

## SPICe Briefing

# Double Jeopardy (Scotland) Bill

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The Scottish Government introduced the [Double Jeopardy \(Scotland\) Bill](#) in the Parliament on 7 October 2010.

The current common law rule against double jeopardy generally prevents someone from being tried twice for the same crime. The policy memorandum published along with the Bill notes that:

“This is a feature of most legal systems and acts as an important check upon the power of the state. There appears to be a broad consensus in society that the rule serves a useful purpose.” (para 2)

The Bill would restate the rule against double jeopardy in statute. In doing so, it seeks to clarify and reform certain aspects of the current rule – in particular, providing for a number of exceptions to the rule. The proposals in the Bill are based on work carried out by the Scottish Law Commission, although departing from its recommendations in a number of important respects.

This briefing includes consideration of: (a) the current common law rule against double jeopardy; (b) the work undertaken by the Scottish Law Commission (SLC); and (c) the proposals in the Bill.



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## EXECUTIVE SUMMARY

The [Double Jeopardy \(Scotland\) Bill](#) was introduced in the Parliament on 7 October 2010. The current common law rule against double jeopardy generally prohibits someone from being tried twice for the same crime. The rule may apply where a person has already been acquitted or convicted of an offence. The second situation might arise where, for example, there is a subsequent attempt to prosecute a person on more serious charges relating to the circumstances of the original case.

The Bill seeks to replace the common law rule with one set out in statute. In doing so, it would reform certain aspects of the current rule – in particular, providing for a number of exceptions to the rule (ie circumstances in which a person can be tried more than once for the same crime). The proposals in the Bill are based on work carried out by the Scottish Law Commission (SLC). They do, however, depart from the SLC's recommendations in a number of important respects.

Both the Scottish Government and SLC have highlighted the importance of having a rule against double jeopardy. The SLC recommended, and the Bill provides for, a general rule against double jeopardy comprising two elements:

- a core rule preventing a second prosecution for offences (or aggravated forms of such offences) which a person could have been convicted of in the original case
- a broader principle aimed at preventing the improper splitting of charges by a prosecutor seeking multiple chances of convicting an accused in relation to a single set of acts

The Bill provides for three exceptions to the general rule against double jeopardy, allowing an acquitted person to be tried again where:

- tainted acquittals – the original acquittal is tainted by an offence against the course of justice (eg one involving the intimidation of witnesses or jurors)
- new evidence of admissions – the prosecutor has new evidence that the accused admitted committing the offence
- general new evidence – the prosecutor has other new evidence of guilt

The provisions in the Bill setting out the new evidence exceptions include significant departures from the SLC's proposals. In relation to new evidence of admissions, the SLC recommended that there should be an exception for post-acquittal admissions only. The Bill expands this to include new evidence of pre-acquittal admissions.

The SLC did not reach a firm conclusion on whether there should be a more general new exception, but did make a number of recommendations on what any such exception should involve. The Bill goes further than recommended by the SLC: (a) applying the exception to a wider range of offences; and (b) not restricting the exception to cases originally determined after the coming into force of the exception (ie allowing retrospective application).

# INTRODUCTION

## RULE AGAINST DOUBLE JEOPARDY

Broadly speaking, the current common law rule against double jeopardy prevents someone from being tried twice for the same crime. The rule may apply where a person has been:

- acquitted of an offence – preventing the person from being tried again in relation to the circumstances of the original case<sup>1</sup>
- convicted of an offence – preventing the person from being subsequently tried for further offences in relation to the circumstances of the original case (eg where the prosecutor might otherwise have sought to have the person tried on more serious charges relating to the same circumstances)

## OPTIONS FOR REFORM

In November 2007, the Scottish Government asked the Scottish Law Commission (SLC) to consider a number of criminal justice issues, stating that:

“A series of studies have been commissioned aimed at ensuring an appropriate balance between the rights of the accused and the ability of the Crown to prosecute in the public interest.” (Scottish Government 2007)

One of the issues which the SLC was asked to look at was the rule on double jeopardy, including whether there should be exceptions to it.

After initial work on the topic, the SLC produced a [Discussion Paper on Double Jeopardy](#) (SLC 2009a). It included (in appendix 2) consideration of double jeopardy in a number of other jurisdictions, including England and Wales. This was followed by publication of its [Report on Double Jeopardy](#) (SLC 2009b), including a draft bill, in December 2009.

The SLC’s report included recommendations that:

- there should continue to be a general rule against double jeopardy
- the rule against double jeopardy should be reformed (clarifying the current rule) and restated in statute
- it should be possible to retry an acquitted person where the acquittal is tainted by an offence against the course of justice in relation to the original case (eg involving the intimidation of witnesses or jurors)
- it should be possible to retry an acquitted person who subsequently admits to having committed the offence

In addition to the situation where there is evidence of a post-acquittal admission, the SLC also considered whether there should be a more general new evidence exception allowing a retrial where other new evidence of guilt emerges. It did not reach a firm conclusion as to whether or not there should be such an exception, and thus made no recommendation on that point. Its

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<sup>1</sup> References to acquittals cover verdicts of not guilty and not proven. The acquittal of an accused person does not prevent a subsequent prosecution for perjury in relation to sworn evidence given by the accused at the original trial.

report did, however, include a number of recommendations on how such an exception might best be formulated – to help inform any future debate on the topic. Recommendations in relation to a more general new evidence exception included:

- that it should apply only in relation to murder and rape (with the Scottish Ministers being able to add further offences by way of affirmative order)
- that it should apply only to cases originally determined after the coming into force of the exception (ie the change should not be retrospective in its effect)
- that evidence should be regarded as “new” only if it was not, and could not with the exercise of reasonable diligence have been, available at the original trial

Following consideration of the SLC’s report, a Scottish Government [consultation](#) (2010a) sought further views on a number of issues. In a [letter](#) to the SLC, the Justice Secretary indicated that:

“In relation to double jeopardy, I published a consultation paper on Monday 22 March. This consultation is not upon the Report on Double Jeopardy in its entirety. I fully accept the general thrust of the recommendations on codifying the rule and in relation to post-acquittal confessions and tainted or corrupted trials.

Instead, the consultation paper focuses upon the establishment of a new evidence exception, where the Commission was of course undecided either way. My personal view is that if new evidence emerges which shows the original ruling was fundamentally flawed, it should be possible to have a second trial. I also believe that this reform should be made retrospective. (...)

The public consultation will run until 14 June and it is my intention to legislate on this issue at the earliest practicable opportunity thereafter.” (Scottish Government 2010b)

[Responses to the consultation](#) (Scottish Government 2010c) are available online.

The [Double Jeopardy \(Scotland\) Bill](#) (the Bill) was, together with [explanatory notes](#) and a [policy memorandum](#), introduced in the Parliament on 7 October 2010. In many respects, it adopts the approach proposed by the SLC. There are, however, a number of important differences. In general these differences would extend (beyond that proposed by the SLC) the scope of some exceptions to the general rule against double jeopardy – thus allowing a person to be tried again in a wider range of circumstances. Significant departures from the proposals of the SLC include:

- admissions – the SLC recommended that there should be an exception for post-acquittal admissions, allowing the retrial of an acquitted person who subsequently confesses to having committed the offence. The Bill would expand this exception to new evidence of pre-acquittal admissions. This would mean that a prosecutor seeking to retry a person on the basis of a pre-acquittal admission would not be restricted to the limited range of offences covered by the more general new evidence exception provided for in the Bill
- other new evidence – in addition to actually having a general new evidence exception (the SLC did not reach a firm conclusion on whether there should be such an exception), the Bill would go further than recommended by the SLC: (a) applying the exception to a wider range of offences; and (b) not restricting the exception to cases originally determined after the coming into force of the exception (ie allowing retrospective application)

## TERMINOLOGY

The term “prosecutor” is (unless the context indicates otherwise) used in this briefing to refer to the Crown Office & Procurator Fiscal Service (COPFS) – the body responsible for prosecuting cases in Scotland in the public interest.

Although not generally used in this briefing, the following legal terms may be found in other texts dealing with the topic of double jeopardy:

- “ne bis in idem” (not twice for the same thing) – another term for the rule against double jeopardy
- “res judicata” (a thing decided) – may be used to describe the plea advanced by an accused person claiming that the current prosecution violates the rule against double jeopardy
- “tholed assize” (to have undergone trial) – the rule against tholing an assize twice is another way of describing the rule against double jeopardy

## CURRENT COMMON LAW

The SLC has noted that whilst the rule against double jeopardy has long been a principle of Scots criminal law, the precise scope of the current common law rule is uncertain:<sup>2</sup>

“Although it has long been clear that no-one could be tried twice for the same ‘matter or charge that has been tried’, there have been relatively few reported cases in which issues of double jeopardy have arisen, and it is not possible to say with any certainty exactly where the boundaries of the rule lie. What is ‘the same matter or charge’? The decided cases are not easily reconciled, and provide only the most general indication. Must there have been a sentence imposed before a prior conviction will afford double jeopardy protection to the accused who is again charged with a crime arising out of the same incident? It appears that different rules may apply in solemn and summary proceedings, but again the present law is unclear.” (SLC 2009b, para 2.5)

In light of such uncertainties, the SLC’s report indicated that any attempt to restate the rule in statute would probably involve some alteration of the existing rule, and noted that:

“Respondents to the Discussion Paper agreed that the present law was unsatisfactory and would benefit from restatement and reform.” (2009b, para 2.6)

The rule against double jeopardy can prevent a person being tried for a crime in relation to which that person has already been either acquitted or convicted. However, acquittal or conviction are not the only possible outcomes of a prosecution. A case may also be deserted – either “pro loco et tempore” or “simpliciter”. Cases which have been deserted do not give rise to the application of the rule against double jeopardy. Where a case which has been deserted pro loco et tempore, the prosecutor may seek to bring the same charges at a later point in time.<sup>3</sup> The situation is different where proceedings are deserted simpliciter. Where this happens, the prosecutor is barred from taking further proceedings against the accused in respect of the same

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<sup>2</sup> The detail of the common law rule is considered in part 3 of the SLC’s discussion paper (2009a).

<sup>3</sup> The prosecution may, for example, ask the court to desert proceedings pro loco et tempore where difficulties have arisen which, although resolvable, will prevent the case going to trial in the foreseeable future (eg the serious illness of a vital witness).

crime (although a private prosecution is not prevented where this is otherwise competent). The basis of the accused's protection from further proceedings where a case is deserted simpliciter is personal bar rather than double jeopardy. The SLC's report did not recommend any changes in relation to the treatment of cases which have been deserted and the Bill does not deal with the topic.

## **NEW STATUTORY RULE AGAINST DOUBLE JEOPARDY**

### **JUSTIFICATION**

The SLC concluded that the retention of a general rule against double jeopardy "remains essential to the rule of law" (SLC 2009b, para 2.2). It highlighted three main reasons for this conclusion:

- a recognition of the finality of criminal proceedings
- an expression of the limits of the power of the state vis-à-vis the citizen
- protection for accused persons against the anxiety and humiliation that would be caused by repeated trials

The policy memorandum highlights the same reasons for retaining the general rule, stating that the Bill:

"reforms and upholds this rule and places it onto a statutory footing. In almost all cases it will remain a feature of Scots law that a person cannot be tried again for an offence of which they have been acquitted or convicted." (para 2)

### **CORE RULE**

The SLC's report (2009b, para 2.18) recommended the following core rule against double jeopardy:

- a second prosecution should be prohibited where a person has previously been acquitted or convicted of an offence and one of the following applies:
  - the second prosecution charges offences which it would have been competent to convict the accused of in the earlier case (eg a previous murder conviction or acquittal will bar a subsequent prosecution for that murder, but also for lesser alternatives such as attempted murder, culpable homicide and assault)
  - the second prosecution charges offences which are aggravated forms of the offences charged in the earlier case (eg a previous acquittal or conviction for assault will bar a subsequent prosecution for the same assault even if charged as assault to severe injury)

This core rule is provided for in section 1 of the Bill.

In relation to the current common law rule, the SLC identified a degree of uncertainty as to whether or not it applies to cases where a prosecutor accepts a person's guilty plea, in the same way as it does to cases where a judge or jury reach a guilty verdict. The SLC concluded that it should and, in light of the current uncertainty, included a relevant recommendation in its report (2009b, para 2.63). Section 1(3) of the Bill implements the SLC's recommendation.

The SLC's report did not specifically deal with the acceptance of a person's not guilty plea in the above context. This was on the basis that any current uncertainty in relation to the application of double jeopardy where prosecutors accept guilty pleas is not replicated in relation to not guilty pleas. In relation to its proposed statutory rule against double jeopardy, the SLC's intention was that the acceptance of a not guilty plea should be treated in the same way as an acquittal by a judge or jury.<sup>4</sup>

## **BROADER PRINCIPLE**

The SLC also recommended that the above core rule should be supplemented by a broader principle against the unreasonable splitting of cases by the prosecutor. It used the following scenario to illustrate the need for such a principle:

“a person who, while drunk, steals a car and crashes that car into a bus queue may be charged with drunk driving, theft, and dangerous driving. (...) It would, however, be objectionable without good reason to separate the charges so that each offence was tried in separate proceedings: the Crown should not be permitted, for instance, to hold the theft charge as a backup, to be charged only if it is unsuccessful in securing a conviction on the dangerous driving charge.” (SLC 2009b, para 2.9)

The above quotation acknowledges that there may be circumstances in which it is appropriate to prosecute different charges arising from the same incident in separate trials (eg where a charge of driving whilst disqualified, which of necessity involves the disclosure of previous driving convictions, is prosecuted separately from other alleged driving offences).

The SLC proposed that the broader principle should prevent a person from being tried again in relation to the “same acts” giving rise to an earlier prosecution (in relation to which the accused was either acquitted or convicted) unless there are “special circumstances” justifying a separate prosecution.<sup>5</sup> It observed that:

“it appeared to be the present practice of the Crown to bring all charges relating to a particular incident in the same proceedings wherever possible, and that a rule which generally prevented subsequent prosecutions arising from the same acts of the accused would effectively place this long-standing practice of the Crown upon a statutory footing.” (SLC 2009b, para 2.23)

The SLC went on to note that the application of the principle would give rise to two separate questions:

The first is whether the second charge arises out of the same acts as the first. It should be for the accused to raise the issue of the previous prosecution as a plea in bar of trial; and if the accused does not take the point in advance of the trial, and persuade the court that the instant prosecution does indeed relate to the same acts as an earlier trial, the issue of justification does not arise. Once it has been established to the court's satisfaction that the instant prosecution relates to the same acts as an earlier trial, it should be for the Crown to show that there are special circumstances justifying the prosecution.” (SLC 2009b, para 2.31)

In arguing for a “same acts” test, the SLC report noted that:

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<sup>4</sup> Discussions between the author and SLC officials (September 2010).

<sup>5</sup> The draft bill published as part of the SLC report provided for a plea in bar of trial on the basis that the alleged offence arises out of “the same, or largely the same, acts or omissions” in relation to which the accused has previously been acquitted or convicted.

“this was the approach which the UK was bound to adopt to those who had already been subjected to criminal prosecution elsewhere in the EU, by virtue of the test developed by the European Court of Justice in applying Article 54 of the Schengen Convention. According to that Court, in assessing what constitute the ‘same acts’, ‘the relevant criterion (...) is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected’.” (2009b, para 2.22)

In support of allowing the courts to exercise discretion to allow a subsequent prosecution arising out of the same acts of the accused (ie where there are special circumstances), the SLC stated that:

“It should be borne in mind that the justification for the broader principle against multiple proceedings arising from the same acts is based on a concern to avoid what would, in substance, be abuses of process – the improper splitting of charges so as to afford the prosecution multiple chances of convicting the accused in respect of a single set of acts. Where there is no such impropriety, and where the public interest otherwise favours prosecution, the court should have discretion to allow further proceedings notwithstanding the fact that they concern the same acts as formed the subject matter of an earlier prosecution.” (SLC 2009b, para 2.35)

The SLC’s recommendations in relation to a broader principle are generally provided for in section 7 of the Bill. The explanatory notes indicate that:

“The section does not define ‘special reason’ as such, which will be left to the courts to determine in any particular case. An example of a special reason may include a case in which trials were separated on the application of, or with the consent of, the person against whom the charge is brought. Another possibility would be where charge was brought at a previous trial for the sole purpose of allowing a witness to give evidence in a natural way but where the prosecutor had no intention of seeking a conviction for that offence. Two further examples of special reason are contained within sections 8 and 9.”<sup>6</sup> (para 41)

## **PREVIOUS FOREIGN PROCEEDINGS**

### **Proposals**

The SLC’s report noted that

“Another area in which the present law lacks clarity is in its treatment of foreign trials. Does a trial in a foreign jurisdiction bar a subsequent trial in Scotland for the same offence, or for another offence arising out of the same acts? It seems clear that the verdicts of other UK courts will be treated as barring proceedings in Scotland; the Schengen convention prevents the prosecution in the UK, on the basis of the same acts, of those who have previously been tried in other EU states; but the status of other foreign verdicts is unclear.” (2009b, para 2.64)

The SLC recommended that acquittal or conviction by a court outwith Scotland should generally bar subsequent prosecution for the same acts in a Scottish court, but that the Scottish court

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<sup>6</sup> The provisions in section 9 are considered below in relation to nullity of first proceedings. Section 8 seeks to deal with particular issues which might arise in a prosecution for murder, where that offence was not charged in the original case (see paras 42-50 of the explanatory notes to the Bill).

should be permitted to disregard the earlier proceedings (thus allowing a trial in Scotland) where all of the following apply:

- the previous prosecution was outwith the UK
- allowing the case to proceed to trial would not be inconsistent with the obligations of the UK under the Schengen Convention – the implications of the convention in relation to double jeopardy are considered further below but, for present purposes, can be said to prevent a Scottish court from disregarding the verdict of a criminal court in another state where Article 54 of the Convention applies (EU member states plus Iceland and Norway)
- the Scottish court is satisfied that it is in the interests of justice to do so (eg where the Scottish legal system attaches a much greater degree of seriousness to the conduct in question)
- the Scottish legal system attaches a much greater degree of seriousness to the conduct in question)

The Bill does not include a provision explicitly stating that previous prosecutions outwith Scotland are, in general, to be treated in the same way as previous Scottish prosecutions when considering the application in Scotland of the rule against double jeopardy. However, the wording of the Bill (in particular the provisions of section 10) would appear to imply that this is the intention. The SLC's recommendations in relation to cases where a Scottish court should be able to ignore a non-UK verdict are expressly provided for in sections 7 and 10 of the Bill.

## **Schengen Convention**

Articles 54 to 58 of the [Schengen Convention of 1990](#) provide for a rule against double jeopardy in relation to multiple prosecutions in contracting states. Article 54 states that:

“A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”

Although not currently a party to the Schengen Convention, the United Kingdom has opted to participate in certain aspects of the convention, including the provisions of Articles 54 to 58. For the purposes of these provisions, other contracting states consist of EU member states plus Iceland and Norway. Appendix 1 of the SLC's discussion paper (2009a, paras 16-36) provides more information on these provisions.

## **SUBSEQUENT DEATH OF VICTIM**

The SLC's report (2009b, para 2.38) stated that case law suggests that the current common law rule against double jeopardy is subject to a proviso allowing a person who has been tried for assault to be tried again for murder or culpable homicide if the victim dies from his/her injuries after the first trial. It noted that this limitation on the rule would appear to apply regardless of whether the first trial resulted in a conviction or an acquittal.

Having considered the arguments for any similar limitation to a new statutory rule against double jeopardy, the SLC recommended a somewhat narrower proviso than would appear to exist at present:

“It should continue to be possible to prosecute a person for murder or culpable homicide where that person has previously been tried and convicted, prior to the victim’s death, for an offence involving the assault which is alleged to have led to the victim’s death.

It should, however, no longer be possible to prosecute a person for murder or culpable homicide where that person has previously been acquitted of an offence involving the assault which is alleged to have led to the victim’s death.” (SLC 2009b, para 2.48)

The SLC did, however, also recommend what would amount to an extension of the current proviso – applying it to other offences of causing death: (a) instances of culpable homicide not involving assault; and (b) statutory offences of causing death (eg causing death by dangerous driving).

Section 11 of the Bill seeks to implement some of the SLC’s recommendations on this issue. It would not implement the recommendation that the proviso should only apply where the original prosecution led to a conviction. Thus, the Bill would allow for subsequent prosecution in a wider range of cases than was proposed by the SLC. In advancing its recommendation on this point, the SLC report stated that:

“Opinion was divided (...) as to whether it should continue to be possible to prosecute for murder where the outcome of the assault trial was an acquittal.

A majority of respondents agreed with our preliminary view that a prosecution for murder or culpable homicide should be barred by an acquittal of the assault which was alleged to have caused the victim’s death. Others disagreed, for various reasons.” (2009b, paras 2.42-2.43)

This was one of the issues covered by the Scottish Government’s [consultation](#) (2010a). Again, a majority of those responding on the particular issue agreed with the SLC’s view. The Government’s reasons for departing from the SLC’s recommendation on this point are set out in the policy memorandum (para 44).

## **NULLITY OF FIRST PROCEEDINGS**

The SLC’s report noted that:

“One of the established features of the present Scots law of double jeopardy is that, in order for the rule against double jeopardy to apply, the first proceedings cannot have been fundamentally null (so, for instance, there is no bar to a further trial where the original court was improperly constituted, or the original charge failed to specify the locus of the offence). This is in accordance with principle – double jeopardy cannot arise where the accused was never truly in jeopardy at the first trial – and with the rules of all of the other legal systems which we surveyed.

Application of the letter of the law could, however, result in an accused who has endured the stress of one set of proceedings which he believed to be valid being faced with a second set of proceedings in respect of precisely the same offence. (...)

We consider that the risk of real unfairness to the accused would arise only in the case where the defect in the original proceedings was asserted by the Crown at some point after those proceedings had terminated in an *ex facie* valid verdict. We are aware of no such case having arisen in practice. We expect that it would be in only the most exceptional case that a court would consider disregarding an *ex facie* valid verdict which had not been set aside by a higher court. (...)

On the basic question, while the situation is likely to arise only rarely, we consider that any attempt by the prosecutor to prosecute again where it is contended that the first proceedings were fundamentally null should be subject to the control of the High Court. That Court should have the power to prevent such a prosecution – even if it is satisfied that the first proceedings were a nullity – in circumstances where to proceed against the accused would be contrary to the interests of justice.” (2009b, paras 2.76-2.83)

The SLC went on to recommend that:

“In any case where the Crown would propose to argue in response to a plea which might be raised in relation to double jeopardy that the original proceedings were a nullity, the approval of the High Court should be required before proceedings may be brought.” (2009b, para 2.84)

The above recommendation is provided for in sections 9 and 12 of the Bill. It would appear that section 9 is intended to cover a situation where the prosecutor was not aware of the original proceedings prior to the accused relying on double jeopardy to advance a plea in bar of trial (under section 7 of the Bill).<sup>7</sup> The provisions in section 12 would be relevant where the prosecutor is, from the outset, aware of the original proceedings and seeks a court ruling in advance of bringing a new prosecution.

## EXCEPTIONS TO THE NEW STATUTORY RULE

### OVERVIEW

Although some of the provisions considered above might also be characterised as exceptions to the rule against double jeopardy (eg those dealing with the subsequent death of a victim), sections 2 to 4 of the Bill expressly deal with three issues as exceptions to the rule:

- tainted acquittals
- new evidence – admissions
- new evidence – general exception

Section 13 of the Bill provides that the new statutory rule, including the exceptions to that rule, will (once the relevant provisions are brought into force) have retrospective application. Thus, for example, the new exception in relation to tainted acquittals could be relied on by the prosecution even if the allegedly tainted acquittal preceded the coming into force of the legislation. For the most part, the SLC also recommended that a new statutory rule, including exceptions to that rule, should have retrospective application. However, the SLC recommended that any general new evidence exception should not apply retrospectively. In this respect, the Bill departs from the SLC’s recommendations. The point is considered in more detail below, when looking at the general new evidence exception.

The policy memorandum indicates that:

“The exceptions created by the Bill are intended and expected to affect only a very small number of serious criminal cases. Based on the experience with the similar exceptions to the rule against double jeopardy enacted in England, Wales and

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<sup>7</sup> This is, perhaps, most likely to happen where the original prosecution took place outwith Scotland.

Northern Ireland it is anticipated that the procedure provided by the Bill will be used infrequently, perhaps once every 5 years.” (para 11)

Although the intended focus may be a “very small number of serious cases”, it may be noted that it is only the general new evidence exception that is limited to a specified list of offences by the provisions of the Bill.<sup>8</sup> The other exceptions could (at least in theory) apply in relation to the prosecution of any offence, although the nature of the alleged offence might influence the High Court’s deliberations on whether it is in the interests of justice to set aside an acquittal and grant authority for a fresh prosecution (see below). In practice, it may be the approach taken by the police and prosecutor to cases which have already been prosecuted which will determine the impact of the proposals. For example, the explanatory notes (in considering the costs involved in the proposals) state that:

“An even more difficult question is whether the new exceptions to double jeopardy will cause changes to normal police practice. This is in relation to the storing and preservation of evidence from an investigation. The police currently retain case records for serious crimes until a suspect is identified. After a suspect has been taken to trial, the need to retain records for individual crimes is assessed on a case by case basis. If a trial has ended in an acquittal and the police consider that no other suspect can be or is likely to be identified, there may at present be little reason to retain the evidence gathered in the investigation and it may be destroyed (although material will be retained where this is thought appropriate). However, once this Bill becomes law, it will become possible to retry the acquitted person in certain circumstances, including where new evidence emerges or an admission of guilt is made. This may mean that there may be more reason to retain evidence in a number of cases.

The decision whether to retain productions following an acquittal would be a matter for discussion between the police and the Crown Office. The number of such cases is hard to estimate.” (paras 84-85)

Section 4(5) of the Bill provides that the general new evidence exception can only be used once in relation to any particular case (ie it could not be used to justify a person being prosecuted three or more times for the same offence). The Bill does not seek to impose this restriction in relation to use of the other proposed exceptions (ie tainted acquittals and new evidence of admissions).

The wording of the sections setting out the three exceptions appears to indicate that they are only relevant where the original prosecution was in Scotland. It would, however, be possible for the police or prosecution in Scotland, if they are made aware of evidence casting doubt on a foreign acquittal, to pass such evidence to equivalent bodies in the other country. It would then be for those bodies to decide whether a further prosecution is justified (taking into account whatever rules that country has in relation to double jeopardy).

The provisions dealing with the above mentioned three exceptions include various common elements:

- outcome of the original case – the exceptions would only apply where the accused was originally acquitted of an offence
- application to the High Court – before bringing a new prosecution, the prosecutor would have to apply to the High Court to set aside the acquittal and grant authority for a fresh prosecution

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<sup>8</sup> The relevant offences are considered below.

- interests of justice test – in addition to various specific tests applying to particular exceptions, the High Court would, when dealing with an application to set aside an acquittal and grant authority for a fresh prosecution, have to be satisfied that granting the application is in the interests of justice

These common elements are considered further below (before going on to consider the specific exceptions in detail).

## **Outcome of the original case**

The three exceptions set out in sections 2 to 4 of the Bill would only apply where there had been an acquittal in the original case (including cases where an accused was acquitted of some charges but convicted of others). They would not, therefore, allow the prosecutor to seek authority for a fresh prosecution where the accused was convicted of the original offence(s) but without aggravating factors which the prosecutor had hoped to prove.

It would appear that the exceptions relating to tainted acquittals and admissions could apply where the original acquittal was the result of: (a) the decision of a judge or jury following trial; or (b) the acceptance of a not guilty plea by the prosecutor without the case getting as far as a trial. However, one implication of the test set out in section 4 of the Bill is that the general new evidence exception is unlikely to apply unless the original acquittal involved a trial at which evidence was led.<sup>9</sup>

The approach taken by the Bill in this area is generally in line with that proposed by the SLC.

## **Application to the High Court**

Before bringing a new prosecution on the basis of one of the three exceptions set out in sections 2 to 4 of the Bill, the prosecutor would have to apply to the High Court to set aside the original acquittal and grant authority for a fresh prosecution. Section 5 of the Bill provides that at least three judges must deal with the application.

The approach taken by the Bill in this area is generally in line with that proposed by the SLC.

## **Interests of justice test**

The High Court, when dealing with an application to set aside an acquittal and grant authority for a fresh prosecution, would have to determine whether various tests are satisfied. Most of these tests are specific to the particular exception.<sup>10</sup> However, in all cases the court would have to be satisfied that granting the application is in the “interests of justice”.

The approach taken by the Bill in this area is generally in line with that proposed by the SLC. Whilst considering the possible formulation of a general new evidence exception, the SLC’s report commented as follows:

“There are a number of factors which might render a retrial contrary to the interests of justice. The question of whether it will be possible to have a fair trial given the existence of prejudicial publicity will be one, although the court might well feel it more

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<sup>9</sup> Section 4(6)(c) of the Bill would require the High Court, when dealing with an application to set aside an acquittal and grant authority for a fresh prosecution, to consider whether the new evidence in conjunction with that led at the original trial would have led to a jury convicting.

<sup>10</sup> The particular tests are considered below – when dealing with particular exceptions.

appropriate to consider this in the context of a plea of oppression raised at the outset of any subsequent proceedings. Other factors can readily be imagined, relating to the passage of time and the unavailability of defence witnesses. We do not think it necessary, or particularly helpful, to seek to constrain the court's freedom to deny the Crown the opportunity of a second prosecution where it would, in the court's view, be contrary to the interests of justice, provided only that the courts should not exercise this discretion so as to reintroduce the strict prohibition on double jeopardy by the back door." (2009b, para 5.64)

## **TAINTED ACQUITTALS**

The SLC recommended that it should be possible to retry an acquitted person where that acquittal was tainted by certain offences against the course of justice. It highlighted two justifications for this recommendation:

- that such an offence may have undermined the validity of the initial prosecution to the extent that the accused was not truly in jeopardy in the original case<sup>11</sup>
- that an accused who commits such an offence should not be allowed to benefit from that conduct

The SLC went on to recommend that the possibility of retrial should not be limited to cases where the accused was shown to have been involved in the tainting of the original case (ie it should be sufficient to show that someone committed a relevant offence against the course of justice). The SLC noted that those responding to its discussion paper had been:

"almost evenly divided on the question of whether a retrial should be possible where it could be shown that the accused had nothing to do with the tainting of his first trial." (2009b, para 3.5)

The second of the justifications outlined above for allowing a retrial is clearly less relevant where it can be shown that the accused had nothing to do with the tainting of the initial acquittal. However, the SLC stated that:

"the true – and sufficient – justification for the second trial is the defective nature of the original proceedings, not the desire to punish the accused for his involvement in the tainting offence." (2009b, para 3.6)

The above recommendations of the SLC are provided for in section 2 of the Bill.

In applying to the High Court to set aside an acquittal and grant authority for a fresh prosecution, the prosecutor would have to prove, on the balance of probabilities, that a relevant offence against the course of justice was committed in relation to the original prosecution. This requirement could be met by the prosecutor producing relevant documentation to show that someone had already been convicted of such an offence, or by leading evidence in support of its belief that someone has committed such an offence.<sup>12</sup>

In relation to what should, or should not, count as a relevant offence against the course of justice, the SLC recommended that:

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<sup>11</sup> On this basis, the SLC argued that an "exception" for tainted acquittals is not really an exception to the rule against double jeopardy at all, but rather a vindication of that rule.

<sup>12</sup> The SLC's report (2009b, paras 3.21-3.32) considered and rejected the case for imposing a more stringent test – with reference to the test used in relation to the equivalent exception to double jeopardy in England and Wales (see sections 54 to 57 of the Criminal Procedure and Investigations Act 1996).

- perjury by any witness (including the accused) should not be treated as such an offence<sup>13</sup> – this recommendation was advanced on the basis that the “assessment of whether a witness is inaccurate, evasive, or actually guilty of perjury, is part of the normal trial process” (SLC 2009b, para 3.10) and thus different from the offences against the course of justice identified below<sup>14</sup>
- inducing a defence witness to give false evidence (subornation of perjury), or the bribery or intimidation of a prosecution witness, juror or judge should be treated as such an offence

Section 2 of the Bill implements the above recommendation.

Before the High Court sets aside an acquittal and grants authority for a new prosecution, it would have to conclude that the commission of the relevant offence against the course of justice did result in a tainted acquittal. The SLC recommended different tests for this, depending upon the type of offence against the course of justice:

- interference with a witness – the acquittal should be treated as tainted if the court is satisfied (on the balance of probabilities) that the interference led to the withholding of evidence, or the giving of false evidence, which was capable of being regarded as credible and reliable by a reasonable jury and which would have been likely to have had a material effect on the outcome of the original proceedings
- interference with a juror or judge – the acquittal should be treated as tainted unless the court is able to conclude that the interference had no effect on the outcome of the original proceedings<sup>15</sup>

Again, section 2 of the Bill implements the above recommendation.

## **NEW EVIDENCE – ADMISSIONS**

The SLC considered the possibility of having a “new evidence exception” to the general rule against double jeopardy in relation to:

- cases where there is evidence of a post-acquittal admission
- cases where other new evidence pointing to the guilt of the former accused emerges

In relation to post-acquittal admissions, the SLC stated that:

“Before considering whether there should be some general exception to the rule against double jeopardy, it would be sensible to look first at whether, in the particular case of an admission by the acquitted person, a more limited exception might be desirable. As we noted in the Discussion Paper, such a confession seems to be qualitatively different from other forms of possible new evidence. If it is credible, it indicates that one of the parties to the original trial is admitting that it was conducted by him or on his behalf on a wrong basis. There is something profoundly disquieting

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<sup>13</sup> Perjury consists of wilfully giving false evidence on oath or affirmation in judicial proceedings.

<sup>14</sup> Witnesses (including the accused) may be prosecuted for perjury in relation to sworn evidence given at the original trial.

<sup>15</sup> The SLC’s report (2009b, paras 3.44-3.48) sets out the case for having what amounts to a lower test for treating an acquittal as tainted where there has been interference with a juror or judge.

about the notion that a person should effectively be able to boast – with impunity – that he has ‘got away with it’.”<sup>16</sup> (SLC 2009b, para 4.2)

The SLC went on to recommend that it should be possible to retry an acquitted person who subsequently admits to having committed the offence.

The exception set out in section 3 of the Bill does cover the above scenario, but provides for a significantly wider exception than that proposed by the SLC. In addition to post-acquittal admissions, the exception in the Bill covers evidence of any pre-acquittal admission which was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of the original acquittal.

It might be argued that the extension of the exception to cover new evidence of a pre-acquittal admission is not particularly significant given that, without that extension, such new evidence would be covered by the general new evidence exception provided for in section 4 of the Bill (discussed below). However, that more general exception is subject to various restrictions on when it can be used which do not apply to the exception set out in section 3 of the Bill. It may also be noted that the reasons given by the SLC for supporting an admissions exception with retrospective application focus on features which are particular to post-acquittal admissions:

- the desirability of preventing former accused persons from boasting, with impunity, that they “got away with it”
- the argument that an acquitted person who subsequently admits committing the offence effectively waives the right not to have the case reconsidered<sup>17</sup>

Thus, other arguments would need to be advanced for treating new evidence of a pre-acquittal admission differently from other new evidence (eg new forensic evidence or new evidence from an eye witness).

Section 3 of the Bill provides that, in applying to the High Court to set aside the acquittal and grant authority for a fresh prosecution, the prosecutor would have to prove, on the balance of probabilities, that the former accused credibly admitted having committed the offence. The court would also have to be satisfied that other evidence provided sufficient corroboration of the admission. These tests are generally in line with those proposed by the SLC.

The fact that the Bill refers to a person who “admits to committing” the offence would appear to imply that the exception would not apply to all incriminating statements which might be made by an acquitted person. For example, an admission of being present at the locus of an offence may strengthen the prosecution case, but might not amount to an admission of having committed the offence. It would be for the court to determine, in relation to the particular circumstances of the case, whether or not any statement is an admission of committing the offence.

## **NEW EVIDENCE – GENERAL EXCEPTION**

### **Arguments for and against having a general new evidence exception**

As noted earlier in this briefing, the SLC did not reach a firm conclusion on whether there should be a more general new evidence exception:

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<sup>16</sup> The former accused might sometimes be prosecuted for perjury in such a situation, but this would not always be possible (eg where he/she did not give evidence at the original trial).

<sup>17</sup> See paragraph 4.10 of the SLC’s report (2009b).

“There are strong arguments on both sides, and a division of opinion within the Commission. We therefore make no recommendation as to whether or not there should be an exception to the rule against double jeopardy on the basis of new evidence.” (SLC 2009b, para 4.43)

The SLC noted that responses to its discussion paper did not disclose any examples of cases where the current absence of such an exception had prevented the bringing to justice of a guilty person. However, it emphasised the importance in principle of this issue:

“This is certainly the most critical, and the most difficult, issue thrown up by this reference. If introduced, such an exception would effectively remove the recognition by the law that a person who has ‘tholed his assize’ cannot be prosecuted again for the same offence. However narrowly drawn it may be, any exception to the general rule against a retrial can be seen as ending the security of all those acquitted of crimes to which the exception relates.” (SLC 2009b, para 4.12)

The SLC sought to distinguish between the impact of a specific exception for post-acquittal admissions and a more general new evidence exception:

“The justification for any exception to the rule against double jeopardy must involve, among other factors, a weighing of the positive value of the exception in allowing the conviction of the guilty against the general loss of finality. Under an exception for post-acquittal confessions, the acquitted person who subsequently admits, or confesses, or boasts, that he committed the crime of which he was acquitted thereby forfeits the equitable protection which he would otherwise enjoy against further prosecution. The acquitted person who does not later confess retains the protection of the rule against double jeopardy. The exception to the finality of criminal judgments is strictly limited. When viewed from this perspective, there does not appear to be any logical inconsistency between allowing an exception based upon a post-acquittal confession and refusing to allow such an exception on the basis of other new evidence.” (SLC 2009b, para 4.22)

Arguments in favour of a general new evidence exception are outlined at paragraphs 4.18 to 4.36 of the SLC’s report (2009b). The SLC considered various arguments relating to consistency, balance, scientific and technical advance, public perception, and moral principle. It appeared to place most weight on arguments concerning public perception and moral principle:

“Although we are unaware of any present case in which the double jeopardy rule is preventing a conspicuously guilty person from being brought to justice, it is not difficult to imagine such a high profile case arising in the future. One obvious scenario would be a murder prosecution in which the body of the victim was not discovered, despite thorough inquiries, until after the trial and acquittal of the alleged murderer. If the body, when discovered, yielded clear evidence of the guilt of the acquitted person, one might readily imagine a public outcry if the rule against double jeopardy prevented that person from being tried again.

Of course, if one were of the view that it would always be unjustified, whether morally or politically, to allow for an exception to the rule against double jeopardy on the basis of new evidence, then this would be an end of the question, regardless of the possibility of outraged public opinion. But there is an undeniable value in bringing those guilty of serious crimes to justice, and it may not be unreasonable to regard this as being capable of outweighing the general interest in the finality of acquittals in some limited circumstances. (...)

In the absence of any evidence of outstanding cases in which the introduction of new evidence would allow the prosecution of arguably guilty people who had escaped

justice because of the rule against double jeopardy, the general question, as to whether it would be sensible to have an exception to the rule against double jeopardy, must be approached on the basis of the competing public interest issues.” (SLC 2009b, paras 4.34-4.36).

The SLC highlighted a number of concerns about a general new evidence exception (raised by those responding to its discussion paper), including a response from one legal academic stating that:

“This is, I think, a difficult matter. On the one hand, the public interest would seem to be served by the hearing in court of new and compelling evidence; on the other, no acquitted person would ever feel secure if he might be retried at any future time on the basis of such evidence. On balance, I am inclined to favour a time limit (...) beyond which no exception based on new evidence would apply (...) or an outright rejection of the exception.” (SLC 2009b, para 4.40).

In concluding its consideration of the above arguments, the SLC stated that:

“We have considered these issues carefully, both from first principles and in the light of the responses to our Discussion Paper. There are strong arguments on both sides, and a division of opinion within the Commission. We therefore make no recommendation as to whether or not there should be an exception to the rule against double jeopardy on the basis of new evidence.” (SLC 2009b, para 4.43)

However, on the basis that there was a “considerable body of opinion which considers that there should be a carefully drawn and narrowly defined exception” (SLC 2009b, para 4.44), the SLC went on to consider how any more general new evidence exception might best be formulated.

As indicated above, the Scottish Government decided that the Bill (see section 4) should include a general new evidence exception. The policy memorandum says that:

“Factors in favour of an exception include the prospect of existing and future scientific advances that provide new, compelling evidence sufficient to justify an exception and the clear value to society and to public confidence in the criminal justice system in bringing those guilty of serious crimes to justice.

This position was supported by the majority of consultation responses and also by the Crown Office and Procurator Fiscal Service. It was also generally supported by MSPs in the Parliamentary debate on the consultation exercise on 24 March 2010.” (paras 31-32)

Key features of the proposed general new evidence exception are considered below.

### **Offences to which the exception would apply**

The SLC was of the view that any general new evidence exception should, so as to limit the impact which it would have in diluting a more general recognition of the finality of criminal proceedings, apply only to the most serious offences. Thus, it proposed that such an exception should only apply where the original acquittal related to such an offence. The SLC acknowledged that there is “no direct, objective, and uncontroversial test of seriousness” (SLC 2009b, para 5.6) but proposed that the exception should be limited to murder and rape, with the Scottish Ministers having the power to add further offences by way of affirmative order.

The Scottish Government accepted that this particular exception should apply only to a limited number of very serious offences. However, the Bill provides for a more extensive list than that

proposed by the SLC (see section 4(3) and schedule 1 of the Bill). The policy memorandum notes that:

“The Bill goes beyond the SLC’s recommendation of murder and rape to include culpable homicide, genocide, crimes against humanity, war crimes, and a broader range of sexual offences. The Government is confident that these offences should be covered, but also considers that this is an issue where there is substantial scope for further debate during Parliamentary consideration of the Bill.

The Bill also gives Scottish Ministers the power to add or remove offences from the list by statutory instrument. This will allow the list to be amended if new offences are created in the future or it is thought that an offence should no longer appear on the list.” (paras 33-34)

Although the Government’s stated position is that this exception should only apply to the most serious cases, and this may indeed be how the provisions would be applied in practice, some of the offences listed in schedule 1 are quite broad (eg the offence of sexual assault set out in section 3 of the Sexual Offences (Scotland) Act 2009), potentially extending to somewhat less serious behaviour.

Other offences which might be considered for addition to the list in the Bill include serious drugs offences. It has also been suggested that relevant offences could be identified by reference to the court in which the original prosecution took place (eg only where that prosecution was in the High Court).<sup>18</sup>

## Test to be applied by the High Court

In addition to the general interests of justice test (outlined above), the SLC recommended that the High Court should have the power to set aside an acquittal (and grant authority for a fresh prosecution) only if satisfied that both of the following apply:

- the case against the accused is strengthened substantially by the new evidence identified in the prosecutor’s application
- it is highly likely that a reasonable jury would have convicted on the basis of the new evidence plus any evidence led at the original trial

Section 4(6) of the Bill adopts this approach.

The SLC also recommended that “evidence should be regarded as ‘new’ only if it was not, and could not with the exercise of reasonable diligence have been, available at the original trial” (SLC 2009b, para 5.15).<sup>19</sup> Again, this approach is adopted in section 4(6) of the Bill.

## Retrospective application

The SLC recommended that any general new evidence exception should apply only to cases determined after the coming into force of the exception. In other words, it recommended that the exception should not apply retrospectively. In looking at this issue, the SLC considered

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<sup>18</sup> The SLC (2009b, paras 5.2-5.6) considered such an approach to the issue, but preferred the option of limiting the exception to a list of very serious offences.

<sup>19</sup> The SLC (2009b, paras 5.8-5.13) considered, but ultimately rejected, a wider definition of new evidence used in relation to the equivalent exception to double jeopardy in England and Wales (see section 78 of the Criminal Justice Act 2003).

whether or not retrospective application would be: (a) compatible with the European Convention on Human Rights (ECHR); and (b) justifiable on general public policy grounds.

In relation to ECHR, the SLC considered compliance with Article 8, which provides that:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The SLC said:

“In our view, that right of an acquitted person not to be tried again is an actual right which is recognized and enforced by the courts. (...) It is for consideration whether interference with that right might constitute a breach of an individual’s rights under Article 8 of the Convention [ECHR]. We are not aware of any case in which such a claim has been brought, but we are conscious that ‘private life’ is a term which is interpreted widely and which covers the physical and psychological or moral integrity of a person.

(...) if the position of persons already acquitted is altered then they are being deprived of a right which they currently enjoy. And any interference with rights which are protected by the Convention must be proportionate to the public interest to be served. Before removing the right not to be tried again, we might expect the state to be able to demonstrate some counterbalancing public interest in securing the conviction of probable criminals who, under the present law, are able to avoid justice because of the operation of the rule against double jeopardy. As we have noted more than once in this Report, there is no evidence of even one person in relation to whom such a public interest could be demonstrated.

Nevertheless, we have – for obvious reasons – seen no case in which the point has been taken, and we do not consider, absent any authority on the matter, that we could definitively say that the retrospective application of a new evidence exception would engage Article 8 of the Convention.” (SLC 2009b, paras 5.75-5.77)

In relation to the more general question of whether or not retrospective application would be justifiable on general public policy grounds, the SLC stated that:

“Leaving aside any question of the European Convention, there is a question as to whether this alteration to the position of acquitted persons (to their detriment) is justifiable on general public policy grounds. We have seen no evidence of any reason to make such a provision retrospective. (...)

None of the respondents to the Discussion Paper was able to point to any existing case in which a new evidence exception could be applied. COPFS (who were strongly in favour of retrospectivity) suggested that one reason for this was that in the absence of such an exception there was no incentive to look for such cases. This may well be so. Nevertheless, the absence of any evidence of existing cases in which the retrospective application of an exception would enable the correction of allegedly erroneous acquittals strikes us as telling.

We have also had regard to what COPFS has told us about the treatment of productions following an acquittal. At present, while the case papers are retained, productions are routinely disposed of after the end of a trial which results in acquittal.

If a new evidence exception were introduced for future cases, we might expect this practice to change; but this practice, perfectly appropriate in view of the current law, must in our view severely restrict the practical benefit to be gained from making any new evidence exception retrospective in application.

In summary, we consider that while it would probably be competent for the Scottish Parliament to legislate to give a new evidence exception retrospective effect, this should only be done if the Parliament is satisfied that the practical benefits of retrospective application in terms of the correction of erroneous acquittals in serious cases are sufficient to outweigh the general detriment to all those previously acquitted in rendering their hitherto final verdicts open to challenge. On the basis of the evidence provided in response to our Discussion Paper, we do not consider that this test is met.” (SLC 2009b, paras 5.79 and 5.85-5.87)

The paragraphs quoted above indicate that, in reaching its position on retrospective application, the SLC: (a) considered that a lack of evidence pointing to existing erroneous acquittals which might be remedied by a retrospective general new evidence exception counted against such retrospective application in terms of both ECHR compliance and general public policy grounds; and (b) placed most weight on arguments based on general public policy grounds.

In recommending that any general new evidence exception should not have retrospective effect, the SLC proposed a different approach than that which it suggested in relation to tainted acquittals and post-acquittal admissions. This distinction reflected its belief that a retrospective general new evidence exception (even one limited to serious offences) would represent a more fundamental departure from the rule against double jeopardy. In relation to the other two exceptions, the SLC highlighted a number of points which might counter objections to their having retrospective effect:

- tainted acquittals – it may be argued that a person acquitted following a tainted trial has not faced a true determination of guilt or innocence and cannot, therefore, object to the matter being considered again
- post-acquittal admissions – it may be argued that an acquitted person who subsequently admits to the offence effectively waives the right not to be prosecuted again<sup>20</sup>

The Bill provides that the proposed general new evidence exception would apply retrospectively (ie it could be used to justify a second prosecution of someone acquitted before the relevant provisions are brought into force). The Scottish Government’s reasons for taking this approach are set out in the policy memorandum:

“The Government’s view, as set out in the consultation paper, is that the argument in favour of retrospectivity is similar to the argument for having a new evidence exception at all. Public confidence in the justice system is weakened where compelling new evidence emerges and it is not possible to hold a new trial. This argument applies regardless of whether the initial trial was held before or after the coming into force of the new evidence reform. Although it is true that none of the responses to the SLC’s Discussion Paper identified any existing cases that might be caught by this provision being made retrospective, the Government considers that potential cases are more likely to emerge once an exception is available. Cases affected by a double jeopardy exception will always be very rare, but they are particularly important in terms of seriousness and in maintaining public confidence in the justice system. Even if ultimately no existing acquittals are retried as a result of

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<sup>20</sup> This argument only applies in relation to post-acquittal confessions. It is not a justification for retrospective application in relation to a wider confessions exception as provided for in the Bill.

this Bill, there seems to be a strong argument of principle to provide the option of a retrial for an historical case should compelling new evidence arise.” (para 40)

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