Stage 3 proceedings on the Double Jeopardy (Scotland) Bill are scheduled to take place on 22 March 2011.

This briefing highlights key issues raised during parliamentary scrutiny of the Bill, since its introduction on 7 October 2010 to the completion of stage 2 scrutiny by the Justice Committee on 1 March 2011.
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EXECUTIVE SUMMARY

The current common law rule against double jeopardy generally prevents someone from being tried twice for the same crime. The Double Jeopardy (Scotland) Bill seeks to restate that rule in statute. In doing so, it also seeks to clarify and reform certain aspects of the current rule – in particular, providing for a number of exceptions to the rule.

The Bill is based on work carried out by the Scottish Law Commission (SLC). However, its provisions (both as introduced and as amended at stage 2) depart from the SLC’s recommendations in a number of important respects.

The Parliament’s Justice Committee was designated as lead committee for parliamentary consideration of the Bill. Stage 1 was completed with a plenary debate on 3 February 2011. Stage 2 proceedings took place on 1 March 2011. Stage 3 is scheduled for 22 March 2011.

The Justice Committee found strong support amongst witnesses for retaining a general rule against double jeopardy, and for enshrining that rule (with some clarification) in statute. The provisions of the Bill seeking to achieve this aim were supported by MSPs speaking during the stage 1 debate and were subject to relatively minor amendment only at stage 2.

Key areas of debate, during the scrutiny of the Bill at stages 1 and 2, included the following elements of the Bill as introduced:

- provisions allowing someone to be prosecuted for homicide (eg murder) where that person was originally prosecuted and acquitted of assault, but since the acquittal the victim has died from injuries apparently inflicted during the alleged assault – the general approach in the Bill as introduced is still reflected in the Bill as amended at stage 2
- provisions establishing a general new evidence exception allowing for the possibility of a retrial in at least some cases where evidence of guilt emerges after an alleged offender has been acquitted – the general approach in the Bill as introduced is still reflected in the Bill as amended at stage 2
- provisions restricting the possible application of the general new evidence exception to a list of particular offences – the Bill was amended at stage 2 to replace the list with provisions restricting the exception to High Court cases
- provisions allowing for the retrospective application of the general new evidence exception – the approach in the Bill as introduced is still reflected in the Bill as amended at stage 2
- provisions establishing a specific new evidence exception for admissions which is not restricted in its application to cases involving serious offences (thus applying more widely than the general new evidence exception) – although the provisions establishing this exception were amended (to bring them more into line with the general new evidence exception) the original approach on this point (ie not being restricted to serious offences) is still reflected in the Bill as amended at stage 2
INTRODUCTION

The Scottish Government introduced the Double Jeopardy (Scotland) Bill in the Parliament on 7 October 2010. Its provisions were based on work carried out by the Scottish Law Commission (SLC), although departing from the SLC’s recommendations in a number of important respects.

The current common law rule against double jeopardy generally prevents someone from being tried twice for the same crime. The Bill would restate the rule 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 Parliament’s Justice Committee was designated as lead committee for parliamentary consideration of the Bill. Its stage 1 report was published on 26 January 2011. The Bill completed stage 1 (consideration of general principles) with the stage 1 debate on 3 February 2011. The general principles of the Bill were agreed by a large majority of MSPs.¹

Stage 2 (detailed consideration) was carried out by the Justice Committee on 1 March 2011 and was followed by publication of the Bill as amended at stage 2. A total of 41 stage 2 amendments were lodged: (a) 31 Scottish Government amendments relating to various aspects of the Bill; and (b) 10 amendments lodged by Robert Brown MSP relating to the provisions of the Bill establishing an exception to the rule against double jeopardy where there is evidence of an admission of guilt. All of the Government amendments were agreed (without division). Robert Brown’s amendments were not successful (either being rejected, pre-empted or not moved).

Stage 3 (final consideration) is scheduled for 22 March 2011.

Information on the Bill as introduced, and on relevant work carried out by the SLC, is set out in a separate SPICe briefing (McCallum 2010). Key dates in the Parliament’s consideration of the Bill are set out in the following table.

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NEW STATUTORY RULE AGAINST DOUBLE JEOPARDY

General rule against double jeopardy

The Justice Committee’s stage 1 report (2011a) notes that the committee found strong support amongst witnesses for retaining a general rule against double jeopardy, and for enshrining that rule (with some clarification) in statute. The stage 1 report stated that:

“The Committee recognises the fundamental importance of the double jeopardy rule, in providing certainty about the finality of criminal proceedings and in protecting

¹ The outcome of the stage 1 vote on the general principles of the Bill was: for 114, against 2, abstentions 0 (with the two Scottish Green Party MSPs voting against).
accused persons against repeated prosecution. In the interests of clarifying and entrenching the rule, the Committee fully supports putting it on a statutory footing.” (para 28)

This element of what the Bill as introduced sought to achieve also received general support amongst MSPs speaking during the stage 1 debate. The relevant provisions of the Bill were subject to relatively minor amendment only at stage 2.

**Subsequent death of victim**

One aspect of the proposed statutory rule against double jeopardy, in relation to which the Bill as introduced departed from the recommendations of the Scottish Law Commission (SLC), related to provisions dealing with a prosecution for homicide (eg murder) where a victim dies at some point after the alleged offender has been prosecuted for assaulting the victim.

The SLC’s report on double jeopardy (2009, 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 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 original trial resulted in conviction or acquittal. Having considered the arguments for any similar statutory provision, the SLC recommended that it should continue to be possible to prosecute a person for 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 death. However, it also recommended that it should no longer be possible to prosecute a person for such an offence where the original prosecution resulted in an acquittal.

Section 11 of the Bill as introduced sought to implement some of the SLC’s recommendations on this issue, but not the recommendation that the proviso should only apply where the original prosecution led to a conviction. Thus, the Bill as introduced allowed for the possibility of a subsequent prosecution in a wider range of cases than was proposed by the SLC.

The Justice Committee stated, in its stage 1 report (2011a), that:

“The Committee recognises the views of those on both sides of this debate. Indeed, the Committee has some sympathy with the view that someone who has been acquitted of an assault should not face the threat of further prosecution because the victim has since died, if there is not also evidence, not used in the original proceedings, indicating that the acquitted person did in fact attack the victim.

However, the Committee accepts that murder is considered as a distinct offence under Scots law and that the Bill’s approach maintains the status quo of allowing for a new trial for murder following either an earlier conviction or acquittal for assault. This reflects the exceptional gravity of the crime of murder, and the practical reality that a murder inquiry is almost certain to be more extensive than that following an apparently non-fatal assault, and therefore liable to yield additional evidence or prompt additional witnesses to come forward. There must at least be some circumstances in which, without the possibility of a re-trial following the victim’s death, someone could, through acquittal on the charge of assault, quite literally ‘get away with murder’. The Committee is therefore inclined to support the provisions in section 11 but would invite the Scottish Government to consider whether it would be appropriate to add a requirement that some new evidence is available (in addition to the requirement, set out in schedule 2, that authority for a re-trial following an earlier acquittal can only be granted if the court considers that to be in the interests of justice).” (paras 112-113)
The Justice Secretary highlighted, during the stage 1 debate, the interests of justice test as an important protection for alleged offenders in such circumstances, but indicated that he would consider further the committee’s suggestion for an additional requirement of new evidence.

During stage 2 consideration, the Justice Secretary noted that the Scottish Government had concluded that the suggested additional test for cases where the alleged offender was originally acquitted was not needed. He did, however, lodge amendments which sought to give more prominence to the interests of justice test (with the relevant test being set out section 11 rather than as a consequential amendment in schedule 2). The amendments were agreed and are, therefore, reflected in the Bill as amended at stage 2.

EXCEPTIONS TO THE NEW STATUTORY RULE

The Justice Committee’s stage 1 report (2011a, para 154) concluded that the exceptions to the rule against double jeopardy (set out in the Bill as introduced) were “on balance, appropriate”.

The principle of providing for some relatively narrow exceptions to the rule against double jeopardy was also generally supported by MSPs speaking during the stage 1 debate. For example, Richard Baker MSP noted that:

“Scottish Labour welcomes the Double Jeopardy (Scotland) Bill, which will introduce important reforms to our laws on double jeopardy. It will reconfirm that important principle in statute while also ensuring that, in future, there can be new proceedings against the accused in exceptional cases where there are clear reasons for believing that justice was not done in the original trial.” (Scottish Parliament 2011, col 32913)

However, there was less agreement in relation to some of the details of the proposed exceptions. The three new exceptions provided for in the Bill are considered below.

Tainted acquittals

The Scottish Law Commission (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 (eg intimidation of a witness). This recommendation was provided for in section 2 of the Bill as introduced.

During stage 1 consideration of the Bill, some witnesses raised concerns about the scope of the tainted acquittals exception in the Bill as introduced (eg it was suggested that the possibility of further prosecution should be limited to more serious offences). However, the Justice Committee supported the approach adopted in the Bill. An approach which was also generally supported by MSPs speaking during the stage 1 debate.

The relevant provisions of the Bill were subject to relatively minor amendment only at stage 2.

New evidence – general exception

The SLC did not reach a firm conclusion on whether there should be a general new evidence exception allowing for the possibility of a retrial in at least some cases where evidence of guilt emerges after an alleged offender has been acquitted. It noted that:

“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 2009, para 4.43)

The Scottish Government decided that its proposals should include a general new evidence exception. Section 4 (in conjunction with schedule 1) of the Bill as introduced provided that an alleged offender, who has already been acquitted, could be prosecuted again if the High Court is satisfied in relation to all of the following tests:

- the case against the alleged offender is strengthened substantially by the new evidence
- the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the original trial
- on the new evidence and the evidence which was led at the original trial, it is highly likely that a reasonable jury properly instructed would have convicted the person
- it is in the interests of justice to do so

In addition, the Bill limited the possible application of the general new evidence exception to: (a) cases involving certain specified serious offences (listed in schedule 1); and (b) a single use for any particular case.

Witnesses providing evidence to the Justice Committee were divided on the merits of the Bill’s provisions in this area. However, the committee concluded that:

“While recognising the principled arguments on both sides of the debate, the Committee supports the inclusion of a general new evidence exception. It also considers that the tests, as outlined in the Bill, are appropriate.” (Scottish Parliament Justice Committee 2011a, para 68)

Having some form of general new evidence exception was also supported by MSPs speaking during the stage 1 debate.

Much of the debate on this exception focussed on two issues: (a) which offences should be covered by the exception; and (b) whether the exception should apply to cases concluded prior to the legislation coming into force (ie retrospectively). Both issues are considered below.

**General new evidence exception – relevant offences**

There was broad support within the Scottish Parliament for the proposition that the general new evidence exception should only apply to cases involving very serious offences. There were, however, differences of opinion on the precise range of offences and in relation to the best method for expressing the legislative intent in statute. Schedule 1 of the Bill as introduced set out a list of offences to which the exception would apply. This list was significantly more extensive than that suggested by the SLC (which had put forward an initial list restricted to just murder and rape). In its stage 1 report (2011a), the Justice Committee stated that:

“The Committee agrees that a general new evidence exception should only apply to a limited number of very serious offences. While the Committee understands the rationale for including in schedule 1 at least some additional offences not recommended by the SLC, it also understands the concern that some of these additional offences encompass less serious as well as more serious crimes, and that there is no clear logic for why other offences that are often at least as serious in nature are not also included. For these reasons, the Committee questions whether there could ever be a single, fixed list of this sort that would adequately define the appropriate scope of the exception.
The Committee is interested in the possibility of replacing schedule 1 with a different mechanism for limiting the scope of the exception to the most serious offences. This might either be that the original offence had been prosecuted on indictment or that it had been tried in the High Court (...)\(^2\). The Committee does not yet have a concluded view on which of these alternatives would be more appropriate, but believes that either, while perhaps losing some of the precision of a fixed list of offences, may more exactly capture the idea of limiting the exception to serious crimes than a list of the sort currently included in the Bill.” (paras 81-82)

During the stage 1 debate, the Justice Secretary said that:

“The question of which offences should be covered is a difficult one, however. The Scottish Law Commission suggested limiting it to murder and rape. The bill goes further by adding other serious sexual offences and culpable homicide, and valid arguments can be made to include other crimes such as attempted murder or serious drug offences. The Justice Committee questioned whether any list of that sort would ever be adequate, however, and suggested simply restricting the new-evidence exception to cases that were prosecuted originally on indictment or to cases in the High Court. I agree that the focus must be on serious crime, and I will give further consideration to the committee’s views.” (Scottish Parliament 2011, col 32905-32906)

Scottish Government amendments, agreed at stage 2, replaced the list provided for in the Bill as introduced with provisions stating that the exception could only be used in relation to High Court prosecutions. In support of these amendments, the Cabinet Secretary stated that:

“Although there is a consensus that the exception must be restricted to serious cases, deciding exactly where to draw the line has proven to be extremely difficult. (...) I therefore accept the merits of the argument made by the committee in favour of applying a restriction based on the seriousness of the case and identified by reference to the court where the original trial took place.

I am strongly of the view that an exception for all solemn cases would be too broad. The range of offences that could be tried on indictment is wide – indeed, too wide for that to be an acceptable limit. However, I agree that a restriction to all cases that were originally tried at the High Court provides certainty that the new-evidence exception will remain focused on the most serious of cases.” (Scottish Parliament Justice Committee 2011b, col 4241)

**General new evidence exception – retrospective application**

As noted above, the SLC did not reach a firm conclusion on whether there should be a general new evidence exception. However, it recommended that any such 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. The Scottish Government took a different view and thus section 13 of the Bill as introduced provided for the exception to apply retrospectively.

This was another issue in relation to which witnesses providing evidence to the Justice Committee were divided. The committee concluded that the possibility of retrospective application was justified:

“On the question of whether the section [providing for retrospective application] is compatible with the European Convention of Human Rights, the Committee

\(^2\) Prosecutions on indictment may take place in the sheriff courts and, in the most serious cases, in the High Court.
recognises some concerns raised about the potential impact on an acquitted person’s Article 8 rights to respect for their private and family life. However, the Committee is reassured by much of the evidence it received on the issue that the provision is ECHR compatible. The Committee also recognises that those most opposed to retrospectivity did not primarily base their objections on ECHR considerations, but rather on the argument that it would take away from some acquitted persons a right, acquired by virtue of their acquittal, on which they were entitled to rely.

Although the Committee understands the intellectual force of this argument, it also recognises the legitimate concern of the public in ensuring that an opportunity exists for justice to be done. It therefore believes that prosecutors should be able to seek to reopen cases where compelling evidence has become available, even if (given the safeguards rightly included in the Bill) relevant circumstances arise only rarely."

(Scottish Parliament Justice Committee 2011a, paras 135-136)

The position adopted in the Bill as introduced was broadly supported by MSPs speaking during the stage 1 debate and the relevant provisions of the Bill were not amended at stage 2.

**New evidence – admissions**

In addition to the general new evidence exception considered above, section 3 of the Bill as introduced sought to establish a particular exception dealing with cases where there is new evidence that the alleged offender admitted committing the offence. It provided that this exception should apply to both:

- pre-acquittal admissions – where there is new evidence that the alleged offender admitted committing the offence at some point prior to the original acquittal (such evidence being new if it was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of that acquittal)
- post-acquittal admissions – where there is new evidence that the alleged offender admitted committing the offence at some point after the original acquittal (such evidence will always be new given the timing of the alleged admission)

The exception for new evidence of admissions, in the Bill as introduced, differed from the general new evidence exception in the following respects:

- the application of the general new evidence exception, but not that of the admissions exception, was limited to: (a) cases involving certain specified serious offences; and (b) a single use for any particular case
- the tests which the High Court were directed to apply, when deciding whether to allow a new prosecution on the basis of one of the two new evidence exceptions, differed in a number of respects

The question of whether new evidence of admissions should be treated differently from other new evidence (eg whether the admissions exception should apply to less serious offences where the general new evidence exception would not apply) was considered during both stages 1 and 2. One suggestion was that the two exceptions should be amalgamated. The Justice Committee’s stage 1 report (2011a) noted that:

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3 The proposals put forward by the Scottish Law Commission in its Report on Double Jeopardy (2009) included a recommendation that it should be possible to retry an acquitted person who subsequently admits to having committed the offence (ie an exception for post-acquittal admissions). It did not, however, recommend that this exception should extend to pre-acquittal admissions.
“Finally, in relation to the SLC’s suggestion that, because the Bill provides for a general new evidence exception, having separate provision for admissions may no longer be necessary, the Committee accepts that admissions are a particular sort of ‘new evidence’ in this context and that there may be merit and greater simplicity in treating the two exceptions together in the Bill.” (para 55)

Arguments for and against applying the admissions exception more widely (eg to all offences) have generally focussed on different circumstances. Those in favour of it having the broader application set out in the Bill as introduced have tended to highlight the possibility of a person being acquitted and then boasting about “getting away with it”. For example, the Justice Secretary argued during the stage 1 debate that:

“No one should be able to brag about their guilt with impunity. That undermines the system and deeply wounds and scars the victims of crime and their families. I therefore think that the admissions exception should apply to all types of criminal case.” (Scottish Parliament 2011, col 32905)

However, this does not necessarily justify different treatment where there is evidence of an admission but no suggestion of bragging. For example, why should there be the possibility of a second prosecution in relation to the first of the following scenarios but not the second?

- scenario 1 – a new witness states that he heard the alleged offender admitting that he committed a minor assault
- scenario 2 – a new witness states that he saw the alleged offender committing a minor assault

Although the first scenario might involve someone boasting about getting away with the offence, this need not be the case. Even assuming that the alleged offender did actually make the admission, it may have been something overheard prior to the original prosecution but not reported to the police at that time. Or, if post-acquittal, may have been made to a confidant who subsequently decides to go to the police (eg after falling out with the alleged offender).

During stage 2 consideration, Robert Brown MSP lodged a number of amendments which would have amalgamated the two new evidence exceptions. One consequence of his amendments would have been to restrict the possibility of a further prosecution based on an admission in the same way as other new evidence (eg to cases involving serious offences). However, the first of his amendments was heavily defeated (by seven votes to one) with the others, as a consequence, being not moved or pre-empted. Thus, the Bill as amended at stage 2 still provides that the admissions exception, unlike the general new evidence exception, is not limited to cases involving serious offences or a single use for any particular case.

Even though the wording of the Bill does not limit the application of the admissions exception to serious cases, it would appear that the Scottish Government envisages it being used in a limited range of cases. During the stage 1 debate, the Minister for Community Safety said that:

“The bill is plainly not intended to encourage the reopening of cases involving low-level offences as a result of an admission; rather, it is about the principle of pursuing people who boast of their guilt.” (Scottish Parliament 2011, col 32946)

In relation to the second difference between the two new evidence exceptions – the nature of the tests which the High Court would be directed to apply when deciding whether to allow a new prosecution – relevant Scottish Government amendments were lodged at stage 2. They sought to bring the tests for the admissions exception into line with those for the general new evidence exception. During stage 2, the Justice Secretary stated that the amendments, put forward in response to suggestions made by the Justice Committee, would:
“replace part of the test for the High Court to use in assessing whether an admission would justify a double jeopardy retrial with elements of the general test for new evidence that is used in section 4. Although I think that the current test in section 3 would have worked, I accept the argument that there is merit in applying the same test to all forms of new evidence.” (Scottish Parliament Justice Committee 2011b, col 4240)

The Government amendments were agreed without division and are, therefore, reflected in the Bill as amended at stage 2.

One consequence of the changed tests for the admissions exception is that it (like the general new evidence exception) is only likely to lead to the possibility of a new prosecution where the original acquittal followed a trial – not cases where the original acquittal resulted from the prosecutor’s decision to accept a not guilty plea at some point prior to trial. This follows from the test at section 3(4)(cb) of the Bill as amended. It provides that the High Court must be satisfied that a reasonable jury would have convicted the alleged offender had it been presented with the new evidence of an admission plus the evidence which was led at the original trial. If there was no original trial, and thus no evidence led, the new evidence of an admission is not by itself likely to satisfy the test.

SOURCES


RELATED BRIEFINGS

Double Jeopardy (Scotland) Bill (4 November 2010)

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