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For discussion on
22 May 2023

Legislative Council Panel on
Administration of Justice and Legal Services

Proposal to Amend the Criminal Procedure Ordinance (Cap. 221)

I. PURPOSE

This paper briefs Members on the Government's proposal to introduce legislative amendments to the Criminal Procedure Ordinance (Cap. 221) ("**CPO**") to provide for a statutory procedure for the prosecution to appeal by way of case stated against a verdict or order of acquittal given by the Court of First Instance ("**CFI**") constituted by a panel of three judges ("**Panel**") to try a case concerning offences endangering national security without a jury under Article 46 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("**HK National Security Law**"), the key features of the legislative proposal and the outcome of the consultation exercise conducted from 20 April to 8 May 2023 on the legislative proposal.

II. BACKGROUND

2. A case concerning offences endangering national security may be tried in the CFI either before a judge and a jury, or before a Panel without a jury if the Secretary for Justice ("**SJ**") has issued a certificate under Article 46 of the HK National Security Law[1].

[1] Article 46(1) of the HK National Security Law provides: "對高等法院原訟法庭進行的就危害國家安全犯罪案件提起的刑事檢控程序，律政司長可基於保護國家秘密、案件具有涉外因素或者保障陪審員及其家人的人身安全等理由，發出證書指示相關訴訟毋須在有陪審團的情況下進行審理。凡律政司長發出上述證書，高等法院原訟法庭應當在沒有陪審團的情況下進行審理，並由三名法官組成審判庭。" (Translation: In criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. Where the Secretary for Justice has issued the certificate, the case shall be tried in the Court of First Instance without a jury by a panel of three judges).

3. As in criminal cases tried by professional judges such as judges of the District Court and magistrates, if a case is tried by a Panel in the CFI without a jury, the Panel will give reasons for its verdict. A reasoned verdict enables both the prosecution and the defence to ascertain whether the court has committed any error of law, and if so, how such error has impacted on the ultimate verdict.

4. Under the existing CPO, whilst a defendant may appeal to the Court of Appeal ("**CA**") against his or her conviction or sentence by the CFI regardless of the mode of trial, the prosecution does not have a right to appeal to the CA if the defendant is acquitted by a Panel even though its reasons for verdict may disclose an error of law. This is contrasted with an acquittal by a judge of the District Court or a magistrate which is subject to appeal by way of case stated on matters of law under section 84 of the District Court Ordinance (Cap. 336) ("**DCO**") or section 105 of the Magistrates Ordinance (Cap. 227) ("**MO**") (as the case may be). The prosecution's inability to appeal to the CA against an acquittal by a Panel in such circumstances gives rise to an anomaly.

5. As pointed out by a responsible official of the Legislative Affairs Commission of the Standing Committee of the National People's Congress ("**NPCSC**") on 30 December 2022 in response to questions by the media concerning the Interpretation by the NPCSC of Article 14 and Article 47 of the HK National Security Law, it is the imperative of Article 7[2] of the HK National Security Law that the Hong Kong Special Administrative Region should amend and refine the relevant local legislation in a timely manner and resolve legal issues encountered in the implementation of the HK National Security Law through local legislation as far as practicable.

6. A miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. The miscarriage of justice arising from an erroneous acquittal would be gravest where the offence in

[2] Article 7 of the HK National Security Law provides: "香港特別行政區應當儘早完成香港特別行政區基本法規定的維護國家安全立法，完善相關法律。" (Translation: The Hong Kong Special Administrative Region shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law of the Hong Kong Special Administrative Region and shall refine relevant laws).

question is one endangering national security. In order to serve the interests of justice and for the judicial authorities to properly discharge the duty under the HK National Security Law[3] to effectively prevent, suppress and impose punishment for acts and activities endangering national security, it is necessary that the prosecution be vested with the right to appeal, thereby giving the CA the opportunity to examine and, where justified, correct any error of law made by a Panel of the CFI when trying cases concerning offences endangering national security without a jury.

7. Against the above background, the Government proposes to amend the CPO to provide for a new statutory procedure for the prosecution to appeal to the CA against a verdict or order of acquittal given by the CFI constituted by a Panel under Article 46 of the HK National Security Law.

8. A consultation exercise (consultation paper in **Annex A**) was conducted from 20 April to 8 May 2023, with submissions received from stakeholders including the two legal professional bodies and law schools.

III. KEY FEATURES OF THE LEGISLATIVE PROPOSAL

9. The legislative proposal seeks to add new provisions to Part IV of the CPO to create an appeal by way of case stated procedure which is essentially modelled on the appeal procedure under section 84 of the DCO and section 105 of the MO. The new provisions, being procedural in nature, will apply to verdicts or orders of acquittal given after the legislative amendments have come into operation.

Mode and scope of appeal

10. The legislative proposal will provide for a right of the SJ to appeal to the CA against a verdict or order of acquittal given by a Panel constituted under Article 46 of the HK National Security Law to try a case concerning offences endangering national security in the CFI without a jury

[3] See in particular Articles 3, 8 and 42.

(including any order quashing or dismissing a charge for any alleged defect in the charge or want of jurisdiction). The legislative proposal will not affect cases tried in the CFI with a jury, whether they are cases concerning offences endangering national security or otherwise.

11. The proposed new provisions will be primarily modelled on section 84 of the DCO. We believe this will facilitate the development of the procedures, practice and jurisprudence of the new mechanism of appeal against acquittal by the Panel, and achieve coherence amongst prosecution appeals against acquittals in different levels of courts.

12. The appeal, which is by way of case stated, will relate to "matters of law only". It is not an appeal by way of rehearing but a review by the appellate court on the limited ground that there is an error of law or an excess of jurisdiction. An error of law includes a perverse conclusion or finding of fact that no reasonable judge, applying his or her mind to the proper considerations and giving himself or herself the proper directions, could have come to[4].

Appeal mechanism

13. Under the legislative proposal, the appeal will be initiated by the SJ making an application in writing to the Panel to state a case. The application has to be made within 14 clear days after the reasons for a verdict or order of acquittal have been recorded, or within such further period as the CA may allow.

14. The case stated should set out the facts, the grounds on which the verdict or order of acquittal was arrived at or given, and the grounds on which the acquittal is questioned for the opinion of the CA.

15. Existing section 34(2)(b) of the High Court Ordinance (Cap. 4) ("**HCO**") provides that the CA shall be duly constituted for the purpose of determining any appeal under Part IV of the CPO if it consists of an uneven

[4] *Li Man Wai v Secretary for Justice* (2003) 6 HKCFAR 466.

number of Justices of Appeal not less than 3. It would be for the CA to determine the number of Justices of Appeal[5] determining a particular appeal as it sees fit.

16. It is necessary to preserve the *status quo* of a defendant/respondent pending determination of the prosecution's appeal, so as not to render the appeal nugatory. With reference to section 35 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) and section 84(b) of the DCO, we propose to introduce the following provisions:

(a) Immediately after the Panel gives a verdict or order of acquittal, the prosecution may inform the Panel of its intention to appeal. If so, the Panel may either (i) on the prosecution's application, order that the defendant be detained in custody pending determination of the appeal or (ii) admit the defendant to bail.

(b) If an application to state a case has already been made, the prosecution may also apply to the CA for a warrant to arrest the respondent. Once the respondent is arrested pursuant to such warrant, the CA may order that the respondent be detained in custody or admit the respondent to bail.

(c) To avoid doubt, Article 42 of the HK National Security Law applies to the consideration of detention and bail.[6]

17. In line with the existing practice, we propose to amend section 83Y of the CPO so that the powers of the CA to extend the period for making the application to state a case, to issue a warrant of arrest, to order the detention of a defendant or respondent or to admit him or her to bail may be exercised by a single judge.

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[5] By virtue of section 5(2) of the HCO, a judge of the CFI may, on the request of the Chief Justice, act as an additional judge of the CA.

[6] Article 42(2) of the HK National Security Law provides: "對犯罪嫌疑人、被告人，除非法官有充足理由相信其不會繼續實施危害國家安全行為的，不得准予保釋。" (Translation: No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security).

18. With reference to section 84(c) of the DCO, we propose that the CA may do the following in determination of the appeal:

(a) If the CA is satisfied that there is no sufficient ground for interfering with the verdict or order of acquittal, it must dismiss the appeal;

(b) If the CA is satisfied that there are sufficient grounds for interfering with the verdict or order of acquittal, it must reverse the verdict or order, and direct that (i) the trial be resumed or (ii) the respondent be retried. Even if the CA finds the Panel has erred in law, it does not mean that CA must interfere with the acquittal. There must be "sufficient grounds for interfering"[7];

(c) The CA may also give all such necessary and consequential directions as it considers appropriate. In practice, such directions may include, if circumstances so require, a direction to the CFI to find the respondent guilty and sentence the respondent accordingly[8].

19. Defence and prosecution costs in appeals by way of case stated under section 84 of the DCO are respectively provided in section 9A and section 13A of the Costs in Criminal Cases Ordinance (Cap. 492). We propose to amend the latter Ordinance to provide for defence and prosecution costs for the new appeal mechanism.

Procedural rules

20. With reference to section 84(a) of the DCO, we propose that the provisions of sections 106 to 109 of the MO will apply, with necessary

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[7] *Secretary for Justice v Fan Kin Chung* CACC 381/2022 (5 March 2003).

[8] By way of example, the CA made such direction in the case of *Secretary for Justice v Chan Chi Wan Stephen* [2016] 3 HKLRD 186. For an appeal by way of case stated against acquittal by the DC, section 84(c)(ii) of the DCO also empowers the CA to find the respondent guilty, record a conviction and pass such sentence on the respondent as might have been passed on him by a judge. This specific power will not be adopted under the legislative proposal as the CA in *Secretary for Justice v Wong Sau Fong* [1998] 2 HKLRD 254 took the view that such a power would be inconsistent with Article 11(4) of the Hong Kong Bill of Rights which guarantees a convicted person's right of appeal against sentence. What the CA may do in such circumstances would be to reverse the acquittal and direct that the trial be resumed and that the trial court should find the respondent guilty and sentence the respondent accordingly.

modifications, to the preparation and amendment of the case stated and setting down of the appeal.

21. Currently, no rules of court have been prescribed for appeals by way of case stated under section 84 of the DCO and section 105 of the MO and the appeal mechanisms have so far operated without any significant difficulties. Therefore, we believe that it is not necessary to make any procedural rules by way of subsidiary legislation to facilitate the operation of the new appeal mechanism. Nonetheless, if, in the future, the Judiciary and legal practitioners consider it necessary to have procedural rules for the new appeal mechanism, the Criminal Procedure Rules Committee can make rules and orders to regulate the practice and procedure by virtue of section 9 of the CPO.

IV. IMPLICATIONS

22. The legislative proposal will not have adverse implications on the rule of law, the court's independent judicial power or the defendant's right to a fair trial as guaranteed by the Basic Law and the Hong Kong Bill of Rights. The legislative proposal does not contravene the principle against double jeopardy[9].

V. OUTCOME OF THE CONSULTATION EXERCISE

23. For those respondents who provided a substantive reply, on the whole, they were supportive of the legislative proposal. In particular, the respondents generally agreed that there is an anomaly as described in

[9] Article 11(6) of the Hong Kong Bill of Rights, which corresponds to Article 14(7) of the International Covenant on Civil and Political Rights, provides that "*[n]o 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*". Article 5 of the HK National Security Law also provides, amongst others: "任何人已經司法程序被最終確定有罪或者宣告無罪的，不得就同一行為再予審判或者懲罰。" (Translation: No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings). Where the law provides for a mechanism for the prosecuting authorities to appeal against an acquittal and the time for appeal has not expired, the acquitted person has not been "finally acquitted" in accordance with the law, and hence the aforesaid provisions are simply not engaged.

paragraph 4 above following the creation of a new mode of trial for cases concerning offences endangering national security in the CFI, and that the interests of justice are served by providing the prosecution with an avenue of appeal to correct any erroneous acquittal given by a Panel, similar to the position in respect of prosecution appeals against acquittals arising from District Court and Magistrates' Courts trials.

24. Some respondents made a few comments concerning the technical or operational aspects of the legislative proposal. We have carefully considered these comments. A summary of the major comments concerning the technical or operational on the aspects of the legislative proposal received and our responses are set out at **Annex B**.

VI. WAY FORWARD

25. Earlier this year, the Government proposed to amend the CPO to provide for a statutory appeal procedure for the prosecution to appeal against rulings of no case to answer by judges of the CFI in criminal trials ("**No Case to Answer Appeal Proposal**")[10]. Similar to the No Case to Answer Appeal Proposal, the present proposal will address a lacuna in the criminal appeal system due to the prosecution's inability to appeal against any acquittals resulting directly from decisions made by professional judges of the CFI that are erroneous, so as to prevent possible miscarriage of justice. A timely response to such significant legal lacunae is necessary. The Government aims to introduce the two legislative proposals by an amendment bill as soon as practicable.

[10] For details of the No Case to Answer Appeal Proposal, please refer to the discussion paper for the meeting of the Legislative Council Panel on the Administration of Justice and Legal Services on 27 February 2023 (ref: LC Paper No. CB(4)130/2023(01)), available at https://www.legco.gov.hk/yr2023/english/panels/ajls/papers/ajls20230227cb4-130-1-e.pdf.

VII. ADVICE SOUGHT

26. Members are invited to note and comment on the legislative proposal.

Department of Justice
15 May 2023

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Annex A

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

INTRODUCTION

The Department of Justice ("**DoJ**") would like to invite comments on the legislative proposal ("**Proposal**") which seeks to amend the Criminal Procedure Ordinance (Cap. 221) ("**CPO**") to introduce a statutory procedure for the prosecution to appeal by way of case stated against a verdict or order of acquittal by the Court of First Instance ("**CFI**") constituted by a panel of three judges ("**Panel**") to try a case concerning offences endangering national security without a jury under Article 46 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("**HK National Security Law**").

BACKGROUND

Current law on appeal mechanisms for criminal trials generally

2. It is a rule of the common law that any right to appeal must be expressly conferred by legislation. Existing legislation provides for the right of defendants in criminal cases to appeal against conviction and/or sentence at all levels of trial courts, i.e. the magistrates' courts[1], the District Court ("**DC**")[2] and the CFI[3].

[1] Section 113 of the Magistrates Ordinance (Cap. 227) ("**MO**").
[2] Sections 82 and section 83G of the CPO, read in conjunction with section 83 of the District Court Ordinance (Cap. 336) ("**DCO**").
[3] Sections 82 and section 83G of the CPO.

3. As regards the prosecution's right to appeal in criminal cases under existing legislation, the Secretary for Justice ("**SJ**") may appeal against the acquittal by a magistrate[4] or by the DC[5] by way of case stated to the CFI or to the Court of Appeal ("**CA**") respectively, and may apply to the CA for review of any sentence passed by a magistrate and the DC[6].

4. In *Li Man Wai v Secretary for Justice*[7], the Court of Final Appeal ("**CFA**") explained the nature of an appeal by way of case stated (in the context of section 105 of the MO but the principles therein are of general application). An appeal by way of case stated is not an appeal by way of rehearing but a review by the appellate court on the limited ground that there is an error of law or an excess of jurisdiction. Where a magistrate or a judge has come to a conclusion or finding of fact which no reasonable magistrate or judge, applying his/her mind to the proper considerations and giving himself/herself the proper directions, could have come to, this would be regarded as an error of law. Such a conclusion or finding is often described as "perverse". This is the case where the appellate court is satisfied that the magistrate or the judge, in reaching his/her conclusion or finding, has misdirected himself/herself on the facts or misunderstood them, or has taken into account irrelevant considerations or has overlooked relevant considerations. In such a case, the appellate court is entitled to intervene and the magistrate's or judge's conclusion or finding would not be allowed to stand.

5. On the other hand, the prosecution's right to appeal in respect of criminal trials in the CFI is more circumscribed. Currently, the SJ may only appeal against certain decisions of a Judge of the CFI that will effectively result in a defendant's acquittal without undergoing a full trial[8], and may

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[4] Section 105 of the MO.
[5] Section 84 of the DCO.
[6] Section 81A of the CPO.
[7] *Li Man Wai v Secretary for Justice* (2003) 6 HKCFAR 466.
[8] Namely, appeal under section 81E of the CPO against a discharge under section 16 of the CPO, and appeal under section 81F of the CPO against an order quashing an indictment under section 53 of the CPO. It may also be noted that the DoJ recently proposed to amend the CPO to provide for a statutory appeal procedure for the prosecution to appeal against rulings of no case to answer by judges of the CFI in criminal trials (see paragraph 17 below).

apply for review of any sentenced passed by the CFI[9]. However, the CPO does not provide for any right of the prosecution to appeal against an acquittal of a defendant after a full trial in the CFI to the CA. The CPO provides for a procedure for the prosecution to refer questions of law arising from such trial to the CA for opinion[10], but the acquittal will not be affected, and the acquitted defendant cannot be retried even if the CA finds any error of law that undermines the acquittal.

6. Defendants and the prosecution may appeal against any final decision of the CFI or CA (as the case may be) to the CFA with the leave of the CFA[11]. However, "a verdict or finding of a jury" is explicitly carved out from the appealable final decision of the CFI, meaning that the prosecution cannot appeal against an acquittal by the jury in the CFI to the CFA.

Trial of cases concerning offences endangering national security in the CFI

7. The HK National Security Law came into effect on 30 June 2020. Article 41(1) provides that the HK National Security Law and the laws of the Hong Kong Special Administrative Region ("**HKSAR**") shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offences endangering national security over which the HKSAR exercises jurisdiction.

8. Article 46 of the HK National Security Law provides:

> "對高等法院原訟法庭進行的就危害國家安全犯罪案件提起的刑事檢控程序，律政司長可基於保護國家秘密、案件具有涉外因素或者保障陪審員及其家人的人身安全等理由，發出證書指示相關訴訟毋須在有陪審團的情況下進行審理。凡律政司長發出上述證書，高等法院原訟法庭應當在沒有陪審團的情況下進行審理，並由三名法官組成審判庭。"

[9] Section 81A of the CPO.
[10] Section 81D of the CPO.
[11] Sections 31 and 32 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484).

(English translation:
"In criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. Where the Secretary for Justice has issued the certificate, the case shall be tried in the Court of First Instance without a jury by a panel of three judges.")

9. After enactment of the HK National Security Law, there are two modes of trial for a case concerning offences endangering national security in the CFI, namely (i) the conventional mode of trial before a judge and a jury; and (ii) where the SJ issues a certificate under Article 46 of the HK National Security Law, trial before a three-judge Panel without a jury. As the CA pointed out in *Tong Ying Kit v Secretary for Justice*[12],

> "Granted jury trial is the conventional mode of trial in the Court of First Instance, it should not be assumed that it is the only means of achieving fairness in the criminal process. Neither [Article 87 of the Basic Law] nor [Article 10 of the Hong Kong Bill of Rights] specifies trial by jury as an indispensable element of a fair trial in the determination of a criminal charge. When there is a real risk that the goal of a fair trial by jury will be put in peril by reason of the circumstances mentioned in the third ground, the only assured means for achieving a fair trial is a non-jury trial, one conducted by a panel of three judges as mandated by [Article 46(1) of the HK National Security Law]. Such a mode of trial serves the prosecution's legitimate interest in maintaining a fair trial and safeguards the accused's constitutional right to a fair trial."

[12] *Tong Ying Kit v Secretary for Justice* [2021] 3 HKLRD 350.

10. Whilst a jury is not required to give reasons for its verdict, where a case concerning offences endangering national security in the CFI is tried by a Panel without a jury, the Panel will give reasons for its verdict[13]. The defendant, the prosecution and members of the public would be able to understand the Panel's analysis of the evidence and the law, the findings of facts and findings of law it made in reaching its verdict.

11. As the HK National Security Law does not contain any provision concerning appeal, the appeal mechanisms in cases concerning offences endangering national security tried in the CFI continue to be governed by the local laws of the HKSAR, in particular the CPO, whether the case is tried by a judge and a jury or by a Panel without a jury. Thus, for cases concerning offences endangering national security tried in the CFI by a Panel, whereas a defendant has the right to appeal to the CA against any conviction by the Panel, the existing CPO does not allow the prosecution to appeal to the CA against an acquittal by a Panel.

JUSTIFICATIONS

12. The prosecution's inability to appeal against an acquittal by a Panel trying a case concerning offences endangering national security in the CFI to the CA gives rise to an anomaly. Like cases tried by a magistrate or the DC, the Panel will give reasons for its verdict. A reasoned verdict enables the prosecution to ascertain whether the court has committed any error of law, and if so, how such error has impacted on the ultimate verdict of acquittal. Just as there is a legitimate public interest in allowing the prosecution to appeal against an erroneous verdict of acquittal by a magistrate or the DC by way of cases stated, there is no reason why the prosecution should not in similar circumstances be allowed to appeal against an erroneous verdict of acquittal by a Panel.

[13] Which is what the court did in *HKSAR v Tong Ying Kit* [2021] HKCFI 2200, the first case concerning offences endangering national security tried in the CFI by a Panel without a jury.

13. The public interest in detection of crime and bringing criminals to justice is well-recognised[14]. To enable the prosecution to bring an appeal so that the appellate court can scrutinise and correct any error of law committed by the trial court serves the interests of justice, and does not in any way undermine any constitutional right enjoyed by a defendant charged with a criminal offence, including the right to a fair trial[15]. This appeal mechanism is especially important in the context of handling cases concerning offences endangering national security. It is necessary in order to ensure proper discharge of the judicial authorities' duty under the HK National Security Law[16] to effectively prevent, suppress and impose punishment for acts and activities endangering national security.

14. As pointed out by a responsible official of the Legislative Affairs Commission of the Standing Committee of the National People's Congress ("**NPCSC**") on 30 December 2022 in response to questions by the media concerning the Interpretation by the NPCSC of Article 14 and Article 47 of the HK National Security Law, it is the imperative of Article 7[17] of the HK National Security Law that the HKSAR should amend and refine the relevant local legislation in a timely manner and resolve legal issues encountered in the implementation of the HK National Security Law through local legislation as far as practicable.

15. A statutory procedure for the prosecution to appeal against acquittal does not contravene the principle of finality or the principle against double jeopardy. Article 11(6) of the HKBOR, which corresponds to Article 14(7) of the International Covenant on Civil and Political Rights ("**ICCPR**"), provides that "*[n]o 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*". Where the law provides for a mechanism for the prosecuting authorities to appeal against an

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[14] See e.g. *HKSAR v Lee Ming Tee & Securities and Future Commission (Intervener)* (2003) 6 HKCFAR 336, at 396A-C, para 187; *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400, at para 116(5).

[15] Article 87 of the Basic Law and Articles 10 and 11 of the Hong Kong Bill of Rights ("**HKBOR**"). See also Article 4 and Article 5 of the HK National Security Law.

[16] See in particular Articles 3, 8 and 42.

[17] Article 7 of the HK National Security Law provides that the HKSAR shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law and shall refine relevant laws.

acquittal and the time for appeal has not expired, the acquitted person has not been "finally acquitted" in accordance with the law, and hence Article 11(6) of the HKBOR or Article 14(7) of the ICCPR is simply not engaged[18].

16. All in all, the DoJ considers that it is necessary and legitimate to amend the CPO to provide for a statutory procedure for the prosecution to appeal by way of case stated against a verdict or order of acquittal by a Panel constituted under Article 46 of the HK National Security Law to try a case concerning offences endangering national security in the CFI to the CA, and legislative amendment to implement the Proposal should be introduced as soon as practicable.

17. The DoJ recently proposed to amend the CPO to provide for a statutory appeal procedure for the prosecution to appeal against rulings of no case to answer by judges of the CFI in criminal trials ("**No Case to Answer Appeal Proposal**")[19]. Similar to the No Case to Answer Appeal Proposal, the present proposal will address a lacuna in the criminal appeal system due to the prosecution's inability to appeal against acquittals directed or given by professional judges of the CFI, so as to prevent possible miscarriage of justice. A timely response to such significant legal lacunae is necessary. The DoJ aims to introduce the two legislative proposals by an amendment bill as soon as practicable.

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[18] In *State of Trinidad and Tobago v Boyce* [2006] 2 AC 76, at para 15, the Judicial Committee of the Privy Council rejected the proposition that the old common law rule which prevented the prosecution from appealing against an acquittal formed a fundamental right or freedom. Their Lordships had this to say at paras 15-16:

> "[15] … they certainly do not think that [the principle against double jeopardy] is infringed by the prosecution having the right to appeal against an acquittal.
> [16] … There is nothing particularly unfair or unjust about a statutory rule which enables an appellate court to correct an error of law by which an accused person was wrongly discharged or acquitted and order that the question of his guilt or innocence be properly determined according to law. Such a rule exists in many countries. …"

[19] For details of the No Case to Answer Appeal Proposal, please refer to the discussion paper for the meeting of the Legislative Council Panel on the Administration of Justice and Legal Services on 27 February 2023 (ref: LC Paper No. CB(4)130/2023(01)), available at https://www.legco.gov.hk/yr2023/english/panels/ajls/papers/ajls20230227cb4-130-1-e.pdf.

KEY FEATURES OF THE PROPOSAL

18. The DoJ would like to seek the views of the Judiciary, legal profession and other relevant stakeholders on the Proposal comprising the following features.

Mode and scope of appeal

19. The Proposal will introduce new provisions under Part IV of the CPO to provide for a right of the SJ to appeal to the CA against a verdict or order of acquittal of a three-judge Panel constituted under Article 46 of the HK National Security Law to try a case concerning offences endangering national security in the CFI without a jury (including any order quashing or dismissing a charge for any alleged defect in the charge or want of jurisdiction). The Proposal will not affect cases tried in the CFI with a jury, whether they are cases concerning offences endangering national security or otherwise.

20. As mentioned above, the proposed appeal mechanism will be appeal by way of case stated, essentially modelled on the existing appeal by way of case stated procedure under section 84 of the DCO and section 105 of the MO which judges and practitioners are familiar with. The proposed new provisions will be primarily modelled on section 84 of the DCO. We believe this will facilitate the development of the procedures, practice and jurisprudence of the new mechanism of appeal against acquittal by the Panel, and achieve coherence amongst prosecution appeals against acquittals in different levels of courts.

21. The appeal will relate to "matters of law only", in the sense explained in established case authorities (see paragraph 4 above).

Appeal mechanism

22. Under the Proposal, the appeal will be initiated by the SJ making an application in writing to the Panel to state a case. The 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. The proposed appeal period is longer as compared with that for an appeal by way of case stated under section 84 of the DCO (7 days which may be extended by the court). Given the unique nature of cases concerning offences endangering national security which often involve relatively complex and novel points of laws, and complicated factual matrix, it is necessary to allow the prosecution more time to consider whether or not to lodge an appeal. By comparison, the proposed appeal period is shorter than the appeal periods applicable to other types of prosecution appeals under the CPO (e.g. 21 days for application for review of sentence[20] and for appeal against discharge[21]).

23. The case stated should set forth the facts, the grounds on which the verdict or order of acquittal was arrived at or made, and the grounds on which the acquittal is questioned for the opinion of the CA.

24. We are mindful of the fact that a Panel comprises three judges pursuant to Article 46 of the HK National Security Law, but do not think it necessarily follows that the CA determining an appeal against any decision of the Panel must be constituted by more than three Justices of Appeal. Existing section 34(2)(b) of the High Court Ordinance (Cap. 4) ("**HCO**") provides that the CA shall be duly constituted for the purpose of determining any appeal under Part IV of the CPO if it consists of an uneven number of Justices of Appeal not less than 3. It would be for the CA to determine the number of Justices of Appeal[22] determining a particular appeal as it sees fit.

25. It is necessary to preserve the status quo of a defendant/respondent pending determination of the prosecution's appeal. With reference to section 35 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) and section 84(b) of the DCO, we propose to introduce the following provisions:

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[20] Section 81A(2)(c) of the CPO.
[21] Rule 3(2) of the Criminal Procedure (Appeal against Discharge) Rules (Cap. 221F).
[22] By virtue of section 5(2) of the HCO, a judge of the CFI may, on the request of the Chief Justice, act as an additional judge of the CA.

(a) Immediately after the Panel gives a verdict or order of acquittal, the prosecution may give notice of intention to appeal. If so, the Panel may either (i) on the prosecution's application, remand the defendant in custody pending determination of the appeal or (ii) admit the defendant to bail.
(b) If an application to state a case has already been made, the prosecution may also apply to the CA for a warrant to arrest the respondent. Once the respondent is brought before the CA pursuant to such warrant, the CA may remand the respondent in custody or admit the respondent to bail.
(c) To avoid doubt, Article 42 of the HK National Security Law applies to the consideration of remand and bail.[23]

26. Currently, section 83Y of the CPO provides that certain powers of the CA under Part IV of the CPO may be exercised by a single judge, such as to extend the time within which notice of appeal may be given, to admit an appellant to bail or to order a respondent to be detained in custody. In line with the existing practice, we propose that the powers of the CA to extend the period for making the application to state a case, to issue a warrant of arrest, to detain or admit a respondent to bail may be exercised by a single judge.

27. With reference to section 84(c) of the DCO, we propose that the CA may do the following in determination of the appeal:

(a) If the CA is satisfied that there is no sufficient ground for interfering with the verdict or order of acquittal, it must dismiss the appeal;
(b) If the CA is satisfied that there is sufficient ground for interfering with the verdict or order of acquittal, it must reverse the verdict or order, and direct (i) that the trial be resumed or (ii) that the defendant be retried. Even if the CA finds the Panel has erred in

[23] Article 42(2) of the HK National Security Law provides that no bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.

law, it does not mean that CA must interfere with the acquittal. There must be "sufficient ground for interfering"[24];

(c) The CA may also give all such necessary and consequential directions as it thinks fit.

28. For an appeal by way of case stated against acquittal by the DC, section 84(c)(ii) of the DCO also empowers the CA to find the respondent guilty, record a conviction and pass such sentence on the respondent as might have been passed on him by a judge. This specific power will not be adopted under the Proposal as the CA in *Secretary for Justice v Wong Sau Fong*[25] took the view that such a power would be inconsistent with Article 11(4) of the HKBOR which guarantees a convicted person's right of appeal against sentence.

29. Defence and prosecution costs in appeals by way of case stated under section 84 of the DCO are respectively provided in section 9A and section 13A of the Costs in Criminal Cases Ordinance (Cap. 492). We propose to amend the latter Ordinance to provide for defence and prosecution costs for the new appeal mechanism.

Procedural rules

30. With reference to section 84(a) of the DCO, we propose that the provisions of sections 106 to 109 of the MO will apply, *mutatis mutandis*, to the preparation, amendment and setting down of a case stated.

31. Currently, no rules of court have been prescribed for appeals by way of case stated under section 84 of the DCO and section 105 of the MO and the appeal mechanisms have so far operated without any significant difficulties. Therefore, we believe that it is not necessary to make any procedural rules by way of subsidiary legislation to facilitate the operation of the new appeal mechanism. Nonetheless, if, in the future, the Judiciary and legal practitioners consider it necessary to have procedural rules for the new appeal mechanism, the Criminal Procedure Rules Committee can make rules

[24] *Secretary for Justice v Fan Kin Chung* CACC 381/2022 (5 March 2003).
[25] *Secretary for Justice v Wong Sau Fong* [1998] 2 HKLRD 254.

and orders to regulate the practice and procedure by virtue of section 9 of the CPO.

CONSULTATION

32. Before taking the matter forward, the DoJ would like to seek the views of the Judiciary, legal professional bodies and other relevant stakeholders on the Proposal outlined above.

33. Please address your views and comments to the following on or before 8 May 2023 –

Policy Affairs Unit 2
Constitutional and Policy Affairs Division
Department of Justice
5/F, East Wing, Justice Place
18 Lower Albert Road
Central, Hong Kong SAR
(Subject: Consultation on prosecution appeal against acquittal by Panel constituted under NSL46)
Fax: 3918 4799
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which are directly related to the consultation.

Department of Justice
April 2023

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Annex B

Summary of Major Comments Concerning the Technical or Operational Aspects of the Legislative Proposal Received and the Department of Justice's Responses

Issues	Respondents' Comments	Department of Justice's Responses
1. Effect of the new appeal mechanism on prior acquittals and on-going trials	• The Hong Kong Bar Association ("**HKBA**") considered it necessary to provide certainty as to (1) whether the appeal mechanism would take effect retrospectively; (2) how it affects trials that are already on-going; and (3) whether it is considered more appropriate to provide a cut-off date for the operation of the proposed amendments.	• The new appeal mechanism does not have retrospective effect in that it does not apply to any acquittal given *before* the legislative amendments come into operation. • The new appeal mechanism, being purely procedural in nature, will apply to verdicts or orders of acquittal given *after* the legislative amendments come into operation. It does not impair any existing right or obligation of a defendant because a defendant does not have a vested right in any particular course of procedure, nor can a defendant be said to

Issues	Respondents' Comments	Department of Justice's Responses
		have any substantive "right" to an acquittal which is tainted by an error of law committed by the trial court. Thus, there is no question of "retrospective" application in such circumstances. • For the above reasons, and bearing in mind the HKSAR's duty to effectively prevent, suppress and impose punishment for acts and activities endangering national security, we do not consider it appropriate to provide a cut-off date for the operation of the proposed amendments, which is bound to be arbitrary.
2. Period within which an application to state a case	• The HKBA considered that the proposed appeal period of 14 days (subject to such	• We will adhere to the proposal to adopt the 14-day appeal period subject to the

Issues	Respondents' Comments	Department of Justice's Responses
is to be made ("**appeal period**")	further period as the CA may allow) is sensible and justified, but when application for an extension of time is made, the applicant (i.e. the prosecution) should provide justifications and an extension of time may only be granted when the CA is satisfied that there is good reason justifying the extension. • The Law Society of Hong Kong ("**LSHK**") noted that their members' experience tends to show that, for appeals by way of case stated in lower courts, a period of time longer than 14 days is usually required. The LSHK would have no objection if a slightly longer appeal period (of 21 days) is proposed.	CA's power to grant an extension of time. • As in the case of any application for an extension of time for any type of legal proceedings, it is for the party seeking the court's indulgence to justify the extension.

Issues	Respondents' Comments	Department of Justice's Responses
3. Mode of service of documents on defendant/respondent	• With reference to the appeal by way of case stated in CACC 277 & 278/2021, judgment of which is pending, the HKBA observed there may be a need to clearly set out the mode of service of documents on the defendant/respondent under the new appeal mechanism.	• The issue of service of documents under consideration in CACC 277 & 278/2021 arose due to certain defendants' leaving the jurisdiction, apparently in order to evade service or avoid the consequences of the appeal. • We note the prosecution's stance taken in CACC 277 & 278/2021 is that the legislative intent must be that section 115 of the MO is applicable in considering the question of service of documents. We will monitor the development of the appeal concerned and, when the judgment is available, reconsider if any procedural rules in relation to the service of documents need to be introduced to resolve the issue.

Issues	Respondents' Comments	Department of Justice's Responses
		• Under the new appeal mechanism, immediately following acquittal, the prosecution may inform the Panel of its intention to appeal, upon which the Panel will consider the question of detention or bail of the defendant, thus securing the defendant's continued presence within jurisdiction. For this reason, we do not consider there to be any real risk of the prosecution being unable to effect service of documents on a defendant/respondent in the present context.
4. CA's powers in determination of the appeal	• Whilst the HKBA welcomed the proposal not to adopt the provisions in section 84(c)(ii) of the DCO that	• We consider that the powers of the CA to direct the trial be resumed and to give all such necessary and consequential

Issues	Respondents' Comments	Department of Justice's Responses
	empower the CA to directly find a respondent guilty, record a conviction and pass sentence, the HKBA considered there to be a need to expressly make clear whether the other "necessary and consequential directions" that the CA may make would include a power to direct the Panel to enter a conviction.	directions as it thinks fit, properly construed in context, is sufficiently clear to encompass a direction to the Panel to find the respondent guilty and to sentence the respondent accordingly. This will not be affected by the proposed removal of the CA's own power to directly find a respondent guilty.
	• Professor Simon Young of the Faculty of Law, The University of Hong Kong observed that the word "reverse" suggests the only order available to the CA (if it is satisfied that there is sufficient ground for interfering) is to convict, and suggested that the power for the CA to convict and direct the trial be	• If the CA comes to the view that, on the basis of the evidence in the case, the only reasonable outcome is that the Panel should find the respondent guilty[1], the above direction would be inevitable. • In the legal context, "reverse", in relation to a judgment, may mean "to undo, repeal

[1] C.f. *Secretary for Justice v Chan Chi Wan Stephen* [2016] 3 HKLRD 186, paragraph 93.

Issues	Respondents' Comments	Department of Justice's Responses
	resumed in the trial court for sentence should be spelled out more clearly, particularly in clarifying the meaning of the word "reverse".	or make avoid" or "set aside". The reversal of a verdict or order of acquittal does not necessarily point to a conviction. This would depend on what error of law the CA has found and the precise direction it gives. For example, if the CA finds that the Panel misconstrued the elements of the offence, the CA may simply reverse the acquittal, and direct that the trial be resumed before the Panel and that the Panel reconsider whether the offence is proved on the evidence as applied to the law as declared in the CA's opinion.

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