

SECTION 26

RIGHT NOT TO BE TRIED OR PUNISHED MORE THAN ONCE

Section 26

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.

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POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 26?

You will need to consider s. 26 in assessing legislation, a policy or a program where it:

- makes changes to existing offences that might allow a person to be tried a second time for the same underlying criminal activity;
- amends any criminal procedure rules relating to previous convictions and acquittals;
- creates a regulatory regime that provides for the imposition of a punishment for doing something that would also amount to a crime;
- creates an overlap between an offence in regulations and an offence in the parent Act.

These policy triggers are not exhaustive.

DISCUSSION

Section 26 protects an accused against what is commonly referred to as 'double jeopardy'. The prohibition on double jeopardy is a well-supported and fundamental safeguard in the common law considered to be part of the right to a fair trial.

This right means that a person who has been tried in proceedings where the person was at risk of the imposition of a penalty cannot be tried again on a charge that is substantially the same as the original charge.

The purpose of the principle against double jeopardy is to ensure fairness to an accused and to bring finality in the system of justice by preventing repeated attempts to convict.

The following points should be noted regarding the scope of this right:

- It applies in respect of all criminal offences, regardless of their seriousness.
- It does not apply to civil trials that may result in a form of civil liability.
- Penalties and sanctions imposed by professional disciplinary bodies do not usually form a punishment for the purposes of this right.
- It applies after a final judgment of either conviction or acquittal. This means that all applicable proceedings for judicial review and all appeals must be finally exhausted or the time limits for invoking such reviews or appeals must have passed.

- It only applies to the benefit of the same legal person.²⁷⁸
- It is aimed at preventing new trials or punishments for offences with substantially the same elements.
- It does not prevent the reopening of a case (including the conduct of a new trial) when a conviction has been found by an appeal court to have been a miscarriage of justice. New trials may be held, for example, when evidence emerges, after conviction, of serious procedural flaws or in the event of new or newly discovered facts.
- In particular, it has the consequence that a person who has been acquitted of a criminal charge is not to be subjected to a criminal trial for the same offence or substantially the same offence.

The prohibition against double jeopardy appears in a number of other human rights instruments from comparable jurisdictions. Refer to Appendix H for more information.

In many jurisdictions, there have been legislative refinements to this prohibition since the enactment of the relevant human rights instrument: for example, in light of advances in DNA technology.

REASONABLE LIMITS ON THE RIGHT NOT TO BE TRIED OR PUNISHED MORE THAN ONCE

As with all of the human rights protected in the Charter, the right not to be tried or punished more than once may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

KEY POINTS TO REMEMBER

- A person who has been tried in proceedings where he or she was at risk of the imposition of a penalty cannot be tried again on a charge that is substantially the same as the original charge.
- This right only applies in respect of criminal offences and not civil trials that may result in a form of civil liability. Disciplinary penalties and sanctions will most likely not form a punishment for the purposes of this right.
- This right only applies where a person has been finally acquitted or convicted (that is, after all appeals have been exhausted).
- This right only applies to benefit the same legal person.
- This right does not prevent the reopening of cases (including the conduct of a new trial) when a conviction has been found by an appeal court to have been the result of a miscarriage of justice.

MEASURES TO IMPROVE COMPLIANCE

If you are creating a statutory offence that is part of a new regime and there are existing offences that apply to the activity, ensure that the legislation doesn't allow for the punishment for the new offence to be imposed in addition to any punishment for the existing offence, or for a person convicted or acquitted of the existing offence to be tried for the new offence.

RELATED RIGHTS AND FREEDOMS

If your policy or legislation raises an issue under s. 26, check whether it also raises an issue under s. 27 (retrospective criminal laws).

HISTORY OF THE SECTION

This right is modeled on article 14(7) of the ICCPR.

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Case Law

1. *Spencer v. Wellington District Court* [2000] 3 NZLR 102.

²⁷⁸ *Spencer v. Wellington District Court* [2000] 3 NZLR 102.