



**THE LAW SOCIETY'S SUBMISSIONS ON
THE CONSULTATION PAPER ON DOUBLE JEOPARDY**

<i>Recommendations by the LRC Double Jeopardy Sub-committee</i>	<i>Law Society's Response</i>
<p><u>Recommendation 1</u></p> <p>That the rule against double jeopardy should be retained, but relaxed in exceptional circumstances as proposed in the latter part of this paper.</p>	<p>We support in principle the relaxation of the rule against double jeopardy for the reasons stated in Chapter 2 of the Consultation Paper.</p> <p>Keeping the rule with limited relaxation preserves the principle that a person should not be tried twice for the same offence and the sanctity of a jury's verdict of not guilty and at the same time addresses the desirability that those who really are guilty should be convicted and recognizes that where an acquittal has been obtained in circumstances which are tainted and amount to a perversion of the criminal justice system, the public interest is best served by providing an opportunity to correct that abuse.</p> <p>Recommendation 1 achieves both purposes</p>

<p><u>Recommendation 2</u></p> <p>That the court be empowered to make an order to quash an acquittal and direct a retrial where:</p> <p>(a) there is subsequent revelation of "<i>fresh</i>" and "<i>compelling</i>" evidence against an acquitted person in relation to a serious offence of which he was previously acquitted; or</p> <p>(b) an acquittal is tainted.</p>	<p>We support Recommendation 2.</p>
<p><u>Recommendation 3</u></p> <p>(a) That the rule against double jeopardy should be relaxed to allow a retrial:</p> <p>(i) where there is "<i>fresh</i>" and "<i>compelling</i>" evidence in respect of an offence tried in the High Court for which the maximum sentence is 15 years' imprisonment or more, whether that offence is the offence for which the accused has been previously acquitted or the offence to be tried upon the quashing of the acquittal; or</p> <p>(ii) where there is a "<i>tainted acquittal</i>" in respect of an indictable offence tried in the District Court or High Court.</p>	<p>The discovery of "<i>fresh evidence</i>" may well call into question the correctness of the original acquittal but the accused cannot properly be said to be at fault. Advances in technology may well justify re-opening a case in the overall public interest but this relaxation should be approached carefully. We support Recommendation 3(a) (i). It is right to restrict the relaxation here to the most serious categories of cases and to High Court acquittals.</p> <p>We support Recommendation 3(b)(ii) and the LRC Sub-committee's view that a harder line should be taken with tainted acquittals and this should extend to the District Court.</p>

Views sought:

- (i) **whether the court should be empowered to order a retrial of a more serious offence than that in relation to which the accused was acquitted and whether, if the court is to be so empowered, the power should be limited to cases where the new charge is murder or another offence of similar gravity?**
- (ii) **whether Hong Kong should adopt a provision similar to section 100(4) of the NSW 2001 Act, but with a broader scope that would disapply the relaxation of the double jeopardy rule to an application to quash an acquittal under either the "*fresh and compelling evidence*" or "*tainted acquittal*" limb where the acquitted person was convicted of a lesser or alternative offence at the original trial.**
- (b) **We further recommend that descriptions of the offences to be covered by the proposed relaxation should be contained in a schedule to the relevant legislation, and**

We do not think that the court should be empowered to order a retrial of a more serious offence than that in relation to which the accused was acquitted when it is the original offence that he was undeservedly acquitted.

We believe adopting a similar approach to that in s. 100(4) of the NSW 2001 Act affords some additional protection to those convicted of a lesser offence and has the merit of simplicity and agree that the scope should be extended to cover both the "*fresh and compelling evidence*" limb and the "*tainted acquittal*" limb.

We agree that the offences to be covered (the 15+ years' of imprisonment) should be set out in a schedule to amending legislation. However, care must be taken not to open the door

<p>that the schedule of offences should be capable of amendment by subsidiary legislation, subject to negative vetting by the Legislative Council.</p>	<p>too wide. We do not support the suggestion for amendment by subsidiary legislation subject to negative vetting. This will leave too much to the composition of LegCo at any given moment.</p>
<p><u>Recommendation 4</u></p> <p>That for the purpose of determining what amounts to "<i>fresh and compelling evidence</i>":</p> <p>(a) Evidence is "<i>fresh</i>" if it was not adduced in the proceedings in which the person was acquitted, and it could not have been adduced in those proceedings with the exercise of reasonable diligence.</p> <p>(b) Evidence is "<i>compelling</i>" if it is reliable, substantial, and in the context of the issues in dispute in the proceedings, in which the person was acquitted, is highly probative of the case against the acquitted person.</p> <p><u>Views Sought:</u> Whether "<i>fresh and compelling evidence</i>" should include evidence which was in the possession of the prosecution at the time of the original trial but was inadmissible at the time, and which has since become admissible under the law prevailing at the time of the application.</p>	<p>We support Recommendation 4.</p> <p>We proposed that the approach to whether the evidence is "<i>fresh and compelling</i>" could be along the line of the CA's power to admit new evidence on an appeal: see for example the discussion about the criteria to be applied in <i>R v. Ch'Ng Poh</i> [1996] HKCA 231; CACC000333/1994. Using "<i>fresh</i>" and "<i>compelling</i>" means that the new evidence presents as reliable on a balance of probabilities and passes first base.</p> <p>"<i>Fresh and compelling</i>" evidence should not extend to evidence which was in the possession of the prosecution at the time of the trial, was then inadmissible but has since become admissible because of a change in the law. Logically we cannot see how such evidence can be said to "<i>fresh</i>". There are also obvious difficulties in going this far. It presents as retrospective legislation.</p>

Recommendation 5

That:

- (a) A "*tainted acquittal*" should be defined as one where the accused person or another person has been convicted (whether in Hong Kong or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted and the commission of the administration of justice offence was a significant contributing factor in the person's acquittal.
- (b) "*Administration of justice offences*" should be defined by specifically listing offences the ingredients of which involve interfering with the administration, or perverting the course, of justice.
- (c) The standard of proof should be "*on a balance of probabilities*".

Views sought:

Whether the alternative approach of defining a tainted acquittal by reference to the commission of *any* offence (not just an administration of justice offence) which has had a material impact in determining the verdict in the previous proceedings should be adopted?

We support the Recommendation 5.

We can see practical difficulties in extending the relaxation to cover any offence which has had a material impact in the determining the verdict. It is unclear to us what these other offences apart from the "*administration of justice offences*" are that the LRC Subcommittee has in mind. The best solution may be for there to be a careful drafting of the list of relevant offences.

Recommendation 6

That before allowing an application to quash an acquittal under either the "*fresh and compelling evidence*" limb or the "*tainted acquittal*" limb, the court must satisfy itself that it is in the interests of justice to do so.

Views Sought:

- (i) whether the legislation should include a non-exhaustive list of factors to be considered by the court in determining what amounts to the "*interests of justice*" and, if so, what factors the list should include?**

- (ii) whether there should be a minimum time between the filing of the notice of application and the hearing of the application, even though our inclination is to leave this to the court's discretion.**

We support Recommendation 6.

"*Interests of justice*" is a familiar term and meets the spirit of the intended relaxation. We do not favour a non-exhaustive list of factors to be considered as this is best left to be considered by the Court of Appeal in the particular circumstances of the case. In any event, examples will appear as applications are made.

We do not think there should be a minimum time between filing and hearing. Again, these are matters best left to the court.

Recommendation 7

That an application to quash an acquittal should be made to the Court of Appeal.

We agree that the Court of Appeal is the right forum to handle this kind of applications.

<p><u>Recommendation 8</u></p> <p>That only one application to quash an acquittal should be permitted upon the relaxation of the rule against double jeopardy, regardless of which limb forms the basis of the application.</p>	<p>We support Recommendation 8 as there must be an end to litigation.</p>
<p><u>Recommendation 9</u></p> <p>That:</p> <p>(a) an appeal can be made by the prosecution or an acquitted person against the Court of Appeal's decision on an application for an order to quash an acquittal under the "<i>fresh and compelling evidence</i>" limb or the "<i>tainted acquittal</i>" limb; and</p> <p>(b) Appeal should be by leave and the test for granting leave should be that provided in the Hong Kong Court of Final Appeal Ordinance (Cap 484).</p> <p>(c) the Hong Kong Court of Final Appeal Ordinance (Cap 484) should apply to this type of appeal.</p> <p><u>Views Sought:</u></p> <p>Whether the "<i>substantial and grave injustice</i>" and "<i>a point of law of great and general importance</i>" tests in Cap 484 are adequate and, if not, what alternative or additional grounds should be provided for.</p>	<p>We support this Recommendation.</p> <p>We consider the "<i>substantial and grave injustice</i>" and "<i>a point of law of great and general importance</i>" tests to be adequate. These are accepted tests of the Court of Final Appeal to consider whether to order retrials and there is familiarity with these approaches, as the Court of Final Appeal has built up a lot of case law on these tests.</p>

Recommendation 10

That where an order for retrial is made, an indictment/charge sheet for the retrial cannot be presented later than two months after the date of the order, unless the Court of Appeal gives leave. The Court of Appeal should not give leave unless satisfied that:

- (a) the prosecutor has acted "*with due expedition*";**
- (b) there is "*a good and sufficient cause*" for retrial despite the lapse of time; and**
- (c) there is otherwise no prejudice to the acquitted person in question.**

We support Recommendation 10

A short period to bring the re-trial is justified. If the prosecution is in a position to make an application logically they should be ready to proceed with the new trial if leave is granted. This is a matter the Court of Appeal could consider on the application for leave as part of the strength of the case for leave to begin again to be granted.

Recommendation 11

That:

- (a) there be a statutory prohibition on publication of anything which has the effect of identifying an acquitted person who is:
 - (i) the subject of an application or order for retrial; or**
 - (ii) the subject of a police investigation (or an application for authorisation of such an investigation) in connection with a possible retrial, unless the publication is authorised by an order of the Court of Appeal or the court of retrial;****

We support Recommendation 11.

Just like committal proceedings, publicity should be restricted to avoid possible prejudice to a new trial. Similarly, there must be restrictions on how much a jury can know about the case. There may be problems where the trial takes place long after the event as this might make a jury wonder what has gone on before but these are matters best left to be addressed by the trial judge, with the assistance of counsel at the new trial.

- (b) the court may make an order described in para (a) if it is satisfied that it is in the interests of justice to do so, and before making the order, an acquitted person is given a reasonable opportunity to be heard;**
- (c) the court may make an order prohibiting the publication of such further or other matters that the court regards as necessary in the interests of justice;**
- (d) the court may at any time vary or revoke an order made under the recommendations in (a) or (c) above;**
- (e) the prohibition on publication (whether by statute or by order) ceases to have effect when there is no longer any step that could be taken which would lead to an acquitted person being retried, or at the conclusion of the retrial (if he is retried), whichever is the earliest;**
- (f) a contravention of the prohibition on publication is punishable as contempt of court;**
- (g) the prosecution at the retrial before a jury cannot mention that the Court of Appeal has found that it appears that there is fresh and compelling evidence against an acquitted person, or that it is more likely than not that the fact that the acquittal is tainted is a significant contributing factor in the acquittal, unless the court of retrial grants leave to do so;**
- (h) a respondent to an application is entitled to be present**

<p>and heard at the hearing (whether or not he is in custody), but the application can be determined even if he is not present so long as he has been given a reasonable opportunity to be there; and</p> <p>(i) any orders made by the Court of Appeal or court of retrial pursuant to this recommendation may be made subject to such conditions as are considered necessary in the interests of justice and to safeguard the fairness of the retrial.</p>	
<p><u>Recommendation 12</u></p> <p>That:</p> <p>(a) the police's powers to investigate after an acquittal and the conditions to be fulfilled (including the obtaining of the Director of Public Prosecutions' consent) before such an investigation could be carried out should be expressly set out in the legislation and to that end provisions similar to section 85 of the English 2003 Act should be adopted;</p> <p>(b) the police should have urgent investigative powers and to that end a provision similar to section 86 of the English 2003 Act should be adopted; and</p> <p>(c) where an order for retrial is granted, provisions that currently enable a defendant who successfully appeals against conviction, but in respect of whom a retrial is ordered, to be arrested, summoned to appear, remanded in custody, or released on bail, pending his retrial, should apply to an acquitted person with necessary modifications.</p>	<p>We support Recommendation 12, which appears to be practical, reasonable and balanced.</p>

<p><u>Recommendation 13</u></p> <p>To remove the pre-condition that "<i>the person so entitled is unknown or cannot be found</i>" from section 102(2)(a)(ii) of the Criminal Procedure Ordinance (Cap 221). Both the prosecution and the defence should be provided with equal rights to apply for the retention of exhibits or seized materials.</p> <p>A comprehensive review should be carried out of the existing criminal law and procedure (including, for example, rule 60 of the Criminal Appeal Rules (Cap 221A), section 42 of the Magistrates Ordinance (Cap 227) and section 25 of the Evidence Ordinance (Cap 8)) and appropriate amendments made to cater for the relaxation to the rule against double jeopardy.</p>	<p>We support Recommendation 13.</p>
<p><u>Recommendation 14</u></p> <p>That relaxation of the rule against double jeopardy under both the fresh and compelling evidence limb and the tainted acquittal limb should apply to acquittals before and after the relaxation.</p>	<p>We do not accept this Recommendation.</p> <p>This presents as a type of retrospective legislation. The relaxation of the double jeopardy rule is a fundamentally new approach and we would be more comfortable applying it to new cases only.</p>

Recommendation 15

That:

- (a) the court should have a discretion to make a costs order in favour of an acquitted person if an application to quash the acquittal fails;**
- (b) the judges assigned to hear an application should be different from those who presided over the trial or heard the appeal leading to the acquittal so as to avoid any perception or allegation of bias;**
- (c) no judge who sits on the Court of Appeal hearing the application or who has heard the original trial or appeal leading to the acquittal should sit as the trial judge in the subsequent retrial.**

We have no problem with these practical house-keeping proposals.

**The Law Society of Hong Kong
Criminal Law & Procedure Committee
26 May 2010**