

The Law Reform Commission's Double Jeopardy Sub-committee released a consultation paper today (March 11) proposing that the rule against double jeopardy, which prevents a person who has been acquitted of an offence from being tried again for the same offence, should be relaxed in exceptional circumstances.

The sub-committee proposes that where "fresh and compelling" evidence subsequently came to light in respect of a serious offence, or where there the original acquittal was the result of perjury, perversion of the course of justice or the like, the rule against double jeopardy should be relaxed.

Under the existing rule, if a person has been previously acquitted or convicted of an offence, any subsequent prosecution for the same offence will be barred. The rule stems from the notion that a person who has undergone the ordeal of a criminal trial should be left undisturbed following the final verdict, either to go on to lead a normal life if acquitted or to face the appropriate punishment if convicted.

The chairman of the sub-committee, Mr Paul Shieh, SC, said, "The existing rule provides certainty for the individual who has been tried, but it is unsatisfactory from the community's point of view when it allows a person to escape justice and punishment when new and compelling evidence pointing to his guilt has emerged subsequent to the acquittal.

"Such situations may arise where, for instance, DNA evidence is uncovered, or where an individual admits his guilt after acquittal safe in the knowledge that he can no longer be prosecuted. Public concern in a number of other jurisdictions about the effects of a strict application of the rule has led to proposals for, or the adoption of, changes in the law."

Mr Shieh explained that the sub-committee was not recommending the complete abolition of the rule against double jeopardy, but merely its relaxation in certain exceptional circumstances.

He said the sub-committee believed that the relaxation of the rule would address potential injustice and public concern arising from strict adherence to the rule in some circumstances.

The sub-committee recommends empowering the court to make an order to quash an acquittal and direct a retrial where:

- there is subsequent revelation of "fresh and compelling" evidence against an acquitted person in relation to a serious offence of which he was previously acquitted; or
- his acquittal is "tainted" (that is, the acquittal involves some interference with, or perverting of, the administration of justice, such as perjury or interference with witnesses, in the previous proceedings which contributed to his acquittal).

In recommending the relaxation of the rule, Mr Shieh SC said that the sub-committee was mindful of the need for any reform to be compatible with the Basic Law and

the Hong Kong Bill of Rights.

He emphasised that a number of safeguards had been incorporated to ensure that the power to quash an acquittal would not be abused and that the scope of the relaxation would be narrowly tailored to the legitimate purpose of pursuing and convicting the guilty.

The safeguards include the following:

- the proposed reform will only apply to serious offences;
- the consent of the Director of Public Prosecutions will be needed before law enforcement agencies can reinvestigate an acquittal case;
- only the Court of Appeal will have the jurisdiction to quash an acquittal and order a retrial;
- new evidence which could have been found by law enforcement agencies acting with reasonable diligence will not meet the threshold of the "fresh and compelling evidence" exception;
- before quashing an acquittal and ordering a retrial, the Court of Appeal must be satisfied that it is in the "*interests of justice*" to do so;
- prohibitions on publication apply to protect the identity of the accused so as to prevent prejudicial publicity from affecting the fairness of any retrial; and
- the prosecution will only have one opportunity to apply for a retrial in respect of any particular case that originally resulted in an acquittal.

"The recommendations do not concern the quashing of a conviction by way of appeal. The existing law in Hong Kong already provides for procedures and mechanisms for a convicted person to appeal against his conviction (and for the Court's power, in some circumstances, to order a re-trial following the quashing of a conviction).

"The recommendations only concern the quashing of an acquittal, which the Courts are presently powerless to do because of the rule against double jeopardy," Mr Shieh SC added.

Mr Shieh stressed that the recommendations in the consultation paper were intended to facilitate discussion and did not represent the sub-committee's final conclusions.

He appealed for public comments and suggestions on any issues discussed in the consultation paper (in particular the specific requests for feedback highlighted in Chapter 4 which summarises all the recommendations) to be submitted on or before 31 May 2010.

Copies of the consultation paper are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. The consultation paper can also be accessed on the Commission's website at www.hkreform.gov.hk.

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