



HONG KONG BAR ASSOCIATION

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9 May 2023

Mr. Llewellyn MUI
Solicitor General
Constitutional and Policy Affairs Division
Department of Justice
5/F East Wing, Justice Place
18 Lower Albert Road, Central
Hong Kong.

Dear *Llewellyn*

**Consultation Paper on the Legislative Proposal to Introduce a Mechanism for
Appeal against Acquittal by the Court of First Instance
Constituted by a Panel of Three Judges
for Cases Concerning Offences Endangering National Security**

I refer to your letter of 20 April 2023.

Please find enclosed the Position Paper of the Hong Kong Bar Association dated 9 May 2023 in relation to the captioned Consultation Paper.

Yours sincerely,

Eugene Yim
Honorary Secretary

香港大律師公會

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**Re: Consultation Paper on the Legislative Proposal to Introduce a
Mechanism for Appeal against Acquittal by the Court of First Instance
Constituted by a Panel of Three Judges for Cases Concerning Offences
Endangering National Security**

**POSITION PAPER OF THE HONG KONG BAR ASSOCIATION
(“HKBA”)**

1. The HKBA refers to the captioned Consultation Paper (“**Paper**”) issued by the Department of Justice (“**DOJ**”), as attached to their letter to the Bar Chairman dated 20 April 2023 (“**Letter**”).
2. The Paper and the Letter outline the DOJ’s proposal to introduce a statutory prosecution appeal mechanism against acquittal in the Court of First Instance (“**CFI**”) for cases concerning offences endangering national security, through amendments to the Criminal Procedure Ordinance (Cap.221) (“**CPO**”). The amendment bill has yet to be published.
3. To begin with, it is acknowledged that there is a developing trend among common law jurisdictions to provide more avenues to prosecution appeals with a view to rebalancing the previously asymmetrical appeals process and promoting accuracy of outcome of criminal proceedings on the basis that accuracy is the major component of the legitimacy of verdicts:
 - a. The Irish Law Reform Commission, in their “*Consultation Paper on Prosecution Appeals in Cases Brought on Indictment*”, referred to the problem highlighted by the Director of Public Prosecutions arising from the absence in Irish law of a proper system to allow appeals from decisions of judges in criminal trials to be brought by the prosecution, and explored whether there should be a broader prosecution right of appeal (§3). The paper observed a general trend abroad towards “*with prejudice*” avenues of appeal, and of the 13 jurisdictions surveyed, most of them “*permit appeals on questions of law arising from any trial ruling*”. (§1.89)¹

¹ A “*with prejudice*” appeal is one in which the appellate court has the power to overturn a decision favourable to the accused, and is brought primarily for the purpose of achieving the correct result in the particular case appealed. By way of contrast, a “*without prejudice*” appeal is one in which the appellate court has no power to quash the

- b. The Commission also made a general comment that “*whilst the volume of prosecution appeals in the common law jurisdictions is not great, there is evidence that, where used, such appeals have made a significant contribution to the development of criminal law appellate jurisprudence.*” (§1.90)
4. In this connection, the HKBA agrees in principle that there is an anomaly² to be addressed following the creation of a new mode of trial for cases concerning offences against national security. Under this mode of trial, a defendant could be tried and acquitted by the CFI (constituted by a panel of 3 designated judges) without a jury, but with full reasons provided by the Court. In these circumstances, there is no strong reason why the position in respect of prosecution appeals from this mode of trial should be any different to District Court and Magistracy Court trials, where an avenue for prosecution appeals (with the appellate court having the power to overturn an acquittal if it allows the appeal) already exists.
5. The HKBA also agrees in principle that prosecution appeals are not inconsistent with the protection of fundamental human rights under the International Covenant on Civil and Political Rights (“**ICCPR**”) or the Hong Kong Bill of Rights (“**HKBOR**”).
 - a. The UK Law Commission, in their report on “*Double Jeopardy and Prosecution Appeals*”, considered the implication of prosecution appeals on human rights under the ICCPR and the European Convention on Human Rights (“**ECHR**”). As to the meaning of “*finally convicted or acquitted*”, the Commission observed that “*a defendant has not been “finally acquitted” if the acquittal is set aside, and a rehearing ordered, in the course of an ordinary appeal.*” (§3.10) and that “[a] prosecution appeal is an ordinary procedure which may be invoked before the decision has become *res judicata*.” (§3.19)

acquittal or other ruling favourable to the accused, and is brought for the purposes of clarifying the law for future cases.

² As described in the opening sentence of the 3rd paragraph of the Letter.

6. Subject to further consideration of the amendment bill when it becomes available, the HKBA has the following comments and observations concerning the operation of the proposed statutory regime.

Retrospectivity

7. As a general point, the HKBA considers that a clear stance as to the issue of retrospectivity of the proposed amendments may be necessary, in order to provide certainty as to (1) whether the appeal mechanism (albeit a procedural amendment in nature, it does create and vest upon the Prosecution a substantive right of appeal) would take effect retrospectively; (2) how it affects national security trials that are already ongoing; and (3) whether it is considered more appropriate to provide a cut-off date for the operation of the proposed amendments.

Mode and scope of appeal and procedural rules

8. Paragraph 21 of the Paper states that any case stated appeals would relate only to matters of law. The HKBA observes that whilst in the past, this appeal avenue was sparingly used, there was a notable increase in such appeals in 2021; and in general, prosecution appeals against factual findings framed as questions of law on the basis that no reasonable judge would have come to those findings are becoming uncomfortably more frequent. In this regard, it is pertinent to note the observations of the Court of Final Appeal (“CFA”) in *Li Man Wai v Secretary for Justice* (2003) 6 HKCFAR 466 where the Court took the opportunity to examine the scope of case stated appeals in great detail and sounded a reminder that the questions should not be framed to circumvent the restrictions on appealing the finding of facts. Bearing these observations in mind, the HKBA takes the view that the proposed limited scope of appeal is, as a matter of law, a sensible one.
9. Paragraph 20 of the Paper states that the proposed appeal mechanism would be modelled on the existing s.84 of the District Court Ordinance (“DCO”) and s.105 of the Magistrates Ordinance (“MO”). In paragraphs 30-31 of the Paper, it is proposed to adopt s.84(a) of the DCO as the procedural rule, under which MO ss.106-109 would apply *mutatis mutandis* to the preparation, amendment and setting down of a case stated. The HKBA has the following observations in respect of the mode of service of documents on the

defendants in light of the fact that both s.84 of the DCO and s.105 of the MO would be modelled on:

- a. The mode of service of documents on the defendants is provided for under s.115 of the MO. This section, however, does not apply to s.84 of the DCO.
- b. Reference is made to the above issue in CACC 277 & 278/2021, which concerned two case stated appeals from the District Court. One of the issues raised was about whether there are provisions governing the mode of service of documents on the defendants under s.84 of the DCO. That appeal was heard on 17 January 2023, with the judgment still pending to be handed down.
- c. It follows that there may be a need to clearly set out the mode of service of documents on the defendants in the proposed mechanism. Consideration may also be given to whether a need to amend the mode of service of documents on case stated appeals from the District Court as well.
- d. There are prescribed rules governing the service of documents for other prosecution appeals under the CPO, namely appeals under s.81D of the CPO for reference of a question of law following acquittal; appeals against a discharge by s.16 of the CPO under s.81E of the CPO; and appeals against an order quashing an indictment under s.81F of the CPO. Such rules are set out in Criminal Appeal Rules (Cap. 221A), Criminal Procedure (Reference of Questions of Law) Rules (Cap. 221E), and Criminal Procedure (Appeal against Discharge) Rules (Cap. 221F). The prescription of corresponding rules in relation to service of documents under the new proposed appeal mechanism will avoid uncertainty in the service of documents and prevent unnecessarily procedural issues affecting the substantive appeal.

Appeal mechanism

10. Paragraph 22 of the Paper proposes that the appeal application has to be made within 14 clear days after the reasons for a verdict have been recorded or after the order of acquittal has been made (whichever is later), or within such

further period as the CA may allow. Such proposed appeal period is longer than the 7 days prescribed period for an appeal by way of case stated under s.84 of the DCO, but shorter than the 21 days period for sentence review and appeal against discharge. The HKBA is of the view that the proposed time frame is sensible and justified. The HKBA has the following additional observations:

- a. When an application for an extension of time is made, we expect that the applicant should provide justifications and specify their reasons, and that an extension of time may only be granted when the Court is satisfied that there is good reason justifying an extension.
 - b. It is also the practice in the United Kingdom. R.35.2 of the Criminal Procedure Rules 2020 provides that if extension of time is required, the applicant should specify the reasons.
11. Paragraph 25 of the Paper proposes the introduction of a number of provisions regarding remand and bail, referencing s.35 of the Hong Kong Court of Final Appeal Ordinance (Cap.484) (“HKCFAO”) and s.84(b) of the DCO, the HKBA agrees that, in principle, there is a need to preserve the *status quo ante* before the case is finally determined:
- a. In the recent CFA decision *HKSAR v Milne John* (2022) 25 HKCFAR 257, in the context of a permanent stay in a CFI jury trial, the trial judge granted bail without travel restrictions to the defendant after ordering a permanent stay of proceedings. The defendant had then left the jurisdiction.
 - b. The CFA opined that “...if, having left the jurisdiction, the respondent were not voluntarily to return, or could not be brought back to the jurisdiction under compulsion, the appeal against the judge’s stay decision would have been rendered nugatory. That should not have occurred.” (§75)
 - c. The CFA also stressed that in exercising the discretion to detain a defendant under s.35(2) HKCFAO, the proper exercise of such discretion will generally be to maintain that *status quo ante*. It does not serve the public interest if a criminal defendant departs from this

jurisdiction and does not return to the jurisdiction or not be liable to extradition to face trial.

12. The HKBA welcomes the proposal under paragraph 28 of the Paper not to adopt the provisions that empower the CA to directly find a respondent guilty, record a conviction and pass sentence upon allowing the prosecution's appeal in compliance with Article 11(4) of the HKBOR.
13. The HKBA notes however that s.84(c)(iii) of the DCO empowers the CA to give all such necessary and consequential directions as it shall think fit. Such a power can be invoked by the CA to order/direct the lower court to find the defendant guilty and to sentence him (See, e.g. *HKSAR v Chan Chi Wan Stephen* [2016] 3 HKLRD 186), but this was in the context of the existence of provisions which allow for the CA to directly convict and sentence. The need for the CA to send the matter back to the lower court for sentencing, ***with an order to the lower court to convict***, was to preserve the defendant's right to appeal ***to the CA*** on sentence in compliance with Article 11(4) of the HKBOR. Given the proposal under paragraph 28 of the Paper that the existing provisions that empower the CA to directly find a respondent guilty, record a conviction and pass sentence would ***not*** be adopted, there is in our view a need to expressly make clear whether the other "necessary and consequential directions" that the CA would be empowered to make would ***include*** a power to direct the lower court to enter a conviction.
14. The HKBA would like the opportunity to comment further on the specific implementation proposed later including the draft legislation when it becomes available.

Dated 9 May 2023

HONG KONG BAR ASSOCIATION