THE LAW REFORM COMMISSION OF HONG KONG

REPORT

DOUBLE JEOPARDY

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REPORT

DOUBLE JEOPARDY

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Preface

1. The rule against double jeopardy stipulates that *"no-one may be put in peril twice for the same offence."*[1] If a person has been previously acquitted or convicted of an offence and is later charged with the same offence, the rule against double jeopardy will apply to bar the prosecution.[2] The rule is grounded on 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.

2. While the rule against double jeopardy provides certainty and a conclusion for the individual who has been tried, from the community's point of view the question arises as to whether a person should be allowed to escape justice when new evidence, of sufficient strength, has emerged subsequent to his acquittal which points to his guilt. Rapid developments in recent years in forensic science and DNA testing have highlighted these concerns and changes to the law have been proposed or adopted in a number of jurisdictions.

3. In Australia, the inability in the case of *R v Carroll*[3] to prosecute a person previously charged with and acquitted of murdering a baby girl was instrumental in prompting legislative change. The case concerned the murder in Queensland in 1973 of a 17-month old baby girl. The murder trial started in 1985. The key issue at the murder trial was one of identification and there was inconsistent expert testimony as to the identity of the person responsible for the bite-marks found on the baby's leg. Carroll was found guilty of murder but acquitted on appeal. By 1999, however, new evidence (in the form of a confession from Carroll to an inmate whilst he was in custody for the original trial, and improved expert evidence on the dental imprints found on the baby's leg) revealed that Carroll was responsible for the baby's death, but he could not be charged again with murder as he had been previously acquitted of that charge. Carroll was instead charged with, and convicted of, perjury on the basis that the new evidence showed that his testimony at the murder trial had been untrue. However, the perjury conviction was set aside on appeal on the basis that the perjury prosecution inevitably sought to controvert the earlier acquittal on the murder charge. The Crown then appealed to the High Court of Australia against the decision in the perjury case.

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1 Law Commission, *Report: Double Jeopardy and Prosecution Appeals* (2001), Law Com No 267, at para 2.2.

2 Law Commission, *Report: Double Jeopardy and Prosecution Appeals* (2001), Law Com No 267, at para 2.2. The rule also applies where the accused could, by an alternative verdict, have been convicted at the previous trial.

3 [2002] HCA 55, [2000] QSC 308.

The High Court ruled that the conviction of Carroll for perjury, where the alleged perjury was Carroll's denial on oath that he had killed the baby girl, was in direct conflict with the determination of the Court of Criminal Appeal in acquitting Carroll on the charge of murder, and on common law principles the trial judge should have stayed the perjury charge as an abuse of process.[4] The Crown's appeal was therefore dismissed. It should be noted that the occasion has not yet arisen in Hong Kong for the courts to consider similar factual circumstances. Hence, the reasoning in the *Carroll* case has not yet been tested in Hong Kong.

4. The *Carroll* case led to widespread demands in Australia for reform of the double jeopardy law. In New South Wales, the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 now makes it possible for an acquitted person in New South Wales to be retried for serious offences under the Crimes (Appeal and Review) Act 2001. In Queensland, the Criminal Code (Double Jeopardy) Amendment Act 2007 amended the Criminal Code by adding a new chapter providing exceptions to the double jeopardy rule. The effect is that an acquitted person may now be retried for murder or where there has been a "*tainted acquittal*" in respect of an offence for which the maximum sentence is 25 years' imprisonment.

5. In England and Wales, the law against double jeopardy has been amended on two occasions. The first amendment was made by the Criminal Procedure and Investigations Act 1996 which provides for the retrial of an acquitted person in respect of a "*tainted acquittal*" involving a fundamental defect in the previous proceedings that could affect the outcome of the case. More recently the law was amended by the Criminal Justice Act 2003, which came into operation in April 2005. The result of this amendment is that, in relation to certain serious offences classified as "*qualifying offences*", the prosecution may now apply to the Court of Appeal to quash an acquittal and to order the acquitted person to be tried again for the same offence. Since the passing of the 2003 Act there have been a number of applications to the Court of Appeal to quash a previous acquittal and for an order to retry the acquitted

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[4] [2002] HCA 55, at para 138: "*It contravened the rule that the acquittal of an accused person 'may not be questioned or called in question by any evidence which, if accepted, would overturn or tend to overturn the verdict' (Garrett v The Queen (1977) 139 CLR 437 at 445).*"

See also: *"126 At the trial for perjury, the central issue once again was whether the accused had killed Deidre Kennedy. That is because the Crown case on the perjury charge was that Carroll had killed her and his sworn denial at the murder trial necessarily meant that he had lied on oath at that trial and was guilty of perjury. …*

127 Thus, the evidence supporting the charge of perjury put in issue the very fact that was in issue on the charge of murder, a charge of which Carroll was acquitted. By finding that he was guilty of perjury, the jury's verdict necessarily proved that he had murdered Deidre Kennedy. It contradicted the acquittal of Carroll in respect of the charge of murdering her. So the issue is whether it was open to the Crown to charge Carroll with perjury when the resultant verdict on the perjury charge necessarily contradicted - or at all events had a tendency to undermine - the acquittal of the accused on the charge of murder. I do not think that there is any doubt that this was a course that the common law does not tolerate."

person on the basis of new evidence.[5] The Court of Appeal has granted some of the applications[6] and refused the others.[7]

6. In New Zealand, new sections 378A to 378F were inserted into the Crimes Act 1961 in June 2008 providing for the retrial of previously acquitted persons. Ireland, Scotland, South Australia and Tasmania have also relaxed the rule against double jeopardy. This will be further discussed in Chapter 3.

Terms of reference

7. In January 2006, the Secretary for Justice and the Chief Justice referred the topic of double jeopardy to the Law Reform Commission for consideration. The terms of reference for the project are:

> *"To examine the protections against double jeopardy found in the present law, particularly in relation to autrefois acquit, autrefois convict and stay of proceedings, and to recommend such changes in the law as may be thought appropriate."*

The sub-committee

8. A sub-committee was appointed in May 2006 to consider and advise on the present state of the law and to make proposals for reform. The members of the Double Jeopardy Sub-committee are:

Mr Paul W T Shieh, SC *(Chairman)*	Senior Counsel
Mr Derek Chan	Barrister
Mr David Leung	Senior Assistant Director of Public Prosecutions Department of Justice
Dr Gerard McCoy, QC, SC	Senior Counsel
Mr Christopher Morley	Solicitor

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5 It must be pointed out that it may not be possible to access the judgments for all applications under the Criminal Justice Act 2003 as the Act has built-in reporting restrictions to protect against the risk of prejudice to the administration of justice in possible future retrials. Hence, some of the judgments relating to such applications may not be available. This will be further discussed under the heading "Restrictions on publication and other safeguards" in Chapter 3.

6 *R v Dunlop* [2007] 1 Cr App R 8 (p 115); *R v A* [2008] EWCA Crim 2908; *R v C* [2009] EWCA Crim 633; and *R v Mark Weston* [2010] EWCA Crim 1576.

7 *R v Miell* [2008] 1 Cr App R 23; *R v B(J)* [2009] EWCA Crim 1036; and *R v G(G) and B(S)* [2009] EWCA Crim 1077.

Mr Ng Kam Wing (up to 11 January 2009)	Chief Superintendent of Police Hong Kong Police Force
Mr Stephen Cheng Se-lim (from 12 January 2009)	Chief Superintendent of Police Hong Kong Police Force
Mr Tsui Pui	Chief Chemist (Drugs, Toxicology & Documents Group) Forensic Science Division Government Laboratory
Mr Simon Young	Associate Professor Faculty of Law University of Hong Kong
Mr Peter Sit	*Secretary to the sub-committee (until Feb 2008)*
Mr Byron Leung	*Secretary to the sub-committee (from March 2008)*

Public consultation

9. The sub-committee issued a consultation paper containing its recommendations for reform in March 2010. The consultation period officially ended on 31 May 2010, but was extended in response to requests from a number of those whose views had been sought. A total of 22 written responses were received to the consultation paper and a list of those who responded can be found at Annex A to this report.

Layout of the report

10. This report sets out in Chapter 1 the nature of the rule against double jeopardy and how it operates in Hong Kong. Chapter 2 examines the arguments for and against the rule, and addresses the constitutional and human rights concerns in relaxing the rule. Chapter 3 looks at the existing law and proposals for reform in other jurisdictions, and considers various options before making a number of recommendations for the relaxation of the rule. Chapter 4 contains all our recommendations for reform.

Acknowledgements

11. We wish to express our particular thanks to the following persons whose replies to the sub-committee's Secretary have proved invaluable.

Miss Alix Beldam	Senior Legal Manager Criminal Appeal Office Royal Courts of Justice England & Wales
Miss Amanda Bowring	Domestic Affairs Division Crown Prosecution Service England & Wales
Mr Nicholas Cowdery AM, QC	Director of Public Prosecutions New South Wales
Mr Roger Daw	Director of Policy Crown Prosecution Service England & Wales
Mr T J Ellis SC	Director of Public Prosecutions Tasmania
Mr Stephen Pallaras QC	Director of Public Prosecutions South Australia
Mr Terry Ryan	Assistant Director-General Department of Justice and Attorney-General Queensland
Miss Karen Squibb-Williams	Strategic Policy Adviser Strategy and Policy Directorate Crown Prosecution Service England & Wales
Mr Gareth Williams	Policing Powers and Protection Unit Home Office England & Wales

Chapter 1

The rule against double jeopardy

The rule against double jeopardy

1.1 The rule against double jeopardy was founded on the maxim that no man ought to be punished twice for the same offence: *nemo bis in idipsum.*[1] This maxim, in turn, had its origins in the ecclesiastical concept that "*God judges not twice for the same offence*".[2] A person relying on the rule is protected by the legal principle enshrined in the Latin maxim *nemo debet bis vexari pro eadem causa*. Lord Hodson, in *Connelly v DPP,* explained the principle as follows:

> *"The classic statement of the principle is to be found in Hawkins' Pleas of the Crown, ch 35, section 1, and is as follows: 'That a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found 'not guilty' on an indictment or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime.'"*[3]

1.2 The rule against double jeopardy may be regarded as having two aspects. The first involves the *autrefois* doctrine expressed in the form of a plea. The *autrefois* plea is formalistic in nature; narrowly defined; and leaves very little discretion for the court to determine the plea. Thus, an *autrefois* plea would fail if the circumstances do not fall within the narrowly defined situations under which the doctrine operates. The second aspect of the rule against double jeopardy empowers the court to order a stay of proceedings for abuse of process. In contrast with the *autrefois* doctrine, the power to stay proceedings provides a wider discretionary power for the court, and encompasses more than the *autrefois* plea. Because of this, a defendant may fail in an *autrefois* plea but may succeed in an application to stay the court proceedings on the basis of an abuse of process.

1.3 The *autrefois* doctrine comprises within it the concepts of *autrefois convict* and *autrefois acquit* (see below). A successful *autrefois* plea

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1 M L Friedland, *Double Jeopardy* (Clarendon Press, Oxford, 1969), at 5.

2 M L Friedland, *Double Jeopardy* (Clarendon Press, Oxford, 1969), at 5.

3 [1964] AC 1254, at 1330 to 1331.

for a particular charge bars a prosecution on that charge. However, as mentioned above, where the circumstances fall short of a successful *autrefois* plea, the court may invoke its inherent jurisdiction to stay the proceedings if allowing the prosecution to proceed would constitute an abuse of process.

The *autrefois* doctrine: the pleas of *autrefois* acquit and *autrefois* convict

1.4 Under the *autrefois* doctrine, even if compelling evidence has subsequently come to light pointing to a person's guilt, he cannot be prosecuted for the same offence for which he has been previously acquitted (*autrefois acquit*) or convicted (*autrefois convict*). Professor Glanville Williams explained the doctrine and its terminology in this way:

> *"Suppose that a transgressor is charged and acquitted for lack of evidence, and evidence has now come to light showing beyond doubt that he committed the crime. Even so, he cannot be tried a second time. He has what is termed, in legal Frenglish, the defence of autrefois acquit. Similarly, if he is convicted, even though he is let off very lightly, he cannot afterwards be charged on fresh evidence, because he will have the defence of autrefois convict. These uncouth phrases have never been superseded, though they might well be called the defence of 'previous acquittal' and 'previous conviction'; and 'double jeopardy' makes an acceptable generic name for both. Another general title is res judicata."*[4]

1.5 The *autrefois* rule also prevents a person from being tried for an offence in respect of which he could have been convicted at a previous trial.[5] This refers to cases where, at an earlier trial, there was the possibility that a jury could have returned a verdict of not guilty as charged but guilty of a lesser alternative offence. The acquittal of the primary charge would also constitute an acquittal of the alternative charge, even if the jury was not asked to give a verdict on the lesser alternative offence.[6]

1.6 An example of this is where a person is charged with an offence under the Theft Ordinance (Cap 210). The Schedule to that Ordinance lists alternative offences of which a defendant may be found guilty. So, for instance, if a defendant is charged with theft, contrary to section 9 of the Theft Ordinance, he may be found not guilty of that charge but guilty of an alternative offence listed in the Schedule, such as taking a conveyance without authority, contrary to section 14, or obtaining property by deception, contrary to

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4 G Williams, *Textbook of Criminal Law* (Stevens & Sons, 1978), at 24.

5 *Archbold Hong Kong 2012* (Sweet & Maxwell), at para 4-32, referring in particular to *Connelly v DPP* [1964] AC 1254.

6 *Archbold Hong Kong 2012* (Sweet & Maxwell), at para 4-32.

section 17.[7] Even if the jury was not asked at the time to give a verdict on these alternative charges, an acquittal of the theft charge could also amount to an acquittal of the alternative offences, and the rule of *autrefois acquit* would apply to any future proceedings.

1.7 The defence must establish on the balance of probabilities that the plea of *autrefois* applies.[8] The plea may be raised in criminal proceedings in any court.[9]

Relevant statutory provisions and cases in Hong Kong

1.8 In Hong Kong, the right of an accused to plead *autrefois* is found in the Hong Kong Bill of Rights Ordinance (Cap 383) and the Criminal Procedure Ordinance (Cap 221). Article 11(6) of the Hong Kong Bill of Rights in Cap 383 (the "HKBOR") provides that:

> *"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong."*[10]

Section 31(1) of Criminal Procedure Ordinance (Cap 221) states that:

> *"In criminal proceedings in any court on a plea of autrefois convict or autrefois acquit the accused person may state that he has been previously convicted or acquitted, as the case may be, of the offence charged."*

1.9 By way of illustration and example, the *autrefois* plea succeeded in the Hong Kong case of *R v Li Wing-tat*.[11] In this case, two informations were laid for the same offence by an oversight, with the result that the conviction for the second information was quashed on appeal.[12] Conversely, the *autrefois* plea failed in *Yu Wai-shan & Another.*[13] The applicant in this case had been acquitted of a charge of manufacturing a dangerous drug, but

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7 Other alternative offences for theft under section 9 of the Ordinance include: obtaining pecuniary advantage by deception (under section 18); obtaining services by deception (under section 18A); and evasion of liability by deception (under section 18B). See para 1 of the Schedule to the Theft Ordinance (Cap 210).

8 See *R v Coughlan & Young* (1976) 63 Cr App R 33, and *Archbold Hong Kong 2012* (Sweet & Maxwell), at para 4-32.

9 Section 31(1) of the Criminal Procedure Ordinance (Cap 221). On the timing of a stay of proceedings application, see *Yeung Chun Pong & Others v Secretary for Justice* (2006) 9 HKCFAR 836, discussed below in this chapter.

10 This provision is expressed in similar terms in Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR). See discussion in Chapter 2.

11 [1991] 1 HKLR 731.

12 See also *Archbold Hong Kong 2012* (Sweet & Maxwell), at para 4-32.

13 [1986] HKLR 550.

was convicted of the offence of conspiracy to traffic in a dangerous drug on substantially the same evidence. Although the issue of double jeopardy was raised by the defence, the Court of Appeal held that it did not apply in this case, as the two offences were different in both form and substance.[14]

Prerequisites for a plea of *autrefois acquit* or *autrefois convict*

1.10 Certain conditions must be satisfied before a plea of either *autrefois acquit* or *autrefois convict* can be made. These conditions are as follows:

- the present offence laid against the accused must be in law the same offence as the one for which the accused has been acquitted or convicted in a previous trial;

- the accused must have been at real risk of being convicted of the same offence in a previous trial;

- the acquittal or conviction must be valid. An *autrefois* plea will NOT be accepted if there was no valid acquittal or conviction on the previous charge. Acquittals or convictions arrived at under the following situations would become invalid:

  (a) defective charge or indictment
  (b) court lacked competent jurisdiction
  (c) proceedings were otherwise *ultra vires*
  (d) proceedings were so irregular as to be a nullity
  (e) withdrawal of summons (before pleading) and discharge at committal proceedings or following the entry of a *nolle prosequi*

- the acquittal or conviction of the previous offence must have been final. This may mean either that the time for appeal has lapsed or that the appeal has been determined. Thus, a plea of *autrefois* would not succeed if there was no final adjudication and disposal of the previous charge. An example of this is where an accused, though having been found guilty, had not been sentenced for the original charge. The reason is that a person is said to be "*convicted*" of an offence only after he has been sentenced.[15]

These requirements are briefly discussed and commented on in turn below.

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14 See also *Archbold Hong Kong 2012* (Sweet & Maxwell), at para 4-33.

15 *R v Richards* [1993] AC 217 (PC).

The same offence

1.11 As noted above, under the *autrefois* doctrine, a person cannot be tried for the same offence for which he has been previously acquitted or convicted. Further, he cannot be tried for an offence for which he could have been convicted in a previous trial (such as a lesser alternative charge).

1.12 In addition, a person may not be tried for an offence (say, murder) the proof of which would mean that there is a need to prove the commission of another offence (say, manslaughter) of which he has been previously acquitted. Lord Hodson said in *R v Connelly*,

> *"… where there is an acquittal of a lesser offence which is in law an essential ingredient to [a greater offence], it is plainly not possible to convict on the greater without in effect reversing the acquittal on the other and lesser offence."*[16]

1.13 There appears to be a divergence of views on the question of how similar "*the same offence*" must be. Bruce comments that:

> *"The charge in the first and second indictment must either be the same or be substantially the same, or the charge on the second indictment must not be one in respect of which the accused could have been lawfully convicted."*[17]

Bruce and McCoy also note that:

> *"These special pleas are based on the fundamental principle that an accused should not be placed in double jeopardy, that is, the accused should not be prosecuted twice for the same offence or one substantially similar to that for which he has been previously acquitted or convicted."*[18]

Similarly, *Archbold Hong Kong* states:

> *"A person may not be tried for a crime which is in effect the same or substantially the same as one of which he has previously been convicted or acquitted (or could have been convicted by way of a verdict of guilty of a lesser offence)".*[19]

Archbold Hong Kong goes on to note, however, that:

> *"The cases in this aspect of autrefois are not unanimous."*[20]

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16 [1964] AC 1254, at 1332. See also *Archbold Hong Kong 2012* (Sweet & Maxwell), para 4-32.

17 A Bruce, *Criminal Procedure: Trial on Indictment* (Butterworths, Issue 19), Division VI, at para 454.

18 A Bruce and G McCoy, *Criminal Evidence in Hong Kong* (Butterworths), at [1001] of Division VII.

19 *Archbold Hong Kong 2012* (Sweet & Maxwell), para 4-32.

20 *Archbold Hong Kong 2012* (Sweet & Maxwell), para 4-32.

1.14 The majority of the House of Lords in *Connelly v DPP*[21] applied a narrower test of what would amount to "*the same offence*" for the purposes of an *autrefois* plea. Lord Devlin in *Connelly* said:

> *"The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law. Robbery is not in law the same offence as murder (or as manslaughter, of which the accused could also have been convicted on the first indictment) and so the doctrine does not apply in the present case."*[22]

1.15 This approach was confirmed in *R v Beedie,* where the English Court of Appeal agreed that the later charge had to be "*the same*" as the original charge before the plea of *autrefois* could be established. Rose LJ stated in *Beedie*:

> "*In relation to his first submission, Mr Smith was inclined to concede, on reflection, that Clark J's analysis of the speeches in Connelly v Director of Public Prosecutions was correct, namely that the majority of the House of Lords identified a narrow principle of autrefois, applicable only when the same offence is alleged in the second indictment. In our judgment this concession was rightly made*."[23]

1.16 He went on:

> *"It follows that we are unable to accept the view of the editors of Archbold's Criminal Evidence, Pleading & Practice expressed in earlier editions, and in paragraph 4-117 of the 1997 edition, that Lord Morris of Borth-y-Gest's speech, and in particular his third and fourth principles expressed at p1305 (that the principle of autrefois applies to offences which are the same, or substantially the same, and an appropriate test is whether the evidence to support the second indictment or the facts constituting the second offence would have been sufficient to procure a conviction on the first indictment), represents the ratio of the House's decision. Clark J's analysis was correct. The majority of their Lordships in Connelly v Director of Public Prosecutions defined autrefois in the narrow way which we have described, that is when the second indictment charges the same offence as the first and said that judicial discretion should be exercised in other appropriate cases. Lord Morris and Lord Hodson took the view that no such discretion existed."*[24]

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21 [1964] AC 1254.

22 *Connelly v DPP* [1964] AC 1254, at 1339 to 1340.

23 [1998] QB 356, at 360.

24 [1998] QB 356, at 361.

1.17 Following *Beedie*, for a plea of *autrefois* to succeed, the offence of which a person was previously acquitted or convicted must be in law the same as the offence for which he is now being prosecuted. According to this view, an offence which was considered to be "*substantially the same*" as the one for which the accused was previously convicted or acquitted, even on the same or similar facts, would not be sufficient to establish an *autrefois* plea. This aspect of the *autrefois* doctrine was expounded by Stock JA in *Yeung Chun Pong & Others v Secretary for Justice*:

> *"18. The parameters of the plea are not only narrow but clear and ascertainable by the application of strict logic. Once it is understood that the plea is an aspect of res judicata, it becomes evident that in order for it to be invoked, it is incumbent upon an accused to identify with precision the previous decision relied upon and, in the context of criminal proceedings, that can only be done by reference to a verdict and the elements of the offence necessarily encompassed by that verdict.*
>
> *19. The test of autrefois acquit is one directed at the elements of the two offences under comparison. By this is meant a comparison of the constituent elements in law of the offences charged, and the facts asserted in the charges themselves. 'For the doctrine to apply it must be the same offence both in law and in fact'.*[25] *This is a 'purely legal test of whether the person's acquittal in the first proceedings necessarily in law involves an acquittal in the second' and covers an 'implied alternative acquittal … where the jury could lawfully have convicted the defendant on an alternative charge to the one being tried but have returned no verdict on it'.*[26] *It is not a test that compares the testimony given in the previous trial with the testimony that is anticipated in the second trial. It is this latter notion encouraged by the phraseology of certain judgments – such as the 'same matter' in Wemyss v Hopkins*[27] *– that has caused confusion and a blurring of lines, a confusion that has been exposed in R v Beedie,*[28] *and analysed in depth in Pearce v The Queen.*[29] *Since it is not a test that examines testimony to be given, its validity or invalidity does not change with emerging testimony. It is either good or bad ab initio."*[30]

1.18 In *Yeung Chun Pong & Others v Secretary for Justice,* Stock JA explained what would amount to the same offence by referring to the judgment

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25 *Connelly v DPP* [1964] AC 1254, at 1339.

26 Corker & Young "*Abuse of Process in Criminal Proceedings*" 2nd ed, para 7.20.

27 (1875) LR 10 QB 378.

28 [1998] QB 356.

29 [1998] 194 CLR 610.

30 *Yeung Chun Pong & Others v Secretary for Justice* [2008] 3 HKLRD 1, at paras 18-19.

of the Court of Criminal Appeal in *R v Barron.*[31] The question before the Court in *Barron* was whether a person could be charged with gross indecency with another male person where his earlier charge of sodomy had been quashed. Stock JA cited the following judgment from the Court of Criminal Appeal in *Barron* to explain the position:

> *"20. … 'The test is not, in our opinion, whether the facts relied upon are the same in two trials. The question is whether the appellant has been acquitted of an offence which is the same offence as "gross indecency," ie whether the acquittal on the charge of sodomy necessarily involves an acquittal on the charge of gross indecency. It is quite clear that the jury could not have convicted the appellant of gross indecency at the first trial. And it is equally clear that the acquittal on the graver charge did not necessarily involve an acquittal of the minor offence. … There has … been no verdict that the appellant was not guilty of gross indecency …."'*[32]

1.19 This paper proceeds on the basis that the narrower test applies to the *autrefois* doctrine.

At risk of conviction; a valid verdict

1.20 As noted earlier, the *autrefois* doctrine is grounded upon the belief that an accused should not be put at peril of conviction for the same offence more than once. It follows that for a plea of *autrefois* to succeed, the original proceedings must have placed the accused at real risk of being convicted of the offence with which he now stands charged a second time. If for some reason there was no such risk to the accused (such as where the previous trial was invalid) the accused cannot then rely on the *autrefois* protection. This is because if he was never at risk of being convicted in a previous trial, it cannot be said that he would be jeopardised twice when being charged again with the same offence.[33]

1.21 A verdict may be rendered invalid because certain procedural requirements have not been complied with, or the court hearing the case does not have the necessary jurisdiction. In such a situation, the accused would not have been in any real danger of being convicted at the trial, so the plea of *autrefois* would fail.[34]

1.22 In its consultation paper on double jeopardy, the English Law Commission explained what would amount to a valid acquittal or conviction:

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31 [1914] 2 KB 570.

32 [1914] 2 KB 570, at 576.

33 A Bruce, *Criminal Procedure: Trial on Indictment* (Butterworths, Issue 19), Division VI, at paras 405-450.

34 A Bruce, *Criminal Procedure: Trial on Indictment* (Butterworths, Issue 19), Division VI, at paras 405-450.

"For a plea of autrefois to succeed there must previously have been a valid acquittal or conviction. This means, first, that the defendant must have been acquitted or convicted by a court of competent jurisdiction and the proceedings must not have been ultra vires. Thus a purported acquittal by a magistrates' court of an offence triable only on indictment will not found a plea of autrefois acquit. Second, a purported acquittal or conviction by a competent court does not preclude a subsequent prosecution if the proceedings were so irregular as to be a nullity – for example, where magistrates purported to acquit without giving the prosecution an opportunity to adduce evidence, or where two defendants were tried together without being joined in the same indictment. An invalid acquittal cannot found a plea of autrefois because in law it does not exist."[35]

1.23 A person relying on *autrefois acquit* therefore has to show that there was a valid acquittal at the previous trial. Various situations which would not amount to a valid acquittal were identified by the English Law Commission:

"The need for an acquittal or conviction at the end of the first trial means that the autrefois rule does not apply where the defendant is discharged in committal proceedings, where a summons is withdrawn before the defendant has pleaded to it, where the information is dismissed owing to the non-appearance of the prosecutor, or where the information was so faulty that the accused could never have been in jeopardy on it. In these cases, there is no finding of the court which amounts to an acquittal."[36]

A final verdict

1.24 For a plea of *autrefois* to succeed, the verdict in respect of the original proceedings must be not only valid but also final. Bruce lists what would amount to a final verdict as including:

"(1) A lawful verdict of a jury after a plea of not guilty to a charge appearing in the indictment and a trial on that plea. This applies to both common law and statutory alternatives to the charge on the indictment. Where the verdict is one of guilty, it is necessary for the verdict to have been accepted by the judge and the judgment of the court imposed on the accused. Where the verdict is not

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35 Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 2.7.

36 Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 2.8.

guilty, it is necessary that the verdict be accepted by the judge and some order disposing of the matter be made.

(2) An implied verdict in relation to a common law or statutory alternative to the charge upon which the verdict was returned.

(3) A conviction following a plea of guilty, including a plea of guilty to a lesser offence. A person is not convicted after a plea of guilty until he is sentenced. Where the accused pleads guilty to a lesser offence (whether the lesser offence is expressly pleaded on the indictment or otherwise) and that plea is accepted, the conviction on the lesser count is deemed to be an acquittal on the greater charge. Offences taken into consideration do not rank as convictions for the purpose of this doctrine.

(4) An acquittal after a judge has ordered that the accused be discharged after a 'paper' committal. Such an acquittal may be set aside on appeal in which case, there is a statutory provision which prevents a plea to autrefois acquit.

(5) An order by the Court of Appeal quashing a conviction under section 83(3) of the Criminal Procedure Ordinance which, in the absence of an order that the appellant be re-tried, operates as an order that the court of trial record an acquittal. Such an order is no bar to the prosecution taking such further appellate steps as are available to them. An order for re-trial removes the bar to a fresh trial on indictment.

(6) An order for a substituted verdict on appeal.

(7) An order that a verdict of not guilty be entered after the prosecutor has offered no evidence in the circumstances set out in section 51A of the Criminal Procedure Ordinance. If the formalities required under this section are not observed, the order of the court is a nullity and the plea is not available.

(8) An acquittal following a finding that the accused is under disability."[37]

[37] A Bruce, *Criminal Procedure: Trial on Indictment* (Butterworths, Issue 19), Division VI, at para 452.

Stay of proceedings

1.25 As noted above, an accused may only plead *autrefois* if he is charged with the same offence for which he has been previously convicted or acquitted. The *autrefois* plea does not apply to the situation where a person is charged with a different offence, although the facts of the two offences are the same or substantially the same. In such a situation, the accused may apply to the court for a stay of the proceedings, on the basis that continuation of the hearing of the case would be an abuse of the court's process. In *Yeung Chun Pong & Others v Secretary for Justice,* Stock JA said:

> *"Their Lordships in Connelly decided that the courts had the power to stay proceedings where, although the plea in bar could not be made out because the second trial was not for the same offence, the charges in the later case were founded on the same or substantially the same facts as the charges in a previous indictment on which the accused had been tried to conclusion. They thereby endorsed the spirit of the rule against double jeopardy where it applies outside the strict limits of the plea in bar saying that there was no reason why the two pleas 'should exhaust the inherent power of the court.'"*[38]

1.26 In *Yeung Chun Pong & Others v Secretary for Justice,* Stock JA explained the basis of the power to stay proceedings as follows:

> *"'In general if a prosecution is brought, the court's duty is to try the case. … However, the court also unquestionably has jurisdiction to stay criminal proceedings brought by the Secretary in the exceptional cases where such a course is justified. That jurisdiction rests on the court's inherent power to prevent abuse of its own process: Connelly v DPP [1964] AC at pp 1354, 1361.'"*[39]

1.27 Stock JA continued his explanation of the power to stay proceedings as follows:

> *"The point is encapsulated thus in the Notice of Application, that:*
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> *' … even if [in this case] autrefois acquit is strictly inapplicable, the Judge has a discretion to stay the proceedings where the second indictment arises out of the same or substantially the same set of facts as the first. That discretion should be exercised in favour of an accused unless the prosecution establishes that there are special circumstances for not doing so.'"*[40]

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38 *Yeung Chun Pong & Others v Secretary for Justice* [2008] 3 HKLRD 1, at para 26.

39 *Yeung Chun Pong & Others v Secretary for Justice* [2008] 3 HKLRD 1, at para 25.

40 *Yeung Chun Pong & Others v Secretary for Justice* [2008] 3 HKLRD 1, at para 29.

1.28 Under this aspect of the rule against double jeopardy, an accused may be protected from being tried twice in respect of the same or similar facts if it can be shown that the current charge against him could or should have been prosecuted in a previous trial where the facts of the case were the same or substantially the same as those of the current charge. In such circumstances, the court may exercise its inherent jurisdiction to stay the proceedings on the basis that they are oppressive and unfair and would amount to an abuse of the court's process.

1.29 For a "*stay*" application to succeed, it must be shown that there were no valid reasons why the accused was not charged with the different offence at the previous trial, and that it would be unjust and thus an abuse of the court's process to prosecute him subsequently on essentially the same or similar facts and evidence. Lord Devlin in *Connelly v DPP* explained the power of the court to stay proceedings:

> *"As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3*[41] *where it can properly be used."*[42]

1.30 In certain special circumstances, however, a second trial could be initiated against a person on the same or similar facts in respect of which he was previously convicted or acquitted. Lord Devlin, in *Connelly,* said:

> *"But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule. Without attempting a comprehensive definition, it may be useful to indicate the sort of things that would, I think, clearly amount to a special circumstance. Under section 5(3) of the Act a judge has a complete discretion to order separate trials of offences charged in one indictment. It must, therefore, follow that where the case is one in which, if the*

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41 Rule 3 refers to the Indictment Act 1915 in England, Schedule 1, rule 3, which permitted a series of offences of the same or a similar character to be joined in the same indictment: see Law Commission Consultation Paper No 156 (cited above), footnote 42, at 12. Rule 7 of the Indictment Rules (Cap 221), the equivalent provision in Hong Kong, provides as follows: "*Subject to section 18 of the Ordinance, charges for any offences may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.*"

42 *Connelly v DPP* [1964] AC 1254, at 1359 to 1360.

offences in the second indictment had been included in the first, the judge would have ordered a separate trial of them, he will in his discretion allow the second indictment to be proceeded with. A fortiori, where the accused has himself obtained an order for a separate trial under section 5(3). Moreover, I do not think that it is obligatory on the prosecution, in order to be on the safe side, to put into an indictment all the charges that might conceivably come within rule 3, leaving it to the defence to apply for separation. If the prosecution considers that there ought to be two or more trials, it can make its choice plain by preferring two or more indictments. In many cases this may be to the advantage of the defence. If the defence accepts the choice without complaint and avails itself of any advantage that may flow from it, I should regard that as a special circumstance; for where the defence considers that a single trial of two indictments is desirable, it can apply to the judge for an order in the form made by Glyn-Jones J in Reg v Smith."[43]

1.31 In *R v Beedie,*[44] the Court of Appeal confirmed that the subsequent proceedings may be stayed where there are no special circumstances to support the continuation of the trial. In *Yeung Chun Pong & Others v Secretary for Justice,* Stock JA referred to *Beedie* to illustrate the fact that a stay of proceedings may be granted where a plea of *autrefois* had failed to succeed:

> *"R v Beedie provides a further example of a case in which the plea of autrefois acquit did not run but a stay was granted because the second prosecution was based on substantially the same facts. The defendant was the landlord of a property in which a young woman died of carbon monoxide poisoning caused by the use of a defective gas fire. The defendant pleaded guilty to an offence under the Health and Safety at Work Act 1974 of failing in his undertaking as a landlord to ensure the safety of the deceased by maintaining the fire and flue in good repair and proper working order. Subsequently he was charged with manslaughter and upon rejection of a plea of autrefois convict, he pleaded guilty. The conviction was quashed on appeal because the court was of the opinion that:*
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> > *'A stay should have been ordered because the manslaughter allegation was based on substantially the same facts as the earlier summary prosecutions, and gave rise to a prosecution for an offence of greater gravity, no new facts having occurred ….'*[45]"[46]

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43 [1964] AC 1254, at 1360.

44 [1998] QB 356.

45 [1998] QB 356, at 366.

46 *Yeung Chun Pong & Others v Secretary for Justice* [2008] 3 HKLRD 1, at para 37.

1.32 In *Yeung Chun Pong & Others v Secretary for Justice*, the Court of Appeal expressed the concern that "*… stay applications constitute a growth industry in this jurisdiction.*" [47] The undesirable consequences of unmeritorious applications for a stay of proceedings were stated by Stock JA as follows:

> *"Courts elsewhere have also become increasingly troubled by the frequency of applications to stay proceedings on the grounds of abuse of process, and by assumptions made as to the extent of the discretion. This is not to assert that meritorious applications are never made, nor to discourage counsel from their clear duty when their professional judgment, properly informed of the exceptional circumstances that will warrant a stay, dictates the making of an application. Yet it is obvious at every level of our court system that unmeritorious applications are made far too frequently. The effect is to prolong court proceedings, to cause them to be interrupted by collateral applications upon review, and unnecessarily to increase costs and the burden upon the administration of justice.*
>
> *It should by now be recognised as trite that the power to order a stay … is to be used only in the most exceptional circumstances: Lee Ming Tee;* [48] *and, in the context of suggested double jeopardy cases, Lord Devlin noted in DPP v Humphrys* [49] *that:*
>
> > *'If there is the power which my noble and learned friends think there is to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.'"* [50]

1.33 The Court of Final Appeal has recently considered the "*stay of proceedings*" principle in *Yeung Chun Pong & Others v Secretary for Justice* and has endorsed the following:

> *"There is a discretionary power to stay a prosecution as an abuse of process where (i) a person faces a second trial arising from the same or substantially the same set of facts as gave rise to an earlier trial (whether in the same jurisdiction or in a competent court in another jurisdiction) and (ii) the prosecutor cannot advance any special or exceptional circumstances to justify the holding of a further trial."* [51]

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47 *Yeung Chun Pong & Others v Secretary for Justice* [2008] 3 HKLRD 1, at para 71.

48 (2001) 4 HKCFAR 134.

49 [1977] AC 1 at 26.

50 *Yeung Chun Pong & Others v Secretary for Justice* [2008] 3 HKLRD 1, at paras 72-73.

51 *Yeung Chun Pong & Others v Secretary for Justice* FACC No 8 of 2008, at para 21.

The Court of Final Appeal, however, held on the facts of the case that the Hong Kong money laundering trial did not arise from the same or substantially the same set of facts as gave rise to the earlier trial (which was a trial in the Court of Macau).[52] The court also held that a conviction on the Hong Kong conspiracy to launder money charge would not be inconsistent with the acquittal on the Macanese money laundering charge.[53]

Procedure for making an *autrefois* plea

1.34 Section 31(1) of the Criminal Procedure Ordinance (Cap 221) provides that "*[i]n criminal proceedings in any court on a plea of autrefois convict or autrefois acquit the accused person may state that he has been previously convicted or acquitted, as the case may be, of the offence charged.*" Subsection 2 provides that the word "*court*" in subsection (1) includes the District Court and a magistrate. The *autrefois* plea is normally made either on or before arraignment before the trial court in the magistracy, District Court or Court of First Instance.

1.35 In committal proceedings, the magistrate has an implied power to stay proceedings to prevent an abuse of its own process and in theory such a power could apply to instances where the accused is being tried for the same offence. This was considered by the Court of Final Appeal in *Yeung Chun Pong v Secretary for Justice.*[54] In this case, the court held that there was an implied power in every court to protect the integrity of its own process. There was therefore such an implied power in the examining magistrates to stay proceedings in order to prevent abuse of the process of the magistrates' court. In respect of committal proceedings, the court was of the view that the decision of an examining magistrate as regards an *autrefois* application was neither decisive nor final, because the defendant could freely raise the plea at trial or apply to the High Court for a stay of the criminal proceedings, and the

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52 "*23. Let us now compare and contrast the two charges in question. Drawing the threads together, the position comes to this. Under the money laundering charge in the Macanese proceedings, the case which had been brought against these three appellants is that they together with others had used the 95 account held in Madam Tse's name between 27 August 1999 and 5 June 2000 to launder HK$187,000,000 being the proceeds of illegal bookmaking on horse races in Hong Kong during the 1999-2000 season. But under the conspiracy to launder money charge in the Hong Kong proceedings, the case being brought against these three appellants is that between 30 June 1998 and 3 September 1999 they had conspired together and with others to use the 74 account held in the 2nd appellant's name to launder HK$216,152,319 being the proceeds of illegal bookmaking on horse races in Hong Kong during the 1998-1999 season.*

24. The only overlap, if it amounts to an overlap at all, is that constituted by (i) the fact that the last transaction on the 74 account was the transfer of its credit balance of HK$70,220.46 to the 95 account and (ii) the eight days from 27 August to 3 September 1999 common to both charge periods. Otherwise the charges periods, one of 10 months and the other of 14 months, are different. The bank accounts used are wholly different. And the two lots of proceeds, each in nine figures, are wholly different: one from the 1998-1999 racing season and the other from the 1999-2000 racing season. Viewed realistically and in context, the overlap or similarities are insignificant."

53 *Yeung Chun Pong & Others v Secretary for Justice* FACC No 8 of 2008, at para 25.

54 (2006) 9 HKCFAR 836.

prosecution could seek judicial review of the examining magistrate's decision on the *autrefois* issue. For this reason, the Court of Final Appeal said that the preferable approach would be to leave the determination of an *autrefois* issue to be dealt with as pleas in bar by the trial court, subject to the exercise, when it was properly invoked, of the High Court's supervisory jurisdiction to grant a stay of proceedings to prevent an abuse of process arising from the exceptional case in which a defendant was tried twice for the same offence.[55]

1.36 Bruce summarises how an *autrefois* plea can be made and determined as follows:

> *"The plea should be in writing although it may not be strictly necessary to do this.*[56] *The prosecution may either reply or demur. If the prosecution replies, the matter is determined by the trial judge in the absence of a jury. Where an issue is joined by a demurrer, a jury should be empanelled to try the issue. The onus of proof is on the accused. The standard of proof is the civil standard. The plea, if it is to be advanced, should be made before arraignment. It may be open to raise the issue on appeal even though it was not pleaded and dealt with at trial."*[57]

Conviction or acquittal by a foreign court

1.37 A conviction or acquittal by a foreign court of competent jurisdiction is sufficient to place the accused in jeopardy for the purposes of an *autrefois* plea. In Hong Kong, this has been recently considered by the Court of Appeal in *Yeung Chun Pong & Others v Secretary for Justice.* In that case, Stock JA said:

> *"It is established that the doctrines of autrefois acquit and autrefois convict apply to acquittals and convictions in a foreign jurisdiction, though in the case of autrefois convict only if the defendant has truly been in jeopardy: Thomas;*[58] *R v Roche;*[59] *Aughet;*[60] *Thomas;*[61] *Friedland, Double Jeopardy;*[62] *and R v Cheong.*[63]"[64]

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55 (2006) 9 HKCFAR 836 at para 45.

56 An *autrefois* plea is usually made orally by counsel for the defence at the proceedings.

57 A Bruce, *Criminal Procedure: Trial on Indictment* (Butterworths, Issue 19), Division VI, at paras 455-500.

58 (1664) 1 Keble 677.

59 (1775) 1 Leach 134.

60 (1918) 13 Cr App R 265.

61 [1984] 3 All E R 34.

62 Chap 12.

63 [2006] EWCA Crim 524; [2006] Crim L R 1088.

64 *Yeung Chun Pong & Others v Secretary for Justice* [2008] 3 HKLRD 1, at para 51.

Thus, if there is no real risk of punishment (because of the impossibility of extradition, for example), then it could not be said that the accused was in jeopardy on the previous charge: *R v Thomas.*[65]

[65] [1985] QB 604 (CA).

Chapter 2

Should the rule against double jeopardy be reformed?

2.1 In his 2001 report on a review of the criminal courts in England and Wales, Lord Justice Auld commented on the historical basis for the doctrine against double jeopardy:

> *"Like many of our principles of criminal law, it has its origin in harsher times when trials were crude affairs affording accused persons little effective means of defending themselves or of appeal, and when the consequence of conviction was often death. Thus, in Hawkins' Pleas of the Crown it is said that it is founded on the maxim 'that a man shall not be brought into danger of his life for one and the same offence more than once'."*[1]

2.2 In *Green v United States*, Black J explained the reasons why a person should not be prosecuted more than once for the same offence:

> *"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."*[2]

2.3 The explanation given in the *Green* case was grounded upon the belief that a person who has undergone the ordeal of a criminal trial should, following the final verdict, be left undisturbed, either to face the appropriate punishment in the case of a conviction, or to lead a normal life in the case of an acquittal. In this chapter, we first consider both (i) the justifications for the rule against double jeopardy and (ii) the arguments in favour of reform. We then address the constitutional and human rights concerns raised by reform of the rule. After considering the competing arguments and human rights/ constitutional concerns, we set out our conclusion that the rule against double jeopardy should be reformed.

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1 The Right Honourable Lord Justice Auld, *Report on Review of the Criminal Courts of England and Wales* (The Stationery Office, 2001), Chapter 12, para 50.

2 *Green v United States* (1957) 355 US 184, at 187 to 188.

Justifications for the rule against double jeopardy and counter-arguments

2.4 The principal justifications for the rule are that it:

(a) avoids the repeated distress of the trial process;

(b) reduces the risk of a wrongful conviction;

(c) promotes finality in the criminal justice system; and

(d) encourages the efficient investigation of crime.

(a) Avoids the repeated distress of the trial process

2.5 In its 1999 consultation paper on double jeopardy, the English Law Commission noted the reasons generally advanced to justify the existence of the rule against double jeopardy. The Commission considered that *"a powerful consideration"* was the fact that the rule avoided the repeated distress of the trial process, and noted that that distress affected not only the accused, but also his family, witnesses on both sides, and, of course, the victim.[3] A similar observation was made by the New Zealand Law Commission in its 2001 report.[4]

2.6 The English Law Commission considered that the anxiety and distress justified a general rule against retrials, but not an absolute one.[5] The Commission pointed out that the distress caused by a retrial arising from the prosecution's existing right of appeal on a point of law from acquittal in the magistrates' court would not be any less than that caused by a retrial as a result of a relaxation of the double jeopardy rule.[6] In the Law Commission's view, the fact that the distress caused might be out of proportion to the seriousness of the alleged crime or the public interest in the conviction of the offenders might be an argument for confining relaxation of the rule to serious offences, or only where relaxation was in the interests of justice, but not for negating the proposed relaxation entirely. Professor Paul Roberts expressed a similar view:

> *"[I]t is doubtful that the desire to minimise distress, well intentioned though it is, justifies any rule against retrials, of any*

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3 Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 4.7.

4 New Zealand Law Commission, *Report on Acquittal Following Perversion of the Course of Justice* (2001), Report No 70, at para 13.

5 Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at paras 5.11-5.13.

6 Under the then section 28A of the Supreme Court Act 1981. In Hong Kong, section 83E of the Criminal Procedure Ordinance (Cap 221) allows the Court of Appeal to order a retrial where it allows an appeal against conviction. The Law Commission's observation would therefore apply with equal force in Hong Kong.

degree of generality ... [I]f the justification for retrial is otherwise irresistible, the unavoidable distress of further proceedings will almost never be a decisive objection."[7]

(b) Reduces the risk of a wrongful conviction

2.7 The English Law Commission noted that, if it was accepted that juries do on occasion return perverse verdicts of guilty, the chances of a wrongful conviction must increase if an individual is tried more than once for the same offence.[8] The likelihood of conviction, whether the defendant was guilty or not, might be greater at a second trial as the prosecution may have acquired, because of the first trial, a tactical advantage. Furthermore, an innocent person may not have the stamina or resources to fight a second charge. The Scottish Law Commission also noted that the prosecution had an institutional memory which would probably be denied to the defence, and the prosecution also had access to much greater resources for preparation and examination of evidence before instituting proceedings.[9] Hence, the prosecution might be expected to be at an advantage where a new trial proceeded upon much of the same evidence, especially when the second prosecution occurs at some considerable time after the first.

2.8 Nonetheless, the English Law Commission considered that the risk of wrongful conviction was "*equally true of any trial*" and observed that if the new evidence was "*very strong*", the risk at a retrial would be "*very small – considerably smaller than in the ordinary case, where the prosecution's evidence need only constitute a case to answer*".[10] The Scottish Law Commission did not consider the increased risk of wrongful conviction a persuasive argument against a retrial, with the presumption of innocence and the prosecution's burden of proving its case beyond reasonable doubt providing safeguards.[11]

(c) Promotes finality in the criminal justice system

2.9 It is clearly desirable from the point of view of all parties (whether victims, witnesses or the accused) that there is a point at which the circumstances of the offence can be put behind them. The English

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7 Paul Roberts, "Justice for all? Two bad arguments (and several good suggestions) for resisting double jeopardy reform" (2002) International Journal of Evidence and Proof 197, at 210.

8 Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 4.5.

9 Scottish Law Commission, *Discussion Paper on Double Jeopardy* (2009), Discussion Paper No 141, at 2.20. In the same paragraph, the Commission said: "*On balance, we do not consider the notionally increased risk of wrongful conviction to be a persuasive argument*."

10 Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 5.10.

11 Scottish Law Commission, *Discussion Paper on Double Jeopardy* (2009), Discussion Paper No 141, at paras 2.15, 2.16 and 2.20.

Commission noted the need for finality in the criminal justice process and *"the virtue in putting a line under emotive and contentious events, so that life can move on."*[12] The prospect that it might be necessary to go through the trial process again at some future date is likely to cause anxiety not only to the defendant but also to others involved.

2.10 The New Zealand Commission commented that "*[b]y preventing harassment and inconsistent results [the rule against double jeopardy] promotes confidence in court proceedings and the finality of verdicts.*"[13] The Scottish Law Commission also noted that the principal rationale for the rule against double jeopardy was to bring about finality.[14] There are two aspects. The first is the general interest of society in treating final judgments of the courts as conclusive, so that parties and others can carry on with their lives. Secondly, avoiding the possibility of conflicting judicial decisions on the same case is important for maintaining public confidence in the general efficacy of the courts.

2.11 The English Law Commission, however, observed that the reopening of an acquittal would be an "*extraordinary rather than an ordinary procedure*", and suggested that only acquitted defendants who were in fact guilty would be in fear of a retrial because only they would fear that further evidence might be found one day.[15] The Commission considered that it was not undesirable that such defendants should be subjected to the anxiety of knowing that their crimes might eventually be punished. The Commission admitted that a higher value should be given to the "*finality*" argument, even though the Commission maintained that that did not mean that no exception could be justified.[16]

(d) Encourages the efficient investigation of crime

2.12 It could be argued that if the prosecution were able to prosecute once again a defendant who had been acquitted there would be a risk that the initial investigation might not be carried out as diligently as it should be. The English Law Commission observed that "*[T]he fact that there is but one chance to convict a defendant operates as a powerful incentive to efficient and*

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12 Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 4.8. However, in the same paragraph, the Commission also observed that, *"this consideration may well be outweighed by others, such as the need to avoid miscarriages of justice."*

13 New Zealand Law Commission, *Report on Acquittal Following Perversion of the Course of Justice* (2001), Report No 70, at para 14.

14 Scottish Law Commission, *Discussion Paper on Double Jeopardy* (2009), Discussion Paper No 141, at para 2.30.

15 Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 5.14.

16 Law Commission, *Report: Double Jeopardy and Prosecution Appeals* (2001), Law Com No 267, at para 4.22: "*Any exception must, however, be limited to those types of case where the damage to the credibility of the criminal justice system by an apparently illegitimate acquittal is manifest, and so serious that it overrides the values implicit in the rule against double jeopardy*."

exhaustive investigation."[17] A similar view was expressed by the New Zealand Law Commission, which said that "*[o]pportunity for the Crown to revisit its case after acquittal would provide perverse disincentives to getting it right at the outset.*"[18]

2.13 The Scottish Law Commission did not think that a weakening of the rule against double jeopardy would cause any diminution in the natural inclination and efforts of the police and prosecution to gather all available evidence, although the Commission believed in general that any institution's professional predisposition to act properly could only benefit from rules requiring it to do so.[19] In any event, we believe that this concern can be adequately addressed by providing in the legislation that evidence that could, with the exercise of reasonable diligence by law enforcement agencies, have been adduced in the original trial cannot form the basis for reopening an acquittal.[20]

Arguments in favour of reform

2.14 While there are sound justifications for the rule against double jeopardy, powerful arguments also exist in favour of relaxing that rule in certain circumstances. The most obvious is where new and compelling evidence is brought to light after the completion of the original proceedings which points to the guilt of an acquitted defendant. This situation is increasingly likely to arise with the rapid advances in recent years in the scope and quality of scientific evidence, particularly DNA testing, which offers persuasive evidence which was not previously available. There may also be circumstances where other compelling evidence comes to light after the conclusion of the original trial, perhaps from a newly identified witness or documentary source.

2.15 Professor Ian Dennis notes that the emergence of new evidence of guilt calls into question the legitimacy of an acquittal and suggests that a mistake has been made. He states that a retrial in such circumstances will serve to *"resolve the legitimacy problem of the first acquittal and forward the aims of criminal justice if the defendant is in fact guilty."*[21] In considering whether exceptions should be made to the strict rule against double jeopardy, one of the questions to be asked is whether society would be worse off if the rule remains unchanged.

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17 Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 4.11.

18 New Zealand Law Commission, *Report on Acquittal Following Perversion of the Course of Justice* (2001), Report No 70, at para 16.

19 Scottish Law Commission, *Discussion Paper on Double Jeopardy* (2009), Discussion Paper No 141, at 2.23.

20 This is recommended in Recommendation 4 in Chapter 3.

21 I Dennis, "Rethinking Double Jeopardy" [2000] Crim L R 933, at 945, referred to in English Law Commission, *Report: Double Jeopardy and Prosecution Appeals* (2001), Law Com Report No 267, at para 4.4.

2.16 As regards the social impact of failing to convict a person of a serious offence where new evidence has been unearthed since his acquittal which unequivocally points to his guilt, the English Law Commission said:

> *"There is … the spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person's own admission) points strongly or conclusively to guilt. Such cases may undermine public confidence in the criminal justice system as much as manifestly wrong convictions. The erosion of that confidence, caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself."*[22]

2.17 The unfortunate consequences of a rigid adherence to the rule against double jeopardy in the face of new evidence are illustrated by *Carroll* case in Australia, referred to in the preface to this report. There have therefore been calls for reform, or actual legislative change, in a number of jurisdictions.

Constitutional and human rights implications

2.18 Article 39 of the Basic Law of the Hong Kong Special Administration Region specifically provides that the provisions of the International Covenant on Civil and Political Rights (ICCPR) shall remain in force and shall be implemented through the laws of Hong Kong. Article 39 further provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law, and such restrictions shall not contravene this Article. Article 14(7) of the ICCPR provides that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. Article 11(6) of the HKBOR (already referred to in Chapter 1) is in similar terms to Article 14(7) of the ICCPR and states:

> *"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong."*[23]

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22 Law Commission, *Report: Double Jeopardy and Prosecution Appeals* (2001), Law Com Report No 267, at para 4.5.

23 In *Ubamaka v Secretary for Security* [2011] 1 HKC 508, the Court of Appeal held (*per* Fok J, as he then was):- "*art 14(7) of the ICCPR and art 11(6) of the BOR prohibit a subsequent prosecution for the same offence and not one for the same actions, thereby restricting the protection to a situation in which the strict plea of autrefois acquit or autrefois convict would be available but not to one in which the wider principle of double jeopardy would be available.*" (at para 123)

2.19 One concern that has to be addressed is whether any relaxation of the rule against double jeopardy would be compatible with the ICCPR and Article 11(6) of the HKBOR. Hong Kong is not alone in incorporating constitutional guarantees of the rule against double jeopardy. Before drawing any conclusion, therefore, it would be useful to examine (as we do below) how these human rights implications were addressed by some of the overseas jurisdictions which have reformed the rule against double jeopardy.

England and Wales

2.20 Both the ICCPR and Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms apply to England.[24] The question of compatibility of any relaxation of the rule with Article 14 of the ICCPR and Article 4 of Protocol No 7 was considered by the English Law Commission in its 1999 consultation paper. The Commission said:

> *"Article 14 applies both to the reopening of a conviction and to the reopening of an acquittal. Read literally, it therefore prohibits even the power of an appellate court to quash a criminal conviction and to order a retrial if new evidence or a procedural defect is discovered after the ordinary appeals process has been concluded. In its General Comment on Article 14(7), however, the United Nations Human Rights Committee, the treaty body charged with implementing the ICCPR, expressed the view that the reopening of criminal proceedings 'justified by exceptional circumstances' did not infringe the principle of double jeopardy. The Committee drew a distinction between the 'resumption' of criminal proceedings, which it considered to be permitted by Article 14(7), and 'retrial' which was expressly forbidden.*
>
> *The distinction between 'resumption' and 'retrial' has not yet been expressly recognised in the law of England and Wales. It has, however, taken firm root in European human rights law, and is now reflected in Article 4(2) of Protocol 7 to the ECHR."*[25]

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[24] Article 4 of Protocol No 7 - Right not to be tried or punished twice

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

[25] Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at paras 3.12 to 3.13. The Commission's recommendation to reform the rule against double jeopardy was implemented by the Criminal Justice Act 2003. The Act is reviewed in greater detail later in this paper.

2.21 The human rights perspective of the double jeopardy rule was also considered by Lord Justice Auld in his report on the criminal courts:

> *"To permit reopening of an acquittal in such a circumstance [ie where there is compelling new evidence] is not inconsistent with the International Covenant on Civil and Political Rights 1966 or with the European Convention of Human Rights. Both provide that no-one shall be tried a second time for an offence of which he has been 'finally' convicted or acquitted 'in accordance with the law and penal procedure' of each state. And both accommodate the reopening of criminal proceedings in exceptional circumstances. Indeed, the ECHR expressly provides for the reopening of cases in accordance with provisions of domestic law where there is evidence of newly discovered facts or if there was a fundamental defect in the proceedings, which could affect the outcome of the case."*[26]

New Zealand

2.22 Similar protection against double jeopardy is also provided in section 26(2) of the New Zealand Bill of Rights Act 1990: "*No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again*." The distinction between "*resumption*" and "*retrial*," and the implications for the double jeopardy rule, were considered by the New Zealand Law Commission in its 2001 report. The Commission stated:

> *"In this context 'resumption' contemplates a revisiting of a fundamentally defective proceeding; 'retrial' the exposure of an accused to a retrial where there has been no fundamental defect. Thus the retrial of a defective proceeding would not offend against Article 14(7) or section 26(2)."*[27]

South Africa

2.23 Section 35(3)(m) of the Constitution of the Republic of South Africa provides:

> *"Every accused person has a right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."*

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[26] The Right Honourable Lord Justice Auld, *Report on Review of the Criminal Courts of England and Wales* (The Stationery Office, 2001), Chapter 12, at para 52.

[27] New Zealand Law Commission, *Report on Acquittal Following Perversion of the Course of Justice* (2001), Report No 70, at para 10. In this report, the Commission recommended reforming the rule against double jeopardy. The report's recommendations are reflected in the Criminal Procedure Bill which will be reviewed in greater detail later in this paper.

2.24 In considering whether the constitutional right precluded reform of the rule against double jeopardy, the South African Law Commission observed, "*This is not an absolute rule because it is arguable that a retrial in the event of formal defects in the hearing is permitted. The [Constitution], in any event, permits it.*"[28] The Commission further stated in its report,

> *"3.9 There is no international covenant on human rights the Commission is aware of which - in the case of an acquittal on the merits of the case - prohibits an appeal by the prosecuting authority or provides an acquitted person with the right not to have the acquittal set aside on appeal.*
>
> *….*
>
> *5.6 … The Constitution is silent on the right of the State to prosecute appeals and the emphasis is on the right of an accused person. If one bears in mind that the supposed negative right of not to have an acquittal reconsidered is a right of the accused and not one of the State, the omission is significant. Once it is accepted that the provisions concerning appeals on bail, sentence and on legal points are not unconstitutional, there is no reason to imagine that an appeal on the merits by the State would be. …*
>
> *….*
>
> *5.21 … Even if it is accepted that such an extension [of the prosecution's right to appeal on questions of fact] infringes the protection against double jeopardy, which, in the Commission's view, it does not, it can be argued that it is a justifiable limitation of the protection against double jeopardy."*[29]

Other commentaries on Article 14(7) of the ICCPR

2.25 Article 11(6) of the HKBOR (Article 14(7) of the ICCPR) applies to a retrial following either a conviction or an acquittal. There is no express limitation clause under the article. As observed by the Law Commission in England, Article 14(7) of the ICCPR, if construed literally, may even prohibit an appellate court from quashing a criminal conviction and ordering a retrial if fresh evidence or a procedural defect is discovered after the conclusion of the ordinary appeal process.[30]

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[28] South African Law Commission, *Simplification of Criminal Procedure (The Right of the Attorney-General to Appeal on Questions of Fact)* (2000), Project 73 (Discussion Paper 89), at footnote 50.

[29] South African Law Commission, *Third Interim Report: Simplification of Criminal Procedure (The Right of the Director of Public Prosecutions to Appeal on Questions of Fact)* (2000), Project 73. In the report, the Commission recommended extending the prosecution's right to appeal on questions of fact, and the recommendation is "*[u]nder consideration by the Department of Justice and constitutional Development*" (see Annexure G of Thirty Fourth Annual Report 2006/2007 of the Commission).

[30] Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 3.12.

2.26 However, the United Nations Human Rights Committee (the "Committee"), the treaty body charged with implementing the ICCPR, has not construed Article 14(7) in such a literal way. In General Comment No 13, the Committee stated:

> *"19. In considering state reports, differing views have often been expressed as to the scope of paragraph 7 of Article 14. Some states parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most states parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a retrial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of ne bis in idem may encourage states parties to reconsider their reservations to Article 14, paragraph 7."*

The Committee appears to endorse the view that "*a resumption of a trial justified by exceptional circumstances*" does not violate Article 14(7), and the Article has not conferred an absolute right on acquitted persons.[31] General Comment No 32, in replacing General Comment No 13 has put beyond doubt the non-absolute character of Article 14(7):

> *"56. The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal."*

2.27 The Committee did not list the "*exceptional circumstances*" that it had in mind. Nevertheless, those circumstances referred to in Article 4(2) of Protocol 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms provide some guidance: "… *if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case*". Furthermore, commenting on Article 14(7) of the ICCPR, an authoritative treatise on this subject made the following observations:

> *"Article 14(7) permits a state's prosecuting authorities to apply to 'reopen' an acquittal, in exceptional circumstances, after it has the quality of res judicata; but it prevents the prosecuting authorities from bringing fresh criminal proceedings on their own initiative. This distinction has taken firm root in European*

[31] Article 14 of the ICCPR is not included in Article 4 of the Covenant as a non-derogable right at time of public emergency.

human rights law, and is now reflected in Art 4(2) of Protocol 7 to the European Convention."[32]

2.28 From the above analysis, it would appear to be the general consensus of a number of common law jurisdictions and commentaries that a relaxation of the rule against double jeopardy can be justified if there are exceptional circumstances. The reforms adopted or proposed in various jurisdictions including England, New South Wales, New Zealand and Queensland, explored in greater detail in the next chapter, are that an acquitted person can be brought to trial again for the same offence if the offence is*, inter alia*, a serious one and the evidence against the acquitted person is of a sufficiently strong character (formulated in various statutes by reference to its being "*new*", "*fresh*" or "*compelling*"). The question, then, is on what juridical basis such an exception can be justified under the relevant human rights and constitutional legislation. Some of the discussions we identified above attempted to draw a distinction between "*resumption*" of "*a fundamentally defective proceeding*" (which is permissible), and a "*retrial*" (which is not). However, we find this distinction unsatisfactory. To try to suggest or formulate "*defects*" which are so fundamental as to render the formal trial as somehow uncompleted (and hence capable of being "*resumed*") is artificial and strained. A trial that is "*resumed*" under the supposed exception is no less a "*retrial*" (in that the accused is being put on trial again). The reality is that there are some defects which are sufficiently exceptional and constitute such an affront to the community's sense of justice that as a matter of policy the law should permit an exception to the ostensible "*right*" against double jeopardy. In our view there already exists in the current human rights jurisprudence a sufficient basis for the creation of an exception to a right guaranteed by the Basic Law and the ICCPR, without having to resort to such strained distinctions between a permissible "*resumption of trial*" and an impermissible "*retrial*".

2.29 According to Article 39(2) of the Basic Law, any restriction of rights and freedoms enjoyed by Hong Kong residents under the ICCPR, including an acquitted person's right under Article 11(6) of the HKBOR, must be "*prescribed by law*". In relation to this phrase, the Court of Final Appeal in *Leung Kwok Hung & Others v HKSAR* said:

> *"26 In his judgment in Shum Kwok Sher v HKSAR (2002) 5 HKCFAR 381, Sir Anthony Mason NPJ, taking into account a range of comparative materials, held that, consistently with international human rights jurisprudence, the expression 'prescribed by law' in art 39(2) mandates the principle of legal certainty (at para 60).*
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> *27 To satisfy this principle, certain requirements must be met. It must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to*

[32] Ben Emmerson QC, Professor Andrew Ashworth & Alison Macdonald, *Human Rights and Criminal Justice,* 2nd ed, Sweet & Maxwell: London, 2007, at para 12-30.

regulate his conduct. As pointed out by Sir Anthony Mason NPJ (at para 63), the explanation of these requirements in the often quoted passage in the majority judgment of the European Court of Human Rights in Sunday Times v United Kingdom (No 1) (A/130) (1979-1980) 2 EHRR 245 (at para 49, p 271), the 'thalidomide' case, is of assistance:

'First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'

28 There is an inevitable tension between requiring a law to be formulated with sufficient precision and the desirability of avoiding excessive rigidity in the law. The appropriate level of precision must depend on the subject matter of the law in question. See Shum Kwok Sher v HKSAR (2002) 5 HKCFAR 381 at para 64."[33]

2.30 Apart from being "*prescribed by law*", a restriction should also satisfy other requirements. In respect of the presumption of innocence under Article 11(1) of the HKBOR[34] which, unlike the right of peaceful assembly under Article 17, does not have explicit or built-in "*constitutional requirements for restriction*", the Court of Final Appeal said in *HKSAR v Lam Kwong Wai & Another*:

"Although these rights are expressed in absolute terms and are not subject to explicit exceptions or qualifications, it has generally been accepted elsewhere that an encroachment on these rights by way of presumption or reverse onus of proof may be justified if it has a rational connection with the pursuit of a legitimate aim and if it is no more than necessary for the achievement of that legitimate aim … In Hong Kong, it has been accepted that a justification provision is to be implied in the BOR (R v Sin Yau Ming [1992] 1 HKCLR 127). In principle, the same approach applies to the Basic Law. … the presumption is not an absolute

[33] [2005] 3 HKLRD 164.

[34] Also under Article 87(2) of the Basic Law.

right and is capable of derogation but the derogation must be justified."[35]

The Court of Final Appeal went on to say that if the provision in question derogated from the presumption of innocence, the derogation could be justified by passing the rationality test and proportionality test:

(1) the restriction must be rationally connected with one or more of the legitimate purposes; and

(2) the means to impair the right of peaceful assembly must be no more than what is necessary to accomplish the legitimate purpose in question.[36]

The Court of Final Appeal said in *Leung Kwok Hung & Others v HKSAR*:

> *"The use of a proportionality principle in examining whether a restriction of a fundamental right is necessary in a democratic society is consistent with the approach to constitutional review in many jurisdictions. … Although the terms in which the proportionality test is formulated for application may vary from one jurisdiction to another, having regard to matters such as the text of the constitutional instrument in question and the legal history and tradition informing constitutional interpretation in the jurisdiction concerned, the nature of the proportionality principle is essentially the same across the jurisdictions."*[37]

2.31 We are of the view that the right guaranteed under Article 11(6) of the HKBOR is not absolute, and the derogation of an acquitted person's right can be justified under exceptional circumstances in compliance with the rationality principle and the proportionality principle. The pre-conditions for the derogation should also be set out clearly in the legislation so as to fulfil the "*prescribed by law*" requirement. These "*exceptional circumstances*" are, as we will recommend in the next chapter, the discovery of fresh and compelling evidence as to guilt, and "*tainted acquittals*" involving a fundamental defect in the previous proceedings, which could affect the outcome of the case.

2.32 We believe that the relaxation of the rule against double jeopardy to be proposed in this paper would satisfy the rationality test as the restriction of the right under Article 11(6) is rationally connected with the legitimate

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35 [2006] 3 HKLRD 808, at para 21.

36 [2006] 3 HKLRD 808, at para 40. The case of *Leung Kwok Hung & Others v HKSAR* ([2005] 3 HKLRD 164) was about the right of peaceful assembly under Article 17 of the HKBOR which have built-in "*constitutional requirements for restriction*" (ie "*in conformity with the law*" and "*necessary in a democratic society*"). The Court of Final Appeal said that the constitutional requirement of necessity involved the application of a proportionality test which should be formulated in the following terms: (1) the restriction must be rationally connected with one or more of the legitimate purposes; and (2) the means to impair the right of peaceful assembly must be no more than what is necessary to accomplish the legitimate purpose in question ([2005] 3 HKLRD 164, at paras 33 and 36).

37 [2005] 3 HKLRD 164, at para 34.

purpose of pursuing and convicting the guilty, a key aim of the criminal justice system. The two types of exceptional circumstances, if shown, would undermine the legitimacy of the acquittal, and with the availability of evidence which either shows the original acquittal to have been "*tainted*" or which attains the strength of being "*fresh and compelling*" as to guilt, there would be a strong prospect of showing that the accused was guilty of the offence charged.

2.33 We also believe that the relaxation satisfies the proportionality test as the means (ie relaxation only under two exceptional circumstances with measures to prevent abuses) is no more than what is necessary to accomplish the legitimate purpose. What is important here is the presence of safeguards to ensure that the power to quash an acquittal will not be abused and that the scope of the relaxation is narrowly tailored to the legitimate purpose. In this regard, reference should be made to the following safeguards that we propose and discuss more fully in the next chapter:

(a) the reform only applies to acquittals of serious offences and not all criminal offences;

(b) the consent of the Director of Public Prosecutions is needed before law enforcement agencies can reinvestigate the acquittal case;

(c) only the Court of Appeal will have the jurisdiction to quash the acquittal and order a retrial;

(d) new evidence which could have been found by law enforcement agencies acting with reasonable diligence will not meet the "*new and compelling*" evidence exception;

(e) it must be in the "*interest of justice*" before the Court of Appeal may quash the acquittal and order a retrial;

(f) 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

(g) the prosecution will only have one opportunity to apply for a retrial in respect of any particular case that originally resulted in an acquittal.

Whilst the courts will be the ultimate arbiter of whether the proposed reforms are HKBOR and Basic Law-compliant if a challenge is mounted in future, based on (i) the international recognition of the legitimacy of some form of exceptions to the rule against double jeopardy (ii), the totality of the safeguards, and (iii) the rigour of our proposals as compared to similar reforms in other jurisdictions, we believe that our proposals are likely to survive scrutiny under the Basic Law and HKBOR.

2.34 The Legal Policy Division of the Department of Justice agreed with the conclusion in the consultation paper that the proposed relaxation of the rule was likely to satisfy the requirements of rationality and proportionality as laid down in human rights jurisprudence. The Division believed that that relaxation, together with the proposed safeguards, would strike a fair balance between allowing an acquitted person to be tried again for a serious offence and ensuring a fair and public hearing.

2.35 In the Division's opinion, Article 87(1) of the Basic Law should also be considered.[38] The Division observed that as Article 87(1) had not yet been judicially considered, it would be relevant to consider the approach adopted by the local courts in interpreting other relevant Basic Law provisions, such as Article103 which preserved the previous system of recruitment, employment, discipline, management, etc, in relation to the public service. Sir Anthony Mason NPJ said in *SJ v Lau Kwok Fai*[39] regarding the interpretation of Article 103,

> *"65. … It is the continuity of that system that is preserved. Preservation of that system does not entail preservation of all the elements of which the system consists. Some elements may change and be modified or replaced without affecting the continuity of the system as a whole. Some degree of change is to be expected in any system governing the public service, not least in the aspects of the system mentioned in art 103. It could not have been contemplated that there was to be no change at all in the aspects of the system to which art 103 refers. As Hartmann J pointed out in the June judgment:*
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> > *'... Art 103 cannot therefore be interpreted in such a narrow way as to inhibit all introduction of new measures for the good governance of the public service and thereby for the good governance of Hong Kong, the public service being the constitutionally recognised servant of Hong Kong.'*
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> *66. The broad question is, as Hartmann J noted in the February judgment, whether the system continues or whether it is so materially changed that it becomes another system."*

2.36 By analogy, the Division observed that Article 87(1) was unlikely to be regarded as freezing all the principles in criminal proceedings previously applied in Hong Kong and all the rights previously enjoyed by parties to criminal proceedings, and prohibiting any modification to such principles and rights even if such modification would be in the interests of justice. The Division believed that the proposed relaxation with the built-in safeguards in the consultation paper was unlikely to be regarded as inconsistent with Article

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38 "*In criminal or civil proceedings …, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained.*"

39 [2005] 3 HKLRD 88.

87(1), especially when the proposed relaxation was consistent with Article 11(6) of HKBOR.

Should the rule against double jeopardy be reformed?

2.37 There are three options in response to the question whether the rule against double jeopardy should be reformed:

(a) maintain the *status quo*;

(b) abolish the rule in its entirety;

(c) retain the rule, but relax it in exceptional circumstances (a halfway-house approach).

2.38 We reject option (b) because we believe the rule still has a role to play in our criminal justice system, as the justifications set out earlier in this chapter clearly illustrate. Besides, Article 11(6) of the HKBOR would also render this option unconstitutional. Nevertheless, strict adherence to the rule may run counter to the interests of justice where subsequent revelation of compelling evidence as a result of, for example, scientific breakthrough proves the guilt of an acquitted person.

2.39 The Law Commission in England underscored the main question to be considered:

> *"The crucial question is whether the principles underpinning the rule against double jeopardy can ever be outweighed by the need to pursue and convict the guilty. In favour of an exception, we can identify a high value in terms of the accuracy of the outcome of the proceedings – that is, convicting the guilty, and only the guilty – which is a key aim of the criminal justice system. To justify an exception, the advantages in terms of accuracy of outcome must override the collective and individual process values served by the rule."*[40]

2.40 The criminal justice system is likely to be even more acutely undermined if an acquitted person cannot be brought to justice, despite his subsequent confession to a serious crime. This could be expected to spark public disquiet and reduce public confidence in the criminal justice system. The *Carroll* case in Australia is a classic example of this. While we are not aware of a similar case in Hong Kong so far, the existing rule against double jeopardy allows such a case to happen. Professor Ian Dennis believed that a retrial in such circumstances would serve to *"resolve the legitimacy problem of the first acquittal and forward the aims of criminal justice if the defendant is in*

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[40] Law Commission, *Report: Double Jeopardy and Prosecution Appeals* (2001), Law Com Report No 267, at para 4.2.

fact guilty."[41] In our opinion, Lord Justice Auld highlighted the crux of the matter:

> *"… If there is compelling evidence, say in the form of DNA or other scientific analysis or of an unguarded admission, that an acquitted person is after all guilty of a serious offence, then, subject to stringent safeguards of the sort proposed by the Law Commission, what basis in logic or justice can there be for preventing proof of that criminality? And what of the public confidence in a system that allows it to happen?"*[42]

2.41 The consultation paper therefore adopted option (c), and recommended that the rule against double jeopardy should be retained, but relaxed in exceptional circumstances as proposed in the latter part of the paper. Annex B at the end of this report lists the respondents who either supported or opposed (or had reservations about) the proposed relaxation. Thirteen of the 18 respondents who commented on this recommendation supported the proposed relaxation, while one respondent expressed reservations and four were not in favour of the recommendation.[43] Those who supported the relaxation generally agreed that the proposal would serve the public interest by pursuing and convicting the guilty, because the rule as it stood was too stringent. For example, the Law Society of Hong Kong supported in principle the relaxation as, in their words, "*the public interest is best served by providing an opportunity to correct that abuse*". This view was shared by the Legal Policy Division of the Department of Justice which did not object to this recommendation from the human rights perspective. The Hong Kong Bar Association endorsed in particular "*the principle that a reputable justice system in which there is public confidence should provide robustly for the pursuance and conviction of the guilty*".

2.42 The Bar Association also wanted to make sure that the relaxation would not affect the "*abuse of process*" aspect of the rule against double jeopardy. We reiterate that the proposed reform focuses on the *autrefois* doctrine and does not tamper with the "*abuse of process*" aspect. We agree, however, that a saving provision would avoid any doubt, and recommend accordingly.

2.43 In contrast, Patrick Layden, QC, Scottish Law Commissioner, expressed reservations on the recommendation. He believed that the possibility of charging an acquitted person with perjury could be a "*safety valve*" for the criminal justice system if the proposed relaxation were not

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41 Prof Ian Dennis, "Rethinking Double Jeopardy" [2000] Crim L R 933, at 945, referred to in Law Commission, *Report: Double Jeopardy and Prosecution Appeals* (2001), Law Com Report No 267, at para 4.4.

42 The Right Honourable Lord Justice Auld, *Report on Review of the Criminal Courts of England and Wales* (The Stationery Office, 2001), Chapter 12, at para 51.

43 These figures do not include Professor Martin Friedland who agreed that tainted acquittals should be dealt with by way of the proposed relaxation, but not in the case of fresh and compelling evidence as this would put acquitted persons "*in a continuing state of anxiety and insecurity*".

adopted. This view was shared by Professor Martin Friedland. We note, however, that the maximum penalty for perjury is seven years' imprisonment,[44] which is probably lighter than the penalty for those offences which would be covered by the proposed relaxation. An acquitted person would therefore be likely to be better off if he was only charged with perjury. A further difficulty is that an acquitted person might not have given evidence in the previous trial, and as a result a perjury charge could not apply.

2.44 Mr Layden and Professor Gu Minkang both observed that there was a lack of statistics on questionable acquittals or evidence of problems under the current regime. Mr Layden thought that without such evidence it might be premature to relax the rule. The Hong Kong Bar Association, in a similar vein, suggested that there were other more pressing issues for reform. We believe, however, that the need for reform is more a matter of principle and one should not wait until the problem has manifested itself in a significant number of cases before commencing the reform process. In our view there are a number of reasons for the lack of statistical evidence. First, there is no incentive to critically review existing acquittals under the current rule. Secondly, it is difficult to gauge what and how much new evidence would be unearthed subsequently that would undermine existing acquittals. Subsequent revelations of questionable acquittals have definitely sparked public outcry in a number of other jurisdictions where the law has been changed. The *Carroll* case was one such example. Another example was the case of Mark Weston in England. Weston was originally acquitted of murder in 1995.[45] Because of the relaxation of the rule in 2005 and the discovery of new forensic evidence, his acquittal was quashed in mid-2010 and he was retried and convicted of the offence in December 2010. Had there not been such relaxation, he would never have been brought to justice. Detective Superintendent Barry Halliday, head of Thames Valley Police's Major Crime Review Team, said:

> *"This is the third murder conviction in the UK under the double jeopardy law. Offenders should be aware that my team, and others like it across the country, will continue to relentlessly investigate unsolved homicides and serious sexual assaults to bring those responsible to justice."*[46]

2.45 At the end of the day, the question is whether Hong Kong should reform pre-emptively or only when there has been an acquittal as outrageous as the *Carroll* case. We are of the view that it makes more sense to anticipate and prevent an anomaly, rather than only react after the event.

2.46 While acknowledging that the rule against double jeopardy is not an absolute right, the Hong Kong Human Rights Monitor ("HKHRM") still opposed the proposed relaxation. HKHRM's concern revolves around

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44 Section 31 of the Crimes Ordinance (Cap 200).

45 The Crown Court judgment for the retrial was not available. For the Court of Appeal judgment on the application for a retrial order, please see *R v Mark Weston* [2010] EWCA Crim 1576.

46 http://www.cps.gov.uk/news/press_releases/145-10/

political persecution and a biased police force in the light of the Hong Kong political situation, where the Hong Kong Government is not elected democratically and law enforcement agencies are not accountable to the public. In HKHRM's opinion, people particularly at risk are those holding political dissenting views who have been acquitted of serious charges of a terrorist or political nature. In response, we emphasise that both the consultation paper and this report recommend a number of built-in safeguards. An aggrieved detained person could in any event challenge the relevant authorities and apply for a writ of *habeas corpus*, which is entrenched in Article 5 of the HKBOR, in addition to claiming damages. HKHRM was also concerned that law enforcement agencies might work less thoroughly if they were given a second chance to charge a suspect after his acquittal. We reiterate that the proposed definition of "*fresh*" evidence in Recommendation 4 below does not include evidence that could have been adduced with the exercise of reasonable diligence. This should adequately address the concern of lax investigation.

2.47 The Society for Community Organisation ("SoCO") pointed out that the Fifth Amendment to the US Constitution expressly prohibits putting a person in jeopardy twice for the same offence. The Fifth Amendment to the US Constitution provides, *inter alia*, "… *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb* …". We note, however, that protection against double jeopardy under this provision is not absolute. The American case of *Aleman v Honorable Judges of the Circuit Court of Cook County* recognises the tainted acquittal exception to the double jeopardy commonly found in the common law world.[47] We have already addressed the constitutional and human rights concerns earlier in this chapter.[48] As we have emphasised in those paragraphs, the proposed relaxation would incorporate built-in safeguards to ensure compliance with the HKBOR and the Basic Law.[49]

2.48 The SoCO also argued that even if a case was referred back to the trial court for a retrial, this was only a resumption of trial, not a second trial. As we have pointed out earlier in this chapter, however, the difference between "*resumption of trial*" and "*retrial*" is essentially only semantic in this context. We have already addressed the SoCO's comments on (i) possible violation of the HKBOR, (ii) distress to acquitted persons, and (iii) slack investigation by law enforcement agencies. As regards the SoCO's concern that there was a risk that the proposed relaxation could be used as a tool for political oppression, there are, as mentioned above, built-in safeguards to address any such risks.

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47 138 F 3d 302 (7th Cir 1998).

48 Under the heading "Constitutional and human rights implications".

49 This will be further discussed in Chapter 3.

Recommendation 1

We recommend that the rule against double jeopardy should be retained, but relaxed in exceptional circumstances as proposed in the latter part of this report. The proposed legislation should make it clear that the relaxation shall not affect the power of the court to order a stay of proceedings where there has been an abuse of process.

2.49 In the next chapter, we consider what amounts to "*exceptional circumstances*", as well as other issues arising from the relaxation of the rule.

Chapter 3

Relaxing the rule against double jeopardy

3.1 In the last chapter, we recommended that the rule against double jeopardy should be retained, but relaxed in "*exceptional circumstances*". In this chapter, we identify what these "*exceptional circumstances*" are and deal with a number of issues consequential to the relaxation of the rule. Before we make recommendations on these issues, we will study how these issues have been addressed in other common law jurisdictions. The various issues to be considered in this chapter are:

(i) the type(s) of "*exceptional circumstances*" that warrant the relaxation of the rule;

(ii) measures to prevent abuses;

(iii) the mechanism for making an application to quash an acquittal

  (a) forum and the time limit for the application

  (b) number of permissible applications

  (c) whether there should an appeal channel in relation to any decision on an application for quashing an acquittal, and

  (d) time limits for commencing a retrial after an order for retrial

(iv) restriction on publication and other safeguards;

(v) powers of investigation after acquittal;

(vi) retention of exhibits for a possible retrial;

(vii) scope of application of the relaxation; and

(viii) miscellaneous.

For convenience, we use the following abbreviations in this chapter when referring to the legislation in other jurisdictions:

Australia

- the Crimes (Appeal and Review) Act 2001 (as amended by the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006), New South Wales – "the NSW Act"
- the Criminal Code (as amended by the Criminal Code (Double Jeopardy) Amendment Act 2007), Queensland – "the Queensland Code"

- Criminal Law Consolidation Act 1935 (as amended by the Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008), South Australia – "the South Australian Act"
- Criminal Code Act 1924 (as amended by the Criminal Code Amendment Act 2008), Tasmania – "the Tasmanian Act"

England and Wales

- Criminal Justice Act 2003, – "the English 2003 Act"
- Criminal Procedure and Investigations Act 1996,– "the English 1996 Act"

Ireland

- Criminal Procedure Act 2010 – "the Irish Act"[1]

New Zealand

- the Crimes Act 1961 (as amended by the Crimes Amendment (No 2) Act 2008), – "the NZ Act"

Scotland

- Double Jeopardy (Scotland) Act 2011 – "the Scottish Act".

Ireland, Scotland, South Australia, Tasmania and Victoria have recently legislated to relax the rule against double jeopardy.[2] The provisions in the Irish, Scottish, South Australian, Tasmanian and Victorian Acts are similar to those in the other pieces of legislation which have been examined in detail in the consultation paper. In order to avoid repetition, only those provisions which are peculiar to the Irish, Scottish, South Australian, Tasmanian and Victorian Acts are discussed in the following paragraphs.

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1 The part on double jeopardy in this Act implements the relevant recommendations of the final report of the Balance in the Criminal Law Review Group. This was part of the package of measures which comprised the "Justice for Victims Initiative" announced by the Minister for Justice, Equality and Law Reform in June 2008.

Press release on publication of the Criminal Procedure Bill 2009:

http://www.justice.ie/en/JELR/Pages/Criminal%20Procedure%20Bill%202009

Final Report by Balance in the Criminal Law Review Group:

http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf

Criminal Procedure Act 2010:

http://www.oireachtas.ie/documents/bills28/acts/2010/a2710.pdf

2 The Scottish Law Commission ("SLC") concluded in its final report published in December 2009 that the existing law on double jeopardy should be reformed. The Double Jeopardy (Scotland) Act 2011 is based on the proposals made by the SLC, while departing from the proposals in a number of important respects. The Act received Royal Assent on 27 April 2011. The Double Jeopardy (Scotland) Act 2011 is at: http://www.legislation.gov.uk/asp/2011/16/notes/contents and the SLC's report is at: http://www.scotlawcom.gov.uk/publications/reports/2000-2009/.

Exceptional circumstances that warrant the relaxation of the rule

3.2 Chapter 2 recommended relaxing the rule against double jeopardy in certain clearly defined exceptional circumstances. The question is what these exceptional circumstances should be.

Australia: New South Wales

3.3 The *Carroll* case led to a national outcry in Australia at the rigidity of the rule against double jeopardy. The resulting reform legislation in New South Wales, Queensland, South Australia, Tasmania and Victoria is based on the recommendations made by the Standing Committee of Attorneys General Model Criminal Law Officers Committee after an extensive consultation process.[3] In New South Wales, the rule has been relaxed so as to allow the retrial of some offences. In December 2006, the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 was enacted to amend the NSW Act.

3.4 Part 8 of the NSW Act makes provision in certain circumstances for the retrial of an acquitted person in respect of a "*tainted acquittal*", or a life sentence offence if the Court of Criminal Appeal is satisfied that there is "*fresh*" and "*compelling*" evidence.[4]

3.5 ***"Fresh and compelling evidence":*** Section 100(1) of the NSW Act provides that an acquitted person may be retried for a life sentence offence if the Court of Criminal Appeal is satisfied that there is "*fresh*" and "*compelling*" evidence against the acquitted person, and it is in the interests of justice for the person to be so retried. According to section 98(1), a life sentence offence means murder or any other offence punishable by imprisonment for life.

3.6 ***"Tainted acquittal":*** Under the NSW Act, a case involving an offence for which the maximum penalty permissible falls short of a life sentence can also be retried. However, this can only be done if the court is satisfied that the acquittal was a tainted one. Under section 101, an acquitted person may be retried for an offence carrying a maximum sentence of 15 years' imprisonment or more if the Court of Criminal Appeal is satisfied that the acquittal was a "*tainted acquittal*", and in all the circumstances it is in the interests of justice to do so.

Australia: Queensland

3.7 The Criminal Code (Double Jeopardy) Amendment Act 2007 amended the Criminal Code so that an acquitted person may now be retried

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[3] http://www.media.tas.gov.au/print.php?id=24539

[4] See below under the heading "Definition of the relevant terms" for an explanation of what is meant by "*tainted acquittal*" and "*fresh*" and "*compelling*" evidence.

for murder or, in the case of a tainted acquittal, an offence punishable by life imprisonment or for a period of 25 years or more.

3.8 ***"Fresh and compelling evidence":*** Section 678B(1) of the Queensland Code provides that the Court of Appeal may order an acquitted person to be retried for murder if it is satisfied that there is "*fresh*" and "*compelling*" evidence against him, and in all the circumstances it is in the interests of justice for the order to be made.

3.9 ***"Tainted acquittal":*** Section 678C(1) provides that the Court of Appeal may order an acquitted person to be retried for an offence punishable by life imprisonment or for a period of 25 years or more if it is satisfied that the acquittal is a tainted one, and in all the circumstances it is in the interests of justice for the order to be made.

England and Wales

3.10 The common law rule against double jeopardy is essentially the same in England and Wales as in Hong Kong. Following a review of the existing law, the English Law Commission concluded in a 2001 report that:

> *"… the rule against double jeopardy should be subject to an exception in certain cases where new evidence is discovered after an acquittal, but only where the offence of which the defendant was acquitted was murder, genocide consisting in the killing of any person, or (if and when the recommendations in our report on involuntary manslaughter are implemented) reckless killing."*[5]

Retrial of a "qualifying offence" where there is "new and compelling evidence"

3.11 The English 2003 Act adopted an approach similar to that proposed by the English Law Commission and allowed certain serious offences to be retried under specified conditions. The English 2003 Act came into operation in April 2005.

3.12 Under sections 75 and 76 of the English 2003 Act, a person is liable to be retried for a "*qualifying offence*" where there is "*new and compelling*" evidence pointing towards the guilt of the acquitted person, and a retrial is in the interests of justice.

3.13 The "*qualifying offences*" are defined by reference to those listed in Part 1 of Schedule 5 to the English 2003 Act and are, by nature, serious offences. The offences are listed under the following categories:

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[5] English Law Commission, *Report on Double Jeopardy and Prosecution Appeals* (2001), Report No 267, at para 4.42.

(a) Offences against the person, including murder, manslaughter, and kidnapping.

(b) Sexual offences, including rape and intercourse with a girl under 13.

(c) Drug offences, such as producing or being involved in the production of a Class A drug.

(d) Criminal damage offences, such as arson endangering life.

(e) War crimes and terrorism, including genocide, crimes against humanity and hostage-taking.

(f) Conspiracy in relation to any of the qualifying offences.

Part 3 of Schedule 1 makes it clear that aiding, abetting, counselling or procuring the commission of a qualifying offence is itself a qualifying offence.

3.14 Section 76 of the English 2003 Act provides that, with the written consent of the Director of Public Prosecutions, a prosecutor may apply to the Court of Appeal for an order to quash the acquittal of a person, and to order the person to be retried for a qualifying offence. Before giving his consent, the DPP must be satisfied that the evidence against the acquitted person is "*new and compelling*", and that it is in the public interest for the application to proceed. The Court of Appeal must quash the acquittal and order a retrial if the requirements in sections 78 (new and compelling evidence) and 79 (interests of justice) of the English 2003 Act are met.[6]

3.15 The case of *R v Dunlop*[7] provides an example of the English 2003 Act in action. In 1991, Billy Dunlop was charged with murdering Julie Hogg in 1989. However, after two juries had failed to reach a verdict, he was formally acquitted of murder. Later, while he was in prison for another offence, he confessed to a prison officer that he had murdered Hogg. In his letters to three other persons, he also mentioned that he had confessed his guilt. In a witness statement, Dunlop admitted that his denial of murdering Hogg at the murder trial was a lie. In a subsequent interview, Dunlop admitted that he had murdered Hogg. However, the application of the double jeopardy rule at that time meant that Dunlop could not be charged again with murder. Dunlop was aware of that fact. In October 1999, Dunlop was arrested and charged with perjury. He pleaded guilty to that charge and was sentenced to six years' imprisonment in 2000.

3.16 When the English 2003 Act came into force in April 2005, the prosecution applied to quash Dunlop's acquittal for murder on the basis that murder was a qualifying offence under the English 2003 Act and there was "*new and compelling evidence*" against Billy Dunlop. In the hearing of the prosecution's application, the parties to the proceedings agreed that murder was a qualifying offence and that Dunlop's confession and his plea of guilty to the charge of perjury would amount to new and compelling evidence.

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6 Section 77 of the English 2003 Act.

7 *R v Dunlop* [2006] EWCA Crim 1354, [2006] All ER (D) 96 (Sep).

However, the defence contended that it was neither in the interests of justice nor fair for Dunlop to be retried because at the time when Dunlop had made his confessions and pleaded guilty to perjury, he believed that he could not and would not be tried again for the murder charge. The Court of Appeal rejected this argument and ruled that the prosecution had made out its case for the court to order the retrial of Dunlop. The reasons given by the court were as follows:

> *"41. In the light of this evidence we rejected Mr Owen's suggestion that Dunlop was induced to make his confessions to the police and to plead guilty to perjury because he had been told that he could not be retried for murder. The highest that Dunlop's case can be put is that, had he known that it was possible that he might be retried, he would not have set out on the course that involved repeated confessions of his guilt of murder and his plea of guilt to perjury. In short, he might not have provided the new and compelling evidence on which the Crown Prosecution Service's application for a retrial is founded. We think it right to approach this case on the footing that this is indeed the position.*
>
> *Discussion*
>
> *42. In reliance on the belief that he was immune from retrial, Dunlop has provided new evidence which is not merely compelling, but overwhelming. There has been no suggestion that he is in a position to attempt to rebut this evidence. In these circumstances we suggested to Mr Owen that the issue was not so much whether it was fair that he should be exposed to the jeopardy of another trial, but whether it was fair, having particular regard to the fact that he had set out to 'put the record straight' and pay the considerable penalty for perjury, that he should be exposed to further punishment for murder, the punishment in question being a mandatory life sentence. Mr Owen did not demur from this proposition.*
>
> *43. In considering the case for an exception to the double jeopardy rule, the Law Commission commented as follows:*
>
> > *'There is, further, the spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person's own admission) points strongly or conclusively to guilt. Such cases may undermine public confidence in the criminal justice system as much as manifestly wrongful convictions. The erosion of that confidence, caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself.'*

Those words might have been written of the present case.

44. We are dealing here with the crime of murder. The Law Commission identified the unique features of this crime as providing a unique justification for an exception to the double jeopardy rule. Parliament has extended the exception further than the crime of murder, but that does not detract from the fact that the strongest justification for the exception is likely to be the case of murder.

45. We have concluded that the public would rightly be outraged were the exception to the double jeopardy rule not to be applied in the present case simply on the basis that Dunlop would not have made the confessions that he did had he appreciated that they might lead to his retrial. We can see no injustice in allowing a retrial in this case. As for the sentence that Dunlop has served for perjury, that was imposed as punishment for lying under oath. It may be that the sentence reflected the consequence of the perjury, namely Dunlop's acquittal of murder, and that for this reason it should be taken into account, to some extent, when determining the minimum term to be served should Dunlop now be convicted of that crime. That is a matter that will fall for consideration if and when a judge comes to sentence Dunlop for the offence of murder.

46. For the reasons that we have given we were, at the end of the hearing, left in no doubt that this is a case where justice requires the application of the provisions of Part 10 that provide an exception to the rule against double jeopardy."[8]

Retrial where there has been a tainted acquittal

3.17 The English 2003 Act was not the first legislation in England and Wales to introduce an exception to the rule against double jeopardy. In the English 1996 Act, provision is made for retrial in relation to what is termed a "*tainted acquittal*". Section 54(1) of the English 1996 Act applies where a person has been acquitted of an offence, and a person has been convicted of an "*administration of justice offence*" involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal. In such a situation, if it appears to the court before which the person was convicted that there is a real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted, the court shall certify that it so appears.[9] The court, however, shall not so certify if, because of lapse of time or for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted.[10] Where the court so

8 *R v Dunlop* [2006] EWCA Crim 1354, at paras 41- 46.

9 Section 54(2) of the English 1996 Act.

10 Section 54(5) of the English 1996 Act.

certifies, an application can then be made to the High Court for an order quashing the acquittal. Under section 54(4), where an order is made, proceedings may be taken against an acquitted person for the offence of which he was acquitted.

New Zealand

The Crimes Act 1961

3.18 The general statement of the rule against double jeopardy appears in section 26(2) of the New Zealand Bill of Rights 1990, which states that *"[n]o one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again."* This principle is reflected in sections 358 and 359 of the Crimes Act 1961 ("the 1961 Act"). Section 358(1) provides as follows:

> *"On the trial of an issue on a plea of previous acquittal or conviction to any count, if it appears that the matter on which the accused was formerly charged is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made that might then have been made, have been convicted of all the offences of which he may be convicted on any count to which that plea is pleaded, the Court shall give judgment that he be discharged from that count."*

3.19 Section 359(1) of the 1961 Act extends this principle to cases where the defendant could not have been convicted at the earlier trial of the offence now charged, but the later charge is in substance an aggravated version of the earlier one.

Recent reforms

3.20 In 2001, the New Zealand Law Commission proposed reform of the rule against double jeopardy. While confirming the fundamental importance of the rule, the Commission recommended *"a limited and principled exception to it in cases where an accused had secured apparently unmerited acquittal in the most serious classes of case by perjury or other conduct designed to defeat the course of justice."*[11]

3.21 The Criminal Procedure Bill 2004 was introduced to the New Zealand Parliament on 22 June 2004. The Bill proposed the insertion of new sections 378A to 378F to the 1961 Act to make provision for the retrial of previously acquitted persons. The proposed new sections provide for two situations in which an acquitted person may be retried. The first is where there is a "*tainted acquittal*", and the second is where there is "*new and*

[11] New Zealand Law Commission, *Report on Acquittal Following Perversion of the Course of Justice* (2001), Report No 70, at vii.

compelling evidence" to implicate the acquitted person in the commission of a specified serious offence. In June 2008, this part of the Criminal Procedure Bill 2004 was enacted separately as the Crimes Amendment (No 2) Act 2008 which received royal assent on 25 June 2008 and was scheduled to come into force six months after the date of royal assent.

3.22 *Retrial after "tainted acquittal"*: Section 378A(2) provides that the High Court may order a person who has been acquitted of a "*specified offence*" and who has subsequently been convicted of an administration of justice offence to be retried for the specified offence if it is satisfied that:

(a) it is more likely than not that the commission of the administration of justice offence was a significant contributing factor in the person's acquittal for the specified offence;

(b) no appeal or application in relation to the administration of justice offence is pending before any court; and

(c) the retrial is in the interests of justice.

3.23 "*Specified offence*" means an offence punishable by imprisonment for which the person has previously been acquitted and includes any offence for which the person may not be tried because of the acquittal.[12]

3.24 *Retrial on basis of "new and compelling evidence"*: Section 378D allows the Court of Appeal to order the retrial of a person previously acquitted of a "*specified serious offence*" if it is satisfied that:

(i) there is new and compelling evidence to implicate the acquitted person in the commission of the specified serious offence; and

(ii) a further trial of the acquitted person is in the interests of justice.

3.25 A "*specified serious offence*" means an offence that is punishable by 14 years' imprisonment or more and includes any offence for which the person may not be tried because of the acquittal.[13]

Discussion and conclusions

3.26 A review of the provisions in other jurisdictions outlined above suggests that there are a number of matters which require our consideration:

(a) the grounds for relaxation of the rule against double jeopardy;

(b) the types of offences to which the relaxation applies;

(c) definition of the relevant terms.

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12 Section 378A(1) .

13 Section 378B(1).

(a) The grounds for relaxation of the rule against double jeopardy

3.27 Jurisdictions studied above allow an application to quash an acquittal where;

(a) there is subsequent revelation of "*new*"/"*fresh*" and "*compelling*" evidence against an acquitted person in relation to the offence; or

(b) the acquittal is tainted.

3.28 There are three options available to Hong Kong: (a) adopt the above two-limb approach; (b) adopt only one of the two limbs; or (c) apply a different set of circumstances altogether. We believe that it would be preferable to adopt a scheme which has already been tried and tested in other jurisdictions, rather than seek to branch out in a new direction. By adopting a similar approach to that in other jurisdictions Hong Kong would be able to benefit from the development of overseas jurisprudence on equivalent legislative provisions. We can therefore rule out option (c). The question is whether Hong Kong should adopt one or both limbs of the test applied in the jurisdictions to which we have referred.

3.29 A tainted acquittal is one unjustly obtained through the commission of an administration of justice offence, either by the acquitted person himself or another person. As a result, the jury is unable to assess the case fairly. We are of the view that such a scenario strikes at the very basis of the administration of justice and there is a strong case in principle that an acquittal so obtained should be quashed (and the acquitted accused retried).

3.30 Where there is subsequent revelation of "*new*"/"*fresh*" and "*compelling*" evidence in respect of a serious offence, we do not believe that the public would consider it right that retrial of an acquitted person should be precluded by the application of an inflexible rule of law. Instead, we believe that there would be general support for a limited encroachment on the rule against double jeopardy. The sense of repugnancy, unfairness and injustice would be likely to be particularly acute where (for example) an acquitted person makes a subsequent confession to an offence of which he was previously acquitted and nothing could be done to bring him to justice. We consider that such a scenario justifies the relaxation of the rule against double jeopardy. The consultation paper recommended adopting the two-limb approach followed in the other jurisdictions studied, and using the term "*fresh*" rather than "*new*" for the reasons set out in the consultation paper and also later in this chapter.

3.31 The Hong Kong Police Force, the Hong Kong Bar Association and the Law Society of Hong Kong supported this recommendation, while the Legal Policy Division of the Department of Justice had no objection to the recommendation from a human rights perspective. The Society for Community Organisation ("SoCO"), however, did not consider that the "*fresh and compelling evidence*" limb could be justified, as the prosecution should have proceeded in the first instance only when sufficient evidence had been

gathered. We believe that no matter how conscientious law enforcement agencies may be, fresh and compelling evidence (including, for example, an acquitted person's subsequent confession) may still be unearthed subsequent to the original trial. Moreover, such an exception applies in all the jurisdictions studied in this report. SoCO was also concerned that an acquitted person might be retried for a third or subsequent time. To prevent this, Recommendation 8 in this report proposes that only one application can be made to quash an acquittal. In addition, SoCO was concerned that an administration of justice offence committed by a third party might not necessarily be relevant to the acquittal in question. In response, we would point out that Recommendation 5(a) in this report requires that the commission of the administration of justice offence must be a significant contributing factor in the person's acquittal.

3.32 Patrick Layden QC believed that the vast majority of the cases in which a new prosecution was needed should be those prompted by an acquitted person's confession and argued that an exception restricted to such specific circumstances would be sufficient, rather than a general exception applying to *any* fresh and compelling evidence. The Scottish Act has included an "*admission*" exception,[14] in addition to the "*tainted acquittal*" and "*new evidence*" exceptions. However, an acquitted person's admission is only one type of new evidence and we do not think the exception to the double jeopardy rule should be restricted only to circumstances where there has been an admission.

3.33 Professor Martin Friedland agreed that the proposed relaxation should apply to tainted acquittals, but not to fresh and compelling evidence as this would put acquitted persons "*in a continuing state of anxiety and insecurity*". We have already addressed this concern in Chapter 2.[15] Another respondent considered that the court should be given wide discretion to decide whether to quash an acquittal based on the facts of each case, rather than attempting to standardise what cases should be allowed. We would respond that, under the proposed reform, the court is given wide discretion to consider an application to quash an acquittal but it is desirable to clearly set out the parameters, under which such an application can be made (ie the two exceptional circumstances). After carefully considering the public responses, we retain our original recommendation as set out in the consultation paper.

3.34 We have also considered whether an application (and a power) to quash an acquittal (on either ground) should be a stand-alone one (in other words, an order can be made only to quash an acquittal without at the same time directing a retrial), or whether any application/order to quash an acquittal should be coupled with an application/order for a retrial. We consider that an order which only quashes an acquittal serves little purpose, for in the eyes of the law the acquitted person is still innocent whether or not his acquittal has been quashed. The only practical purpose of quashing an acquittal is to clear the way for the retrial of the accused. Under our proposed reform, therefore,

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14 Section 3 of the Scottish Act.

15 Under the heading "Justifications for the rule against double jeopardy and counter-arguments".

an application should be for both the quashing of an acquittal and for an order for retrial, and the court should be expressly empowered to order a retrial after quashing an acquittal.

Recommendation 2

We recommend empowering the court to make an order to quash an acquittal and direct a retrial where:

(a) there is "*fresh*" and "*compelling*" evidence against an acquitted person in relation to a serious offence of which he was previously acquitted; or

(b) the acquittal is tainted.

(b) The types of offences to which the relaxation applies

3.35 The types of offences to which the relaxation applies differ in the jurisdictions discussed above. In respect of the first limb ("*fresh*" and "*compelling*" evidence), they are:

(i) New South Wales: an offence at retrial for which the maximum sentence is life imprisonment;

(ii) Queensland: at retrial, the offence of murder;

(iii) England and Wales: one of the "*qualifying offences*" listed in Part 1 of Schedule 5 to the English 2003 Act in respect of which the accused has been acquitted;[16]

(iv) New Zealand: an offence, of which the accused has been acquitted, punishable by 14 years' imprisonment or more, and includes any offence for which the accused may not be tried because of that acquittal;[17]

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16 (a) Offences against the person, including murder, manslaughter, and kidnapping.

(b) Sexual offences, including rape and intercourse with a girl under 13.

(c) Drug offences, such producing or being involved in production of a Class A drug.

(d) Criminal damage offences, such as arson endangering life.

(e) War crimes and terrorism, including genocide, crimes against humanity and hostage-taking.

(f) Conspiracy in relation to any of the qualifying offences.

17 Section 378B(1) of the NZ Act.

In respect of the second limb (tainted acquittal), the qualifying offences are:

(i) New South Wales: an offence at retrial for which the maximum sentence is 15 years' imprisonment or more;

(ii) Queensland: an offence at retrial for which the maximum sentence is 25 years' imprisonment or more;

(iii) England and Wales: any offence;

(iv) New Zealand: an offence, of which the accused has been acquitted, punishable by imprisonment and includes any offence for which the accused may not be tried because of that acquittal.[18]

3.36 The general trend in these jurisdictions is that offences which can be retried under the "*fresh*" and "*compelling evidence*" limb are more serious than those under the "*tainted acquittal*" limb. We agree with this approach since the sense of unfairness, injustice and repugnancy is, in general, likely to be more pronounced in the case of a tainted acquittal than in a case where there is subsequent discovery of "*fresh/new and compelling*" evidence. In our opinion, this should be factored into our consideration of the appropriate threshold for quashing an acquittal. In other words, offences to be covered by the "*fresh*" and "*compelling evidence*" limb should be more serious (ie there should be a higher threshold for invoking this limb) than offences to be covered by the "*tainted acquittal*" limb. After considering various possibilities, we recommend that offences for which the maximum sentence is 15 years' imprisonment or more should be the appropriate threshold for the "*fresh and compelling evidence*" limb. Annex C lists existing statutory provisions that provide for offences punishable by 15 years' imprisonment or more. As to whether the 15 year threshold should apply to (i) the offence in respect of which there has been an acquittal or (ii) the offence prosecuted at the retrial, we note that different jurisdictions have adopted different approaches.[19] The consultation paper recommended casting the net wider and that the threshold should be measured against either of these two options. Specifically, Recommendation 3(a)(i) in the consultation paper proposed that the rule against double jeopardy should be relaxed to allow a retrial where:

> "*there is 'fresh' and 'compelling' 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*."

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[18] Section 378A(1) of the NZ Act.

[19] The threshold in the NSW Act and the Queensland Code is in respect of the offence to be retried, while that in the English 2003 Act and the NZ Act is in respect of the offence in respect of which there has been an acquittal.

As explained in paragraph 3.42, we have concluded that the words "*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*" are now unnecessary.

3.37 Lastly, in line with the requirement that offences which are subject to this exception should be more serious than those under the "*tainted acquittal*" limb, the consultation paper recommended that the offences subject to this exception should be limited to those tried in the High Court. This would exclude offences with a maximum sentence of 15 years or more but which in fact were tried in a lower court.

3.38 By way of contrast, we are of the view that the threshold for invoking the "*tainted acquittal*" limb should be lower than that for invoking the "*fresh and compelling evidence*" limb (in other words, the "*tainted acquittal*" limb could apply to less serious offences). The question is whether retrial should be permissible where there has been a "*tainted acquittal*" in respect of (i) all indictable offences; (ii) all indictable offences tried in the District Court and the High Court; or (iii) all indictable offences and all summary offences transferred to the District Court or High Court for trial. We are of the view that a summary offence remains a summary offence (in terms of its inherent nature/seriousness), even if it is tried in the High Court with other indictable offences. Indictable offences tried in the Magistracy should not be included, as the venue for trial would indicate that the facts of the particular offences are, relatively speaking, not so serious. The consultation paper recommended that the "*tainted acquittal*" limb should cover only indictable offences tried in the District Court or High Court.

3.39 The Law Society of Hong Kong, the Legal Aid Department and the Secretary for Security supported the different thresholds recommended under the two limbs. The Legal Policy Division of the Department of Justice believed that the recommendation did not raise human rights concerns. Patrick Layden QC, however, observed that the "*tainted acquittal*" limb should cover any offence, as any action which sought to undermine the legal process was of great concern, even where the offence itself was relatively minor. We note that of the jurisdictions examined in this report, only the English 1996 Act and the Irish Act have gone this far. We are of the view that extending the "*tainted acquittal*" limb to all offences would go too far. In contrast, SoCO suggested that the relaxation should only apply to the most serious offences such as murder and rape. This is, in our opinion, too restrictive and would unduly limit the scope of the proposed relaxation. Some other respondents had different suggestions on the sentence threshold. We are of the view that there could always be different opinions as to the appropriate threshold, and it is not easy to reach a consensus as a society at large at this juncture. We believed that the Legislative Council would be a more suitable forum to determine the appropriate threshold when the proposed legislation is introduced.

3.40 The Hong Kong Police Force suggested that the scope of the "*tainted acquittal*" limb should be reduced to a manageable size by setting a

higher sentence threshold of, say, offences tried in the District Court or High Court punishable with at least 15 years' imprisonment. Alternatively, there should be a time bar after which the prosecution could not reopen an acquittal. The Hong Kong Police Force pointed out that retention of exhibits would present difficulties if the scope of the exception were set too wide. While we appreciate the Police's concern, we trust that the police would exercise their best judgment in addressing the question on retention of exhibits and this should be left to the police to be dealt with on a case by case basis. We therefore retain the sentence threshold for both the "*fresh and compelling evidence*" limb and "*tainted acquittal*" limb recommended in the consultation paper.

3.41 A question arises (under either limb proposed above) as to whether it should only be permissible to proceed to retry an offence which is the same as, or less serious than, the offence of which the accused has been acquitted, or whether it should be permissible to prosecute a more serious offence at the retrial. We note that the courts in New South Wales and Queensland may order a person to be retried for a life sentence offence even if the person was originally charged with, and acquitted of, manslaughter or another lesser offence.[20] The Premier of New South Wales explained the rationale for this approach in his reply to the State Parliament's Legislation Revision Committee:

> *"… there may be some cases where fresh and compelling evidence comes to light that would justify a more serious charge than originally laid, and where the previous acquittal arising from the same facts would act as a bar to trying the offence. … In such a case, it is appropriate to bring the more serious charge. This is not inconsistent with the concept of reopening the earlier proceeding, which after all was sufficiently related to the facts in issue in the case that it would have operated as a bar on further prosecution of the 'new' offence. It is, in a sense, analogous to amending the charges or an indictment after they have been laid."*[21]

3.42 Under the Tasmanian Act, the Court may order a person to be retried for a more serious crime even if the person had been charged with and acquitted of a lesser crime under both limbs.[22] We have some reservations whether it would be appropriate to proceed against an accused for an offence at the retrial which is more serious than that of which he had originally been acquitted. It might be argued that that would effectively place the accused in a worse position than if he had been convicted at the original trial. The

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[20] Section 100(3) of the NSW Act and section 678B(2) of the Queensland Code. There are similar provisions in respect of the "*tainted acquittal*" limb: section 101(3) of the NSW Act and section 678C(2) of the Queensland Code.

[21] Reply dated 16 October 2006 at page 41 of the following link:

http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/275f12d36092671eca257211001b9a4b/$FILE/2006.15%20Legislation%20Review%20Digest.pdf

[22] Sections 393(2) and 394(2) of the Tasmanian Act.

consultation paper therefore specifically sought views from the public on 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 later charge is murder or another offence of similar gravity, along the lines of the approach in New South Wales and Queensland. Neither the Law Society of Hong Kong nor the Legal Aid Department were in favour of empowering the court in this way. On considering this issue further, we agree that the court should not be so empowered. The effect of this conclusion is that it is only the sentence for the offence at the original trial which is relevant. The prosecution could not apply for a retrial for an offence for which the maximum sentence was 15 years or more unless a similar or higher sentence applied to the original offence of which the accused had been acquitted. Hence, the words "*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*" in the original Recommendation 3(a)(i) to which we referred at paragraph 3.36 above are redundant and we have deleted them accordingly from Recommendation 3.

3.43 We further note that section 100(4) of the NSW Act[23] provides that the court cannot order a person to be retried for a life sentence offence where he was charged with and acquitted of the life sentence offence, but was instead convicted of manslaughter or another lesser offence. In New South Wales this point was only mentioned in the context of an acquittal quashed on the "*fresh and compelling evidence*" ground and therefore the reference is only to "*life sentence offences*". In South Australia, this limitation on the relaxation does not apply to the "*tainted acquittal*" limb.[24] However we believe that this provision is designed to address the following problem that could potentially arise out of the quashing of an acquittal on either ground. Consider a case where, in the first trial, an accused was acquitted of a more serious offence (say, murder) but convicted of a lesser alternative offence (say, manslaughter) and subsequently a ground is made out for quashing the acquittal. In such a situation, the question arises as to whether at the time of quashing the acquittal the court should be empowered (or even be required) to quash the conviction (of the lesser offence) as well. If the conviction is not quashed at the same time, then whatever the outcome of the re-trial it could be regarded as being unfair to the accused. Even if the re-trial results in a complete acquittal, the original conviction will still stand (because it has not been quashed). If, on the other hand, the court of retrial convicts the acquitted person (whether of the more serious offence or of a lesser alternative offence), it would mean that he would be convicted twice for, say, killing the same person.

3.44 An alternative proposal would be to empower (or require) the Court to quash the conviction of the lesser offence at the same time as quashing the acquittal of the more serious offence. But this would lead to another problem, in that it is possible that the accused might be completely

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[23] It seems that there is no equivalent provision in other jurisdictions examined in this chapter.

[24] Section 334(3) of the South Australian Act.

acquitted at the retrial (even though previously he had been convicted of a lesser offence and there was otherwise no ground for impugning that conviction). In view of the problems caused by both the above proposals, a yet further alternative proposal would be to adopt a model along the lines of section 100(4) of the NSW Act, to provide that the power to order a retrial should not extend to ordering a retrial of a more serious offence of which the accused had previously been acquitted if the accused was convicted of a lesser alternative offence at the same trial. This would avoid the difficult problems discussed above, but may be regarded as unsatisfactory in that a dubious acquittal would be allowed to stand. On the other hand, it could be argued that in such cases some measure of justice has already been obtained in the original trial (unlike those cases where there has been a full acquittal) and that finality outweighs the need to have full accountability.

3.45 In view of all the above complications and implications, the consultation paper specifically sought views from the public on whether Hong Kong should adopt a provision similar to section 100(4) of the NSW Act. Section 100(4) only applies to persons acquitted of a life sentence offence under the "*fresh and compelling evidence*" limb. The problem described in the preceding paragraphs, however, could arise in respect of any offence under this limb or the "*tainted acquittal*" limb where the accused is convicted of a lesser or alternative offence at the original trial. The consultation paper also sought views on whether a provision of broader application than section 100(4) should therefore be adopted, so that any relaxation of the double jeopardy rule would not extend to an application to quash an acquittal under either limb where the acquitted person has been convicted of a lesser or alternative offence at the original trial. The Law Society of Hong Kong and the Legal Aid Department endorsed the approach in section 100(4) of the NSW Act to deal with the situation where a person had been convicted of a lesser offence. The Law Society of Hong Kong considered that that would give some additional protection to those convicted of a lesser offence, had the merit of simplicity, and that it should be extended to cover both limbs. The Legal Aid Department explained that in such cases some measure of justice had arguably been attained in the original trial, and hence finality outweighed the need to have full accountability. We therefore recommend adopting a provision similar to section 100(4) of the NSW Act, to the effect that the court cannot order a person to be retried for an offence under either limb where he was acquitted of that offence, but was instead convicted of a lesser offence.

3.46 The consultation paper also proposed that, in order to simplify the procedure and to add flexibility, descriptions of offences to be covered by the proposed exceptions to the double jeopardy rule, both under the "*fresh and compelling evidence*" limb and the "*tainted acquittal*" limb, should be contained in a schedule to the relevant legislation. In order to avoid the necessity of invoking the legislative process every time a change is made to the schedule of offences, the consultation paper recommended that the schedule of offences should be capable of amendment by subsidiary legislation, subject to negative vetting by the Legislative Council. The Law Society of Hong Kong agreed that the offences should be set out in a schedule, but did not support amendment by negative vetting as that would depend too much on the

composition of the Legislative Council. Both the Hong Kong Police Force and the Legal Policy Division of the Department of Justice supported the consultation paper's proposal, however. After weighing these responses, we conclude that the schedule of offences to be covered by the proposed relaxation should only be amended in the same way as the other parts of the proposed legislation. This is because amending the schedule of offences would affect the scope of the proposed relaxation, and this should only be sanctioned by the full-fledged legislative process. We have therefore removed this part of the recommendation.

3.47 Finally, we wish to address a related, but separate, issue concerning alternative offences for which an accused could have been (but had not been) convicted at the original trial. In New South Wales and Queensland, the retrial of an acquitted person for an offence includes a trial of an offence which is not the same as the offence of which the person was acquitted.[25] In South Australia, a reference to an offence of which a person has been acquitted includes any other offence with which he was charged that was joined in the same information as that in which the offence of which he was acquitted was charged, and any other offence of which he could have been convicted at the trial of the offence of which he was acquitted.[26] In Ireland, a person who has been acquitted of an offence is also deemed to have been acquitted of any offence in respect of which he could have been convicted in the proceedings concerned by virtue of the first-mentioned offence charged in the indictment, other than an offence for which he has been convicted.[27] In England, a person acquitted of a "*qualifying offence*" is treated as also acquitted of any "*qualifying offence*" of which he could have been convicted in the previous proceedings.[28] In Scotland, an acquitted person may be prosecuted anew for the offence of which he was acquitted, another offence of which the court would have been competent to convict him in the previous proceedings, or an offence arising out of the same, or largely the same, acts or omissions as gave rise to the previous proceedings and being an aggravated way of committing the offence of which he was acquitted.[29] In other words, most of the jurisdictions studied in this report have provisions that allow a person to be retried for an offence in respect of which he could have been convicted at a previous trial, ie a verdict of not guilty as charged but guilty of an alternative offence. The acquittal of the primary charge would also constitute an acquittal of the alternative charge, even if the jury was not asked to give a verdict on the alternative offence. We therefore recommend that a reference to an offence of which a person has been acquitted includes any other offence of which he could have been convicted at the trial of the offence of which he was acquitted. This is along the line of the equivalent provisions in England, Ireland and South Australia which are clearer than those in other jurisdictions.

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25 Section 98(2) of the NSW Act and section 678(2) of the Queensland Code.

26 Section 335(6) of the South Australian Act.

27 Sections 8(2) and 9(2) of the Irish Act.

28 Section 75(2) of the English 2003 Act.

29 Sections 2, 3 and 4 of the Scottish Act.

Recommendation 3

(a) We recommend that the rule against double jeopardy should be relaxed to allow a retrial:

(i) where there is "*fresh*" and "*compelling*" evidence in respect of an offence of which the accused has been acquitted in the High Court for which the maximum sentence is 15 years' imprisonment or more; or

(ii) where there is a "*tainted acquittal*" in respect of an indictable offence tried in the District Court or High Court.

The court, however, should not have power to order a retrial of a more serious offence than that in relation to which the accused was acquitted.

(b) A reference in paragraph (a) to an offence of which a person has been acquitted includes any other offence of which he could have been convicted at the trial of the offence of which he was acquitted.

(c) We also recommend adopting a provision similar to section 100(4) of the NSW 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.

(d) 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.

(c) Definition of the relevant terms

3.48 **Australia: New South Wales –** Section 102(2) of the NSW Act provides that evidence is "*fresh*" 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.*" Evidence is "*compelling*" if it is reliable and 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.[30] According to section 102(4), evidence that would be admissible on a retrial is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

3.49 Concern was expressed during the passage of the legislation through the New South Wales parliament that the statutory definition of the term "*fresh*" might create uncertainty. The Hon Catherine Cusack made the following remarks in the parliamentary debate on 17 October 2006:

> *"I am concerned particularly about proposed section 102, which relates to 'fresh and compelling evidence' … Such matters will be deliberated upon and defined by the courts. The paragraph suggests that there will be no grounds to order a retrial if a court believes that a police officer made a mistake that was foreseeable or avoidable. The legislation will be rendered completely ineffective in such a case. It concerns me that it will be left in the hands of the courts to define what is actually meant by 'if it could have been adduced in those proceedings with the exercise of reasonable diligence'. It has been our experience in recent years that the courts have been conservative and against the implementation of legislation of this Parliament: if there is a loophole in legislation, the courts tend to drive a proverbial steamroller through it."*[31]

As against such sentiments, it can be said that the courts in Hong Kong from time to time have to consider whether something could have been done earlier with the exercise of reasonable diligence, that the courts can be trusted to construe the enabling legislation in accordance with well established principles of construction, and that leaving such matters to the courts should not arouse concern.

3.50 Section 103(2) of the NSW Act provides that an acquittal is tainted if the accused person or another person has been convicted (whether in New South Wales or elsewhere) of an "*administration of justice offence*" in connection with the proceedings in which the accused person was acquitted, and it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted. Under section 103(3), an acquittal is not a tainted acquittal if the conviction for the administration of justice offence is subject to appeal as of right. Section 103(4) further provides:

> *"If the conviction for the administration of justice offence is, on appeal, quashed after the Court of Criminal Appeal has ordered the acquitted person to be retried under this Division because of the conviction, the person may apply to the Court to set aside the order and:*

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30 Section 102(3) of the NSW Act.

31 http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LC20061017051.

(a) to restore the acquittal that was quashed, or

(b) to restore the acquittal as a bar to the person being retried for the offence,

as the case requires."

An "*administration of justice offence*" means the bribery of, or interference with, a juror, witness, or judicial officer; perversion of (or conspiracy to pervert) the course of justice; or perjury.[32]

3.51 **Australia: Queensland –** The definitions of the terms "*fresh*" and "*compelling*" in section 678D(2), (3) and (4) of the Queensland Code are identical to those in the NSW Act. The definition of "*tainted acquittal*" in section 678E(2) is also virtually the same as that in the NSW Act, while section 678E(4) follows closely section 103(4) of the NSW Act. In contrast, section 678E(3) is more elaborate than its equivalent in the NSW Act (section 103(3)).[33] An "*administration of justice offence*" means "*an offence under chapter 16*" of the Criminal Code Act 1899.[34]

3.52 **England and Wales –** Under section 78 of the English 2003 Act, evidence is "*new*" if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related). Evidence is "*compelling*" if it is reliable, substantial, and, "*in the context of the outstanding issues*", appears highly probative of the case against the acquitted person.[35] The "*outstanding issues*" are the issues in dispute in the proceedings in which the person was acquitted (and, if those

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32 Section 98(1) of the NSW Act.

33 Section 678E(3) states: "*An acquittal is not a tainted acquittal during any of the following periods*

(a) the period provided under section 671(1) for the person convicted of the administration of justice offence (the convicted person) to appeal, or obtain leave to appeal, from the conviction;

(b) if, within the period mentioned in paragraph (a), the convicted person gives notice of an appeal — the period ending when the appeal is decided;

(c) if, within the period mentioned in paragraph (a), the convicted person gives notice of an application for leave to appeal, the period ending —

(i) if the application is refused — when the decision refusing the application is made; or

(ii) if the application is granted — when the appeal is decided."

Section 396(3) of the Tasmanian Act is in almost identical terms to section 678E(3) of the Queensland Code.

34 These offences are as follows: retaliation against judicial officer, juror, witness etc, judicial corruption, official corruption not judicial but relating to offences, corruption of jurors, perjury, fabricating evidence, corruption of witnesses, deceiving witnesses, destroying evidence, preventing witnesses from attending, conspiracy to bring false accusation, conspiring to defeat justice, compounding crimes, compounding penal actions, advertising a reward for the return of stolen property, etc, justices acting oppressively or when interested, delay to take person arrested before Magistrate, bringing fictitious action on penal statute, inserting advertisement without authority of court, attempting to pervert justice.

35 Section 78(3) of the English 2003 Act.

were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related).[36] According to section 78(5), it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

3.53 The term "*new and compelling evidence*" was considered in the recent case of *R v Miell.*[37] In 1996, B was stabbed to death. Miell told various people that he had killed B. When Miell was arrested, he denied liability. R confessed twice to the attack but subsequently retracted those confessions. The prosecution case was that the confessions made by R were not true and those made by Miell were. Miell was charged with murder, but was acquitted. Subsequently, while serving a term of imprisonment for other offences, Miell confessed in prison that he had killed B. He also gave a statement to the police to that effect. Miell pleaded guilty to perjury in relation to his previous murder trial and was sentenced to a concurrent term of three years' imprisonment. Miell was arrested in 2007 on suspicion of murdering B. During the police interview, he retracted his confessions. The Crown applied to the Court of Appeal, pursuant to section 76 of the English 2003 Act, for an order quashing Miell's murder acquittal and for a retrial.

3.54 It was common ground that Miell's confessions, including that implicit in his plea of guilty to perjury, constituted new evidence. The prosecution case was that the new evidence was reliable, substantial and highly probative of the case against Miell (ie "*compelling*" under section 78). However, the Court of Appeal found that, on the facts, the new evidence was not compelling in respect of the murder charge against Miell.[38] The court went on to say that section 78 required the court to form their own view of whether the new evidence, including Miell's conviction of perjury on a plea of guilty, was in fact compelling, reliable and highly probative evidence that he was the murderer.[39] On the facts of the case, the court held that the new evidence was not compelling, reliable and highly probative, and hence refused the prosecution's application. The court went on to express the view that had it not been required to form its view on the confession, it would have held it to be contrary to the interests of justice to order Miell to stand trial again.[40]

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36 Section 78(4) of the English 2003 Act.

37 [2008] 1 WLR 627 (CA).

38 *"… were there a retrial, we think that the jury would be in the same position. The fact that parts of the confession statement are manifestly untrue would be likely to leave the jury in doubt as to whether the respondent was telling the truth when he said that he had murdered Mr Burton. The admissions that the jury heard that the respondent had made after the murder to Karen Smith and to two other witnesses were more credible than his confession statement, for they did not include demonstrable untruths, yet at the first trial the jury were in doubt as to his guilt. We think it likely that they would be in the same doubt if they received the new evidence of the respondent's confessions and retraction.*" [2008] 1 WLR 627 (CA), at para 47.

39 [2008] 1 WLR 627 (CA), at para 52.

40 [2008] 1 WLR 627 (CA), at para 52: "*Were we not required to form our own view on the confession, we would have held it contrary to the interests of justice to order the respondent to stand trial again having regard to: (i) our doubts as to whether in fact he committed perjury at his first trial; and (ii) the fact that s74 of the Police and Criminal Evidence Act 1984 would, on the facts of this case, appear at any re-trial effectively to shift the burden of proof onto the respondent*."

3.55 A more recent case, *R v A*,[41] also considered the term "*new and compelling evidence*". In December 2004, A was acquitted of two counts of indecent assault and one count of rape which allegedly took place in 1991 when the complainant, SN, was 15 years old. New evidence showed that SN's allegation was not an isolated complaint against A, but that there were independent allegations from seven other complainants (both boys and girls), which had not been available at the 2004 trial. The allegations encompassed offences of indecent assault, buggery and indecency. The prosecution applied under the English 2003 Act to quash the acquittal and for an order that A should be retried for rape. A submitted, *inter alia,* that the new evidence had to be "*in relation to the qualifying offence*" under section 78(1) of the English 2003 Act (ie direct evidence to prove the alleged rape of SN). The Court of Appeal found that new evidence of the seven other complainants about A's behaviour towards them coincided to a significant degree with SN's complaint against A. The court also agreed with A that none of that new evidence amounted to "*direct*" evidence to prove the alleged rape of SN.[42] Much of the new evidence to be adduced at the forthcoming trial would be directed to both similar fact and propensity in relation to these activities, rather than to full sexual intercourse.[43] The court, however, did not regard it to be necessary that the new evidence required by the statute had to be "*direct*", as contended by A. The court said:

> *"36 … In our judgment the section does not require that it should [be direct evidence]. What matters is that the evidence should be admissible to prove that, in accordance with her complaint, and contrary to his evidence at trial, the respondent raped her. It would be contrary to the purpose of the legislation for new, compelling, highly probative, admissible evidence that he did so to be disregarded. …"*

3.56 The court explained that it reached its conclusion as a matter of principle and derived support for it from the statutory language. If the new and compelling evidence had been intended to be limited to that related directly to the qualifying offence, in the sense suggested by A, the language of the legislation would have been different.[44] The court said:

> *"37 … In our view any admissible evidence in relation to the qualifying offence should be treated as relating to it for the purposes of section 78(1). …*
>
> *38 The prosecution … further rightly contend that the new evidence shows that SN's allegation was not an isolated*

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41 [2008] EWCA Crim 2908.

42 [2008] EWCA Crim 2908, at paras 19 and 36.

43 [2008] EWCA Crim 2908, at para 43.

44 [2008] EWCA Crim 2908, at para 37: it would have been "*similar to that which is provided in the definition of bad character in part 11 of the 2003 Act, evidence 'which has to do with the alleged facts of the offence' (section 98)*."

complaint against a man of good character who spent his adult life blamelessly working with children, but as now appears, one in a series of independent allegations forming a pattern of abuse of those in his care or for whom he was in a position of authority and trust. Even if not 'direct' this provides strong supporting evidence for SN which was not available at trial, and the evidence that the respondent was guilty of the rape of SN is now significantly more powerful than it was. In our judgment if it had been available at the first trial, or if it now were to be deployed at a second trial, the high probability is that the respondent would have been or will be convicted."

Instead of being a single complainant, SN was one of eight complainants whose evidence would be cross-admissible and relevant to the allegation of rape.[45] The court, in view of the new and compelling evidence, concluded that the acquittal should be quashed and ordered a retrial.

3.57 In the 2009 case of *R v C,*[46] the DPP applied for an order quashing C's acquittal in 2002 of the murder/manslaughter charge of his ex-girlfriend "CM". In 2007 another ex-girlfriend, "KH", was attacked in her flat by someone who wielded a blunt object. KH suffered serious injuries, and was brain damaged and partially paralysed. Her ability to communicate was severely impaired. However, she managed to identify C as her assailant, and to recall C's admission to her some years ago that he physically assaulted CM on the night she died. C's counsel argued against KH's memory, as there was a danger of retrograde amnesia and false memory consequent on her injuries.

3.58 In addressing the questions of retrograde amnesia and confabulation, the court considered not only medical reports and appropriate clinicians' evidence on the subject, but also examined accounts given by KH in order to see whether her memory of events at the critical time was in some way so confused as to produce confabulation. The court held that KH's account of events at the critical time appeared to be confirmed in a number of different ways, and there was ample evidence suggesting that KH's identification of C as her assailant was not undermined by retrograde amnesia or false memory. On the face of it, her evidence appeared to be reliable.[47]

3.59 The court noted that there was the evidence independent of KH (the facts of both of the attacks and the compelling features of similarity between the cases)[48] together with the fact that she mentioned his admissions

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45 [2008] EWCA Crim 2908, at para 47.

46 [2009] EWCA Crim 633.

47 [2009] EWCA Crim 633, at paras 13 to 15.

48 [2009] EWCA Crim 633, at para 24. See also: "*18. All of this material leads the Crown to argue that new and compelling evidence of the respondent's guilt of CM's murder for the purposes of sections 78 and 79 of the 2003 Act is now established. The compelling evidence is provided in a number of different ways. It is provided by the similarities in the circumstances of the two direct physical attacks on two young women with whom the respondent had had a sexual relationship. These attacks took place in their homes at night. On both occasions, on his own admissions, the*

to C's stepmother before any attack on her. The court concluded that with the fresh evidence there would be a high probability of conviction, and the evidence was of sufficient compulsion to justify the quashing order.[49]

3.60 In another 2009 case, *R v B(J)*,[50] B(J) was acquitted of offences of great violence committed in the course of a single expedition. He had been tried with two others, and all of them denied any part in the attacks. The two co-defendants were convicted. Later on, one co-defendant entered into an agreement to give assistance to the prosecutor or investigator of the offences in the hope of a review and reduction of his own sentence.[51] He said that he was present at the crime scene reluctantly and had not participated. He implicated B(J) and the third defendant as participating, and another man in planning the offences. The Crown applied under the "*new and compelling evidence*" limb of section 76 of the English 2003 Act for an order quashing the acquittals of B(J) and directing his retrial.

3.61 The court held that the evidence was new as it had not been available to the Crown at trial. The question was whether the evidence was "*compelling*" as defined in section 78(3).[52] This evidence was "*substantial*" in the sense that, if true, it was an eyewitness account of B(J)'s presence at, and active participation in, the offences. Hence the main issue in the application was whether it was "*reliable*" and "*highly probative*" under section 78(3). In the context of this case, these two concepts went together and, if the evidence was reliable and true, it would be highly probative of B(J)'s guilt.

3.62 The court did not doubt that a co-defendant's evidence was capable of being reliable. The question, however, was not whether the evidence of the co-defendant might be reliable, but whether it was reliable. The court finally refused to quash the acquittals as the evidence of the co-defendant, although capable in principle of being true, fell far short of being shown to be reliable for the following reasons:

> *"11. First, it is the statement of a man with a powerful self-interest to serve by reason of the Serious Organised Crime and Police Act agreement and the demonstrated hope that he will achieve a review and reduction of his own sentence. Second, it is the statement of an accomplice who has made it clear that he contends not only that he should be rewarded for giving information but also that his sentence was passed on a*

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respondent had been to visit their homes within a very short period indeed before the attacks actually took place. In both cases he was the last person known to have seen one of them (CM), or to have appeared to want to gain entry to see the other (KH) before the attacks took place. On both occasions the attacker entered the respective homes without forcing his way in. On both occasions the attacker was not interested in theft or sexual crime."

49 [2009] EWCA Crim 633, at para 24.

50 [2009] EWCA Crim 1036.

51 Under s74 of the Serious Organised Crime and Police Act 2005.

52 Section 78(3): "*Evidence is compelling if: (a) it is reliable; (b) it is substantial; and (c) in the context of the outstanding issues it appears highly probative of the case against the acquitted person*."

wrong basis as to his role in these offences. His assertion that his role was minimal is, on the facts of this case, intimately bound up with his contention that it was B(J) and not himself who took an active role. The evidence of an accomplice who is seeking such advantages can of course be true and we leave open the question whether on other facts it might be demonstrated to be reliable. But in the present case it is not so demonstrated. It is, on the contrary, characterised by present implausibility and past fluent lying. Contrary to the verdict of the jury upon him, the co-accused's evidence does not amount to an admission that he was guilty. It does indeed conform to the known facts, but these were all proved at the trial and are not open to dispute. A true account will of course conform to them, but so will a false account. The suggested corroboration, on inspection, is either related to alleged participants other than B(J) or has over it the same question marks as there are about the co-accused."[53]

3.63 A more recent case is *R v G(G) and B(S)*[54] in which two men were acquitted of murder, but a third man was convicted, having been disbelieved in his evidence of alibi. The convicted man agreed to become a police informant and obtained a substantial reduction in sentence. Armed with, *inter alia*, the convicted man's statement implicating the two acquitted men in the murder, the Crown applied to quash the two men's acquittals. The Court of Appeal refused the Crown's application because it was not possible to say whether the convicted man's new evidence was reliable in the sense used in the statute (that is, compelling), bearing in mind his manipulative and cynical nature and the court's finding that he was quite prepared to say anything that would serve his own purposes, whether true or not.

3.64 Section 55(1) of the English 1996 Act deals with quashing an acquittal on the ground that it is "*tainted*". The section provides that where a person has been convicted of an "*administration of justice offence*" involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to an acquittal, and that "*it appears to the High Court likely that, but for the interference or intimidation, the acquitted person would not have been acquitted*", then the acquittal can be quashed. According to section 54(6), administration of justice offences are:

(a) the offence of perverting the course of justice;

(b) the offence under section 51(1) of the Criminal Justice and Public Order Act 1994 (intimidation etc of witnesses, jurors and others);

(c) an offence of aiding, abetting, counselling, procuring, suborning or inciting another person to commit an offence under section 1 of the Perjury Act 1911.

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53 [2009] EWCA Crim 1036.

54 [2009] EWCA Crim 1077.

3.65 **New Zealand –** Under the NZ Act, evidence is "*new*" if it was not given in the proceedings that resulted in the acquittal, and it could not, with the exercise of reasonable diligence have been given in those proceedings.[55] Evidence is "*compelling*" if it is "*a reliable and substantial addition*" to the evidence given in the proceedings that resulted in the acquittal and it implicates the acquitted person "*with a high degree of probability*" in the commission of the specified serious offence.[56]

3.66 Under section 378A(2)(a), a tainted acquittal can justify the court in quashing the acquittal if the court is satisfied, *inter alia*, that "*it is more likely than not that the commission of the administration of justice offence was a significant contributing factor in the person's acquittal for the specified offence".* An "*administration of justice offence*" means "*an offence against any of sections 101, 104, 109. 113, 116 and 117*", which are respectively bribery of a judicial officer, etc, corruption and bribery of a law enforcement officer, perjury, fabricating evidence, conspiring to defeat justice and corrupting juries and witnesses.

Discussion and conclusions

3.67 *Fresh and compelling evidence* – Whether the operative phrase is "*new and compelling*" or "*fresh and compelling*" matters less than how the chosen phrase is defined. However, as indicated above, we prefer the term "*fresh*" to the term "*new*". The word "*new*" might create the impression that it simply refers to evidence that was not used previously, whereas the word "*fresh*" carries the connotation that it was not found or located (and could not have been found or located) previously which is more consistent with our proposal below. As to the definition of the phrase, we are of the opinion that the definitions of the term "*fresh*" in New South Wales and Queensland and of the term "*new*" in New Zealand are to be preferred to the definition adopted in England.[57] The additional criterion applied in the first three jurisdictions that the evidence "*could not have been adduced in those proceedings with the exercise of reasonable diligence*" addresses the argument for retaining the rule against double jeopardy that the rule encourages efficient investigation of crime. We note that in England, even though the concept of "*new*" does not include any consideration of whether the evidence could have been located or adduced at the time of the original trial, this consideration was brought into play in the context of whether it would be in the interests of justice to order a retrial.[58] We believe, however, that the requirement that the evidence could not have been adduced in the earlier proceedings with the exercise of reasonable diligence is an important one and should be built into the definition of the sort of evidence required, rather than being left to a later, discretionary, stage of the exercise. The definition of the term "*compelling*" is more or less the same in the various jurisdictions examined above. Section 7 of the Irish

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55 Section 378B(2).

56 Section 378B(3).

57 These definitions can be found under the heading "Definition of the relevant terms" above.

58 See under the heading "Measures to prevent abuses" below.

Act, however, provides that compelling evidence means evidence which is, apart from being reliable and of significant probative value, such that a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned. We are of the view that this threshold is too high, on the basis that a hearing of an application to quash an acquittal is not a full trial. The consultation paper recommended adopting the definitions of the terms "*fresh*" and "*compelling*" used in the NSW Act.

3.68 The Hong Kong Police Force, the Legal Aid Department and the Law Society of Hong Kong supported this recommendation. The Law Society suggested that in determining whether the evidence was "*fresh and compelling",* reference could be made to the Court of Appeal's existing power to admit new evidence on an appeal, and referred to the criteria in *R v Ch'ng Po.*[59] The consideration in that case however, was whether the relevant evidence was "*credible*", rather than "*fresh*" and "*compelling*" and is therefore not directly relevant to the question arising under the proposed relaxation.

3.69 According to section 78(5) of the English 2003 Act, as mentioned above, it is irrelevant whether any evidence would have been admissible in earlier proceedings against an acquitted person. Lord Goldsmith, the then Attorney General, explained the effect of this provision in Parliament:

> *"This provision states, in effect, that previous admissibility is not relevant to the new evidence. In answer to the question of the noble Lord, Lord Thomas of Gresford, it is to ensure that any new evidence is assessed in accordance with current rules and standards of evidence and that in any potential retrial, those standards and rules of evidence would apply. Evidence which is otherwise new and compelling would not be excluded from consideration of the court solely because it would not have been admissible at some previous date. That does not of course mean that the overriding interests of justice test disappears - that is still for the Court of Appeal to determine."*[60]

3.70 The Law Commission in England recommended in its consultation paper that "*evidence which was not admissible in the first trial, and subsequently becomes admissible owing to a change in the law, should count as new evidence*". In its report, however, the Law Commission reversed that view in the case of evidence that was in the possession of the prosecution at the time of the first trial but was inadmissible because of the then-prevailing rules of evidence, because of public concern that the law might be changed in order to secure a second trial.[61] Similarly, evidence that would

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59 [1996] 1 HKCLR 18.

60 *Hansard* HL, 17 Jul 03, col 1085.

61 *"In CP 156 we proposed that, for the purposes of the new exception, evidence should count as new evidence if, having been inadmissible at the first trial, it becomes admissible through a change in the law. This proposal was comprehensively rejected by respondents, largely through fears that the law might be changed in order to secure a second trial. Even if this seems a little far-fetched, anyone arguing for a change in the law of evidence would be bound to point to examples of cases in which the change would have been effective to secure a*

be admissible on a retrial under the Tasmanian Act is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.[62] Section 10(5) of the Irish Act is to similar effect.

3.71 There is a clear difference between a case where the evidence was already available but inadmissible (by reason of rules of evidence prevailing at the time) at the time of the original trial (as under the Law Commission's recommendation), and a case where the evidence was not in the hands of the prosecution at all at the original trial (as provided under section 78(5)). There are three options if Hong Kong is to have an analogous provision. The first option would be to exclude from the scope of "*fresh and compelling evidence*" evidence which was in the possession of the prosecution (but inadmissible) at the time of the original trial, and which has since become admissible under the rules prevailing at the time of the application. However, evidence which was not in the original prosecutor's possession should not be excluded simply because it would have been inadmissible at the original trial. The second option is to provide that evidence which was in the possession of the prosecution (but inadmissible) at the first trial, and subsequently becomes admissible owing to a change in the law, should still count as fresh evidence. The last option is a half-way house approach, which defines "*fresh and compelling evidence*" as including evidence which was in the possession of the prosecution but inadmissible under the rules prevailing at the original trial but which has since been rendered admissible, with the court given a discretion to exclude that evidence if it sees fit. The consultation paper specifically sought public views on these options.

3.72 The Legal Policy Division of the Department of Justice considered that the half-way house approach would be the best option for better protecting an acquitted person's right to a fair trial from the human rights perspective, as it would give the court discretion to exclude the evidence. On the other hand, neither the Law Society of Hong Kong nor the Legal Aid Department supported including such evidence. The Law Society could not see how it could be regarded as "*fresh*", while the Legal Aid Department made three points. First, admitting such evidence would give rise to public concern over the motive behind the change in the law. Secondly, had such evidence been presented at the first trial, there would have been no guarantee that it would lead to a conviction. Thirdly, the Law Commission in England had also recommended excluding such evidence. After considering the responses, we conclude that "*fresh and compelling evidence*" should not include evidence which was in the possession of the prosecution at the time of the original trial

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conviction; if the argument was successful and the law was changed, the 'example' case could be reopened and the effect would be much the same. We consider these objections well founded. We recommend that it should not be possible to apply for a retrial on the basis of evidence which was in the possession of the prosecution at the time of the acquittal but could not be adduced because it was inadmissible, even if it would now be admissible because of a change in the law." [emphasis added] Law Commission, *Report on Double Jeopardy and Prosecution Appeals* (2001), Report No 267, at para 4.94.

62 Section 395(4) of the Tasmanian Act.

but was inadmissible at the time, and which has since become admissible under the law prevailing at the time of the application.

Recommendation 4

We recommend that for the purpose of determining what amounts to "*fresh and compelling evidence*":

(a) Evidence is "*fresh*" 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.

(b) Evidence is "*compelling*" 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.

The term "*fresh and compelling evidence*", however, should not include evidence which was in the possession of the prosecution, but was inadmissible as a matter of law at the time of the original trial, and which has since become admissible under the law prevailing at the time of the application.

3.73 **Tainted acquittal and administration of justice offences –** In the jurisdictions discussed above, a tainted acquittal is defined by reference to the commission of certain specified offences the definitions or ingredients of which involve some interference with, or perverting of, the administration of justice (such as perjury, interference with witnesses, etc),[63] and to a particular causative link between the commission of such offences with the previous acquittal. Setting out a list of specified "*administration of justice*" offences in the relevant legislation has the benefit of certainty and clarity. However, it may not include all relevant scenarios. For example, an offence other than an administration of justice offence might also bring about, or be instrumental in, an acquittal. This could arise, for instance, where a witness is killed or assaulted (to the extent of incapacitating him) by a third party for reasons unrelated to the proceedings under review. It therefore would not fall within the definition of any recognised "*administration of justice offence*".

3.74 After careful consideration, we believe that there are two ways to define a "*tainted acquittal*". The first is to define it in terms of the commission of a specific administration of justice offence. Under this option (which is that adopted in the jurisdictions discussed above), the definition would list the

[63] Hence some jurisdictions use of the phrase "*administration of justice offences*".

relevant administration of justice offences. The second option is to define a tainted acquittal as one where an offence was committed which had a material impact on the verdict in the proceedings in question. Under this option there is no inherent limitation as to the type of offences, and qualification is determined by reference to its effect on the verdict. This approach has the advantage of flexibility, but lacks precision. As the first approach has the advantages of certainty and experience gleaned from overseas jurisdictions, the consultation paper adopted this approach as the tentative recommendation. However, the consultation paper specifically sought public views on the desirability of the second approach.

3.75 The Hong Kong Police Force, the Law Society of Hong Kong and the Legal Aid Department endorsed the first approach. The Legal Aid Department considered that precision and certainty were imperative as the proposed relaxation would impinge on an acquitted person's liberty. Similarly, the Law Society of Hong Kong considered that there were practical difficulties in extending the relaxation to cover any offence which had had a material impact on determining the verdict. Hence, the best solution would be to draft a list of the relevant offences. In contrast, the ICAC supported the second approach, as an offence other than an administration of justice offence might well interfere with a trial and lead to an acquittal. The Legal Policy Division of the Department of Justice observed that the second approach would not violate the presumption of innocence guaranteed by Article 14(2) of the ICCPR and Article 11(1) of the HKBOR.

3.76 While we understand the concerns expressed about the second approach, we believe that the public would find it repugnant if a person were acquitted of one offence as a result of the commission of another offence which has the requisite causal link with the acquittal, whether or not that offence falls within a predetermined list of "*administration of justice offences*". We are of the view that a compromise approach may strike the right balance. In other words, the definition of "*tainted acquittal*" should not be restricted to the commission of an administration of justice offence as recommended in the consultation paper, but should additionally cover the commission of any offence that has the requisite causal link with the acquittal.

3.77 The example of a witness being killed or assaulted mentioned above would be caught by this extended definition. In addition, the commission of an administration of justice offence or any offence must be "*in connection with the proceedings in which the accused person was acquitted*", as recommended in the consultation paper. This would answer the concern that the secondary offence might be unrelated to the proceedings resulting in the acquittal. In addition, we also retain the conclusion in the consultation paper that the various "*administration of justice offences*" should be specifically listed in the legislation and should consist of offences which involve interfering with the administration, or perverting the course, of justice. This raises the question whether an administration of justice offence can be committed before the relevant proceedings have begun. The Court of Appeal in *HKSAR v Wong Ching-yim* considered this question and, in deciding that an

administration of justice offence could be committed before the relevant proceedings had begun, said:

> "*19. The rationale of this offence, which is one against public justice, is to criminalise acts or conduct which may result in miscarriages of justice or which may result in defeating the ends of justice. Thus rationalized, in our view, the nature of the offence must necessarily be a wide and general one, encompassing a number of possible situations.*
>
> *…*
>
> *21. First, the phrase 'the course of justice', just like phrases such as 'the administration of justice' and 'the ends of justice', is one that is directed to courts of law and other tribunals (whether created or perhaps recognized by statute) which have the function of adjudicating on or determining disputes. …*
>
> *22. Put another way, the 'course of public justice' is a reference to curial proceedings. …*
>
> *23. Accordingly, in determining whether an act or conduct tends to pervert the course of public justice, one must inevitably have regard to the effect of such act or conduct to curial proceedings. It is not necessary that such curial proceedings are actually in existence at the time of the relevant act or conduct or whether such curial proceedings ever take place at all. It is sufficient if such proceedings are imminent, probable or even possible at the time of the relevant act or conduct: see The Queen v Rogerson (1992) 174 CLR 268 at p277 (Col 2) per Mason CJ. Therefore, it is no bar to a charge of perverting the course of public justice that the relevant curial proceedings have not yet begun. From the authorities that exist in this area of the law, it can be seen that as far as criminal proceedings are concerned, the charge is often appropriate where there has been some act committed during the course of police investigations. In The Queen v Rogerson, in the joint judgment of Brennan J and Toohey J, reference is made to attempts to mislead the police in the course of their investigations: see p281 (Col 2). Even where police investigations have not yet begun, it is possible that acts or conduct may pervert the course of public justice: see R v Rafique [1993] QB 843. …*
>
> *24. Though, as a matter of timing, it is not necessary that the relevant act or conduct under scrutiny be perpetrated at a time when curial proceedings are in existence, there must nevertheless be a discernible link between the act or conduct and any possible or actual curial proceedings. In the context, for example, of police inquiries, Deane J said this in The Queen v Rogerson (1992) 174 CLR 268 at p293 (Col 2) to p294 (Col 1):*

'Police inquiries do not, of themselves, constitute "the course of justice" for the purposes of the offence of perverting the course of justice. It is necessary, in a case involving alleged conduct to divert or frustrate police inquiries, to identify some actual or potential relationship between the alleged conduct and some pending, probable or possible curial proceedings whose course the accused intended to pervert."'[64]

3.78 Therefore the subject matter of Recommendations 5(a)(i) and 5(a)(ii) is not entirely the same. Recommendation 5(a)(i) covers convictions for administration of justice offences which can be committed before the actual commencement of proceedings. Recommendation 5(a)(ii) covers convictions for offences committed "*in connection with*" the proceedings which could only be committed after the proceedings have commenced, but would cover cases where, for whatever reason (for example, where in the case of an assault the prosecution did not know that the assault was committed with a view to intimidating a witness in the proceedings), the prosecution had simply prosecuted for an offence (for example, simple assault) which did not fall within the definition of an "*administration of justice offence*".

3.79 The next question is the formulation of the requisite degree of causal connection between the "*administration of justice offence*" or that "*any offence*" and the previous acquittal (ie to what extent the commission of either of these offences had brought about or contributed to the acquittal). The "*trigger elements*" adopted in the overseas jurisdictions referred to above are as follows: the "*but for*" test in New South Wales[65] and England[66] (eg *"but for the commission of the administration of justice offence, the accused person would have been convicted"* in the NSW Act), and the "*significant contributing factor*" in New Zealand[67] (ie "*it is more likely than not*" that the commission of

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64 [2003] 3 HKLRD 1046, at paras 19 to 24. The Court of Appeal went on to talk about the *actus reus* and *mens rea:*

"28. The second important feature of this offence is that the actus reus involves an act or conduct which has a tendency to pervert the course of public justice. Here, we agree with the requirement that the tendency must be a clear or manifest one. That said, it is important to bear in mind that all that needs to be proved is a tendency. It is unnecessary to prove either that the relevant tribunal was or would actually have been misled.

29. The third feature to which we draw attention is the requisite mens rea of the offence. It is insufficient for the prosecution merely to prove the intention to do the act or embark on the conduct complained of: see R v Selvage [1982] QB 372 at p383F. There has to be an intention to pervert. This means that when doing the act or embarking on the course of conduct complained of, the accused must also have known or contemplated the possibility of curial proceedings so that in doing what he did, he would have realised that such act or conduct would have the manifest or clear tendency to pervert the course of public justice or that he intended this to be the effect. See here: The Queen v Rogerson (1992) 174 CLR 268 at p278 (Col 1), p280 (Col 1), p282 (Col 1); R v Rafique [1993] QB 843 at pp 850-851.

30. Lastly, we return to generalities. The concept of perverting the course of public justice really just means the deflection, frustration, impairment or hindrance of the ability of a court or tribunal in any actual, imminent, contemplated or possible curial proceedings, to administer justice."

65 Section 103(2) of the NSW Act.

66 Sections 54(2) and 55(1) of the English 1996 Act.

67 Section 378A(2)(a) of the NZ Act.

the administration of justice offence was "*a significant contributing factor*" in the accused's acquittal). We are of the view that the "*but for*" test is too stringent. The test detracts attention from the essential question of whether the acquittal was tainted and thus the accused was never properly tried for the offence. Whether the accused is likely to have been convicted then or now is a factor more appropriate for the "*interests of justice*" safeguard that, as proposed under the next heading, should apply to this limb. In contrast, the "*significant contributing factor*" test is more reasonable and realistic. The consultation paper therefore recommended adopting the "*significant contributing factor*" test. As to the standard of proof, the consensus of the various jurisdictions is "*on a balance of probabilities*": this is formulated as "*more likely than not*" in New South Wales, Queensland and New Zealand, and "*likely*" in England. We see little difference in substance between these forms of words.

3.80 The Legal Aid Department supported the consultation paper's recommendation that the standard of proof should be "*on a balance of probabilities*". Another respondent suggested adopting the higher standard of "*beyond reasonable doubt*" so as to prevent retrials because of only trivial evidence. We believe, however, that if that standard were adopted the application hearing would effectively be turned into a trial. On reflection, we consider that the word "*proof*" in the recommendation in the consultation paper might have unwittingly carried the connotation that an application hearing has the effect of a final determination of facts when in fact it does not (although the Court of Appeal has to form a view as to the impact of the "*tainted*" evidence on the original trial). We have therefore deleted paragraph (c) from the original Recommendation 5 in the consultation paper,[68] while incorporating the words "*more likely than not*" into the definition of "*tainted acquittal"* in Recommendation 5(a).

3.81 It will be remembered that in the *Carroll* case in Australia (discussed above),[69] the accused was prosecuted for perjury instead of the original offence (in respect of which the accused had made a subsequent confession). It may well be asked whether, because of the reasoning in *Carroll*, in the context of "*tainted acquittals*" there could ever be a case where the "*administration of justice offence*" relied on is a conviction of the accused for perjury in the course of his original trial. On this, we make the following observations. As we noted above, the reasoning in *Carroll* has not yet been tested in Hong Kong. Furthermore, the conviction in question could well not be for a perjury as to the actual commission of the crime in question, but as to some collateral matters such as a false alibi. More importantly, we believe that in practice if the new law is passed there may be little need (if any) to prosecute the accused himself for perjury in relation to the commission of the offence in question. We venture to suggest that in *Carroll* itself, the prosecution was driven to prosecute the accused for perjury because, as the law then stood (ie with the rule against double jeopardy in place), the accused clearly could not be prosecuted for the same offence. The only option left for

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68 "*The standard of proof should be 'on a balance of probabilities'.*"

69 This case was discussed in the Preface.

the prosecution to bring the wrongly acquitted Carroll to justice was to charge him with perjury. With the relaxation of the rule proposed in Recommendation 1, faced with the same situation as in *Carroll* (eg a subsequent confession by the accused, or, indeed, any evidence showing that the accused had lied in denying the commission of the offence), the prosecution in Hong Kong would be able to pursue an unjustifiably acquitted person based on the "*fresh and compelling evidence*" limb, without having to resort to charging the accused with perjury as in the *Carroll* case.

Recommendation 5

We recommend 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:

(i) an administration of justice offence or

(ii) any offence committed in connection with the proceedings in which the accused person was acquitted;

and the commission of the administration of justice offence or that latter offence was, more likely than not, a significant contributing factor in the person's acquittal; and

(b) "*Administration of justice offences*" should be specifically listed in the legislation and should consist of offences which involve interfering with the administration, or perverting the course, of justice.

Measures to prevent abuses

Australia: New South Wales

3.82 In New South Wales, retrial for a life sentence offence will only be ordered if the Court of Criminal Appeal is satisfied that "*in all the circumstances it is in the interests of justice for the order to be made*."[70] Section 104 of the NSW Act provides that it will not be in the interests of justice to order a retrial of an acquitted person unless the Court of Criminal Appeal "*is satisfied that a fair trial is likely in the circumstances*." In this connection, the court is to have regard, in particular, to the length of time since the acquitted person allegedly committed the offence and whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for the retrial of the acquitted person.

[70] Sections 100(1)(b) and 101(1)(b) of the NSW Act.

Australia: Queensland

3.83 Queensland requires that an order for retrial for the offence of murder be "*in the interests of justice*".[71] Section 678F(2) of the Queensland Code provides that it is not in the interests of justice to make an order for the retrial of an acquitted person unless the court is satisfied that a fair retrial is likely in the circumstances. In considering this, the court must have regard in particular to the length of time since the acquitted person allegedly committed the offence; and whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to the investigation of the offence and the prosecution of the proceedings in which the person was acquitted, and the application for the retrial of the acquitted person.[72]

England and Wales

3.84 In England and Wales, there is a similar requirement that retrial of a qualifying offence be "*in the interests of justice*" under their "*new and compelling evidence*" limb. In considering whether it is in the interests of justice to make an order under section 77 of the English 2003 Act, the court shall have regard in particular to:

> *"(a) whether existing circumstances make a fair trial unlikely;*
>
> *(b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;*
>
> *(c) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition;*
>
> *(d) whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition."*[73]

3.85 The Court of Appeal in *R v A*[74] observed that section 79(2) identified four specific features to which regard must be had when the interests of justice were considered. The first two are about the fairness of a retrial, including the extent of any adverse publicity and the delay since the alleged offence was committed. The second two ensure that the possibility of applying for a retrial does not encourage inefficient investigation and prosecution of offences. This is not an exhaustive list, however. The court went on to say:

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71 See sections 678B(1)(b) and 678C(1)(b) of the Queensland Code.

72 Section 678F(3) of the Queensland Code.

73 Section 79(2) of the English 2003 Act.

74 [2008] EWCA Crim 2908, at para 40.

"42 There may be situations where it would be contrary to the interests of justice for a re-trial to be held in the light of the serious short-comings at the first trial. It would be inappropriate to seek to lay down any specific test, although the situations we have in mind are where, to use the description in argument, the evidence at the first trial was 'shot to pieces'. It is ultimately for the court to examine the interests of justice, and the interests of justice cannot be served by a re-trial of an acquitted defendant unless the prospects of conviction at the re-trial are very good."

3.86 In *R v C,*[75] the Court of Appeal held that inroads into the principle against double jeopardy must be examined closely on a case-by-case basis, and the jurisdiction should be exercised with due caution and with the statutory criteria well in mind. In doing so, the court considered the interests of justice generally, and the fairness of any forthcoming retrial. In particular, the court considered: (1) whether the difficulties of testing KH's evidence, because of her mental and physical condition, would deprive C, the acquitted person, of a fair retrial; and (2) whether there had been due diligence exercised in the police investigation leading to the first trial.

3.87 As to the first issue, the court found that KH had extreme difficulties in describing events, but there was no evidence that she suffered from retrograde amnesia. Because of KH's physical and mental condition, it would be necessary in any forthcoming retrial to use an intermediary and a series of measures which would "*maximise*" the quality of her evidence.[76] The court held that, on the face of it, the proposed special measures would assist in enabling KH to do justice to whatever evidence she wished to give. Although it would create difficulties and be time-consuming, the court held that it would not serve to make any forthcoming retrial unfair.

3.88 Regarding the police investigation leading to the first trial, the court doubted whether the most intensive police investigation into the murder of CM could reasonably have been expected to produce evidence of what C

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75 [2009] EWCA Crim 633. This case was also discussed under the heading "(c) Definition of the relevant terms" above. In this case, the DPP applied for an order quashing C's acquittal in 2002 of the murder/manslaughter charge of his ex-girlfriend "CM". In 2007 another ex-girlfriend, "KH", was attacked in her flat by someone who wielded a blunt object. KH suffered serious injuries, and was brain damaged and partially paralysed. Her ability to communicate was severely impaired. However, she managed to identify C as her assailant, and to recall C's admission to her some years previously that he had physically assaulted CM on the night she died. C's counsel argued against KH's recollection of events on the ground that there was a danger of retrograde amnesia and false memory consequent on her injuries.

76 "*21. … She has a serious language disorder. She is able to understand simple, short questions and sentences. She can be assisted when key words are written down. Her answers take the form of a mixture of speech, writing, drawing, gesture and finger-spelling - all with the assistance of an intermediary. The use of the intermediary involves a series of measures which would 'maximise' the quality of her evidence. These include Dr Sacchett, with whom KH has a good working relationship, acting at the intermediary when she gives her evidence, both to enable KH to understand the questions and to assist her to give the answers. It is important in this context to underline that this is not a matter of an interpreter simply translating whatever it is that the witness says. The intermediary has a much more important and difficult role*."

had admitted to KH and what KH had said to the other witnesses, such as to C's stepmother about C's admission to KH. The court held that there was no inefficiency in the original investigative process for which the admission of this evidence might somehow compensate. The court concluded:

> *"26. … We have looked at all the evidence compendiously. We are satisfied that the interests of justice require that this acquittal should be quashed and that the appellant should be retried for the murder of CM. It will be a very difficult trial, but there is no reason to believe that it will not be a fair one. …"*[77]

3.89 The facts of *R v G(G) and B(S)*[78] were discussed under the heading "(c) Definition of the relevant terms" earlier in this chapter. In that case, the convicted man obtained a substantial reduction in sentence by agreeing to become a police informant. Armed with, *inter alia*, the convicted man's statement implicating his two co-defendants who had been acquitted of the murder charge, the Crown applied to quash the two men's acquittals. The Court of Appeal stated that the case in the end depended not on the "*interests of justice*" test in section 79 of the English 2003 Act, but on the "*reliability*" test in section 78. The court also stated that the "*interests of justice*" test was not exhaustive, and the court should stand back from the application and ask whether in all the circumstances it was in the interests of justice that there should be a re-trial. The deliberate manipulation of the courts by a proffered witness was one of the relevant circumstances of the case.

3.90 In respect of the "*tainted acquittal*" limb, it is a prerequisite for an application for a retrial that a person has been convicted of an administration of justice offence involving interference with, or intimidation of, a juror or a witness (or potential witness) in any proceedings which led to an acquittal.[79] Further, the High Court must not make an order to quash an acquittal unless the following four conditions in section 55 of the English 1996 Act are satisfied:[80]

(i) it appears to the High Court likely that, but for the interference or intimidation, the acquitted person would not have been acquitted;[81]

(ii) it does not appear to the High Court that, because of lapse of time or for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted;

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77 [2009] EWCA Crim 633.

78 [2009] EWCA Crim 1077.

79 Section 54(1) of the English 1996 Act.

80 Section 54(3) of the English 1996 Act.

81 We have addressed this requirement in the context of discussing the requisite degree of causal link between the commission of the administration of justice offence and the acquittal in the paragraphs preceding Recommendation 5.

(iii) it appears to the High Court that the acquitted person has been given a reasonable opportunity to make written representations to the court; and

(iv) it appears to the High Court that the conviction for the administration of justice offence will stand.

3.91 Section 55(5) of the English 1996 Act provides that in applying the fourth condition, the High Court shall take into account all the information before it, but ignore the possibility of new factors coming to light. Accordingly, the fourth condition has the effect that the court will not quash the acquittal if, for instance, the time allowed for giving notice of appeal has not expired or there is an appeal pending.[82]

New Zealand

3.92 In respect of the "*tainted acquittal*" limb, before making an order to quash an acquittal, the High Court must be satisfied that the retrial is in the interests of justice. In deciding whether a retrial is in the interests of justice or not, section 378A(3) provides that the High Court must "*have particular regard*" to the following matters:

(i) the length of time since the acquitted person is alleged to have committed the specified offence;

(ii) whether the prosecution acted with reasonable speed since discovering evidence of the administration of justice offence;

(iii) the interests of any victim of the specified alleged offence; and

(iv) whether the retrial can be conducted fairly.

3.93 Regarding the "*new and compelling evidence"* limb, in determining whether a retrial of an acquitted person is in the interests of justice, section 378D(2) of the NZ Act provides that the Court of Appeal is to have particular regard to:

(a) whether before or during the proceedings that led to the acquittal of the acquitted person for the specified serious offence all reasonable efforts were made to obtain and present all relevant evidence then available;

(b) the length of time since the acquitted person is alleged to have committed the specified serious offence;

(c) whether the police and the Solicitor-General acted with reasonable speed in making the application after obtaining new evidence against the acquitted person;

[82] Section 55(6) of the English 1996 Act.

(d) the interests of any victim of the specified serious offence alleged to have been committed; and

(e) whether the retrial for which leave is sought can be conducted fairly.

3.94 Furthermore, before making an application for retrial under the "*new and compelling evidence"* limb, the Solicitor General has to be satisfied that there is new and compelling evidence implicating an acquitted person in the commission of a specified serious offence, and it is in the interests of justice to retry him.[83]

3.95 Under sections 378A(4) and 378D(5), the Solicitor-General must take all reasonable steps to serve a copy of the application on the acquitted person, and must file a copy in the court. The defendant is entitled to be heard at the hearing of an application, which must not be held less than 14 days after notice is filed in the court.

Discussion and conclusions

3.96 Jurisdictions discussed above require that the quashing of an acquittal must be "*in the interests of justice*". In determining this, the court must have regard in particular to a list of non-exhaustive factors set out in the legislation. The consultation paper recommended that an application to quash an acquittal (whether under the tainted acquittal ground or the fresh and compelling evidence ground) should only be granted where it was in the interests of justice to do so. This would give the court a wide discretion to decide on the basis of the facts of each case. The consultation paper specifically invited comments from the public on whether the legislation should include a non-exhaustive list of factors so as to provide the court with some guidance, and if so, what those factors should be. The consultation paper suggested that a non-exhaustive list of factors should include the following:

- Whether a fair retrial is likely;
- The interests of any victim of the offence;
- The length of time that has elapsed since the alleged commission of the offence for which the accused is sought to be retried;
- Whether the Police and the prosecution have acted with reasonable diligence and expedition in -
  - (i) the investigation and prosecution of the offence; and
  - (ii) the application for the retrial;

[83] Section 378D(4) and 378D(1)(a) and (b) of the NZ Act.

- In respect of the "*tainted acquittal*" limb, and in the event of an appeal against the conviction for the administration of justice offence, whether the conviction for the administration of justice offence will stand on appeal.

3.97 Most of those who responded supported the recommendation to impose a requirement that the quashing of an acquittal be "*in the interests of justice*".[84] We therefore retain this recommendation. However, the responses were diverse as to whether there should be a non-exhaustive list of factors. The Hong Kong Bar Association and the ICAC were in favour of such a list, while the Legal Aid Department and the Law Society of Hong Kong were against it, with the Law Society arguing that the court should be left to decide matters in the context of the case. On balance, we believe that the legislation should include a non-exhaustive list of factors. That will provide the court with some guidance while giving the court flexibility to consider such other factors as it considers relevant. Apart from the factors set out in the preceding paragraph, the Hong Kong Bar Association suggested the addition of whether an acquitted person would receive a "*fair trial*" if exhibits at the original trial were no longer available. We believe that this is already subsumed under "*whether a fair retrial is likely*" in the above list. We therefore recommend including in the legislation the list in the preceding paragraph.

3.98 The Hong Kong Bar Association also suggested a standard higher than the balance of probabilities in satisfying the "*in the interests of justice*" requirement. We are of the view that that would not be helpful as the application is not concerned with the proof of guilt and a higher standard might have the effect of turning the application hearing into a trial. Besides, we note that the relevant provisions in the other jurisdictions considered do not stipulate a higher standard and we have therefore decided that there is no need to do so.

3.99 In New Zealand an application cannot be heard within 14 days after filing the notice of application under section 378A(4) or 378D(5). The consultation paper was inclined to leave this to the court's discretion, rather than imposing specific time limits, but it invited comments from the public on this. The Law Society of Hong Kong agreed that it should be left to the court to decide. We therefore make no recommendation on this.

Recommendation 6

We recommend 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. Relevant

[84] The Legal Policy Division of the Department of Justice, the Hong Kong Bar Association, the Hong Kong Police Force, the ICAC, the Law Society of Hong Kong, the Legal Aid Department and the Society for Community Organisation.

factors would include, but are not limited to, the following factors:

- **whether a fair retrial is likely;**
- **the interests of any victim of the offence;**
- **the length of time that has elapsed since the alleged commission of the offence for which the accused is sought to be retried;**
- **whether the law enforcement agency and the prosecution have acted with reasonable diligence and expedition in -**
  - **(i) the investigation and prosecution of the offence; and**
  - **(ii) the application for the retrial;**
- **in respect of the "*tainted acquittal*" limb, and in the event of an appeal against the conviction for the administration of justice offence or the offence referred to in Recommendation 5(a)(ii), whether the conviction will stand on appeal.**

The mechanism for making an application to quash an acquittal

3.100 We will consider the following matters in respect of the mechanism for making an application:

(a) the forum and the prerequisites for the application;

(b) the number of applications that can be made in respect of an acquittal;

(c) whether there should be an appeal channel; and

(d) the time limits for commencing a retrial.

Forum and the time limit for the application

3.101 In New South Wales, an application for retrial is made to the Court of Criminal Appeal according to section 105(4) of the NSW Act. Similarly, such an application is made to the Court of Appeal in Queensland and England.[85] In New Zealand, an application is made to the High Court

[85] Sections 678G and 678(1) (definition of "Court") in the Queensland Code, and section 76 of the English 2003 Act.

under the "*tainted acquittal*" limb, and to the Court of Appeal under the new and compelling evidence limb.[86]

3.102 Pursuant to 39(2) of the Basic Law, rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless "*as prescribed by law*". Even when there are exceptional circumstances justifying a relaxation of the rule against double jeopardy, there should be sufficient safeguards to ensure that the relaxation is fair to acquitted persons. Commenting on Article 14(7) of the ICCPR, leading academics and practitioners made the following observation: *"[t]he dividing line between what is permitted by Art 14(7) and what is forbidden thus rests primarily upon the involvement of an appellate court".*[87] The consultation paper recommended that an application to quash an acquittal should be made to the Court of Appeal. All of those who responded to this recommendation supported it.[88] We therefore retain this recommendation.

3.103 In South Australia, an application for retrial must be made within 28 days after the acquitted person is charged with offence to which the application relates, or a warrant is issued for the person's arrest.[89] While we do not recommend that an application for retrial can only be made if one of these two steps had been taken, we believe that a provision like the South Australian provision would ensure that, where one of these two steps has in fact been taken, there would be no undue delay in making an application. We consider that the court should have power to extend the time limit as it may see fit. We recommend accordingly.

Recommendation 7

We recommend that an application to quash an acquittal should be made to the Court of Appeal within 28 days after the acquitted person is charged with the offence to which the application relates, or a warrant is issued for the person's arrest (whichever is the earlier). The court should be empowered to extend the time limit as it may see fit.

Number of applications

3.104 Under the original section 105(1) of the NSW Act, not more than one application for the retrial of an acquitted person may be made in relation to

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86 Sections 378A (2) and 378D(1) of the NZ Act.

87 B Emmerson, A Ashworth & A Macdonald, *Human Rights and Criminal Justice,* 2nd ed (Sweet & Maxwell: London, 2007), para 12-30.

88 The Hong Kong Bar Association, the Hong Kong Police Force, the Law Society of Hong Kong, and the Society for Community Organisation. The Legal Policy Division of the Department of Justice saw no human rights concern over this recommendation.

89 Sections 336(2) and 337(2) of the South Australian Act.

an acquittal. In other words, an application cannot be made in relation to an acquittal resulting from a retrial under this Act. Section 678G(1) of the Queensland Code provides that not more than one application can be made. Pursuant to section 678G(2), however, an acquittal resulting from a retrial is subject to a further retrial in respect of a tainted acquittal, but not under the "*fresh and compelling evidence*" limb. Section 76(5) of the English 2003 Act provides that not more than one application can be made. In New Zealand, where an acquitted person is again acquitted at a retrial, a further application for an order for another retrial cannot be made.[90] The consultation paper recommended that for the sake of uniformity of treatment between the two limbs and also in the interests of finality, 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.

3.105 The Hong Kong Police Force, the Law Society of Hong Kong and the Society for Community Organisation supported this recommendation.[91] We have therefore decided to retain this recommendation. The Society for Community Organisation also suggested setting a time limit on reopening an acquittal of, say, three years after the first trial so that the accused could be spared long-term psychological distress. We find this suggestion too restrictive and think it would unduly undermine the efficacy of the proposed relaxation. Besides, there is no such restriction in any of the jurisdictions studied in this report. We have therefore decided not to take up this suggestion.

3.106 We note that the newly added section 105(1A) in the NSW Act allows a further retrial of a person acquitted in a retrial if that acquittal was tainted.[92] Similarly, section 397AC(2) of the Tasmanian Act also allows a further retrial if the acquittal from the retrial is tainted. Under the South Australian Act, only one application can be made under the "*fresh and compelling evidence*" limb, and it seems that there is no such restriction under the "*tainted acquittal*" limb.[93] We are of the view that for the sake of uniformity and finality there should only be one application under both limbs.

Recommendation 8

We recommend 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.

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90 Sections 378A(4)(c) and 378D(5)(c) of the NZ Act.

91 The Legal Policy Division of the Department of Justice saw no human rights concern over this recommendation.

92 Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009 amended the NSW Act.

93 Section 337(2) of the South Australian Act.

Whether there should be an appeal channel in relation to any decision on an application for quashing an acquittal

3.107 In England, an appeal against the Court of Appeal's decision on an application can be made to the Supreme Court by either the prosecutor or the acquitted person.[94] The appeal lies only with the leave of the Court of Appeal or the Supreme Court; and leave will not be granted unless the Court of Appeal certifies that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court.[95] In Ireland, an acquitted person or the Director of Public Prosecutions may appeal to the Supreme Court from a determination of the Court of Criminal Appeal on an application for a retrial order if the latter court, the Attorney General or the Director of Public Prosecutions certifies that the determination involves a point of law of exceptional public importance and that it is desirable in the public interest to do so.[96]

3.108 In New Zealand, either the prosecutor or the accused person, with the leave of the court appealed to, may appeal to the Court of Appeal or the Supreme Court against an order of retrial under the "*tainted acquittal*" limb, or against the refusal to make such an order.[97] The existing provisions in section 379A(1) of the Crimes Act 1961 govern the procedures for applying for leave.

3.109 We consider it logical to include a channel for appeal and that that appeal channel should be clearly and expressly stated in the future legislation.

3.110 In our opinion, an appeal to the Court of Final Appeal should not be as of right and leave should be required as a filtering process, and this should be so whether the application to quash the acquittal was under the "*fresh and compelling evidence*" limb or the "*tainted acquittal*" limb. At present, an appeal can be made against a decision of the Court of Appeal to the Court of Final Appeal in a criminal matter on the grounds that "*substantial and grave injustice has been done*" or "*a point of law of great and general importance is involved in the decision*".[98] We believe that the present regime for regulating criminal appeals from the Court of Appeal to the Court of Final Appeal already provides an adequate mechanism for the granting of leave and no special procedure or test for granting leave is needed.

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94 Section 33(1B) of the Criminal Appeal Act 1968, as amended by section 81 of the English 2003 Act.

95 Section 33(2) of the Criminal Appeal Act 1968.

96 Section 14(1) of the Irish Act.

97 Section 379A(1)(ga) of the NZ Act.

98 See section 32 of the Hong Kong Court of Final Appeal Ordinance (Cap 484): "*Leave to appeal shall not be granted unless it is certified by the Court of Appeal or the Court of First Instance, as the case may be, that a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done*."

3.111 The consultation paper therefore recommended that an appeal should lie to the Court of Final Appeal by the prosecution and the acquitted person under both the "*fresh and compelling evidence*" limb and the "*tainted acquittal*" limb. It also recommended that such appeals should be by leave and not as of right, and the current provisions in the Court of Final Appeal Ordinance (Cap 484) governing the procedure and test for granting leave should apply. The Legal Policy Division of the Department of Justice, the Hong Kong Police Force, the Law Society of Hong Kong and the Society for Community Organisation supported this recommendation. The consultation paper specifically sought views on whether the "*substantial and grave injustice*" and "*a point of law of great and general importance"* tests in Cap 484 were adequate and, if not, what alternative or additional grounds should be provided for. The Law Society of Hong Kong considered that these tests were adequate, as they had long been used and accepted and there was well-established jurisprudence on them. We accordingly retain our original recommendation on this point.

Recommendation 9

We recommend that:

(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 "*fresh and compelling evidence*" limb or the "*tainted acquittal*" limb;

(b) appeal should be by leave of the Court of Final Appeal and the test for granting leave should be that provided in the Hong Kong Court of Final Appeal Ordinance (Cap 484) (ie the "*substantial and grave injustice*" and "*a point of law of great and general importance"* tests); and

(c) the Hong Kong Court of Final Appeal Ordinance (Cap 484) should apply to this type of appeal.

Time limits for commencing a retrial after an order for retrial

3.112 In New South Wales, where an order for retrial is made, an indictment for the retrial cannot be presented after two months from the date of the order, unless there is leave of the Court of Criminal Appeal.[99] Under section 106(2) of the NSW Act, the court may give leave only if it is satisfied that the prosecutor has acted with reasonable expedition, and there is a good and sufficient cause for the retrial despite the lapse of time since the order was

[99] Section 106(1) of the NSW Act.

made. There are similar provisions in section 678H(1) and (2) of the Queensland Code.

3.113 In England and Wales, where an acquittal is quashed under the new and compelling evidence limb, an acquitted person cannot be arraigned on indictment later than two months after the date of the order for retrial is made unless the Court of Appeal gives leave.[100] The Court of Appeal must not give leave unless satisfied that the prosecutor has acted "*with due expedition*", and there is "*a good and sufficient cause*" for trial despite the lapse of time since the order was made.[101] In *R v C,*[102] the Court of Appeal stated expressly that the acquitted person must be arraigned on the fresh indictment within three weeks of the date of the order of retrial. In the case of a tainted acquittal, the equivalent provision in section 56(1) of the English 1996 Act is somewhat different:

> *"Where –*
>
> *(a) an order is made under section 54(3) quashing an acquittal,*
>
> *(b) by virtue of section 54(4) it is proposed to take proceedings against the acquitted person for the offence of which he was acquitted, and*
>
> *(c) apart from this subsection, the effect of an enactment would be that the proceedings must be commenced before a specified period calculated by reference to the commission of the offence,*

In Ireland, where the Court makes a re-trial order, the re-trial should take place "*as soon as practicable*".[103]

3.114 We are in favour of setting a time limit after the order for retrial within which the proceedings for a retrial should be brought. The consultation paper proposed that, following the broad consensus of the jurisdictions discussed above, where an order for retrial was made, an indictment for the retrial could not be presented later than two months after the date of the order, unless the Court of Appeal gave leave. The Court of Appeal should not give leave unless satisfied that the prosecutor had acted "*with due expedition*", and there was "*a good and sufficient cause*" for retrial despite the lapse of time. Apart from these requirements, the Court of Appeal should also be satisfied that there was otherwise no prejudice to the acquitted person in question before giving such leave. This "*due expedition*" requirement is in respect of the period between an order for retrial and presentation of an indictment. As to whether the prosecution must also act with due expedition between

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100 Section 84(2) of the English 2003 Act.

101 Section 84(3) of the English 2003 Act.

102 [2009] EWCA Crim 633, at para 38.

103 Section 10(6) of the Irish Act.

acquisition of the new evidence and application to quash an acquittal, this requirement is already inherent in the "*interests of justice*" safeguard recommended above[104] and is not the point under discussion here. The Hong Kong Police Force and the Law Society of Hong Kong were in favour of this recommendation,[105] which we retain.

Recommendation 10

We recommend 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.

Restrictions on publication and other safeguards

Australia: New South Wales

3.115 Section 111(1) of the NSW Act prohibits publication of anything which has the effect of identifying an acquitted person who is the subject of an application or order for retrial, or of a police investigation under section 109 in connection with a possible retrial, unless the publication is authorised by the Court of Criminal Appeal or the court of retrial. The relevant court may make such an order only if it is satisfied that it is in the interests of justice to do so,[106] and before making the order, the court must give the acquitted person a reasonable opportunity to be heard on the application for the order.[107] Under section 111(4), the court may at any time vary or revoke such an order.

3.116 Section 111(5) provides that the prohibition on publication will cease 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

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104 Under the heading "Measures to prevent abuses".

105 The Legal Policy Division of the Department of Justice observed that the recommendation did not raise any human rights concern.

106 Section 111(2) of the NSW Act.

107 Section 111(3) of the NSW Act.

the retrial (if he is retried), whichever is the earliest. A contravention of the prohibition on publication is punishable as contempt of the Supreme Court.[108]

3.117 Under section 106(5), the prosecution at the retrial is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person, or that it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

3.118 By virtue of section 105(5), a further safeguard is that an acquitted person has a right to be present and to be heard at the hearing of the application (whether or not he is in custody). However, the application can be determined even if he is not present so long as he has been given a reasonable opportunity to be there.

Australia: Queensland

3.119 Sections 678K and 678H(5) of the Queensland Code are similar to sections 111 and 106(5) of the NSW Act respectively. Moreover, section 678G(7) & (8) of the Queensland Code is similar to section 105(5) of the NSW Act.

England and Wales

3.120 Under section 82(1) of the English 2003 Act, the Court of Appeal can, by an order, prohibit the publication of any matter that "*would give rise to a substantial risk of prejudice to the administration of justice in a retrial*". The Court of Appeal can only make such an order if it considers that it is necessary in the interests of justice to do so.[109] Publication in contravention of such an order constitutes a criminal offence.[110] In *In re D (Acquitted Person: Retrial)*,[111] the DPP sought an order under section 76(1) of the English 2003 Act quashing D's acquittal for murder and ordering a retrial. At a preliminary hearing, the DPP applied for an order under section 82 restricting publicity of the fact of the substantive application and, if that application were successful, of the hearing and consequent order and judgment of the Court of Appeal. The court held that the interests of justice required the imposition of restrictions on publicity. In this preliminary hearing of the first application made by the DPP for an order under section 76(1), the court said:

> *"11. … Part 10 of the 2003 Act is plainly a comprehensive legislative structure intended to govern, and governing the new process. …*

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108 Section 111(7) of the NSW Act. See also section 111(6): "*Nothing in this section affects any prohibition of the publication of any matter under any other Act or law*".

109 Section 82(3) of the English 2003 Act.

110 Section 83 of the English 2003 Act.

111 [2006] EWCA Crim 733.

….

16. Section 82(1) and (3) was plainly intended, so far as practicable, to ensure that the same fairness of process should apply to any retrial. Without some restrictions on publication, publicity could be given not only to all the evidence examined by the Court of Appeal, considering whether it was indeed new and compelling, but also to the stark fact that the court had reached that conclusion. In some cases, at any rate, that would give rise to a substantial risk to the administration of justice at the retrial.

17. Of course, we do not conclude that it will always be so. Like section 82 itself our concern is whether the substantial risk of prejudice will arise in the specific or individual case … . So the court must examine each application and should only make the order if satisfied that it is necessary, in the interests of justice, to require the imposition of restrictions.

18. In making its decision, the court will also address the principle, not simply of open justice in the sense that the proceedings themselves will take place in a public court, but also the responsibility of the media for reporting legal proceedings. It will no doubt remind itself without any necessity to cite authority, of the common judicial experience that juries are, and should be treated as if they are, robust and independent-minded, capable of evaluating the evidence called before them, and distinguishing it from pre-trial gossip and irrelevant comment."

3.121 Under section 80(5) of the English 2003 Act, the person to whom an application relates is entitled to be present at the hearing (even if he is in custody), and also to be represented at the hearing, whether he is present or not.

New Zealand

3.122 Section 378E(1) of the NZ Act provides that an order for a retrial under section 378A or 378D may be granted subject to:

(a) any conditions that the court considers are required to safeguard the fairness of the retrial;

(b) any other directions as to the conduct of the retrial.

3.123 Section 378E(2) provides that if a court considers that the interests of justice so require, it may exclude any person from the hearing of an application, or forbid any report or account of any evidence given or referred to at such a hearing or prohibit the publication of the name of the acquitted person or of any other person connected with a retrial for which leave is sought or has been granted.

Discussion and conclusions

3.124 We have considered, as an alternative to restrictions on publication, hearing applications in private. In this case, an acquitted person's identity and the reasons for quashing the acquittal would remain undisclosed. However, we firmly believe that the principle of open justice should not be lightly foregone, and an application to quash an acquittal should be heard in open court. Apart from the court's inherent power to direct a hearing to take place in camera or in private, the interests of an acquitted person could be adequately protected by a prohibition against the disclosure of his identity. There are two main approaches to publication adopted in the overseas jurisdictions examined above and they differ in their "*default position*". Under one approach (that in New South Wales and Queensland), the "*default position*" is that of no publication and disclosure of the identity of the accused (against whom an application is made or an acquittal is quashed) and a court order is required before there can be disclosure or publication. Under the other approach (that in New Zealand and England) the "*default position*" is that there is liberty to publish and disclose subject to the court's power to order otherwise or to give directions to safeguard a fair trial. We prefer the former approach because it provides a blanket and "*pre-emptive*" ban unless otherwise authorised by the court. This could avoid a situation where a person acquires knowledge of the identity of the acquitted person by attending a court hearing and then publishes the identity of that person before the court could make an order prohibiting disclosure of his identity. The consultation paper also recommended that apart from this "*default ban*", the court should have power to make such further or other orders restricting the publication or disclosure of such other information as the court regards as necessary in the interests of justice. This would cover cases where a mere prohibition on publication of the identity of the accused would not be sufficient, such as where the facts are so notorious that disclosure of certain underlying facts would reveal to the public the identity of the accused.

3.125 For the purpose of a fair trial, the consultation paper recommended that as a starting point the prosecution at the retrial before a jury should not mention that the Court of Appeal had found that it appeared that there was fresh and compelling evidence against an acquitted person, or that it was more likely than not that the fact that the acquittal was tainted was a significant contributing factor in the acquittal. However, it may be necessary in some cases to allow references to such facts to be made. The consultation paper therefore recommended that the prosecution should be able to make such references if the court of retrial granted leave. As an overarching power, the court conducting the retrial should be empowered to grant leave for such references to be made (and prescribe conditions therefor) as are necessary in the interests of justice and to safeguard the fairness of any retrial.

3.126 As an acquitted person's right to be heard is a fundamental safeguard, the consultation paper recommended that that should be expressly provided for in the legislation, but if the acquitted person waived his right, the application should be allowed to proceed in his absence.

3.127 The Hong Kong Police Force, the Law Society of Hong Kong and the Society for Community Organisation endorsed these recommendations. The Law Society agreed there had to be restrictions on how much a jury could know about the case. If a retrial took place long after the event, that might raise questions in the minds of the jurors which the Law Society considered should best be addressed by the trial judge with counsel's assistance. While endorsing the consultation paper's recommendation, the Legal Policy Division of the Department of Justice made two suggestions. The first was on legal representation for and free legal assistance to acquitted persons. We believe that the existing system dealing with legal representation, whether by legal aid or otherwise, is adequate and there is no need to make any specific or further recommendations in this context. The second suggestion was that additional measures were needed in view of the fact that information prejudicial to an acquitted person might be readily available to the jury on the internet. This concern was shared by the Society for Community Organisation. The Legal Policy Division suggested considering a provision such as that adopted in Queensland which made it an offence for jurors to conduct investigations about the defendant, including by means of the internet.[112] In our view, however, the Queensland provision is too draconian. In any event, judges would invariably remind jurors to disregard whatever they might know about the case before the hearing, and jurors are expected to follow the trial judge's direction. We believe that it would not always be possible to prevent jurors from learning that the hearing is a retrial, especially if the original trial has been widely reported in the media. Our view is shared by Mr Justice Macrae in *HKSAR v Nancy Ann Kissel*[113] and the line of cases to which he referred in ruling on the application to permanently stay proceedings on the basis of adverse pre-trial publicity.

3.128 In this much publicised and discussed case, the defendant was charged with murdering her husband in 2003. Her conviction was quashed by the Court of Final Appeal, and an order of retrial was made. Pending her retrial (which was fixed to start in January 2011), she applied for a permanent stay of the proceedings, principally on the basis that she would not be able to secure a fair trial,[114] contrary to her constitutionally protected right to a fair trial under Article 10 of HKBOR and Article 87 of the Basic Law as set out in *HKSAR v Lee Ming Tee & Another*.[115] Mr Justice Macrae observed that, although the defendant's first trial had been concluded more than five years earlier, the case had been kept alive in the media not simply because of the

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112 Section 69A of the Jury Act 1995 (Qld).

113 Criminal Case No 55 of 2010, Court of First Instance.

114 The defendant categorised the material which in her submission would rendered a fair retrial impossible: "*(i) inadmissible material and prejudicial commentaries, which have come into the public domain as a result of injustices in the first trial, eg wrongful cross-examination, improper comments by the prosecution in closing submissions, and wrongful admission of prejudicial evidence; (ii) her wrongful conviction at the original trial and the massive scale of the subsequent adverse publicity painting her as an evil murderer; and (iii) the wrongful and much publicised rejection of her appeal by the Court of Appeal in strident and denunciatory terms, which has had the effect of destroying her credibility and undermining in advance any reliance on the defence of diminished responsibility*". (at para 3, Criminal Case No 55 of 2010, Court of First Instance)

115 (2001) 4 HKCFAR 133.

Court of Appeal hearing in 2008 and the Court of Final Appeal hearing in early 2010, but by the plethora of books, documentaries and film, newspaper articles and weblogs in the intervening period. Mr Justice Macrae said that the experience of other jurisdictions suggested that it was extremely rare for a court to order a permanent stay of proceedings on the basis that a fair trial might be rendered impossible by pre-trial publicity, and he referred to what the court had said in the *Lee Ming Tee* case:

> *"In most cases, while acknowledging that special care must be taken to counteract the possible effects of prejudicial publicity, the court places its faith in the jury, properly directed, to secure a fair trial for the accused."*[116]

3.129 Mr Justice Macrae quoted Sir Igor Judge's justification in *In re Barot*[117] for the court placing its confidence in the jury:

> *"9 … 'juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright; it is shared by each one of them with the defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court. … We cannot too strongly emphasise that the jury will follow them, not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair.'"*

My Justice Macrae also quoted what Lord Hope of Craighead had said in *Montgomery v H M Advocate*:

> *"10. … 'the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence."*[118]

Lord Hope had specifically referred to a passage in the judgment of Mason CJ in *R v Glennon* which was cited with approval in the *Lee Ming Tee* case:

> *"10 … 'The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions*

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116 (2001) 4 HKCFAR 133, at 109A.

117 (2006) EWCA Crim 2692, at para 31.

118 (2003) 1 AC 641, at 674.

given to them by the trial judge, will render a true verdict in accordance with the evidence.'"[119]

3.130 The High Court of Australia in *Dupas v The Queen* refined the above assumption that juries followed such instructions:

> *"11 … 'What, however, is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations. That capacity is critical to ensuring that criminal proceedings are fair to an accused.'"*[120]

3.131 Mr Justice Macrae adopted the test on pre-trial publicity which was formulated in *Stuurman v H M Advocate* and had been approved in the *Lee Ming Tee* case namely "*whether the risk of prejudice is so grave that no direction of the trial judge, however careful, could reasonably be expected to remove it*."[121] The Court in the *Lee Ming Tee* case observed "*there is good sense in regarding a jury, properly directed, as able to overcome prejudicial publicity in the vast majority of cases*",[122] and gave two reasons for that confidence, summarised as follows by Mr Justice Macrae:

> *"19 … The first is that a juror's recollection of any adverse publicity may be expected to fade with the passage of time: the so-called 'fade factor'. The second is that the nature and atmosphere of the trial process itself enables the jury to concentrate on the actual evidence presented and tested before it: the so-called 'drama of the trial factor'."*[123]

3.132 While being mindful of the view expressed by Lord Mance in *R v Coutts* that "*One is entitled to assume that juries go about their task in the*

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119 (1992) 173 CLR 592, at 603.

120 (2010) 84 ALJR 488, at 494.

121 (1980) JC 111, at 122.

122 (2001) 4 HKCFAR 133, at 191C.

123 Mr Justice Marcrae further said, "*So far as 'the drama of the trial factor' is concerned, I endorse completely the observations of the Court in Lee Ming Tee (at 191 I) and Montgomery:*

'Whatever impression of the case members of the jury may have gained beforehand, at the trial, they are given direct, first hand access to the actual evidence in the case, presented systematically and in detail, with live witnesses tested by cross-examination and exhibits tendered for inspection. They are addressed as to the significance of such evidence by counsel on both sides and guided by the impartial summing-up of the judge. Many jurors will already harbour a healthy skepticism about certain kinds of press reporting. They can be credited with the intelligence to realize that whatever may have been reported, they are far better placed at the trial to make up their own minds on the evidence, with the help of the judge's direction. It is well-recognised that in such circumstances, immersed in what Lawton J called "the drama of a trial" (R v Kray (1969) 53 Cr App R 412 at p.415), the residual effects of any prejudicial pre-trial publicity on the minds of the jury are likely to be minimal.'"

utmost good faith, but the concern is with subconscious as well as conscious reactions",[124] Mr Justice Macrae said:

> *"33 It is not necessary (even were it possible) to find members of a jury who know nothing of a particular case. Nor does their knowledge through the media of a crime or a defendant mean that they cannot fairly try the case solely on the evidence produced before them without being influenced by what they have seen or heard, however lurid and sensational. As Ginsburg J put it in Skilling:*
>
> > *'Prominence does not necessarily produce prejudice, and juror impartiality … does not require ignorance.' "*

3.133 Despite the prolonged prejudicial pre-retrial publicity, Mr Justice Macrae concluded that the defendant could receive a fair trial:

> *"34. In my judgment, neither the quality nor the extent of that publicity which has gone beyond the factual and is personally hostile to the defendant is such that any prejudice arising from it cannot be removed by proper and emphatic directions to the jury at the beginning and end of the trial (as well as on other suitable occasions which present themselves for such warnings during the trial) to ignore anything they may have seen or heard anywhere previously outside court about this case in any medium, and to concentrate as a matter of sworn duty only on the evidence produced before them in court. This would be in addition to directions warning the jury to disregard emotive considerations but to base their findings of fact and their verdict on an objective appraisal of the evidence, uninfluenced by anything they may have seen or heard about this case."*

3.134 As to the internet and any researches which jurors might be tempted to make during the currency of any trial (or retrial), Mr Justice Macrae adopted the guidance to be given to jurors, as articulated by the English Court of Appeal in *R v Thompson and others*:

> *"12 Jurors need to understand that although the internet is part of their daily lives, the case must not be researched there, or discussed there (for example, on social networking sites), any more than it can be researched with, or discussed amongst friends or family, and for the same reason. The reason is easy for jurors to understand. Research of this kind may affect their decision, whether consciously or unconsciously, yet at the same time, neither side at trial will know what consideration might be entering into their deliberations and will therefore not be able to address arguments about it. This would represent a departure from the basic principle which requires that the defendant be*

[124] (2006) 1 WLR 2154, at 2193 A.

tried on the evidence admitted and heard by them in court. Again, we do not purport to lay down a standard form of words; the sense of the message is familiar to all judges. What matters is that it should be explicitly related to the use of the internet. We recommend a direction in which the principle is explained not in terms which imply that the judge is making a polite request, but that he is giving an order necessary for the fair conduct of the trial. Such a direction will naturally fall to be given at the outset of the trial, in the same way as the direction as to collective responsibility addressed earlier in this judgment."[125]

The judgment in the *Kissel* case and the line of authorities to which it refers in our view provide an adequate response to the concerns which have been raised about the use of the internet.

3.135 In its response to the consultation paper, the Legal Policy Division of the Department of Justice also referred to *In re Attorney General's Reference (No 3 of 1999)*[126] in which the House of Lords held that the court in considering whether to make an anonymity order was bound by the Human Rights Act 1998 to act compatibly with any rights arising under the European Human Rights Convention. This involved striking the appropriate balance between the acquitted person's Article 8 rights to respect for his private life and the media's Article 10 rights to freedom of expression and communication. The Division observed that the recommendation in the consultation paper was not inconsistent with the principles set out in this case. Indeed, in the Division's view the recommendation had the added advantage of ensuring that the courts have the opportunity to consider the proportionality test before publication of the restricted information. The recommendation would offer better protection to the right to privacy of an acquitted person without compromising the right of freedom of expression of the press.

3.136 The Legal Policy Division pointed out that any suspension of publication of the Court of Appeal's decisions on applications should be compatible with Article 10 of HKBOR.[127] We have been informed that whilst an order on reporting restriction is in force in England, the Court of Appeal decision would not be made available on any public website.[128] Such an order would cease to have effect when no further steps could be taken to seek a retrial or any retrial has been concluded unless the court has specified an earlier time. The Court of Appeal decision would then be made available.

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125 (2010) EWCA 1623.

126 [2010] 1 AC 145.

127 "*… The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but <u>any judgment rendered in a criminal case or in a suit at law shall be made public</u> except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*"

128 In an email dated 17 September 2010 to the sub-committee's Secretary from Alix Beldam, Senior Legal Manager, Criminal Appeal Office, Royal Courts of Justice, England.

The recommendation in the consultation paper also made an analogous proposal on cessation of the prohibition on publication. The Lord Chief Justice said in *R v C*:

> *"31 … We agree that the interests of justice here require some kind of prohibition on any publicity of these proceedings. That order will be made until the end of the trial. The order will remain until the end of the trial, notwithstanding that the issue of the previous acquittal may be raised, because it would not be in the public interest for the reasons the court has given for its judgment to become public until the trial is concluded."*[129]

3.137 In view of the general support for our recommendation in the consultation paper that there should be a prohibition on publication, we retain this recommendation.

3.138 Under section 12(2) of the Irish Act the court in hearing an application for a re-trial order may exclude from the hearing the public or any portion of it or any particular person, other than *bona fide* representatives of the Press, if the court is satisfied that it is in the interests of justice to do so. As the court already has power under the existing law to hear cases in camera, we do not see the need to so include a similar provision in Hong Kong.

Recommendation 11

We recommend 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 criminal 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;

(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;

[129] [2009] EWCA Crim 633.

(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 the acquittal is tainted, unless the court of retrial grants leave to do so;

(h) a respondent to an application is entitled to be present 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

(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.

Powers of investigation after acquittal

Australia: New South Wales

3.139 Section 109 of the NSW Act governs police investigation of the commission of an offence by an acquitted person in connection with his possible retrial.[130] A police officer is not to carry out or authorise a police investigation unless the Director of Public Prosecutions:

[130] Section 109(2): "*For the purposes of this section, a police investigation is an investigation that involves:*

(a) any arrest, questioning or search of the acquitted person (or the issue of a warrant for the arrest of the person), or

(a) has advised that in his opinion the acquittal would not be a bar to the trial of the acquitted person in New South Wales for the offence, or

(b) has given his written consent to the police investigation on the application in writing of the Commissioner or a Deputy Commissioner of Police.[131]

3.140 The Commissioner or a Deputy Commissioner of Police may apply for police investigation only if satisfied that relevant evidence for the purposes of an application for a retrial has been obtained or is likely to be obtained as a result of the investigation.[132] The Director of Public Prosecutions may not give his consent to the police investigation unless satisfied that:

(a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation, and

(b) it is in the public interest for the investigation to proceed.[133]

Australia: Queensland

3.141 Section 678I of the Queensland Code is similar to section 109 of the NSW Act.

England and Wales

3.142 Section 85 of the 2003 Act governs the investigation of a qualifying offence allegedly committed by a person already acquitted. The police may not take "*certain actions*"[134] for the purposes of such an investigation, unless the Director of Public Prosecutions:

(b) any forensic procedure carried out on the person or any search or seizure of premises or property of or occupied by the person,

whether with or without his or her consent."

131 Section 109(3) of the NSW Act.

132 Section 109(4) of the NSW Act.

133 Section 109(5) of the NSW Act.

134 These actions are set out in subsection(3): "*The officer may not, either with or without the consent of the acquitted person –*

(a) arrest or question him,

(b) search him or premises owned or occupied by him,

(c) search a vehicle owned by him or anything in or on such a vehicle,

(d) seize anything in his possession, or

(e) take his fingerprints or take a sample from him."

(a) has certified that in his opinion the acquittal would not be a bar to the trial of the acquitted person for the qualifying offence; or

(b) has given his written consent to the investigation (before or after the start of the investigation),[135]

except where urgent investigative steps are warranted.[136]

3.143 The Director of Public Prosecutions may only give his consent on a written application.[137] An officer may make such an application only if:

(a) he is satisfied that new evidence has been obtained which would be relevant to an application for quashing an acquittal in respect of an qualifying offence to which the investigation relates, or

(b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation.[138]

3.144 According to section 85(6), the Director of Public Prosecutions may not give his consent unless satisfied that:

(a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation, and

(b) it is in the public interest for the investigation to proceed.

In giving his consent, the Director of Public Prosecutions may recommend that the investigation be conducted otherwise than by officers of a specified police force or specified team of customs and excise officers.[139]

3.145 However, section 85 does not prevent an officer from taking any action for the purposes of an investigation if the following conditions are satisfied:[140]

(a) the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced,

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135 Section 85(2) of the 2003 Act.

136 Section 86 of the 2003 Act

137 Section 85(4) of the 2003 Act: "*such an application may be made only by an officer who - (a) if he is an officer of the metropolitan police force or the City of London police force, is of the rank of commander or above, or (b) in any other case, is of the rank of assistant chief constable or above.*"

138 Section 85(5) of the 2003 Act.

139 Section 85(7) of the 2003 Act.

140 Section 86 of the 2003 Act.

(b) (i) there has been no undue delay in applying for the Director of Public Prosecutions' consent under section 85(2),

(ii) that consent has not been refused, and

(iii) taking into account the urgency of the situation, it is not reasonably practicable to obtain that consent before taking the action; and

(c) either –

(i) the action is authorised by an officer of the rank of superintendent or above under section 86(3),[141] or

(ii) - there has been no undue delay in applying for authorisation under paragraph (c)(i),

- that authorisation has not been refused, and

- taking into account the urgency of the situation, it is not reasonably practicable to obtain that authorisation before taking the action.

Where the requirements of paragraph (c)(ii) are met, the action is nevertheless to be treated as having been unlawful unless, as soon as reasonably practicable after the action is taken, an officer of the rank of superintendent or above certifies in writing that he is satisfied that, when the action was taken,

(a) new evidence had been obtained which would be relevant to an application for quashing an acquittal and retrial in respect of the qualifying offence to which the investigation relates, or

(b) the officer who took the action had reasonable grounds for believing that such new evidence was likely to be obtained as a result of the investigation.[142]

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141 Section 86(3) of the 2003 Act: *"An officer of the rank of superintendent or above may authorise the action if –*

(a) he is satisfied that new evidence has been obtained which would be relevant to an application under section 76(1) or (2) in respect of the qualifying offence to which the investigation relates, or

(b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation."

See also section 86(4): *"An authorisation under subsection (3) must –*

(a) if reasonably practicable, be given in writing;

(b) otherwise, be recorded in writing by the officer giving it as soon as is reasonably practicable."

142 Section 86(6) of the 2003 Act.

Ireland

3.146 There are elaborate provisions in Ireland. Section 15 of the Irish Act sets out the general principle that a person who comes within the scope of section 8 ("*new and compelling evidence*") cannot be subjected to certain police powers (either with or without his consent) in relation to an offence of which he has been acquitted except in accordance with the Act.[143] Section 16 sets out the procedure by which an arrest warrant may be sought from a District Court judge in respect of that person. Section 17 is similar to section 16 but concerns the procedure by which an arrest warrant may be sought from a District Court judge in respect of a person who is in custody either awaiting trial or serving a sentence for another offence. Section 18 sets out the procedure by which a search warrant may be sought from a District Court judge in respect of a place owned or occupied by that person in connection with an investigation into that person's suspected participation in the offence of which he has been acquitted.

New Zealand

3.147 Under section 378C(1) and (2) of the NZ Act, if a member of the police has good cause to suspect that information obtained, or likely to be obtained as a result of an investigation, will tend to implicate an acquitted person in the commission of a specified serious offence, he may "*exercise any of the powers referred to in subsection (3) in the course of a further investigation of whether the acquitted person has committed a specified serious offence*", provided he first obtains the Solicitor-General's consent.[144]

3.148 The Solicitor-General may consent only if he has reasonable grounds to believe that there is, or that a further investigation is likely to reveal, or confirm the existence of, new and compelling evidence to implicate the acquitted person in the commission of the specified serious offence.[145] An acquitted person does not need to be notified of any proposal to seek the Solicitor-General's consent or of the fact that the consent is being, or has been,

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143 These powers are those of arrest, detention, interviewing the person, searching the person or causing him to be searched, photographing the person or causing him to be photographed, taking or causing to be taken his fingerprints or a forensic sample, seizing and retaining for testing or use in evidence anything in his possession or searching a place owned or occupied, or partly owned or occupied by him.

144 Section 378C(3): the investigation includes the following:

"(a) questioning the acquitted person or any other person;

(b) searching the acquitted person or any other person;

(c) searching any premises or vehicles;

(d) seizing any thing;

(e) taking fingerprints or samples;

(f) conducting or commissioning forensic tests or analyses."

145 Section 378C(5).

sought.[146] There is, however, nothing to prevent a member of the police from taking any action if:

(a) the action is necessary as a matter of urgency to prevent substantial prejudice to an investigation or to the administration of justice;

(b) it is not reasonably practicable to obtain the consent of the Solicitor-General; and

(c) the Solicitor-General's consent is sought as soon as reasonably practicable after the action is taken.[147]

The Court of Appeal may, if it thinks it just to do so, exclude from its consideration any evidence against an acquitted person that has been obtained in contravention of section 378C.[148]

3.149 Section 378F(1)(d) also provides that where an order for retrial is granted, the provisions of any enactment that 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, apply with any necessary modifications to an acquitted person.

Discussion and conclusions

3.150 The question here is what, if any, coercive powers (such as seizure, entry, etc) the police should possess, before a prior acquittal is quashed, in order to investigate the offence which is the subject of that acquittal and the prosecution of which would otherwise be met by an *autrofois* plea. The provisions in New South Wales, Queensland and England appear to be broadly similar. The provisions in Ireland, in our opinion, are too elaborate. We agree that the police's powers to investigate and the conditions to be fulfilled before such an investigation could be carried out should be expressly set out in the legislation. Once the threshold for the exercise of such powers has been reached and the requisite consent(s) obtained, the existing law and statutory provisions on the extent and mode of exercise of a particular police power would apply to acquitted persons *mutatis mutandis* and no new or special provision is needed. We are also of the view that the Director of Public Prosecutions is a more appropriate person than senior police officers or the Solicitor General to give consent to such an investigation. The consultation paper recommended adopting section 85 of the English 2003 Act.

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146 Section 378C(4).

147 Section 378C(6).

148 Section 378D(3).

3.151 Both section 86 of the English 2003 Act and section 378C(6) of NZ Act have specific provisions which empower the police to take urgent investigative actions upon fulfilling certain conditions. Obtaining the Director of Public Prosecutions' prior consent may not be feasible or desirable in some urgent situations, and the police's investigation should not be hindered in the interests of justice. As a measure to cater for cases of urgent need, the consultation paper recommended that the Director of Public Prosecutions' consent need not be obtained if a police officer of the rank of superintendent or above believed that the investigation would be substantially and irrevocably prejudiced (following the wording of section 86 of the English 2003 Act). This would cover, for example, circumstances where there is a real or imminent risk of an acquitted person departing from Hong Kong, or that significant evidence will be lost or destroyed. As between the detailed provisions of section 86 of the English 2003 Act and section 378C(6) of the NZ Act, the consultation paper recommended the former provision as it set out more comprehensively the conditions to be fulfilled before the police could invoke such urgent investigative powers.

3.152 Where an order for retrial is granted, section 378F(1)(d) of the NZ Act applies to an acquitted person, with necessary modifications, those provisions that 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. The consultation paper recommended that where an order for retrial is granted, such provisions should apply to an acquitted person, subject to the necessary modifications. There is no need to have separate rules on such matters if the existing rules suffice.

3.153 The Hong Kong Police Force and the Law Society of Hong Kong supported the recommendations in the consultation paper. In the opinion of the Law Society of Hong Kong, the recommendations appeared to be "*practical, reasonable and balanced*". The Legal Policy Division agreed that pre-conditions similar to section 85 of the English 2003 Act should be fulfilled before the investigative powers could be exercised, and the Director of Public Prosecution would be a more appropriate person than the Solicitor General to give consent to investigation.

3.154 The Commissioner of Customs and Excise and the ICAC suggested that similar investigative powers should also be given to their officers because they were, like the police, law enforcement agencies which investigated serious offences.

3.155 Upon considering these comments, we agree that the same investigative powers should be extended to other law enforcement agencies as the "*tainted acquittal*" limb covers all indictable offences tried in the District Court and High Court. Apart from the Department of Customs and Excise and the ICAC, other law enforcement agencies include the Immigration Department, the Fire Services Department, etc. As there are various law enforcement agencies, it would be more advisable not to specify in the proposed legislation which law enforcement agency.

3.156 The Hong Kong Bar Association queried whether it was appropriate for the Director of Public Prosecutions to be the person making the decision of whether such investigative powers should be invoked, as that would blur the respective roles of the Department of Justice and the investigating body. We would point out, however, that the relevant legislation in Australia (NSW, Queensland, South Australia and Tasmania) and England also empowers the Director of Public Prosecutions to give such consent, while the New Zealand legislation empowers the Solicitor General to do so. After carefully considering the Bar's comment, we believe that the Director of Public Prosecutions is the appropriate person to make that decision. It would not be desirable to invoke the court in this respect, as this would put much burden on the court. The requirement for the Director of Public Prosecutions' approval provides a safeguard against abuses. The Hong Kong Bar Association also queried whether the rank of superintendent was sufficiently senior to authorise urgent investigation. We note in this regard that analogous powers are entrusted to a police officer of or above that rank under various statutes.[149] In addition, section 86(6) of the English 2003 Act also empowers an officer of or above that rank to make such authorisation.[150] We have therefore come to the conclusion that an officer of or above the rank of superintendent should be appropriate for this purpose. In respect of law enforcement agencies other than the police, we recommend that a list of the ranks of officers from those law enforcement agencies who can authorise urgent investigations should be set out in a schedule to the legislation.

3.157 After taking account of the responses to the consultation paper, we have decided to retain the recommendations in the consultation paper, except that the investigative powers should be extended to other law enforcement agencies.

3.158 In New South Wales, Queensland and Tasmania, an application for a retrial may not be made unless the acquitted person has been charged with the crime for which the retrial is sought, or a warrant has been issued for the person's arrest in relation to that crime.[151] These provisions are to ensure that the police have sufficient evidence before making an application to quash an acquittal. We consider that if an arrest or a charge is required before making an application, resources would be wasted if the application is not successful. We are of the view that such provisions are not needed.

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149 These include the Official Secrets Ordinance (Cap 521) section 11 (in case of emergency, giving written order to enter (if necessary by force) and search any premises or place and every person found therein, etc); the Firearms and Ammunition Ordinance (Cap 238) section 40 (giving written authorization to enter (if necessary by force) and search any premises, vessels, etc and every person found therein, etc); and the Gambling Ordinance (Cap 148) section 23 (giving written authorization to enter (if necessary by force) and search any premises or place and every person found therein, etc).

150 The "commissioned police officer" in the Tasmanian Act (section 397AE(4)) and the "police officer" in the South Australian Act (section 335(2)).

151 Section 105(2) of the NSW Act, section 678G(3) of the Queensland Code and section 397AC(3) of the Tasmanian Act.

Recommendation 12

We recommend that:

(a) before an acquittal is quashed, the law enforcement agencies' powers to investigate an acquitted person 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;

(b) the law enforcement agencies should have urgent investigative powers and to that end a provision similar to section 86 of the English 2003 Act should be adopted, and a schedule to the legislation should set out a list of the ranks of officers from the law enforcement agencies who could authorise urgent investigation; and

(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.

Retention of exhibits for a possible retrial

3.159 Upon the relaxation of the rule against double jeopardy, there are consequential issues which have to be considered, such as the possible need to retain exhibits after a verdict of acquittal because of the possibility that the verdict may be challenged under the new law. Incidental to this are the practical questions whether there is sufficient storage space to keep these exhibits, and how long they should be kept.

Hong Kong

The Criminal Procedure Ordinance (Cap 221)

3.160 Section 102(1) and (2) of the Criminal Procedure Ordinance (Cap 221) provides that a court may, on its own motion or upon application, dispose of exhibits in the following ways:

(a) order the delivery of the property to the person entitled to it;

(b) order the sale of the property or the retention of the property in the possession of the court, the police or the Customs and Excise service if the person so entitled is unknown or cannot be found;

(c) order the destruction of the property if it is of no value; or

(d) order the forfeiture of the property.

3.161 Section 102(3) of Cap 221 provides that unless the property is perishable, no order for the delivery, sale or forfeiture of property shall be made under subsection (2), unless the court is satisfied that the property will not be required as an exhibit in any proceedings before a court.

3.162 Section 102(5) of Cap 221 also provides that an order under subsection (2), other than an order for the retention of property, shall not, except where the property is a live animal, bird or fish or is perishable, be carried out until the period allowed for making an appeal against the order has expired or, where such an appeal is duly made, until the appeal has been finally determined or abandoned. It seems that section 102 would apply to all materials seized by the law enforcing agencies, regardless of whether the materials have been used as exhibits during a trial.

The Police Force Ordinance (Cap 232)

3.163 The Police Force Ordinance (Cap 232) and the Independent Commission Against Corruption Ordinance (Cap 204) have provisions on the taking of intimate and non-intimate samples from a person, and for their retention and disposal (sections 59A to 59I and sections 10E to 10G respectively). There are also analogous provisions in the Dangerous Drugs Ordinance (Cap 134) on taking, use and disposal of urine samples (sections 54AA and 54AB).

3.164 Sections 59A and 59B of Cap 232 provide for the taking of an intimate sample from a person for forensic analysis. Section 59C provides for the taking of a non-intimate sample from a person with or without his consent for forensic analysis.[152] The terms "*intimate sample*" and "*non-intimate sample*" are defined in section 3.[153] Section 59G provides for the

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[152] Section 59D imposes some restrictions on the use of an intimate sample and a non-intimate sample taken from a person pursuant to Cap 232 and the results of forensic analysis of the samples. Section 59E provides that under certain situations the police can take a non-intimate sample of a swab from the mouth of a person convicted of a serious arrestable offence. Section 59F provides that a person who has attained the age of 18 may voluntarily authorise the police to take a non-intimate sample from him, to store the DNA information derived from the sample in the DNA database or to use the DNA information for the purposes specified in section 59G(2).

[153] *"'intimate sample' (體內樣本) means -*

(a) a sample of blood, semen or any other tissue fluid, urine or hair other than head hair;

(b) a dental impression;

(c) a swab taken from a private part of a person's body or from a person's body orifice other than the mouth"

maintenance of a database storing DNA information derived from intimate and non-intimate samples taken pursuant to Cap 232 and section 10E of Cap 204.

3.165 Section 59H provides for the circumstances under which intimate or non-intimate samples taken from persons pursuant to section 59A or 59C and the relevant records are to be destroyed. If a police officer of or above the rank of chief superintendent is satisfied that it is necessary to the continuing investigation of the offences in relation to which the sample was taken that the sample and the record be retained, he may extend or further extend the deadline for destroying the samples and records for not more than six months for each extension (section 59H(2)).

The Independent Commission Against Corruption Ordinance (Cap 204)

3.166 Section 10E of Cap 204 provides that a non-intimate sample may be taken from a person with or without his consent for forensic analysis. The definitions of "*intimate sample*" and "*non-intimate sample*" are the same as those in section 3 of Cap 232. Section 10F imposes some restrictions on the use of a non-intimate sample taken from a person pursuant to section 10E and on the use of the results of forensic analysis of the sample.

3.167 Section 10G provides for the circumstances under which non-intimate samples taken from persons pursuant to section 10E and the relevant records are to be destroyed.[154] If an officer of the rank of Assistant Director of the Commission Against Corruption or above is satisfied that it is necessary to the continuing investigation of the offences in relation to which the sample was taken that the sample and the record be retained, he may extend or further extend the deadline for destroying the samples and records for not more than six months for each extension (section 10G(2)).

England and Wales

3.168 According to the Crown Prosecution Service, the new double jeopardy law has not changed the legal framework governing retention and disposal of exhibits:

"'non-intimate sample' (非體內樣本) means -

(a) a sample of head hair;

(b) a sample taken from a nail or from under a nail;

(c) a swab taken from any part, other than a private part, of a person's body or from the mouth but not any other body orifice;

(d) saliva;

(e) an impression of any part of a person's body other than-

(i) an impression of a private part;

(ii) an impression of the face; or

(iii) the identifying particulars described in section 59(6)"

[154] Section 10G(1) to (4) of Cap 204 is almost identical to section 59H(1) to (4) of Cap 232.

"I can confirm that the law governing the retention and disposal of exhibits has not been amended in light of this change. …

The new provisions on double jeopardy have not, therefore, prompted any changes to the law governing the retention and disposal of exhibits. The police and Crown Prosecution Service recognise, however, that material must not be disposed without careful consideration of the legal implications, and in any event, without adequate secondary evidence being available. Decisions to destroy exhibits and case material must be made according to the individual circumstances of each case. If disposal is not carried out cautiously, retrials may not be possible and cases may fail on abuse of process arguments."[155]

3.169 The legal framework governing the retention and disposal of exhibits in England therefore remains the same as it was.[156] The Crown Prosecution Service described this framework as follows:

"In essence, if material is seized during the search of premises and that material may be needed for an investigation and/or trial, then a photograph or copy can be taken and the material destroyed where this would be sufficient for evidential and/or forensic purposes. If material is seized following a search of a person or vehicle, there is a duty to retain all relevant material until post-conviction or acquittal."[157]

3.170 The Crown Prosecution Service subsequently confirmed that there was no new statutory provision or internal guideline specifically on retaining evidence for a possible retrial upon the relaxation of the rule against double jeopardy.[158] The Crown Prosecution Service further said:

"… police forces throughout the country have been faced with increasing problems in finding sufficient and appropriate storage space to retain evidential property. Consideration is therefore

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155 In a letter to the sub-committee Secretary from the Crown Prosecution Service dated 12 March 2007.

156 The Crown Prosecution Service mentioned the following:

(a) Section 22 of the Police and Criminal Evidence Act 1984 (PACE);

(b) Code B of the PACE Codes of Practice: <http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/>

(c) The Code of Practice under the Criminal Procedure and Investigations Act 1996: <http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/Disclosure_code_of_practice.pdf?view=Binary>

(d) The Attorney General's Guidelines on Disclosure: <http://www.cps.gov.uk/legal/section20/chapter_c.html>

157 Letter from the Crown Prosecution Service, cited above.

158 In an email to the sub-committee Secretary from the Crown Prosecution Service dated 2 April 2008.

currently being given to developing further guidance to deal with the practical storage issues arising from long-term retention of exhibits."

Australia

3.171 According to the Director of Public Prosecutions of New South Wales, the relaxation of the rule against double jeopardy has not prompted any changes to the rules governing the retention and disposal of exhibits:

> *"There are no provisions under the new Part 8 that relate to the retention of exhibits in 'life sentence offences' or other cases that now come within that part's specified criteria. The NSW Police Force presently has procedures in place to retain exhibits until a matter is finalised and since mid last year has advised investigating police to retain all exhibits in light of the new double jeopardy legislation. The Police are yet to update their Handbook which will give specific instructions in relation to the retention of exhibits in all relevant matters."*[159]

Similarly, there has been no change to the rules governing the retention and disposal of exhibits in Queensland,[160] South Australia[161] and Tasmania.[162]

Discussion and conclusions

3.172 In reforming the law on double jeopardy, we need to consider the law and practice governing the retention and storage of exhibits. We should also consider whether the new legislation should stipulate the types of exhibits to be retained and the length of time they should be retained, or whether this should be dealt with by way of guidelines promulgated by the law enforcement agencies without legislative force.

3.173 One obvious category of exhibits which may have to be preserved post-acquittal is of those which have the potential to provide DNA

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159 In a letter to the sub-committee Secretary from the Director of Public Prosecutions dated 23 March 2007.

160 In an email to the sub-committee Secretary from the Assistant Director-General of the Queensland Department of Justice and Attorney-General dated 9 November 2010, who also said: "*However this may be moot because for homicide matters all exhibits are retained by police until a successful prosecution has concluded. In any circumstances whereby a person was acquitted at of after trial, the murder offence is regarded as unsolved and all exhibits and documents are retained for further investigations. For non-homicide matters, the usual disposal arrangements apply. Further QPS officers advise that there are no plans on implementing any procedures for the retention of exhibits given the changes to double jeopardy.*"

161 In an email to the sub-committee Secretary from the Director of Public Prosecutions in South Australia dated 20 August 2010.

162 In an email to the sub-committee Secretary from the Director of Public Prosecutions in Tasmania dated 24 August 2010.

evidence. Biological science is developing fast and it may well be possible in future to test DNA samples which are not detectable or testable using present techniques. There may also be breakthroughs in other areas of forensic science, such as analysis of fibres, glass, shoeprints, etc, which warrant the retention of the relevant exhibits for future testing or analysis. Analysis or testing made possible by scientific developments may result in materials which were not (or not perceived to be) relevant in the original trial taking on a new significance in a retrial. The speed and extent of relevant scientific advances are impossible to predict. It would be difficult, if not impossible, to predict or anticipate the frequency with which old exhibits would be relevant to later proceedings under the new exceptions to the double jeopardy rule. We do not therefore think that it is practicable or desirable to attempt to set out in statutory form the types of exhibits and materials to be retained, and for how long they should be retained. We therefore make no recommendation on these issues and propose instead to leave this to the relevant law enforcement agencies to decide on a case-by-case basis, subject to such guidelines as the agencies may devise.

3.174 There is, however, one gap in the existing legislation which we would like to address. Under section 102 of Cap 221, it is only when the person so entitled is unknown or cannot be found that the court can order the property to be retained by the police. If the person entitled to claim the property is known or can be found, it appears that the police may not be entitled to seek to retain the exhibits even if, in the judgment of the police, the exhibit (which might have already been used in a trial leading to an acquittal) ought to be retained further because of the possibility of the acquittal being re-opened pursuant to an exception to the double jeopardy rule. It may be that under section 102(3) the court will in any event have to consider whether the property *"will not be required as an exhibit in any proceedings before a court"* and that in considering this, the court can take into account the likelihood of the acquittal being re-opened (and hence the possibility of the property being used as an exhibit in the new trial). However, we believe that the power to apply for retention of an exhibit even when the identity of the person entitled to it is known should be placed on a clear statutory footing.

3.175 We are therefore of the view that subsections (1) and (2) of section 102 are too narrow. Judges should instead be given greater discretion to allow the retention of exhibits. The consultation paper recommended deleting the pre-condition that "*the person so entitled is unknown or cannot be found*" in section 102(2)(a)(ii). In addition, both the prosecution and the defence should be provided with equal rights to apply for the retention of exhibits or seized material, because it may sometimes be in an acquitted person's interest to ensure proper retention of exhibits or seized materials which are crucial to prove his innocence.

3.176 There are a number of other statutory provisions concerning exhibits and the Government Chemist's evidence which could potentially be affected by any relaxation of the rule against double jeopardy. These include, 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). However, this reform exercise should address broad matters of principle and the consultation paper recommended that, if the proposals to reform the double jeopardy rule were accepted, a comprehensive review should then be carried out of the existing criminal law and procedure.

3.177 The Law Society of Hong Kong supported this recommendation in the consultation paper. The Legal Policy Division of the Department of Justice did not object to the proposal to remove the pre-condition from section 102(2)(a)(ii) of Cap 221. Nor did the Division have any in-principle objection against the recommendation from the human rights perspective. The Division, however, had some observations from the legal policy angle by referring to the case *S and Marper v the UK.*[163] The European Court of Human Rights in this case found that the blanket retention of DNA profiles and fingerprints indefinitely under section 64 of the Police and Criminal Evidence Act 1984 where there had been no conviction breached Article 8 of the European Convention of Human Rights on the protection of privacy. Subsequently, the Home Secretary published a ministerial statement[164] in November 2009 proposing a new legislative framework for the retention of DNA and fingerprint records. The Legal Policy Division suggested that any such legislative proposals in England should be examined and the need for similar guidelines in Hong Kong considered. We understand from the Home Office that the reform proposals would be implemented in the Freedom Bill to be introduced in due course.[165]

3.178 The court in *S and Marper v the UK* held that the blanket and indiscriminate retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests, and that the Government had overstepped any acceptable margin of appreciation in that regard. Accordingly, the retention at issue constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society.[166]

3.179 Article 14 of HKBOR provides protection similar to Article 8 of the European Convention of Human Rights for a persons' privacy. As discussed in the preceding paragraphs, section 59H of Cap 232 provides for the disposal (including destruction) of intimate and non-intimate samples and the relevant records where a suspect has not been charged or if charged, has been

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163 (2009) 48 EHRR 50 (Applications nos 30562/04 and 30566/04).

164 http://services.parliament.uk/hansard/Lords/ByDate/20091111/writtenministerialstatements/part003.html

165 In an email to the sub-committee Secretary from the Home Office on 10 September 2010.

166 In *R (on the application of GC) v Metropolitan Police Commissioner; R (on the application of C) v Metropolitan Police Commissioner* [2011] 3 All ER 859, it was common ground that, in the light of *S and Marper v the UK,* the indefinite retention of data was an interference with the rights under Article 8. The Supreme Court held that section 64(1A) of the Police and Criminal Evidence Act 1984 could be read and given effect compatible with the rights under Article 8. Nonetheless, the Association of Chief Police Officers guidelines - as followed by police chiefs across the United Kingdom - to retain biometric samples of DNA and fingerprints for an indefinite period, save in exceptional circumstances, breached the rights under Article 8.

acquitted or discharged, or the charge has been withdrawn. An officer of the rank of or above chief superintendent may extend or further extend the relevant period for not more than six months if he is satisfied on reasonable grounds that it is necessary to the continuing investigation of the offence in relation to which the sample was taken that the sample and the record concerned be retained. The regime in Hong Kong is therefore not one of blanket and indiscriminate retention, and section 59H is, arguably, distinguishable from the blanket and indiscriminate provision considered in *S and Marper v the UK.*

3.180 The Hong Kong Police Force agreed to the recommendation that there should be a comprehensive review of the existing criminal law and procedure and that appropriate amendments should then be made to cater for the proposed relaxation.

3.181 After considering the above responses carefully, we have decided to retain the recommendation.

3.182 The Hong Kong Police Force also made two suggestions. The first was that some guidance should be provided to the police on the circumstances in which they should apply to retain exhibits for a possible retrial, and on how long the exhibits should be retained. While believing that it is for the relevant law enforcement agencies to decide the matter on a case-by-case basis, using their experience and professional judgment, we suggest that possible examples would include the situation where a key witness has claimed to have forgotten events, or changed his testimony, suddenly at the original trial. There may also be other cases where consideration has to be given to whether there is any satisfactory or suitable substitute for certain items of key evidence used during the original trial.

3.183 The Hong Kong Police Force also suggested that legislative provision should be made to allow the admission at the retrial of exhibits in alternative forms (such as photographs, copies, microfilms, etc) in respect of exhibits that could not be or had not been retained. We understand that under existing law, failure to produce an object, while not preventing oral evidence being given as to the object, might attract adverse comment.[167] Failure to produce goes to the weight of the evidence rather than its admissibility. Photographs of exhibits can be adequate secondary evidence. Lord Justice Croom-Johnson said in *R v Uxbridge Justices Ex p Sofaer*:

> *"Exhibits which are part of the evidence do go astray. Sometimes they are tested to destruction. In some cases it is only by testing them to destruction that you obtain the evidence in the first place and the modern scientific techniques which we read about nowadays are examples of that, but where you cannot produce the original you rely upon secondary evidence*

[167] *R v Francis* (1874) 12 Cox CC 612, LR 2 CCR 128.

and here there are the photographs which are good photographs and fairly detailed."[168]

Criminal Evidence in Hong Kong also states the following:

> *"It is not always necessary to produce such objects even where production is relevant. This might occur where the object is too large to produce in court or it has perished. The failure to produce an object does not prevent evidence being given about it. The best evidence rule does not apply to the production of chattels. …*
>
> *…*
>
> *A photograph of a matter relevant to the facts in issue may be produced. The basis of its admissibility is that it is a 'visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents; and it is therefore, in reality, only another species of the evidence which persons give of identity, when they speak merely from memory.'"*[169]

3.184 Hence, we are of the view that there is no need to have a statutory provision such as suggested by the Police. Considerations which have been discussed above, however, could well be relevant to the law enforcement agency's decision whether to apply for retention of exhibits.

Recommendation 13

We recommend removing the pre-condition that "*the person so entitled is unknown or cannot be found*" 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.

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 should be made to cater for the relaxation to the rule against double jeopardy.

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168 (1987) 85 Cr App R 367, at 377.

169 A Bruce and G McCoy, *Criminal Evidence in Hong Kong* (Butterworths, 2010), Division I, at paras 405 and 453. See generally paras 403 to 501.

Scope of application of the relaxation

3.185 A further question which arises is the potential ambit of the proposed exception by reference to the timing of the original acquittal. Three different approaches appear to have been adopted by the overseas jurisdictions studied in this paper. First, in New South Wales, relaxation of the rule against double jeopardy "*extends to a person acquitted before the commencement of*" the relaxation, according to section 99(3) of the NSW Act. The relaxation under the 2003 Act in England "*applies whether the acquittal was before or after the passing of this Act*".[170] Under this approach, it makes no difference *when* the acquittal took place: the exception captures all acquittals, whenever they took place.

3.186 In contrast, the relevant provisions in the Queensland Code apply "*if, after the commencement of this chapter, a person is acquitted of an offence, whether the offence is committed before or after the commencement of this chapter*".[171] In New Zealand, the relaxation of the rule does not apply if an acquitted person was acquitted before the commencement of the relevant statutory provision.[172] Under this approach, the exception only applies to acquittals after the new statutory provision has come into effect.

3.187 Thirdly, the relaxation under the 1996 Act in England "*applies in relation to acquittals in respect of offences alleged to be committed on or after the appointed day*" to be appointed by the Secretary of State by order.[173] Under this approach, the application of the exception is defined not by reference to the date of acquittal, but by reference to whether the offence (of which the accused was acquitted) was alleged to have been committed on or after a particular date.

3.188 We have considered whether the relaxation of the rule against double jeopardy in Hong Kong should apply to acquittals taking place before the reform comes into effect or not. If the relaxation does not have such an effect, there would be no opportunity to rectify unjust acquittals made before the commencement of the relaxation, bearing in mind that there may be developments in forensic science, and fresh and compelling evidence or the fact of a tainted acquittal may be unearthed, only years after an unjustified acquittal (which had taken place *before* the exception comes into force). Hence, the consultation paper recommended that the relaxation under both the "*fresh and compelling evidence*" limb and the "*tainted acquittal*" limb should apply to acquittals before or after the relaxation. As to the English approach (under the English 1996 Act) of defining the "*time factor*" by reference to the time when the alleged offence was committed, insofar as the date of commission of the offence is relevant, it would be taken into account in

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170 Section 75(6) of the 2003 Act.

171 Section 678A(1) of the Queensland Code.

172 Sections 378A(5) and 378D(6).

173 Section 54(7) and (8) of the 1996 Act. The appointed day is 15 April 1997 (SI 1997 No 1019, art 2).

the exercise of the court's discretion in considering whether it would be in the interests of justice to order a retrial and it seems not appropriate to introduce this element in the present context.

3.189 The Hong Kong Police Force supported this recommendation. In contrast, the Law Society of Hong Kong, the Hong Kong Bar Association and Patrick Layden, QC, expressed reservations at extending the proposed relaxation to acquittals made before the effective date of the relaxation. The Law Society of Hong Kong observed that the proposed relaxation was "*a fundamentally new approach*" and should therefore apply to "*new cases only*". Patrick Layden, QC, said:

> *"… a person who has been tried and convicted or acquitted of an offence has a right not to be tried again. The right not to be tried again is a substantive, real right which is recognised and enforceable by the courts. It is in the widest sense an affirmation of the importance of the individual in relation to the state. Absent the most compelling evidence of failed prosecutions in the past, it would be a seriously retrograde step to remove these rights currently enjoyed by those citizens who have been acquitted of the offence to which the legislation might apply."*

The Society for Community Organisation opposed this recommendation because, in their opinion, it was contrary to the principle of non-retrospective criminal offences or penalties in Article 12 of the HKBOR and Article 15 of the ICCPR.[174] The Society also pointed out that the Scottish Law Commission in its 2009 report did not recommend applying the relaxation to acquittals prior to the relaxation.[175]

3.190 We are of the view that Article 12 of the HKBOR is not engaged. Under our proposal, an acquitted person would not be retried for an act that did not constitute an offence at the time of commission. Nor would the proposal have the effect of imposing a heavier penalty. In this regard, we emphasise that the use of the description "*retrospective*" in some of the discussions or commentary must not be mistaken as carrying the connotation of punishing someone for doing an act that was not criminal at the time of commission. Our proposal would not have that effect. In addition, the Legal Policy Division of the Department of Justice observed that the recommendation was "*unlikely*

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174 Article 12 of HKBOR, similar to Article 15 of the ICCPR, provides as follows:

"*(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.*

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

175 Scottish Law Commission, *Report on Double Jeopardy* (2009), SCOT LAW COM No 218.

to raise any human rights concern". The Scottish Law Commission did recommend in its report that the "*new evidence*" limb (other than admission) should only apply prospectively. On the other hand, the report proposed that the "*admission*" limb should apply "*retrospectively*" as the acquitted person, in making an admission, could be regarded as waiving his right not to be tried again. The Scottish Government, however, made a u-turn on the "*new evidence*" limb, and considered that public confidence in the criminal justice system outweighed acquitted persons' rights. Hence, the Bill introduced to the Scottish Parliament in October 2010 provided that the "*new evidence*" limb should also apply "*retrospectively*". Furthermore, relaxation of the rule extends to a person acquitted before the commencement of the relaxation in a number of other jurisdictions, namely under the English 2003 Act, the NSW Act and the Tasmanian Act.[176]

3.191 In conclusion, we reiterate that if the proposed relaxation only applies to acquittals after the relaxation, unjustified acquittals made before the relaxation cannot be rectified. This runs counter to the main purpose of the criminal justice system of bringing those who are responsible to justice, and that would dampen public confidence in the system. We therefore retain the original recommendation.

3.192 The relaxation of the rule in New South Wales applies to a person acquitted in proceedings outside New South Wales, except where the law of that place does not permit the person to be retried.[177] Section 391(2) and (3) of the Tasmanian Act and section 678A(3) and (4) of the Queensland Act have almost identical provisions. There is a similar provision under section 75(4) of the English 2003 Act. Similarly, an acquitted person in South Australia means a person who has been acquitted of a relevant offence whether in that state or another jurisdiction.[178] We are of the view that the proposed relaxation should equally apply to a person acquitted in proceedings outside Hong Kong provided that the other criteria recommended in this report are fulfilled, and we so recommend. In New South Wales, Queensland and Tasmania, the relaxation applies to a person acquitted in proceedings in another jurisdiction, except where the law of that jurisdiction does not permit the person to be retried. There is no such exception in England and South Australia. We believe that the proposed relaxation should not be subject to the law of a yet unknown jurisdiction.

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176 Section 391(1) of the Tasmanian Act: "*This chapter applies if, before or after the commencement of this chapter, a person is acquitted of a crime* …".

177 See section 99(2) of the NSW Act. Another exception is that "*the application of this Division to such a retrial is inconsistent with the Commonwealth Constitution or a law of the Commonwealth*".

178 Sections 336(7) and 337(7) of the South Australian Act.

Recommendation 14

We recommend 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 ordered before and after the relaxation either by Hong Kong courts or courts in other jurisdictions.

Miscellaneous

3.193 Few overseas jurisdictions examined in this report make specific provision in relation to costs or as to the judges who should hear the retrial. In Victoria, however, the Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011 adds a new section 17A to the Appeal Costs Act 1998 which allows an acquitted person to apply to the Court of Appeal for an indemnity certificate in respect of his costs where the DPP has applied to the court for an order to set aside the acquittal and authorise "*the continuation of the prosecution of the charge in the [original] indictment*." The new section 17A provides that in such circumstances the Court of Appeal may grant an indemnity certificate in respect of:

> "*(a) the accused's own costs of the application; and*
>
> *(b) if the Court of Appeal orders that the prosecution of the charge in the direct indictment against the accused may continue, any additional costs that the accused will pay, or will be ordered to pay, as a consequence of the order for the continuation of the prosecution*."

We recommended in the consultation paper that the court should be given a discretion to order costs in favour of an acquitted person if an application to quash the acquittal fails. On the other hand, if the application is successful, no costs should be awarded against the acquitted person. Having considered this issue again, we maintain our original recommendation.

3.194 For the avoidance of doubt, the consultation paper recommended that the judges assigned to hear an application should be different from those hearing the trial or the appeal leading to the acquittal so as to avoid any perception or allegation of bias. By the same token, 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.

3.195 The Law Society of Hong Kong supported "*these practical house-keeping proposals*", as did the Legal Policy Division of the Department of Justice which said that the recommendation on judges was consistent with Article 10 of HKBOR on equality before the court and the right to a fair and public hearing. George YC Mok suggested that a judge or juror who was

aware of the media coverage of the original trial should be disbarred from serving in the retrial. This was to avoid bias against an acquitted person in a retrial and to ensure that the doctrine of "*presumption of innocence*" would not be undermined. We have carefully considered this suggestion but are of the view that it is not practical to require that a judge or juror be completely ignorant of the original trial as we have discussed and concluded in the discussion leading to Recommendation 11 above. We have decided that our original recommendation should be retained in this report.

Recommendation 15

We recommend 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 original trial or heard the appeal resulting in the acquittal so as to avoid any perception or allegation of bias; and

(c) no judge who sits on the Court of Appeal hearing the application, or who has heard the original trial or appeal resulting in the acquittal, should sit as the trial judge in the subsequent retrial.

3.196 We have also considered whether upon relaxation of the rule against double jeopardy in Hong Kong, an acquitted person should remain non-extraditable from other jurisdictions because of the double jeopardy principle. Under the present bilateral agreements between Hong Kong and various overseas jurisdictions, double jeopardy is a common ground for refusal of surrender.[179] Where an acquittal is quashed under our proposed relaxed rule against double jeopardy, it might be arguable that the double jeopardy ground for refusing surrender does not apply, since the acquitted person is no

[179] For example, Article 6(3) of the Fugitive Offenders (Australia) Order (Cap 503C):

> "*Surrender for an offence shall be refused if the person whose surrender is sought cannot under the law of either Party be prosecuted or punished for that offence*."

Article 5(4) of the Fugitive Offenders (United Kingdom) Order (Cap 503R):

> "*Surrender for an offence shall be refused if the person whose surrender is sought cannot under the law of either Party be prosecuted or punished for that offence*."

Article 6(2) of the Fugitive Offenders (New Zealand) Order (Cap 503S):

> "*A person who has been finally acquitted, convicted or pardoned under the law of the Requesting or Requested Party for any offence set out in the request shall not be surrendered for that offence*."

longer an acquitted person. Nevertheless, this question has also to be considered from the point of view of the law of the requested jurisdiction in question.[180] Hong Kong's surrender requests to Australia (New South Wales, Queensland, South Australia, Tasmania and Victoria), England, Ireland, New Zealand and Scotland, where the rule has been relaxed, should not present a problem but the position is uncertain where a surrender request is made to a jurisdiction where the rule remains intact. It may be advisable for the Hong Kong Government to review its bilateral agreements and to liaise with those jurisdictions to see how best to give effect to the relaxed rule against double jeopardy in due course.

3.197 We received a number of miscellaneous suggestions during the consultation exercise. Professor Anthony Colangelo suggested adopting the dual sovereignty doctrine. We are of the opinion, however, that the doctrine is more relevant in the context of a composite state and is not applicable to Hong Kong. The Hong Kong Court of Final Appeal has already decided in a recent case that a foreign conviction or acquittal would enable an accused to make an *autrefois* plea.[181] The Hong Kong Bar Association suggested that the rule against double jeopardy should continue to apply to foreign acquittals. We agree and our recommendations are intended to cover foreign acquittals.[182]

3.198 Patrick Layden, QC, suggested putting the rule against double jeopardy into a statutory form, as that would clearly delineate the parameters of the rule and help reduce the number of unmeritorious applications. Sections 1 and 7 of the Scottish Act restate the rule against double jeopardy. Section 7 expands the rule to allow a defendant to aver as a plea in bar of trial that the offence he faces arises out of the same acts or omissions upon which he has already been tried.[183] We do not favour this approach as we consider the rule against double jeopardy is sufficiently clear without a statutory formulation.

3.199 The Legal Aid Department proposed reviewing and amending legal aid legislation to ensure that legal aid would be available to a person whose acquittal was to be reopened. We believe that legal aid should and would still be available to such persons.

3.200 We note that the Full Court in South Australia may, on application by the Director of Public Prosecutions, order a person who has been acquitted of an indictable offence to be tried for an administration of

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180 Alternatively, this question is to be determined by the bilateral agreement between Hong Kong and the requested jurisdiction itself, if the agreement becomes part of the domestic law of that jurisdiction once the agreement has come into force, without the need for legislation. This is called the "*monism view*", in contrast with the "*dualism view*" (see in general A Aust, *Modern Treaty Law and Practice*, 2nd Edition (Cambridge University Press, 2007), chapter 10).

181 *Yeung Chun Pong & Others v Secretary for Justice* [2008] 3 HKLRD 1.

182 Recommendation 14 in this report.

183 Because of this expansion to cover offences arising out of the same acts or omissions, the Scottish Act provides for some exceptions to this expanded part of the rule in sections 8, 9, 10 and 11.

justice offence that is related to the indictable offence if the Court is satisfied that:-

(a) there is fresh evidence against the acquitted person in relation to the administration of justice offence; and

(b) it is likely that a trial would be fair in the circumstances.[184]

There is a similar provision in section 392 of the Tasmanian Act. Sections 397A and 397AB of that Act set out the procedure to apply for prosecution of an administration of justice offence and for the prosecution itself respectively. We are of the view that it is not appropriate to include a similar provision in the proposed legislation, as the acquitted person will be charged with an offence (ie an administration of justice offence) which may be completely different from that which formed the subject of the previous proceedings, especially when this matter has not been included in the consultation paper. More importantly, such a provision, in our opinion, is not necessary with the proposed relaxation since a person who was unjustifiably acquitted can possibly be retried on the basis of either limb of the proposed relaxation.

[184] Section 338 of the South Australian Act.

Chapter 4

Summary of recommendations

Chapter 2

Recommendation 1 (after para 2.48)

We recommend that the rule against double jeopardy should be retained, but relaxed in exceptional circumstances as proposed in the latter part of this report. The proposed legislation should make it clear that the relaxation shall not affect the power of the court to order a stay of proceedings where there has been an abuse of process.

Chapter 3

Recommendation 2 (after para 3.34)

We recommend empowering the court to make an order to quash an acquittal and direct a retrial where:

(a) there is "*fresh*" and "*compelling*" evidence against an acquitted person in relation to a serious offence of which he was previously acquitted; or

(b) the acquittal is tainted.

Recommendation 3 (after para 3.47)

(a) We recommend that the rule against double jeopardy should be relaxed to allow a retrial:

(i) where there is "*fresh*" and "*compelling*" evidence in respect of an offence of which the accused has been acquitted in the High Court for which the maximum sentence is 15 years' imprisonment or more; or

(ii) where there is a "*tainted acquittal*" in respect of an indictable offence tried in the District Court or High Court.

The court, however, should not have power to order a retrial of a more serious offence than that in relation to which the accused was acquitted.

(b) A reference in paragraph (a) to an offence of which a person has been acquitted includes any other offence of which he could have been convicted at the trial of the offence of which he was acquitted.

(c) We also recommend adopting a provision similar to section 100(4) of the NSW 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.

(d) 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.

Recommendation 4 (after para 3.72)

We recommend that for the purpose of determining what amounts to "*fresh and compelling evidence*":

(a) Evidence is "*fresh*" 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.

(b) Evidence is "*compelling*" 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.

The term "*fresh and compelling evidence*", however, should not include evidence which was in the possession of the prosecution, but was inadmissible as a matter of law at the time of the original trial, and which has since become admissible under the law prevailing at the time of the application.

Recommendation 5 (after para 3.81)

We recommend 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:

(i) an administration of justice offence or

(ii) any offence committed in connection with the proceedings in which the accused person was acquitted;

and the commission of the administration of justice offence or that latter offence was, more likely than not, a significant contributing factor in the person's acquittal; and

(b) "*Administration of justice offences*" should be specifically listed in the legislation and should consist of offences which involve interfering with the administration, or perverting the course, of justice.

Recommendation 6 (after para 3.99)

We recommend 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. Relevant factors would include, but are not limited to, the following factors:

- whether a fair retrial is likely;
- the interests of any victim of the offence;
- the length of time that has elapsed since the alleged commission of the offence for which the accused is sought to be retried;
- whether the law enforcement agency and the prosecution have acted with reasonable diligence and expedition in –
  - (i) the investigation and prosecution of the offence; and
  - (ii) the application for the retrial;
- in respect of the "*tainted acquittal*" limb, and in the event of an appeal against the conviction for the administration of justice offence or the offence referred to in Recommendation 5(a)(ii), whether the conviction will stand on appeal.

Recommendation 7 (after para 3.103)

We recommend that an application to quash an acquittal should be made to the Court of Appeal within 28 days after the acquitted person is charged with the offence to which the application relates, or a warrant is issued for the person's arrest (whichever is the earlier). The court should be empowered to extend the time limit as it may see fit.

Recommendation 8 (after para 3.106)

We recommend 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.

Recommendation 9 (after para 3.111)

We recommend that:

(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 "*fresh and compelling evidence*" limb or the "*tainted acquittal*" limb;

(b) appeal should be by leave of the Court of Final Appeal and the test for granting leave should be that provided in the Hong Kong Court of Final Appeal Ordinance (Cap 484) (ie the "*substantial and grave injustice*" and "*a point of law of great and general importance"* tests); and

(c) the Hong Kong Court of Final Appeal Ordinance (Cap 484) should apply to this type of appeal.

Recommendation 10 (after para 3.114)

We recommend 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.

Recommendation 11 (after para 3.138)

We recommend 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 criminal 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;

(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 the acquittal is tainted, unless the court of retrial grants leave to do so;

(h) a respondent to an application is entitled to be present 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

(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.

Recommendation 12 (after para 3.158)

We recommend that:

(a) before an acquittal is quashed, the law enforcement agencies' powers to investigate an acquitted person 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;

(b) the law enforcement agencies should have urgent investigative powers and to that end a provision similar to section 86 of the English 2003 Act should be adopted, and a schedule to the legislation should set out a list of the ranks of officers from the law enforcement agencies who could authorise urgent investigation; and

(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.

Recommendation 13 (after para 3.184)

We recommend removing the pre-condition that "*the person so entitled is unknown or cannot be found*" 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.

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 should be made to cater for the relaxation to the rule against double jeopardy.

Recommendation 14 (after para 3.192)

We recommend 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 ordered before and after the relaxation either by Hong Kong courts or courts in other jurisdictions.

Recommendation 15 (after para 3.195)

We recommend 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 original trial or heard the appeal resulting in the acquittal so as to avoid any perception or allegation of bias; and

(c) no judge who sits on the Court of Appeal hearing the application, or who has heard the original trial or appeal resulting in the acquittal, should sit as the trial judge in the subsequent retrial.

Annex A

Responses to consultation paper on Double Jeopardy

1. Professor J Anthony Collangelo, Dedman School of Law, Southern Methodist University
2. Customs and Excise Department, HKSAR Government
3. Department of Justice – Legal Policy Division, HKSAR Government
4. Duty Lawyer Service
5. Professor Martin Friedland, Faculty of Law, University of Toronto
6. Government Laboratory, HKSAR Government
7. Professor Gu Minkang, Associate Dean, School of Law, City University of Hong Kong
8. Hong Kong Bar Association
9. Hong Kong Human Rights Monitor
10. Hong Kong Police Force
11. Immigration Department, HKSAR Government
12. Independent Commission Against Corruption
13. Law Society of Hong Kong
14. Mr Patrick Layden, QC, TD
15. Legal Aid Department, HKSAR Government
16. Dr George Y C Mok
17. Ms Veronica Ng
18. Mr Peter Au
19. Security Bureau, HKSAR Government
20. Mr Sher Hon Piu
21. Society for Community Organisation
22. Mr Yu Hon Kwan

Annex B

Snapshot of responses to Recommendation 1

Support	1.	Customs and Excise Department, HKSAR Government
	2.	Department of Justice - Legal Policy Division, HKSAR Government
	3.	Government Laboratory, HKSAR Government
	4.	Law Society of Hong Kong
	5.	Legal Aid Department, HKSAR Government
	6.	Dr George Y C Mok
	7.	Ms Veronica Ng
	8.	Security Bureau, HKSAR Government
	9.	Mr Daniel Wong Kwok Tung (in Oriental Daily, 12 March 2010)
	10.	Mr Yu Hon Kwan
Support with suggestions	1.	Hong Kong Bar Association
	2.	Hong Kong Police Force, HKSAR Government
	3.	Mr James To (in Oriental Daily, 12 March 2010)
Reservations	1.	Mr Patrick Layden, QC, TD
Disagree	1.	Professor Gu Minkang, Associate Dean, School of Law, City University of Hong Kong
	2.	Hong Kong Human Rights Monitor
	3.	Mr Sher Hon Piu
	4.	Society For Community Organisation

Statutory provisions that provide for offences punishable by 15 years' imprisonment or more

15 years' imprisonment

Ordinance	Section	
Dangerous Drugs Ordinance (Cap 134)	5	Dangerous drug not to be supplied except to person authorized or licensed to be in possession thereof
	9	Cultivation of and dealing in cannabis plant and opium poppy
	35	Divan keeping
	37	Responsibility of owners, tenants, etc
	40	False statements, and aiding, abetting, etc offence under corresponding law
Control of Chemicals Ordinance (Cap 145)	2A, 15	Substances useful for manufacture of dangerous drugs
	3, 15	Import and export of substance specified in Schedule 1 or 2
	3A, 15	Export of substance specified in Schedule 3
	4, 15	Supplying or dealing in or with acetylating substance
	5, 15	Manufacture of substance specified in Schedule 1 or 2
	6, 15	Possession of acetylating substance
	7, 15	Substance specified in Schedule 1 or 2 in transshipment
Societies Ordinance (Cap 151)	19	Penalties on office-bearer, etc. of an unlawful society

20 years' imprisonment

Ordinance	Section	
Crimes Ordinance (Cap 200)	47	Incest by men
	54	Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property

Life imprisonment

Ordinance	Section	
Dangerous Drugs Ordinance (Cap 134)	4	Trafficking in dangerous drug
	6	Manufacture of dangerous drug
	38M	Ships used for illicit traffic
Crimes Ordinance (Cap 200)	2	Treason
	3	Treasonable offences
	6	Incitement to mutiny
	15	Unlawful oaths to commit capital offences
	19	Piracy with violence
	20	Piratical acts
	53	Causing explosion likely to endanger life or property
	60, 63	Destroying or damaging property
	85	Making false entry in bank book, etc
	88	Making false entry in register of births, etc

Ordinance	Section	
	89	Making false entry in copy of register sent to registrar
	118	Rape
	118A	Non-consensual buggery
	118C	Homosexual buggery with or by man under 21
	118D	Buggery with girl under 21
	123	Intercourse with girl under 13
	140	Permitting girl or boy under 13 to resort to or be on premises or vessel for intercourse
	159A, 159C	Conspiracy to commit murder, etc
	159G, 159J	Attempting to commit murder, etc
Theft Ordinance (Cap 210)	10	Robbery
	12	Aggravated burglary
Offences Against the Person Ordinance (Cap 212)	2	Murder
	5	Conspiring or soliciting to commit murder
	7	Manslaughter
	9A	Genocide
	10	Administering poison or wounding with intent to murder
	11	Destroying or damaging building with intent to murder
	13	Attempting to administer poison, or shooting, or attempting to shoot or

Ordinance	Section	
		drown, etc, with intent to murder
	14	Attempting to commit murder by means not specified
	16	Impeding person endeavouring to save himself or another from shipwreck
	17	Shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm
	20	Attempting to choke, etc, in order to commit indictable offence
	21	Using chloroform, etc, in order to commit indictable offence
	28	Causing bodily injury by gunpower, etc
	29	Causing gunpowder to explode, etc, or throwing corrosive fluid, with intent to do grievous bodily harm
	42	Forcible taking or detention of person, with intent to sell him
	46	Administering drug or using instrument to procure abortion
Firearms and Ammunition Ordinance (Cap 238)	16	Possession of arms or ammunition with intent to endanger life
	17	Resisting arrest with or committing offence while in possession of arms or ammunition or imitation firearm
	18	Carrying arms or ammunition or imitation firearm with criminal intent
Crimes (Torture) Ordinance (Cap 427)	3	Torture

Ordinance	Section	
Internationally Protected Persons and Taking of Hostages Ordinance (Cap 468)	4	Hostage taking
Biological Weapons Ordinance (Cap 491)	2	Restriction on development etc. of certain biological agents and toxins and of biological weapons
Aviation Security Ordinance (Cap 494)	8	Hijacking
	9	Destroying, damaging or endangering safety of aircraft
	11	Other acts endangering or likely to endanger safety of aircraft
	12	Acts of violence committed during hijacking or attempted hijacking, etc
	15	Endangering safety at aerodromes
United Nations (Anti-terrorism Measures) Ordinance (Cap 575)	11B, 14	Prohibitions against bombing of prescribed objects
	11E, 14	Prohibitions relating to ships
	11F, 14	Prohibitions relating to fixed platforms
Chemical Weapons (Convention) Ordinance (Cap 578)	5, 29	Use, etc, of chemical weapons