The Charter of Human Rights and Responsibilities

Section 26 – Right not to be tried or punished more than once

Scope of the right

The purpose of this right is to ensure fairness to the accused, and to provide certainty in the criminal justice system.

The right will generally apply where a person is charged with exactly, or substantially and practically, the same offence for which he or she has been previously convicted or acquitted. This principle, also known as ‘double jeopardy’ only applies to criminal offences. Sanctions and penalties imposed by professional disciplinary bodies are not usually considered a breach of the right.

In Victoria there are limitations on this right in the law. ‘Fresh and compelling’ evidence can now result in a second prosecution of an acquitted individual on the same facts for serious offences. The rule also applies where an acquittal is found to have been ‘tainted’ by perjury, corruption or perversion of the course of justice. Safeguards incorporated in these exceptions to the double jeopardy rule include that the retrial must be in the interests of justice; there must be a strong case for retrial and police may not start investigating an acquitted person without the permission of relevant authorities.

Case example

Professional disciplinary proceedings and the question of double punishment – Psychology Board of Australia v Ildiri (Occupational and Business Regulation) [2011] VCAT 1036

In this case, Ms Ildiri had been found guilty of numerous fraud offences under the Crimes Act 1958 (Vic). The Psychology Board of Australia sought to rely on those findings of guilt to support the making of a decision that Ms Ildiri engaged in unprofessional conduct under the Health Professions Registration Act 2005 (Vic). The Tribunal found that a finding of unprofessional conduct could not violate the right not to be tried or punished more than once under section 26 of the Charter as the purpose of the disciplinary proceedings was ‘primarily to protect the public, and not to punish the practitioner’. This case confirms that the right not to be tried or punished more than once was only relevant where the purpose of the penalty was punitive.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 26 could be engaged by activities that:

• allow a person to be punished a second time for the same offence
• amend any criminal procedure rules relating to previous convictions and acquittals
• create an overlap between an offence in regulations and an offence in the authorising legislation
• allow continued incarceration of people for example convicted sex offenders, following completion of sentence.

Section 26 of the Charter of Human Rights and Responsibilities Act 2006 says that:

A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.

The right not to be tried or punished more than once in the Charter is modelled on Article 14(7) of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.