removed in the event of the passing of the relevant legislation.

5.3. Standard of Proof

Although the recommendation is that the Court of Appeal decide what is "in the interests of justice" it would appear that the standard of proof is proposed to be no higher than the civil standard of probabilities. The HKBA queries whether this is a sufficiently high standard.

5.4. Stay of Proceedings

As is pointed out in the CP the current rule against Double Jeopardy has two limbs, the second of which empowers the courts to order a stay of

proceedings for abuse of process. Given the infinite number of ways in which such a situation might arise, the HKBA is anxious that nothing in the new legislation imply any sort of erosion of the principles which currently apply to “abuse of process”. If necessary, a “for the avoidance of doubt” provision should be considered.

5.5. Foreign Proceedings

The HKBA notes that the Hong Kong Court of Final Appeal has recently decided a case involving a plea of “autrefois acquit” arising from a conviction in a foreign court (see *HKSAR v Yeung Chun Pong and others* *FACC 8/2008*) and raises whether the terms of reference for the sub-committee extend into this area. In the absence of any particular recommendations the HKBA assumes that the current law pertaining to “overseas convictions” will remain unaffected.

5.6. Availability of Exhibits

The HKBA expresses concern as to whether subjects may be able to receive a “fair trial” if exhibits at a previous trial are no longer available: it would like to see specific reference to this in the context of the “interests of justice” test proposed to apply to applications in the Court of Final Appeal.

Hong Kong Bar Association

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