Passage of the

Double Jeopardy (Scotland) Bill 2010

SPPB 169
Passage of the
Double Jeopardy (Scotland) Bill 2010
SP Bill 59 (Session 3), subsequently 2011 asp 16

SPPB 169

EDINBURGH: APS GROUP SCOTLAND
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Bill (As Passed) (SP Bill 59B)
Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

Annexes D and E of the Justice Committee’s Stage 1 Report were originally published on the web only. This material, comprising the oral and written evidence taken by the Committee, is included in full in this volume.

At its meeting on 12 January 2011, the Subordinate Legislation Committee considered a response from the Scottish Government on delegated powers in the Bill. The Committee noted the response without debate and agreed to reconsider the matter at Stage 2. No extracts from the minutes or the Official Report of that meeting are, therefore, included in this volume. Relevant papers for that meeting, including the Scottish Government’s response, are, however, included.
Double Jeopardy (Scotland) Bill
[AS INTRODUCED]

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Double Jeopardy (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision as to the circumstances in which a person convicted or acquitted of an offence may be prosecuted anew; and for connected purposes.

Double jeopardy

1 Rule against double jeopardy

(1) It is not competent to charge a person who, whether on indictment or complaint (the “original indictment or complaint”), has been convicted or acquitted of an offence (the “original offence”) with—
   (a) the original offence,
   (b) any other offence of which it would have been competent to convict the person on the original indictment or complaint, or
   (c) an offence which—
       (i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and
       (ii) is an aggravated way of committing the original offence.

(2) Subsection (1) is subject to sections 2, 3 and 4 and is without prejudice to sections 107E(3) (prosecutor’s appeal against acquittal: authorisation of new prosecution), 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) and 185 (authorisation of new prosecution) of the 1995 Act.

(3) In this Act, references to a person being “convicted” of an offence are references to—
   (a) the person being found guilty of the offence,
   (b) the prosecutor accepting the person’s plea of guilty to the offence, or
   (c) the court making an order under section 246(3) of the 1995 Act discharging the person absolutely in relation to the offence,

and related expressions are to be construed accordingly.

(4) For the purposes of subsection (3)—
   (a) section 247(1) (conviction of person placed on probation or absolutely discharged deemed not to be a conviction) of the 1995 Act does not apply, and
(b) it is immaterial whether or not sentence is passed.

Exceptions to rule against double jeopardy

2 Tainted acquittals

(1) A person who, whether on indictment or complaint (the “original indictment or complaint”), has been acquitted of an offence (the “original offence”) may, provided that the condition mentioned in subsection (2) is satisfied, be charged with, and prosecuted anew for—

(a) the original offence,

(b) any other offence of which it would have been competent to convict the person on the original indictment or complaint, or

(c) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the original offence.

(2) The condition is that the High Court has, on the application of the Lord Advocate—

(a) set aside the acquittal, and

(b) granted authority to bring a new prosecution.

(3) The court may not set aside the acquittal unless it—

(a) is satisfied that the acquitted person or some other person has (or the acquitted person and some other person have) been convicted of an offence against the course of justice in connection with the proceedings on the original indictment or complaint, or

(b) concludes on a balance of probabilities that the acquitted person or some other person has (or the acquitted person and some other person have) committed such an offence against the course of justice.

(4) Where the offence against the course of justice consisted of or included interference with a juror or with the trial judge, the court must set aside the acquittal if it—

(a) is unable to conclude that the interference had no effect on the outcome of the proceedings on the original indictment or complaint, and

(b) is satisfied that it is in the interests of justice to do so.

(5) But the acquittal is not to be set aside if, in the course of the trial, the interference (being interference with a juror and not with the trial judge) became known to the trial judge, who then allowed the trial to proceed to its conclusion.

(6) Where the offence against the course of justice is not one mentioned in subsection (4), the acquittal may be set aside only if the court is satisfied—

(a) on a balance of probabilities as to the matters mentioned in subsection (7), and

(b) that it is in the interests of justice to do so.

(7) The matters referred to in subsection (6)(a) are—

(a) that the offence led to—
(i) the withholding of evidence which, had it been given, would have been capable of being regarded as credible and reliable by a reasonable jury, or
(ii) the giving of false evidence which was capable of being so regarded, and
(b) that the withholding, or as the case may be the giving, of the evidence was likely to have had a material effect on the outcome of the proceedings on the original indictment or complaint.

(8) In this section, “offence against the course of justice” means an offence of perverting, or of attempting to pervert, the course of justice (by whatever means and however the offence is described) and—

(a) includes—

(i) an offence under section 45(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (aiding, abetting, counselling, procuring or suborning the commission of an offence under section 44 of that Act),

(ii) subornation of perjury, and

(iii) bribery,

(b) does not include—

(i) perjury, or

(ii) an offence under section 44(1) of that Act (statement on oath which is false or which the person making it does not believe to be true).

3 Admission made or becoming known after acquittal

(1) A person who, whether on indictment or complaint (the “original indictment or complaint”), has been acquitted of an offence (the “original offence”) may, if the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence, or

(b) an offence mentioned in subsection (2) (a “relevant offence”).

(2) A relevant offence is—

(a) an offence (other than the original offence) of which it would have been competent to convict the person on the original indictment or complaint, or

(b) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the original offence.

(3) The conditions are that—

(a) after the acquittal—

(i) the person admits to committing the original offence or a relevant offence, or

(ii) such an admission made by that person before the acquittal becomes known, and

(b) the High Court, on the application of the Lord Advocate, has—
(i) set aside the acquittal, and
(ii) granted authority to bring a new prosecution.

(4) The court may set aside the acquittal only if satisfied—

(a) on a balance of probabilities that the person credibly admitted having committed the original offence or a relevant offence,

(b) in the case of an admission such as is mentioned in subsection (3)(a)(ii), that the admission was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of the acquittal in respect of the original offence,

(c) that evidence is available sufficient to corroborate the admission, and

(d) that it is in the interests of justice to do so.

4 New evidence

(1) A person who, whether on indictment or complaint (the “original indictment or complaint”), has been acquitted of an offence (the “original offence”) may, if the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence, or

(b) an offence mentioned in subsection (2) (a “relevant offence”).

(2) A relevant offence is—

(a) an offence (other than the original offence) of which it would have been competent to convict the person on the original indictment or complaint, or

(b) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the original offence.

(3) The conditions are that—

(a) the original offence is one listed in schedule 1,

(b) there is new evidence that the person committed the original offence or a relevant offence,

(c) the High Court, on the application of the Lord Advocate, has—

(i) set aside the acquittal, and

(ii) granted authority to bring a new prosecution, and

(d) the offence to be charged is one listed in schedule 1.

(4) For the purposes of subsection (3)(b), evidence which was not admissible at the trial in respect of the original offence but which is admissible at the time the court considers the application under subsection (3)(c) is not new evidence.

(5) Only one application may be made under subsection (3)(c) in relation to any particular case.

(6) The court may set aside the acquittal only if satisfied that—
(a) the case against the accused is strengthened substantially by the new evidence,
(b) the new evidence was not available, and could not with the exercise of reasonable
diligence have been made available, at the trial in respect of the original offence,
(c) on the new evidence and the evidence which was led at that trial, it is highly likely
that a reasonable jury properly instructed would have convicted the person of—
   (i) the original offence, or
   (ii) a relevant offence (had, in the case of an offence mentioned in subsection
        (2)(b), such an offence been charged), and
(d) it is in the interests of justice to do so.

(7) The Scottish Ministers may by order modify schedule 1 so as to—
   (a) add a further offence to, or
   (b) remove an offence from,
   the schedule.

(8) But the condition mentioned in subsection (3)(a) is not satisfied in relation to an offence
    added under subsection (7)(a) unless that offence was listed in schedule 1 at the time of
    the acquittal of the original offence.

Exceptions to rule against double jeopardy: common provisions

5 Applications under sections 2, 3 and 4
(1) On making an application under section 2(2), 3(3)(b) or 4(3)(c), the Lord Advocate is to
    send a copy of the application to the acquitted person.
(2) The acquitted person is entitled to appear or to be represented at any hearing of the
    application.
(3) For the purposes of hearing and determining the application, three of the Lords
    Commissioners of Justiciary are a quorum of the High Court (the application being
determined by majority vote of those sitting).
(4) The court may appoint counsel to act as amicus curiae at the hearing in question.
(5) The decision of the court on the application is final.
(6) Subsection (3) is without prejudice to any power of those sitting to remit the application
to a differently constituted sitting of the court (as for example to the whole court sitting
together).

6 Further provision about prosecutions by virtue of sections 2, 3 and 4
(1) This section applies to a new prosecution brought by virtue of section 2, 3 or 4.
(2) The new prosecution may be brought despite the fact that any time limit for the
    commencement of proceedings in such a prosecution, other than the time limit
    mentioned in subsection (3), has elapsed.
(3) Proceedings in the new prosecution are to be commenced within 2 months after the date
    on which authority to bring the prosecution was granted.
(4) For the purposes of subsection (3), proceedings are deemed to be commenced—
    (a) in a case where a warrant to apprehend the accused person is granted—
(i) on the date on which it is executed, or
(ii) if it is executed without unreasonable delay, on the date on which it was
granted, and
(b) in any other case, on the date on which the accused person is cited.

(5) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has
been brought, the decision under section 2, 3 or, as the case may be, 4 setting aside the
acquittal has the effect, for all purposes, of an acquittal.

(6) On granting authority under section 2, 3 or, as the case may be, 4 to bring a new
prosecution, the High Court may, after giving the parties an opportunity of being heard,
order the detention of the accused person in custody or admit that person to bail.

(7) The provisions of the 1995 Act mentioned in subsection (8) below apply to an accused
person who is detained under subsection (6) as they apply to an accused person detained
by virtue of being committed until liberated in due course of law.

(8) Those provisions are—

(a) in solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9) (prevention of
delay in solemn proceedings), and

(b) in summary proceedings, section 147 (prevention of delay in summary
proceedings).

(9) Where, in a new prosecution brought by virtue of section 2, 3 or 4, the accused is
convicted of an offence, no sentence may be passed in relation to the offence which
could not have been passed under the earlier proceedings.

Plea in bar of trial

7 Plea in bar of trial that accused has been tried before

(1) This section applies where a person is charged with an offence—

(a) whether on indictment or complaint,

(b) other than by virtue of—

(i) section 2, 3, 4, 11 or 12, or

(ii) section 107E(3) (prosecutor’s appeal against acquittal: authorisation of new
prosecution), 118(1)(c) (disposal of appeals), 119 (provision where High
Court authorises new prosecution), 183(1)(d) (stated case: disposal of
appeal) or 185 (authorisation of new prosecution) of the 1995 Act.

(2) The person may aver, as a plea in bar of trial, that the offence arises out of the same, or
largely the same, acts or omissions as have already given rise to the person being tried
for, and convicted or acquitted of, an offence.

(3) The court must sustain the plea if satisfied on a balance of probabilities as to the truth of
the person’s averment.

(4) But the court may repel the plea despite being so satisfied if it—

(a) is persuaded by the prosecutor that there is some special reason why the case
should proceed to trial, and

(b) determines that it is in the interests of justice to do so.

(5) Subsection (4) is subject to sections 8, 9 and 10.
8 Plea in bar of trial for murder: new evidence and admissions

(1) This section applies where—
   (a) a person is charged with murder,
   (b) the person avers, as a plea in bar of trial under section 7(2), that the charge arises out of the same, or largely the same, acts or omissions as have already given rise to the person, whether on indictment or complaint (the “original indictment or complaint”), being tried for, and convicted or acquitted of, an offence other than murder, and
   (c) the prosecutor asserts, as a special reason why the case should proceed to trial, one of the matters mentioned in subsection (2).

(2) Those matters are that, since the trial on the original indictment or complaint (the “original trial”)—
   (a) there is new evidence that the person committed the murder charged,
   (b) the person has admitted to committing the murder charged,
   (c) such an admission made before the conviction or acquittal at the original trial has become known.

(3) For the purposes of subsection (2)(a), evidence which was not admissible at the original trial but which is admissible at the time the court considers the plea is not new evidence.

(4) For the purposes of determining whether to sustain or repel the plea, three of the Lords Commissioners of Justiciary are a quorum of the High Court (the plea being determined by majority vote of those sitting).

(5) Where the special reason relates to the matter mentioned in subsection (2)(a), the court may repel the plea only if satisfied that—
   (a) the case against the person is strengthened substantially by the new evidence,
   (b) the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the original trial,
   (c) on the new evidence and the evidence which was led at that trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the murder had it been charged, and
   (d) it is in the interests of justice to do so.

(6) Where the special reason relates to the matter mentioned in subsection (2)(b) or (c), the court may repel the plea only if satisfied—
   (a) on a balance of probabilities that the person credibly admitted having committed the murder charged,
   (b) in the case of an admission such as is mentioned in subsection (2)(c), that the admission was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of the conviction or acquittal at the original trial,
   (c) that evidence is available sufficient to corroborate the admission, and
   (d) that it is in the interests of justice to do so.
(7) Section 5 (other than subsections (1) and (3)) applies to a case to which this section applies as it applies to an application under section 4(3)(c), with the modifications that—

(a) the reference in subsection (2) of that section to the acquitted person is to be read as a reference to the person charged, and

(b) the reference in subsection (6) of that section to subsection (3) is to be read as a reference to subsection (4) of this section.

9 Plea in bar of trial: nullity of previous trial

(1) This section applies where—

(a) a person avers, as a plea in bar of trial under section 7(2), that the charge arises out of the same, or largely the same, acts or omissions as have already given rise to the person, whether on indictment or complaint (the “original indictment or complaint”), being tried for, and convicted or acquitted of, an offence, and

(b) the prosecutor asserts, as a special reason why the case should proceed to trial, that the trial on the original indictment or complaint (the “original trial”) was a nullity.

(2) Where the proceedings are before the sheriff, the sheriff must remit the case to the High Court.

(3) Where the proceedings are—

(a) before the High Court, or

(b) are remitted to that court under subsection (2),

the court must determine whether to sustain or repel the plea.

(4) The High Court may repel the plea only if satisfied that—

(a) the original trial was a nullity,

(b) the existence of that trial was not known to the prosecutor before the commencement of the proceedings in which the plea is made, and

(c) it is in the interests of justice to do so.

10 Plea in bar of trial: previous foreign proceedings

(1) This section applies where the previous trial averred under section 7(2) took place outwith the United Kingdom.

(2) In determining under section 7(4)(b) whether it is in the interests of justice for the case to proceed to trial, the court is in particular to have regard to—

(a) whether the purpose of bringing the person to trial in the foreign country appears to have been to assist the person to evade justice,

(b) whether the proceedings in the foreign country appear to have been conducted—

(i) independently and impartially, and

(ii) in a manner consistent with dealing justly with the person,
(c) whether such sentence (or other disposal) as was or might have been imposed in the foreign country for the offence of the kind of which the person has been convicted or acquitted is commensurate with any that might be imposed for an offence of that kind in Scotland, and

(d) the extent to which the acts or omissions can be considered to have occurred in, respectively—
   (i) Scotland,
   (ii) the foreign country.

(3) But the court may not repel the plea if permitting the case to proceed to trial would be inconsistent with the obligations of the United Kingdom under Article 54 of the Schengen Convention.

(4) In subsection (3), the “Schengen Convention” means the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985.

**Other subsequent prosecutions**

11 **Eventual death of injured person**

(1) This section applies where—
   (a) a person (“A”) is, whether on indictment or complaint, convicted or acquitted of an offence (the “original offence”) involving the physical injury of another person (“B”), and
   (b) after the conviction or acquittal, B dies, apparently from the injury.

(2) It is competent to charge A with—
   (a) the murder of B,
   (b) the culpable homicide of B, or
   (c) any other offence of causing B’s death.

(3) Subsection (4) applies where—
   (a) A was convicted of the original offence, and
   (b) A is subsequently convicted of an offence mentioned in subsection (2).

(4) The court may—
   (a) on the motion of A made immediately on A’s being convicted, and
   (b) after hearing the parties on that motion,
quash A’s conviction of the original offence where satisfied that it is appropriate to do so.

(5) A party may appeal to the High Court against the grant or refusal of a motion under subsection (4).

(6) Where A was convicted of the original offence and is subsequently acquitted of an offence mentioned in subsection (2), A may appeal against the conviction under section 106(1)(a) or, as the case may be, section 175(2)(a) of the 1995 Act.

(7) An appeal may be brought by virtue of subsection (6) despite the fact that A, before the acquittal mentioned in that subsection—
   (a) had appealed, or
nullity of proceedings on previous indictment or complaint

(1) This section applies where—
   (a) a person has, whether on indictment or complaint, been charged with, and acquitted or convicted of, an offence, and
   (b) the condition mentioned in subsection (3) is satisfied.

(2) The person may be charged with, and prosecuted anew for, the offence.

(3) The condition referred to in subsection (1)(b) is that, on the application of the prosecutor and after hearing parties, the High Court is satisfied that—
   (a) the proceedings on the indictment or complaint were a nullity, and
   (b) it is in the interests of justice to proceed as mentioned in subsection (2).

General

Retrospective application of Act

For the purposes of sections 1 to 4 and 7 to 12, it is immaterial whether the conviction or, as the case may be, acquittal referred to in each of those sections was before or after the coming into force of this Act.

Subordinate legislation

(1) Any power conferred by this Act on the Scottish Ministers to make orders is exercisable by statutory instrument.

(2) No order under this Act may be made unless a draft of the statutory instrument containing it has been laid before and approved by resolution of the Scottish Parliament.

(3) Subsection (2) does not apply to an order under section 16(3).

Consequential amendments

Schedule 2, which makes amendments of enactments consequential on the provisions of this Act, has effect.

Short title, interpretation and commencement

(1) The short title of this Act is the Double Jeopardy (Scotland) Act 2010.

(2) In this Act, the “1995 Act” means the Criminal Procedure (Scotland) Act 1995 (c.46).

(3) This Act, except this section, comes into force on such day as the Scottish Ministers may by order appoint.
SCHEDULE 1
(introduced by section 4(3)(a))

NEW EVIDENCE: RELEVANT OFFENCES

**Offences against the person**

5 1 Murder.
2 Culpable homicide.

**Genocide etc.**

3 Genocide (within the meaning given by section 1 of the International Criminal Court (Scotland) Act 2001 (asp 13)).

10 4 A crime against humanity (within the meaning given by that section).
5 A war crime (within the meaning given by that section).

**Sexual offences: common law**

6 Rape.
7 Clandestine injury to women.

15 8 Abduction of a woman with intent to rape.
9 Assault with intent to rape or ravish.
10 Indecent assault.
11 Lewd, indecent or libidinous practice or behaviour.
12 Sodomy.

**Sexual offences: offences under the Sexual Offences (Scotland) Act 2009**

13 Rape.
14 Sexual assault by penetration.
15 Sexual assault.
16 Sexual coercion.

20 17 Rape of a young child.
18 Sexual assault on a young child by penetration.
19 Sexual assault on a young child.
20 Causing a young child to participate in a sexual activity.

**Other sexual offences**

30 21 Incest (under the Incest Act 1567 (c.15), section 2A of the Sexual Offences (Scotland) Act 1976 (c.67) or section 1 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)).

22 Sexual intercourse with a stepchild (under section 2 of that Act of 1995).
Double Jeopardy (Scotland) Bill
Schedule 2—Consequential amendments

Unlawful sexual intercourse with a girl under 13 (under section 5 of that Act of 1995).

SCHEDULE 2
(introduced by section 15)

CONSEQUENTIAL AMENDMENTS

Contempt of Court Act 1981

1 Schedule 1 to the Contempt of Court Act 1981 (c.49) (times when proceedings are active for the purposes of section 2 of that Act) is amended as follows.

2 After paragraph 1 (meaning of “criminal proceedings” and “appellate proceedings”), insert—

“1ZA Proceedings under the Double Jeopardy (Scotland) Act 2010 (asp 00) are criminal proceedings for the purposes of this Schedule.”.

3 In paragraph 4 (initial steps of criminal proceedings), after sub-paragraph (e) insert—

“(f) the making of an application under section 2(2) (tainted acquittals), 3(3)(b) (admission made or becoming known after acquittal), 4(3)(c) (new evidence) or 12(3) (nullity of previous proceedings) of the Double Jeopardy (Scotland) Act 2010 (asp 00).”.

4 In paragraph 5 (conclusion of criminal proceedings), after sub-paragraph (c) insert—

“(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f)—

(i) by refusal of the application;

(ii) if the application is granted and within the period of 2 months mentioned in section 6(3) of the Double Jeopardy (Scotland) Act 2010 (asp 00) a new prosecution is brought, by acquittal or, as the case may be, by sentence in the new prosecution.”.

5 In paragraph 7 (discontinuance of proceedings), after sub-paragraph (c) insert—

“(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f) and the application is granted, if no new prosecution is brought within the period of 2 months mentioned in section 6(3) of the Double Jeopardy (Scotland) Act 2010 (asp 00).”.

Criminal Procedure (Scotland) Act 1995

6 The Criminal Procedure (Scotland) Act 1995 (c.46) is amended as follows.

7 In section 72 (preliminary hearing)—

(a) after subsection (2) insert—

“(2A) In a case to which subsection (2B) applies, the court must determine whether it is in the interests of justice for the case to proceed to trial.

(2B) This subsection applies where—

(a) the accused is charged with an offence mentioned in section 11(2) of the Double Jeopardy (Scotland) Act 2010 (asp 00) by virtue of that section;
(b) the accused was acquitted of the offence mentioned in section 11(1)(a) of that Act.”; and

(b) in subsection (4), after “After” insert “determining any question such as is mentioned in subsection (2A) and”.

8 In section 94 (transcripts of record and documentary productions), after subsection (2A) insert—

“(2AA) Subsection (2A) applies to a person mentioned in subsection (2AB) as it applies to a person convicted at the trial, with the modification that the reference to the transcript in subsection (2A) is to be construed as a reference to the transcript of the record made of proceedings at the trial resulting in the acquittal mentioned in subsection (2AB)(b).

(2AB) The person mentioned in subsection (2AA) is a person who—

(a) is convicted of the offence mentioned in subsection (1) of section 11 of the Double Jeopardy (Scotland) Act 2010 (asp 00);

(b) is subsequently acquitted of an offence mentioned in subsection (2) of that section; and

(c) desires to appeal, under subsection (6) of that section, against the conviction of the offence mentioned in paragraph (a).”.

9 In section 107 (leave to appeal), after subsection (2) insert—

“(2A) In respect of an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00), the “report under section 113” in subsection (2)(c) means—

(a) the report of the judge who presided at the trial resulting in the appellant’s acquittal for an offence mentioned in section 11(2) of that Act;

(b) where an appeal against conviction was taken before that acquittal, the report of the judge who presided at the trial resulting in the conviction in respect of which leave to appeal is sought prepared at that time; and

(c) any other report of that judge furnished under section 113.”.

10 In section 109 (intimation of intention to appeal), after subsection (1) insert—

“(1A) Where a person desires to appeal under section 106(1)(a) of this Act by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00), subsection (1) applies with the following modifications—

(a) for the words “two weeks of the final determination of the proceedings” substitute “two weeks of the date on which the person is acquitted of an offence mentioned in section 11(2) of the Double Jeopardy (Scotland) Act 2010 (asp 00)”; and

(b) the reference to identifying the proceedings is to be construed as a reference to identifying—

(i) the proceedings which resulted in the conviction desired to be appealed; and

(ii) the proceedings which resulted in the person’s acquittal as mentioned in section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00).
(1B) Subsections (5) to (9) of section 106 of this Act do not apply where the modifications specified in subsection (1A) apply.”.

11 In section 110 (note of appeal), after subsection (3) insert—

“(3A) In respect of a written note of appeal relating to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00)—

(a) subsection (1) applies as if the reference to the judge who presided at the trial were a reference to—

(i) the judge who presided at the trial resulting in the conviction to which the written note of appeal relates; and

(ii) the judge who presided at the trial for an offence mentioned in section 11(2) of that Act resulting in the convicted person’s acquittal; and

(b) subsection (3)(a) applies as if the reference to the proceedings were a reference to—

(i) the proceedings which resulted in the conviction to which the written note of appeal relates; and

(ii) the proceedings which resulted in the convicted person’s acquittal.”.

12 In section 113 (judge’s report)—

(a) in subsection (1), at the beginning, insert “Subject to subsections (1A) to (1D),”;

(b) after subsection (1) insert—

“(1A) Subsections (1B) to (1D) apply where the copy note of appeal mentioned in subsection (1) relates to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00).

(1B) The reference in subsection (1) to the judge who presided at the trial is to be construed as a reference to—

(a) the judge who presided at the trial for an offence mentioned in section 11(2) of that Act resulting in the appellant’s acquittal; and

(b) where subsection (1C) applies, the judge who presided at the trial resulting in the conviction to which the copy note of appeal relates.

(1C) This subsection applies—

(a) where, in connection with the appeal, the High Court calls for the report to be furnished by the judge mentioned in subsection (1B)(b); and

(b) it is reasonably practicable for the judge to furnish the report.

(1D) For the purposes of subsections (1) to (1C), it is irrelevant whether or not the judge mentioned in subsection (1B)(b) had previously furnished a report under subsection (1).”, and

(c) in subsection (3), for “subsection (1)” substitute “subsections (1) to (1D)”.

13 In section 118 (disposal of appeals), after subsection (1) insert—

“(1A) Where an appeal against conviction is by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00), paragraph (c) of subsection (1) does not apply.”.
After section 176 insert—

“176A Application of section 176 in relation to certain appeals

(1) Section 176 applies in relation to an appeal under section 175(2)(a) by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00) with the following modifications.

(2) In subsection (1)(a), for the words “one week of the final determination of the proceedings” substitute “one week of the date on which the appellant is acquitted of an offence mentioned in section 11(2) of the Double Jeopardy (Scotland) Act 2010 (asp 00)”.

(3) In subsection (2), the reference to the proceedings is to be construed as a reference to the proceedings resulting in the appellant’s acquittal as mentioned in section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00).

(4) In subsection (5), the reference to the inferior court is to be construed as a reference to the court which acquitted the appellant of an offence under section 11(2) of the Double Jeopardy (Scotland) Act 2010 (asp 00).”.

In section 178 (stated case: preparation of draft), after subsection (1) insert—

“(1A) Where an application for a stated case under section 176 of this Act relates to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00)—

(a) the reference in subsection (1) to the final determination of proceedings is to be construed as a reference to the date on which the appellant is acquitted of an offence mentioned in section 11(2) of that Act; and

(b) the reference in subsection (1)(b) to the judge who presided at the trial is to be construed as a reference to the judge who presided at the trial resulting in the conviction in respect of which the application for a stated case is made.”.

In section 179 (stated case: adjustment and signature), after subsection (10) insert—

“(11) In relation to a draft stated case under section 178 of this Act relating to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00)—

(a) the reference in subsection (1) to the court is to be construed as a reference to the court by which the appellant was convicted; and

(b) the references in this section to the judge are to be construed as references to the judge who presided at the trial resulting in that conviction.”.

In section 183 (stated case: disposal of appeal), after subsection (1) insert—

“(1A) Where an appeal against conviction is by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2010 (asp 00), paragraphs (a) and (d) of subsection (1) do not apply.”.
Double Jeopardy (Scotland) Bill  
[AS INTRODUCED]  

An Act of the Scottish Parliament to make provision as to the circumstances in which a person convicted or acquitted of an offence may be prosecuted anew; and for connected purposes.

Introduced by: Kenny MacAskill  
On: 7 October 2010  
Bill type: Executive Bill
These documents relate to the Double Jeopardy (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 7 October 2010

DOUBLE JEOPARDY (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Double Jeopardy (Scotland) Bill introduced in the Scottish Parliament on 7 October 2010:

- Explanatory Notes;
- a Financial Memorandum;
- a Government Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 59–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. Scottish criminal law prohibits a person being placed in jeopardy of criminal prosecution twice for the same offence. This is commonly referred to as the rule against “double jeopardy”. This rule provides an important protection for individuals from being subjected to criminal prosecution twice for the same offence. This Bill builds upon the work of the Scottish Law Commission (SLC) in its December 2009 Report on Double Jeopardy. It contains a number of measures to reform and restate the rule against double jeopardy and also sets out certain exceptions to the rule.

COMMENTARY ON SECTIONS

Double jeopardy

Section 1 Rule against double jeopardy

5. This section places onto a statutory footing the general rule against double jeopardy i.e. that a person should not be prosecuted on more than one occasion for the same offence.

6. Subsection (1) restates the rule against double jeopardy. It provides that where someone has been convicted or acquitted of an offence, it is not possible to charge the person again with the same offence or any other offence of which it would have been competent to convict on the original indictment or complaint. Subsection (1)(c) further provides that it is also not competent to charge the person again with an offence which arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint and is an aggravated way of committing the original offence. The section does not prevent a person from being tried for murder or culpable homicide where the victim dies after that person’s conviction of assault, since murder and culpable homicide are not aggravated ways of committing assault but separate crimes; such prosecutions are regulated by section 11. Similarly, it does not prohibit the charging of a person for murder who has previously been tried for culpable homicide arising out of the same act or omission, provided that murder was not charged at the earlier trial (however, such a charge could result in a plea in bar of trial under section 7).

1 Scot Law Com No. 218
7. Subsection (2) makes it clear that section 1 does not bar a further prosecution where this is authorised under sections 2, 3 or 4 of the Bill, or under existing provisions whereby a new prosecution is authorised by the High Court following appeal (those provisions are set out in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act)).

8. Subsections (3) and (4) define “conviction” and provide that the rule applies to a conviction even if sentence has not been passed. This definition settles the question of whether a sentence must be passed before the rule against double jeopardy may operate, making it clear that double jeopardy protection will apply in any case where a verdict has been delivered or a guilty plea accepted, regardless of whether sentence has been passed.

9. The reference to section 246 of the 1995 Act in subsection (3) expands the definition of conviction to include a special scenario in summary cases. This is where a person has been charged and, although the court was satisfied that the accused committed the offence, it opted in the circumstances to discharge the person without proceeding to conviction. The reference in subsection (4) to section 247(1) of the 1995 Act ensures that a conviction where the offender was placed on probation or discharged absolutely will count as a “conviction” for the purposes of the rule against double jeopardy.

10. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to or after the coming into force of this section.

**Exceptions to rule against double jeopardy**

11. Sections 2, 3 and 4 provide that a further prosecution can take place under certain limited exceptions to the rule against double jeopardy set out in section 1.

**Section 2 Tainted acquittals**

12. This section provides that where a person has been acquitted of an offence either on indictment (solemn proceedings) or complaint (summary proceedings), the acquitted person can be tried again if the High Court is satisfied that the acquitted person or some other person has committed an offence against the course of justice in connection with the original proceedings (whether or not anyone has been convicted of such an offence). Section 13 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section.

13. Subsection (1) provides that the person can be prosecuted anew for the original offence, any other offence of which it would have been competent to convict the person on the original indictment or complaint or for a new offence which arises out of, or largely out of, the same acts or omissions and is an aggravated way of committing the original offence. This is subject to subsection (2).

14. Subsection (2) provides that the Lord Advocate is required to apply to the High Court to have the acquittal set aside and to seek authority to prosecute anew. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.
15. Subsection (3) provides that the court cannot set aside the acquittal unless it is satisfied that the acquitted person or some other person has either been convicted of or has committed an offence against the course of justice in connection with the original proceedings. This subsection needs to be read with subsections (4) to (7).

16. Subsection (4) provides that where the offence against the course of justice is in respect of interference with a juror or the trial judge, the High Court must set aside the acquittal if satisfied that the interference had an effect on the outcome of the original proceedings and that the setting aside of the acquittal would be in the interests of justice. However, subsection (5) provides that where the interference related only to a juror and this was known to the trial judge who allowed the trial to continue then the acquittal is not to be set aside (the trial judge having had an opportunity to consider at the time whether or not it was safe to continue with the trial).

17. Subsections (6) and (7) make provision for where the offence against the course of justice is not in respect of interference with a juror or trial judge. They allow the acquittal to be set aside only if the High Court is satisfied on the balance of probabilities that the offence led to the withholding of evidence or the giving of false evidence which a jury would have been able to regard as being credible and reliable and which was likely to have had a material effect on the outcome of the proceedings. If satisfied as to this and that it is in the interests of justice to do so, the court may set aside the acquittal.

18. Subsection (8) defines an “offence against the course of justice” for the purposes of section 2. It excludes the crime of perjury and its statutory equivalent, an offence under section 44(1) of the 1995 Act. This is because the assessment of whether a witness is guilty of perjury is a part of the normal trial process in a way that external interference is not (see paragraph 3.10 of the SLC’s Report).

Section 3 Admission made or becoming known after acquittal

19. This section provides an exception to the rule against double jeopardy in section 1. It allows a further prosecution to take place where it becomes apparent following an acquittal that the accused has admitted to committing the offence. This applies to both summary and solemn proceedings. Section 13 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section. Section 3 goes beyond the SLC’s Report by including admissions made prior to the date of the acquittal, but which were unknown (and could not with the exercise of reasonable diligence have been known) to the investigating and prosecuting authorities. So, subsection (3)(a), in conjunction with subsections (3)(b) and (4), permits an application for a retrial in such circumstances.

20. Subsections (1) and (2) provide that a fresh prosecution may take place where the admission relates to the original offence; any other offence of which it would have been competent to convict the person on the original indictment or complaint; or an offence which arises out of, or largely out of, the same acts or omissions and is an aggravated way of committing the original offence.

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2 Recommendation 25
21. Subsection (3)(b) provides that the Lord Advocate needs to apply to the High Court if the prosecution wants to set aside the acquittal and bring a fresh prosecution. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.

22. Subsection (4) provides for the test that has to be satisfied before the High Court can set aside the acquittal.

**Section 4  New evidence**

23. This section provides an exception to the rule against double jeopardy in section 1, potentially allowing a fresh prosecution where new evidence is discovered. Section 13 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section.

24. Subsection (3) provides, among other things, that a subsequent prosecution may be permitted only if both the original offence and the one to be charged are listed within schedule 1 to the Bill. Under subsection (7) Scottish Ministers may amend the list by either adding offences or removing offences from it. However, by virtue of subsection (8) the original offence must have been included within the list in schedule 1 at the time of the original acquittal. For any case where the original acquittal was before the commencement of section 4 of the Bill, the offence in question must have been one listed in schedule 1 to the Bill at the time the Act arising from the Bill comes into force.

25. The new evidence may relate either to the commission of the original offence; any other offence of which it would have been competent to convict the person on the original indictment or complaint; or an offence which arises out of, or largely out of, the same acts or omissions and which is an aggravated way of committing the original offence. As in the case of the other exceptions to the double jeopardy rule, the Lord Advocate needs to apply to the High Court to have the acquittal set aside and to seek authority to reprosecute. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.

26. Subsection (4) provides that “new evidence” does not include evidence which was inadmissible at the original trial even if it would be admissible at the time of the subsequent trial. Such previously inadmissible evidence could still be used at the subsequent trial if the relevant changes to admissibility had taken place since the original trial (as the rules that apply at the time of the subsequent trial will govern what evidence is admissible). But it could not, of itself, form the basis of the “new evidence” for the purposes of authorising that subsequent prosecution.

27. Subsection (5) provides that only one new evidence application can be made under section 4 in relation to any one case.

28. Subsection (6) provides for the test that must be satisfied before the High Court can set aside the acquittal and grant authority to bring a fresh prosecution. The application may be granted only if:
• the case against the accused is strengthened substantially by the new evidence;

• the new evidence is evidence which was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence; and

• that 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 of the offence.

29. The court may not grant the application where it considers that to do so would be contrary to the interests of justice.

30. Subsection (7) permits Scottish Ministers to amend schedule 1. Under section 14, such an order would be made by statutory instrument subject to affirmative resolution of the Scottish Parliament.

Exceptions to rule against double jeopardy: common provisions

Section 5 Applications under sections 2, 3 and 4

31. This section contains provisions common to applications made by the Lord Advocate under sections 2(2), 3(3)(b) and 4(3)(c) to the High Court. It provides, for example, that the accused is entitled to be present and be represented at any hearing on an application to prosecute anew (subsection (2)). Subsection (3) provides that any application must be considered by a quorum of at least three High Court judges, with decisions made by a majority.

32. Subsection (4) provides that the court may appoint counsel to act as amicus curae at the hearing. This is particularly important in the case of applications under section 2 involving tainted acquittals where the offence against the course of justice was allegedly committed not by the accused but by a third party. In such a case, there could potentially be no-one in a position to oppose the Lord Advocate’s application.

Section 6 Further provision about prosecutions by virtue of sections 2, 3 and 4

33. This section contains technical provisions which apply to new prosecutions brought by virtue of sections 2, 3 and 4. Subsection (2) provides that any fresh prosecution is not prevented by virtue of time bars applicable to the original prosecution elapsing. Where authority to prosecute has been granted, however, the new prosecution must commence within 2 months of the grant of that authority (subsections (3) and (5)).

34. Subsections (6), (7) and (8) provide that the accused may be detained in custody or granted bail in relation to the fresh prosecution. However, the general time limits usually applicable to criminal prosecutions would then apply.
35. Subsection (9) provides that where a fresh prosecution takes place, the maximum sentence is limited to that which could have been imposed at the time the offence to which it relates was committed.

Plea in bar of trial

36. Sections 7 to 10 deal with a broader range of situations than that covered by the rule in section 1 against double jeopardy. These sections will prevent multiple trials for the same act, in particular, where the new offence charged is not the original offence (or an aggravated way of committing it).

Section 7 Plea in bar of trial that accused has been tried before

37. This section allows a person to aver as a plea in bar of trial that the offence he or she faces on the indictment or complaint arises out of the same or largely the same acts or omissions upon which he or she has already been tried. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to or after the coming into force of this section.

38. Subsection (1) provides that a plea in bar of trial will not be available in relation to the exceptions to double jeopardy detailed in this Bill (sections 2, 3 and 4) or to the special cases detailed in sections 11 and 12. The references to provisions of the 1995 Act ensure that a plea in bar of trial will not be available where the High Court has already granted authority for a retrial following a successful appeal.

39. Subsection (2) provides a broad basis for a person seeking to plead that the trial should be barred because of a previous trial for largely the same acts or omissions. It is broader than the rule against double jeopardy in section 1, which focuses on the offences charged at the previous trial, therefore not necessarily prohibiting a trial for other offences which were not charged at the previous trial, but which arose out of the same or substantially the same acts or omissions.

40. Subsection (3) provides that the court must sustain the plea in bar of trial if it is satisfied on the balance of probabilities that the crime charged relates to the same acts or omissions, or substantially the same acts or omissions, as a crime of which he or she has already been convicted or acquitted. However even if satisfied that there is a bar against a second trial, the court may permit a new prosecution if persuaded by the prosecutor that there is some “special reason” as to why the case should be prosecuted and that it would be in the interests of justice to do so (subsections (4) and (5)).

41. This provision is designed to permit further proceedings for essentially the same criminal act that resulted in an earlier conviction or acquittal where there is “special reason”. 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.

Section 8 Plea in bar of trial for murder: new evidence and admissions

42. Section 8 contains provision which applies where a plea in bar of trial under section 7 is taken in a prosecution for murder in circumstances where murder was not charged at the previous trial and the prosecution argue, as a special reason to permit the case to proceed, that, since the original trial, the person has admitted to committing the murder (or such an admission made before the conviction or acquittal at the original trial has subsequently come to light) or new evidence has emerged. The process to be followed and the tests to be applied are modelled on those set out in sections 3 and 4. The court may not permit a retrial where it considers that to do so would be contrary to the interests of justice.

43. Section 8 is necessary because section 1, which sets out the general rule against double jeopardy, and sections 2, 3 and 4, which set out the exceptions to it, do not expressly deal with this scenario. Those provisions are premised on the basis of the new prosecution being either for the original offence; for any other offence of which it would have been competent to convict the person on the original indictment or complaint; or an offence which arises out of the same or largely the same acts or omissions as gave rise to the original indictment or complaint and is an aggravated version of that offence. Those provisions do not apply where the original trial was for, say, culpable homicide or assault and a second trial is proposed for murder. Section 8 deals with such cases. It builds on section 7 which is also relevant as it permits the previous trial to be cited in a plea in bar of trial, on the basis that the new prosecution will arise from the same or largely the same acts or omissions that already led to the original trial. Section 7 puts the onus onto the prosecution to explain what “special reason” justifies the new trial. Section 8 deals expressly with the situation of an accused being charged with murder where the original trial was for a lesser offence. It sets out two possible special reasons (new evidence and admissions) that may justify a new trial and the factors that the court must consider in determining whether to sustain or repel the plea in bar of trial.

44. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to or after the coming into force of this section.

45. Subsection (2) lists the special reasons averred by the prosecutor to repel the plea in bar of trial and to which this section applies. Those reasons are that there is new evidence that the person committed the murder or an admission that the person committed the murder (including an admission made before the conviction or acquittal at the original trial which only subsequently comes to light).

46. Subsection (3) provides that “new evidence” does not include evidence which was inadmissible at the original trial even if it would be admissible at the time of the subsequent trial.

47. Subsection (4) provides that the plea must be considered by three judges of the High Court, whose decision on the matter is final.

3 For further detail, see paragraphs 2.31 to 2.35 of the SLC’s Report
48. In relation to the new evidence special reason, subsection (5) sets out the test to be satisfied before a plea can be repelled. This is essentially the same test as is contained in section 4(5).

49. Where the special reason relates to an admission, subsection (6) provides that the court may repel the plea only if satisfied that the admission is credible and corroborated and where the admission was made before the acquittal or conviction at the original trial, it was not, and could not with the exercise of reasonable diligence have been, known to the prosecutor at the time of the original trial. It also provides that the court can only repel the plea in bar of trial if to do so is in the interests of justice.

50. Subsection (7) applies the provision of section 5(2) and (4) to (6) to this section so that, among other things, the High Court may appoint an amicus curiae and that the court’s decision on the plea in bar of trial is final.

Section 9 Plea in bar of trial: nullity of previous trial

51. This section applies where a plea in bar of trial is taken in terms of section 7(2) and the prosecutor avers as a special reason to repel the plea that the original trial was a nullity and therefore cannot be regarded as either a valid acquittal or conviction. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to or after the coming into force of the section.

52. Subsections (2) and (3) provide that the matter must be considered by the High Court.

53. Subsection (4) sets out the test that must be satisfied before the High Court can repel the plea in bar. This is essentially the same test as the Court would have applied had an application been made to it under section 12 before proceedings were raised.

Section 10 Plea in bar of trial: previous foreign proceedings

54. This section applies where a plea in bar of trial is taken under section 7(2) where the accused was originally tried in a jurisdiction outwith the United Kingdom.

55. The general rule is that, for the purpose of the plea in bar, it does not matter whether the original trial took place in Scotland or elsewhere. However, if the person was originally tried outwith the United Kingdom, section 10 means that the court may disregard a conviction or acquittal where it determines that there is a sufficient special reason and it would be in the interests of justice to do so. Subsection (2) provides particular factors for the court to consider in determining whether it is in the interests of justice to permit a trial to proceed.

56. Subsections (3) and (4) provide that the court is prevented from disregarding a non-UK verdict where trying the accused would be inconsistent with the UK's obligations under Article 54 of the Schengen Convention; that is, where a charge relating to the same acts has been finally determined in another State to which Article 54 of that Convention applies (that is, an EU Member State, Iceland or Norway).
Other subsequent prosecutions

Section 11  Eventual death of injured person

57. This section provides that where a person is convicted or acquitted of an offence involving the physical injury of another (such as an assault) and that victim subsequently dies as a result of the injury, it is possible to charge the person with their murder, culpable homicide or any other offence of causing the death of the victim. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to the coming into force of this section.

58. Subsections (3) and (4) provide a mechanism to deal with the scenario of person “A” being convicted of the offence at the original trial and also the offence at the subsequent trial. They enable the court, on a motion of A, to quash the original conviction, if considered appropriate. Subsection (5) provides a right of appeal against such a decision.

59. Subsection (6) applies where A was convicted of the offence at the original trial but then acquitted of the offence at the subsequent trial. In such a case, A may appeal against the conviction, notwithstanding any previous appeal or refusal of leave to appeal (subsections (7) and (8)).

60. The Bill makes various technical amendments to the 1995 Act to make provision for prosecutions under section 11. In particular, provision is made for appeals against the earlier conviction. Paragraphs 6 to 17 of schedule 2 set out a number of amendments to the 1995 Act to take into account the unusual circumstances of this section, for example, the amendments in paragraph 11 clarify that the judge who should write the note of appeal for a case coming under section 10(6) should be the judge at the original trial.

Section 12  Nullity of proceedings on previous indictment or complaint

61. This section applies where the prosecutor is of the view that a previous trial was a fundamental nullity and wants to raise a fresh prosecution. In such circumstances, the prosecutor needs to make an application to the High Court for authority to prosecute anew.

62. Subsection (3) sets out the test the High Court needs to consider before granting authority to prosecute.

General

Section 13  Retrospective application of Act

63. This section provides that the double jeopardy rule, the exceptions to it, the provisions on plea in bar of trial, section 11 on prosecutions after the death of the victim and section 12 on prosecutions where previous proceedings were a nullity have retrospective effect in that convictions or acquittals occurring prior to the commencement of the Bill are subject to the Bill.
Section 14  Subordinate legislation

64. This section regulates the powers of the Scottish Ministers contained in the Bill to make orders. It provides for these powers to be exercisable by statutory instrument and also provides for the level of Parliamentary procedure to which any instrument is to be subject.

Section 15  Consequential amendments

65. This section gives effect to consequential amendments contained within schedule 2 to the Bill.

Section 16  Short title, interpretation and commencement

66. This section provides for the short title of the Bill and allows the Scottish Ministers to appoint when the provisions of the Bill should come into force by order.

Schedules

Schedule 1  New evidence: relevant offences

67. This schedule provides the list of offences to which the new evidence exception in section 4 applies.

Schedule 2  Consequential amendments

68. Paragraphs 1 to 5 amend the Contempt of Court Act 1981 to protect double jeopardy proceedings from pre-trial publicity. This protects any subsequent trial from prejudicial publicity arising during the application stage seeking authority to bring a new prosecution.

69. Paragraphs 6 to 17 amend the 1995 Act. These amendments make provision for prosecutions under section 11 (where the victim of, say, an assault dies after acquittal or conviction of a person for that offence). They make provision for appeals against conviction at the first trial.

FINANCIAL MEMORANDUM

INTRODUCTION

70. This document relates to the Double Jeopardy (Scotland) Bill introduced in the Scottish Parliament on 7 October 2010. It has been prepared by Kenny MacAskill MSP, who is the member in charge of the Bill, to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.
71. The Double Jeopardy (Scotland) Bill will restate and reform the law which prevents a person being tried twice for the same offence. The Bill is largely based upon the work of the Scottish Law Commission (SLC), contained within its 2009 Report on Double Jeopardy.\textsuperscript{4}

72. The provisions of the Bill that restate the law on double jeopardy will affirm the existing prohibition on the placing of a person in jeopardy of criminal prosecution twice for the same offence. There is no general proposal to remove this rule: a person should not, in general, be subjected to repeated or successive criminal proceedings for the same incident. Restating the rule against double jeopardy is expected to have no implications for existing criminal practice and therefore involves no additional expense.

73. The aspect of the Bill that is expected to generate cost implications is in relation to the creation of a number of exceptions to the rule against double jeopardy, where in certain limited circumstances another trial will become possible. There are four main circumstances in which another trial will be possible:

(a) There will be a process to permit prosecution of a person (on a more serious charge, such as culpable homicide) where the victim has died after a conviction or an acquittal for a lesser offence (such as assault) at the first trial. The provision will apply retrospectively (i.e. to convictions and acquittals from before the passing of this Bill).

(b) There will be a process to permit a retrial where the original trial was “tainted”, by for example, jury-rigging or intimidation. This provision will apply retrospectively to any offence; but it is expected to be used very rarely.

(c) It will be possible to retry an individual where an admission of their guilt comes to the attention of the prosecutor after the date of the first trial. This will potentially apply to any offence, but is only expected to be used in serious cases. The provision will apply retrospectively.

(d) It will be possible to retry an individual where, after the first trial, compelling new evidence emerges that substantially strengthens the case against the accused. This “new evidence” exception will also apply retrospectively. It will only be possible to have a retrial on the grounds of new evidence for the crimes of murder, rape, culpable homicide, genocide, crimes against humanity, war crimes and serious sexual offences.

74. Arguably, the scenarios outlined in paragraphs (a) and (b) are not truly exceptions to the rule against double jeopardy. In the first example, it was not possible for the accused to be tried for culpable homicide (or murder) at the first trial, so in no sense are they to be tried ‘twice’ for causing the death. In the second example, the original proceedings have been assessed by a court to have been invalid. Therefore what appears to be the ‘second’ trial in this scenario is truly the first, properly conducted, trial.

\textsuperscript{4} SCOT LAW COM No 218
75. Scenarios (a) and (b) cover circumstances where it may already be possible to have a second trial under the existing law. However, the SLC found the law in both of these situations to be unclear, so the provisions in the Bill will resolve any confusion over its operation in the situations detailed in (a) and (b). As the relevant provisions in the Bill mainly clarify and do not significantly change the existing law on permitting a second trial following a trial for assault where a victim dies of injuries received or where the first trial was marred by corruption, the Bill is not expected to lead to any notable increase in such cases leading to a new trial. The reforms will however make the position much clearer and will assist courts in establishing a course of action in the scenarios outlined in (a) and (b).

76. Scenarios (c) and (d) are the two cases where additional costs are expected to arise as a result of the Bill. The additional activity that is expected in both of these cases is detailed in the following table (this list of stages proceeds on the assumption that a new trial is authorised and leads to a conviction. Any individual case could of course be terminated before reaching stage 8: for example, by a decision of the High Court not to authorise a second trial (stage 4) or a not guilty verdict at the second trial (stage 6)).

### Stages in a Double Jeopardy case

<table>
<thead>
<tr>
<th>Stage</th>
<th>Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>New evidence/confession comes to attention of police/prosecutor</td>
</tr>
<tr>
<td>2</td>
<td>Prosecutor decides whether an application should be made to have a second trial</td>
</tr>
<tr>
<td>3</td>
<td>Case for a second trial is argued in the High Court</td>
</tr>
<tr>
<td>4</td>
<td>High Court rules on whether second trial is permitted</td>
</tr>
<tr>
<td>5</td>
<td>Second trial proceeds</td>
</tr>
<tr>
<td>6</td>
<td>Verdict in second trial</td>
</tr>
<tr>
<td>7</td>
<td>If a verdict of guilt, accused is sentenced and (almost certainly) imprisoned</td>
</tr>
<tr>
<td>8</td>
<td>Accused may appeal to High Court against guilty verdict</td>
</tr>
</tbody>
</table>

**IMPACT**

77. The reform is expected to result in a very small number of high profile cases. A similar exception to the rule against double jeopardy was enacted for England and Wales in the Criminal Justice Act 2003. Since that reform became law on 4 April 2005, there have been six “double jeopardy” cases heard in England & Wales, of which two have led to a conviction.

78. Based on the experience with the similar exception to the rule against double jeopardy enacted in England and Wales it is expected that the procedure contained within the Bill will be used infrequently, perhaps once every 5 years. This is in line with the policy intention: the reform is focused upon serious cases where a failure to use new evidence to launch a new prosecution would carry the potential to undermine public perceptions of the effectiveness of the justice system.

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5 c.44, sections 75-97.
79. Where the High Court authorises a second trial as an exception to the rule against double jeopardy, the practical effect will effectively be as if a new criminal case has arisen that needs to be investigated, prosecuted and tried. The process and requirements on court time and on the legal budget will be the same as those for any other serious criminal case going through the court. A double jeopardy trial will simply be an additional piece of court business, processed in largely the same way as any other criminal hearing. All costs are therefore expected to be met from existing resources.

Methodology

80. A Regulatory Impact Assessment for the Bill will be published separately.

81. For the purposes of this financial memorandum, all figures given assume a commencement of provisions in summer 2011.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

Cost of policing - investigations

82. The question of any additional costs falling on the police as a result of this Bill is especially difficult to answer. This is because the initial (and most likely substantial) investigative work will already have been carried out in relation to the first (unsuccessful) prosecution. This investigative work is likely to form a substantial basis for a case which is considered for a second trial as an exception to double jeopardy. The additional investigation that results in new evidence justifying a second double jeopardy trial may be substantial, featuring many hundreds of police man-hours and expensive work on DNA analysis. On the other hand, the second trial may be conducted on the basis of the evidence gathered for the first prosecution, with the addition of a clear and credible admission by the accused. In this second example, the additional cost to the police is likely to be limited to the cost of police officers attending the second trial to give evidence.

83. Due to the unique nature and complexities of individual cases it is almost impossible to estimate an “average cost” for investigations of serious crime. For example, the range of costs for current Strathclyde Police murder investigations range from £3,000 for an uncomplicated murder enquiry through to ongoing investigations in more complex cases where the costs are in excess of £350,000. Historically, some exceptional cases have cost in excess of £2,000,000 due to the complexity of the investigation. The average cost for a “new evidence” investigation is likely to be substantially higher than the average cost for a case based upon the discovery of an admission by an acquitted person. For the purposes of this Memorandum, and bearing in mind that much of the investigative work will have already been conducted ahead of the first trial, a tentative police cost per double jeopardy investigation has been estimated at £300,000. This is a high-end estimate: for example, a new investigation based upon the previous detective work and bolstered by a newly discovered admission will be relatively low cost. Even a “new evidence” case will reuse much of the previous investigative work. Although we anticipate no more than one double jeopardy case progressing through stages 1-8 every 5 years, it is expected that the police will in any five year period assess other potential double jeopardy cases that do not ultimately result in a new prosecution. The Government has assumed that there will be one double jeopardy police investigation a year, resulting in one new prosecution every 5 years. A
high-end tentative assessment of investigative costs for the police is therefore estimated at £300,000 a year.

**Cost of retaining productions/evidence**

84. 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.

85. 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. Over the period 2006/07 to 2008/09, the average number of acquittals for homicide was 16 a year. The average number of rape and attempted rape acquittals was 55 a year. Taken together, these totals provide an average annual figure of 71 acquittals for homicide, rape and attempted rape. It is unlikely that there would be a change in practice for retaining evidence in all of those cases, as evidence would at present be retained for some acquittals. As each case features its own unique characteristics, it is almost impossible to estimate accurately how many would be affected. This Memorandum therefore features two estimates for the average number of acquittals where the Bill will mean a change in practice for the storage of evidence. The first, high-end, estimate is based on an average of 70 cases a year. The second, low-end, estimate is based upon 40 cases annually on average.

86. Strathclyde Police estimate that each murder investigation features an average of 400 productions, although this can of course vary substantially from case to case (one investigation featured over 4,000 items). The number of productions in a rape or attempted rape investigation is typically lower. This evidence would have to be stored securely and in conditions which prevent deterioration. It is estimated that four hundred productions would require approximately 4 square metres of storage. At a cost per square metre for storage of evidence of £60, this would provide a storage figure per case of £240 (4 x £60). An approximate estimate of the total annual cost for additional storage from the reform is therefore between £9,600 (40 x 4 x 60) a year (low-end estimate) and £16,800 (70 x 4 x 60) a year (high-end estimate).

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66Statistical Bulletin: Crime and Justice Series: Criminal Proceedings in Scottish Courts, 2006-07; 2007-08; and 2008-09 (all Table 2 - 'Persons proceeded against by main crime/offence and estimated percentage outcome')
http://www.scotland.gov.uk/Publications/2008/06/02124526/13
http://www.scotland.gov.uk/Publications/2010/03/03114034/2

Attempted rape is not caught by the reform, but its inclusion here seems appropriate as the Bill’s new evidence exception will cover serious sexual offences.
Cost of hearings at High Court

87. The cost of double jeopardy trial proceedings will vary depending upon the complexity of each case. The duration will also vary: as noted above, a case may not progress beyond the application to the High Court for a second trial. The following estimates are based upon a case that runs through each of the stages 1-8 highlighted above. It therefore represents a higher estimate than will necessarily occur in any individual case.

88. The cost of the hearing at which it is decided whether to permit a second trial (stage 3 as described above) and also any appeal by a person convicted at a second trial (stage 8) are both likely to cost the same as a complex criminal appeal case.

89. The average cost to the Scottish Court Service in salary terms per day for a solemn conviction appeal is approximately £4,900. The average cost of a hearing running for 4 days is therefore £19,600.

90. The Crown Office and Procurator Fiscal Service estimate that these hearings would be expected to involve around 40 days preparation and court time for an Advocate Depute. In addition, legal staff would have to consider a range of cases, many of which would not ultimately be subject to a double jeopardy application. This time cost is estimated at 0.25 of a full time legal post, together with 0.25 of a legal trainee. The estimate for average staffing costs for Crown Counsel and legal staff in the hearing is £51,200.

91. The average cost to the legal aid budget of a Criminal appeal case in 2008-09 was £1,585\(^8\). The cost to the Scottish Legal Aid Board of an appeal case of unusual complexity is estimated to be approximately £10,000.

Cost of the 2nd trial

92. The average cost to the Scottish Court Service of a High Court trial in 2009/10 was £14,000. However, the average figure is calculated taking account of the proportion of cases which plead without evidence being led (which was 59% of cases in 2009/10). The Scottish Court Service therefore estimate that an average cost of a High Court case following a double jeopardy retrial decision would be approximately £22,000.

93. The average prosecution costs of a High Court trial in 2005/06 was £19,300\(^9\) (adjusted for inflation £21,000).

94. The average cost to the legal aid budget of a non appeal High Court case in 2008-09 was £16,208. However, SLAB estimate that the average cost for a 2nd trial in a double jeopardy case would be above average and that an average cost per accused of £50,000 would be appropriate.

\(^8\) Scottish Legal Aid Board Annual report, 2008-09, table 4.9

\(^9\) Costs and Equalities and the Scottish Criminal Justice System,
Total costs

95. The **total police service cost** for the impact of the double jeopardy reform is estimated at between £309,600 and £316,800. This is composed of the cost of one serious investigation a year (annual cost £300,000) and a recurring annual cost for the storage of evidence that would not be retained under existing practices of between £9,600 a year (low-end estimate) and £16,800 a year (high-end estimate). For the purposes of the table summarising costs at the end of this Memorandum, the higher figure has been used.

96. The **total prosecution cost** for a double jeopardy case that went through stages 1-8 above is estimated at £123,400. This is composed of the cost of 2 appeal hearings (the decision to permit a retrial and an appeal following conviction) and one trial (£51,200+£21,000+£51,200). On the basis of one double jeopardy case progressing through stages 1-8 every 5 years, this gives an average annual cost to COPFS of £24,680.

97. The **total Scottish Court Service cost** for a double jeopardy case that went through stages 1-8 above is estimated at £61,200. This is composed of the cost of 2 appeal hearings and one trial (£19,600+£19,600+£22,000). On the basis of one double jeopardy case progressing through stages 1-8 every 5 years, this gives an average annual cost to the SCS of £12,240.

98. The **total legal aid cost** for a double jeopardy case that went through stages 1-8 above is estimated at £70,000. This is composed of the cost of 2 appeal hearings and one trial (£10,000+£10,000+£50,000). On the basis of one double jeopardy case progressing through stages 1-8 every 5 years, this gives an average annual cost to SLAB of £14,000.

99. In relation to possible additional costs falling on the Scottish Prison Service, a successful second trial ending in a conviction and custodial sentence could theoretically result in some upward pressure on the prison population. However, the low number of cases anticipated makes estimating additional costs very difficult. The process will not necessarily result in a conviction and to have any effect on prison population, any custodial sentence would either have to result in a new term of imprisonment or extend an existing period of imprisonment. A nil financial impact has been assumed (for information, the average cost per prisoner place in 2008-2009 was £31,106\(^\text{10}\)).

**COSTS ON LOCAL AUTHORITIES**

100. The only expected impact on local authorities would lie in the area of background reports on offenders. A second report may have to be prepared at the time of any second trial. The costs are however expected to be negligible given the low number of cases envisaged (one case affecting one of the 32 local authorities every 5 years).

**COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

101. We do not anticipate any additional costs on other bodies, individuals or businesses.

\(^{10}\) SPS, Annual Report 2009-10
SUMMARY OF COSTS

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GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

102. On 7 October 2010, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Double Jeopardy (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

103. On 6 October 2010, the Presiding Officer (Rt Hon Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Double Jeopardy (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

11 This is a high-end estimate. For further discussion, see paras. 14-17 & 26.
INTRODUCTION

1. This document relates to the Double Jeopardy (Scotland) Bill introduced in the Scottish Parliament on 7 October 2010. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 59–EN.

2. The term “double jeopardy” is commonly used to describe the rule which prevents a person from being put in jeopardy of criminal prosecution twice for the same offence. 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. Its main benefits are that it promotes certainty in making the outcome of criminal proceedings final; it guards against the oppressive scenario of the state pursuing individuals through the courts repeatedly for the same act; and it protects accused persons from the anxiety and humiliation of being subjected to repeated trials. The Double Jeopardy (Scotland) 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.

3. However, the exact extent of the law on double jeopardy is far from clear and there are a number of areas where the existing law does not appear to operate satisfactorily. There have also in recent years been calls to reform the rule so as to permit a new trial where an acquitted person subsequently admits their guilt or where other compelling new evidence emerges following an acquittal. Legislation in England, Wales and Northern Ireland creating exceptions to double jeopardy in both of those situations came into force in 2005. The Republic of Ireland has also recently legislated to create exceptions to its rule against double jeopardy.

4. In Scotland, public debate on this subject led to a reference made by the Cabinet Secretary for Justice, Kenny MacAskill MSP to the Scottish Law Commission (SLC). The reference, which was made on 20 November 2007, was:

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1 It should be noted that the term “acquittal” covers verdicts of both “not guilty” and “not proven”.
2 The Criminal Justice Act 2003, c.44
3 Criminal Procedure Act 2010 (No. 27/2010)
4 See for example, the Official Report of the Scottish Parliament on 22 February 2007: http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0222-02.htm#Col32373
This document relates to the Double Jeopardy (Scotland) Bill (SP Bill 59) as introduced in the
Scottish Parliament on 7 October 2010

“To consider the law relating to:

- judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such;
- the principle of double jeopardy, and whether there should be exceptions to it;
- admissibility of evidence of bad character or of previous convictions, and of similar fact evidence; and
- the Moorov doctrine;

and to make any appropriate recommendations for reform.”5

5. The SLC responded on the first of these points in its Report on Crown Appeals6 published in July 2008. This resulted in the provisions establishing a Crown right of appeal against certain types of judicial ruling contained within the Criminal Justice and Licensing (Scotland) Act 20107. The SLC published its Report on Double Jeopardy in December 2009, having published a Discussion Paper8 and conducted its own consultation exercise in early 2009. The SLC is currently considering the remaining issues of the remit as a single project.

6. The SLC concluded that the existing law on double jeopardy was in need of reform. A number of the recommendations in the Report outlined a statutory restatement of the law on double jeopardy to modernise the rule and make the way it operated clear. The SLC also concluded that it should be possible:

(a) to permit a new prosecution (on a more serious charge, such as culpable homicide) where a victim has died after a conviction for a lesser offence (such as assault) at the first trial;

(b) to permit a retrial where the first proceedings were fundamentally null;

(c) to retry an acquitted person where that person's acquittal was “tainted” in some way, by for example jury-rigging or intimidation of witnesses; and

(d) that a new trial should be permitted where a person admits to an offence after being acquitted.

7. The SLC did not reach a settled view on whether a new trial should be possible where new evidence (such as DNA material) arises with such an impact that it brings into question whether the first trial would have resulted in an acquittal had this “new evidence” been available at the time. The SLC found the arguments finely balanced on this point. It can be argued that a new evidence exception might reduce the certainty in verdicts in criminal trials and could also

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5 Scottish Law Commission (2009), Report on Double Jeopardy, Scot Law Com No 218, para. 1.1. (SLC papers are available online at http://www.scotlawcom.gov.uk/publications/).
8 Scottish Law Commission (2009), Discussion Paper on Double Jeopardy (No 141)
generate a risk of adverse publicity at any second trial. On the other hand, technological, medical and scientific advances may be considered to justify a new evidence exception. Although the Commission was undecided on the merits of a new evidence exception, the Report presented a further 8 recommendations for consideration in the event that Parliament decided to adopt such an exception.

**POLICY OBJECTIVES OF THE BILL**

**Restating the rule against double jeopardy**

8. In restating and reforming the law on double jeopardy the Bill seeks to improve and clarify the law, removing the anomalies and uncertainties identified by the SLC and to generally ensure that an ancient and substantially undefined prohibition on multiple trials is codified in a clear, coherent and modern form. The Bill provides a new formulation of the double jeopardy rule and a process for an accused person to plea in bar of trial that they have already been tried for committing the same or substantially the same acts or omissions.

9. One aspect of the restatement of the rule is provision to permit a new trial where previous proceedings were fundamentally null, for example where the original court was improperly constituted. The Bill also provides a process to permit prosecution of a person (on a more serious charge, such as culpable homicide) where the victim has died after a conviction or an acquittal for a lesser offence (such as assault) at the first trial. These provisions will apply retrospectively (i.e. to convictions and acquittals from before the passing of this Bill).

**Exceptions to the rule**

10. The other substantive objective of the Bill is to provide exceptions to the rule against double jeopardy where this is considered appropriate. There are 3 main circumstances in which another trial may in future be possible:

    (a) There will be a process to permit a retrial where the original trial was “tainted”, by for example, jury-rigging or intimidation. This provision will apply retrospectively to any offence, but it is only expected to arise in more serious cases.

    (b) It will be possible to retry an individual where an admission of their guilt comes to the attention of the prosecutor after the date of the first trial. This will potentially apply to any offence, but is only expected to be used in serious cases. This provision will apply retrospectively.

    (c) It will be possible to retry an individual where, after the first trial, compelling new evidence emerges that substantially strengthens the case against the accused. This “new evidence” exception will also apply retrospectively. It will only be possible to have a retrial on the grounds of new evidence for the crimes of murder, rape, culpable homicide, genocide, crimes against humanity, war crimes and serious sexual offences.

11. 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 Northern Ireland it is anticipated that the procedure provided by the Bill will be used infrequently, perhaps once every 5 years. The reform is focused upon serious cases where a failure to use an admission or new evidence to launch a new prosecution would potentially undermine public perceptions of the effectiveness of the justice system. The system is at risk of being brought into disrepute when compelling new information or a clear post-trial confession arises in a significant case and no new prosecution can be brought against the accused.

ALTERNATIVE APPROACHES

12. There is no alternative approach to primary legislation that would achieve the Bill’s policy objectives.

13. It would be entirely possible to take no action and to leave the law as it stands. Although the SLC identified a number of flaws and inconsistencies with the existing law on double jeopardy, these do not appear to obstruct the course of criminal proceedings to any substantive effect.

14. However, leaving the existing law as it is would continue the current position under which it is not possible to retry an acquitted person even if compelling new evidence emerges of their guilt or if that person makes a full and frank admission. Such cases are few in number and therefore the impact of not adopting this reform on the day to day operation of the criminal justice system would be relatively slight. However, the proposed reform is purposely targeted on a small number of very serious cases: cases which have an impact disproportionate to their number. To hear of a subsequent admission or compelling new evidence after an acquittal for a heinous crime is of course profoundly distressing for victims and their families. It also undermines public confidence in the justice system overall. An inflexible rule against double jeopardy applying in every case ignores advances in investigative technology that can produce compelling evidence years after a trial. It also does nothing to deter acquitted persons from subsequently boasting of their guilt (provided they had not committed perjury at the first trial). Double jeopardy is an important principle ensuring certainty in the legal system and the Government is concerned to ensure that there are not a substantial number of double jeopardy retrials as a result of this Bill. The reform is instead focused upon a handful of cases where the inflexible operation of the existing law promotes justified outrage and discontent with the criminal justice system overall.

GOVERNMENT CONSULTATION EXERCISE

15. The Government conducted a consultation exercise on double jeopardy in the period March to June 2010. The consultation paper asked 10 questions and focused upon the discussion of a “new evidence” exception in the SLC Report. There were 15 responses received to the consultation: 3 from academics, 3 from individuals and the remainder from various representative bodies. These bodies were the Sheriffs’ Association, the Scottish Police Federation, Association of Chief Police Officers in Scotland, Justice for Victims, the Law Society of Scotland, the Glasgow Bar Association, Victim Support Scotland, the Faculty of Advocates and the Royal Society of Edinburgh. The general consensus was in favour of the

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9 See paras. 2.4-2.7 of the SLC Report and also Part 3 of the SLC Discussion Paper on Double Jeopardy
This document relates to the Double Jeopardy (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 7 October 2010

reforms proposed by the SLC and the majority of consultation responses supported the Government position in favour of a new evidence exception. There was, however, some divergence of opinion on the scope of an exception for new evidence. Where appropriate, consultation responses are referred to in the following paragraphs of this memorandum as it examines individual aspects of the Bill. Further information on the responses to the consultation exercise can be found on the Scottish Government’s website\(^\text{10}\).

16. The consultation paper\(^\text{11}\) also sought views on a proposal not considered by the SLC. This was to create an exception to double jeopardy where a disputed judicial ruling (such as that there was no case to answer on the evidence led by the prosecution) resulted in the case not being put to the jury. This would have had the practical effect of making the new Crown right of appeal contained within the Criminal Justice and Licensing (Scotland) Act 2010 apply retrospectively. Consultation responses were generally against this proposal and concerns were expressed that it would not be compatible with the European Convention on Human Rights (ECHR). The Government has decided that this proposal should not feature in the Bill.

THE DOUBLE JEOPARDY (SCOTLAND) BILL

The rule against double jeopardy

17. The first section of the Bill provides a statutory restatement of the rule against double jeopardy. Put simply, it clarifies that a person cannot be tried twice for the same offence. In general, it will remain the case that a person cannot be re-tried for an act or omission for which they have previously been convicted or acquitted. This reform is very much based upon the SLC’s recommendations.

18. The Bill achieves a restatement of the rule against double jeopardy in two ways. The first is contained in section 1, which provides a general prohibition against a person being charged for an offence for which they have already been prosecuted at another trial. This prohibition focuses on the content of the charge at the second trial, rather than the act or omission that resulted in a prosecution. It does not therefore exclude outright a second trial for a charge that was not libelled at the first. For example, section 1 does not prohibit the charging of a person for murder who has previously been tried for culpable homicide arising out of the same act or omission, as long as murder was not charged at the earlier trial.

Plea in bar of trial

19. The second way in which double jeopardy is being restated is contained in section 7 of the Bill. This provision allows a person to argue at any second trial that they have already been tried for committing the same or substantially the same acts or omissions. This provision is designed to permit further proceedings for essentially the same criminal act that resulted in an earlier prosecution in a very restricted set of circumstances. The underlying rationale was set out by the SLC in paragraph 2.35 of the Report:

\(^{10}\) http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure

\(^{11}\) Scottish Government consultation paper on double jeopardy, Question 4 http://www.scotland.gov.uk/Publications/2010/03/22113128/0
“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”.

20. This discretion to allow a new trial in limited circumstances where that would not amount to an abuse of process is given effect in the Bill by allowing a “plea in bar of trial” to be rebutted where the prosecutor can show that there is “special reason”.

21. “Special reason” is not defined by the Bill, but is not intended to provide a general exception to the principle against double jeopardy. An example of a special reason may include a case where the accused person had sought or consented to a separation of charges into different trials, perhaps to avoid evidence in respect of one charge potentially prejudicing the hearing on the other charge. Another possible special reason would be where a 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 (e.g. there may be a previous trial where the prosecutor sought a conviction for sexual assault, but included rape within the charge so as to allow a complainer alleging rape to give a full account at the trial. The prosecutor might in such a case consider that there was insufficient corroboration to pursue the rape charge, but that to have the complainer distort their testimony to remove reference to rape would be undesirable). In such cases the Court has discretion to allow further proceedings.

22. Three specialised examples of special reason are set out in sections 8 to 10 of the Bill.

Plea in bar of trial for murder: new evidence and admissions

23. The exceptions to double jeopardy outlined in sections 3 (admission made or becoming known after acquittal) and 4 (new evidence) cover situations where it is wished to retry an acquitted person on a charge that featured at the earlier trial. These exceptions are discussed elsewhere in this memorandum. However, they do not cover cases where there is now good reason to suspect the accused of murder but where murder was not charged at the first trial (perhaps because the evidence at that time indicated that the matter was entirely accidental). Section 8 of the Bill therefore outlines a form of “special reason” to cover this situation. It will permit a murder prosecution where murder was not charged at the previous trial, in circumstances where new evidence or an admission has subsequently emerged that suggests that the offence in question was in fact murder. The provision is modelled upon the exceptions in sections 3 and 4.

Plea in bar of trial: nullity of previous trial

24. Provision is also made where a plea in bar of trial is taken and the prosecutor avers as a special reason to repel the plea that the original trial was a nullity and therefore cannot be

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12 For further detail, see paras. 2.28 to 2.35 of the SLC’s Report
regarded as either a valid acquittal or conviction. The Bill ensures that the High Court must assess whether the previous proceedings should bar a new trial.

Plea in bar of trial: previous foreign proceedings

25. Section 10 makes provision for where a plea in bar of trial is submitted on the basis that there has been a previous trial in a jurisdiction outwith the United Kingdom. Although generally it should not matter where the preceding trial took place, the Bill gives the court discretion to disregard a conviction or acquittal from such a trial where it determines that there is a sufficient special reason to do so. This could be where there is evidence to suggest that the previous foreign proceedings were corruptly contrived in such a way as to provide a double jeopardy protection against future prosecution. It will not be possible for a court to disregard a verdict determined in another State to which Article 54 of the Schengen Convention applies (i.e. EU Member States, Iceland or Norway).

Tainted acquittals

26. Section 2 of the Bill makes provision for a retrial where the original trial was in some way “tainted”, such as through jury-rigging or the intimidation of witnesses. This provision adopts the SLC’s Recommendation 13. This provision is arguably a different type of exception to the rule against double jeopardy than those set out for new evidence or for admissions. This is because a person acquitted by way of corrupt methods has not truly been subject to the risk of conviction at the original proceedings. Therefore what appears to be a “second” trial in this scenario is truly the first properly conducted trial (this is discussed in further detail in the SLC Report (paras. 3.1 to 3.7)).

Admission made or coming to light subsequent to acquittal

27. Section 3 of the Bill makes provision for a new trial where credible evidence subsequently emerges that the person who has been acquitted has admitted their guilt. This covers the position where an admission is made after the acquittal and adopts the SLC’s Recommendation 25. Although an admission could technically be described as “new evidence”, this has been considered a distinct category of evidence for the purposes of the Bill. Section 3 contains a slight refinement of the SLC’s position, which was restricted to admissions arising after the date of the acquittal at a previous trial. This would not have included admissions made prior to the date of the acquittal, but which were unknown (and could not with the exercise of reasonable diligence have been known) to the investigating and prosecuting authorities. Section 3 of the Bill therefore permits a new trial where the admission was made prior to the acquittal, but where the prosecutor was not, and could not with the exercise of reasonable diligence, have been aware of the admission at the time of the original trial.

Offences to be covered by an exception for admissions

28. Unlike the exception for new evidence, an admission may be used to justify a new trial for any offence. This distinction is justified because the accused person, in admitting their guilt, can be argued to have “waived” their right not to be retried. As the SLC observed in paragraph 4.2 of the Report: “There is something profoundly disquieting about the notion that a person should effectively be able to boast - with impunity - that he has “got away with it”.” However, it
is expected that the exception in respect of admissions will generally only be used in relation to the most serious of offences.

Retrospectivity of the exception for admissions

29. In line with Recommendation 28 in the SLC’s Report, the exception for admissions will apply retrospectively and will therefore be applicable to acquittals from before the commencement of the Bill. The SLC’s reasoning on this point, as set out in paragraphs 4.8 to 4.10 of the Report, is fully accepted by the Government:

“4.8 There are a number of general reasons to be cautious about retrospective legislation. The usual reason for caution with regard to such legislation is that it is seen as unfair and potentially oppressive to make laws which alter the basis upon which citizens have been conducting their affairs...Article 7 of the European Convention on Human Rights (“ECHR”) prohibits not only the criminalisation of conduct which was not criminal at the time when it was committed, but also the imposition of a more severe penalty than was competent at that time. More narrowly, one might argue that the introduction of any retrospective exception to the rule against double jeopardy would deprive an acquitted individual of a vested right or interest – namely the right not to be tried again for the same offence – and that this would be unfair. Finally, one might view the introduction of a retrospective exception as incompatible with the public interest in maintaining the finality of court judgments.

4.9 None of these possible objections to retrospectivity applies with any force to the case in which a person who originally pled not guilty subsequently admits his guilt of the crime of which he was acquitted. Allowing for a retrial in such circumstances does not criminalise conduct which was not criminal when committed. Nor does it increase the maximum sentence applicable to that crime. It merely makes it possible for the acquitted person who later confesses to be convicted and punished for precisely the crime with which he was originally charged. There is no issue of incompatibility with Article 7 of the ECHR.

4.10 Nor does either of the more general objections to retrospective application apply here. Even if it is a valid objection to retrospective application of an exception that it would unfairly deprive the accused person of a settled right not to be tried again, we cannot see how this objection could apply to a person who has admitted his guilt. It seems to us to be reasonable to regard such a person as having waived any such right. He does not, of course, waive his right to be presumed innocent, and such cases may involve very difficult questions of credibility and reliability of evidence, particularly where the accused denies that he has made the admission, or that the admission, if made, was true. But where the fact and reliability of the admission can be established to the satisfaction of a court, the result is that the accused has at his own hand negated the basis upon which he approached the earlier prosecution, namely that he was innocent of the crime with which he was charged.”
**New Evidence**

30. Where a person has been acquitted of an offence, the rule against double jeopardy means that he or she cannot be tried again for that crime. However, ‘new evidence’ may have emerged since the original trial. Although it may have physically existed at the time of the initial trial, improved techniques (e.g. with DNA or photographic enhancement) might mean that the material has acquired new value as evidence. As already noted, confessions are given separate provision from other forms of new evidence in the Bill.

31. It can be argued that a new evidence exception adds uncertainty to the law by calling into question whether any acquittal could some day be retried. There is also a risk that any second trial might be affected by prejudicial publicity. However, the consultation paper\(^{13}\) outlined the Government’s position in favour of an exception to the rule against double jeopardy where new evidence emerges that substantially strengthens the case against the accused. 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.

32. 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\(^ {14}\).

**Offences to be covered by a new evidence exception**

33. The Bill limits the application of a new evidence exception to a certain number of specified offences. This is done in order to promote certainty in the outcome of criminal trials. Every offence that is covered by an exception to double jeopardy creates the theoretical prospect that an acquittal might someday be called into question by the discovery of new evidence. It is therefore appropriate to restrict the application of any exception to the most serious cases. The SLC in its Report recommended that a new evidence exception be limited to murder and rape. This approach was not supported by respondents to the consultation, with only two respondents supporting such a strict limitation. MSPs at the Parliamentary debate on 24 March 2010 also spoke in favour of a more extensive list. However, there does not appear to be any firm consensus as to how wide the range of offences should be crafted. The exact nature of the offences to be included is a difficult question and a compelling case can be made for the inclusion of many offences, based upon individual case studies\(^ {15}\). One proposal made by some consultees was to apply the new evidence exception to any case capable of being tried under solemn criminal procedure. However, this would create a very broad definition; one that the Government considers would be too wide (it could for example capture simple assaults and motor vehicle thefts). 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

\(^{13}\) Scottish Government consultation paper on double jeopardy, Chapter 2

\(^{14}\) http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-10/sor0324-02.htm#Col24875

\(^{15}\) For example, the new evidence exception to double jeopardy adopted in England, Wales and Northern Ireland in the Criminal Justice Act 2003 applies to offences such as serious drugs offences, arson endangering life and conspiracy.
This document relates to the Double Jeopardy (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 7 October 2010

considers that this is an issue where there is substantial scope for further debate during Parliamentary consideration of the Bill.

34. 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. It will not be possible to use this power to permit a double jeopardy retrial in a case where the offence was not on the list at the time of the first trial.

Evidence not used at the original trial

35. The consultation paper sought views about the situation where evidence was available at the time of the original trial but the prosecution chose not to rely upon it, perhaps for tactical reasons. It also raised the prospect of a scenario where a particular piece of evidence was not unearthed during the original investigation, but that arguably should have been discovered by the authorities. The SLC considered that evidence covered by those two situations should not count as “new” evidence for the purposes of justifying a second trial. This approach was supported by most consultees and the Government has adopted this SLC Recommendation (number 31) in the Bill. As a result, for the purpose of a new evidence exception, material will be regarded as “new” if it was not, and could not with the exercise of reasonable diligence have been, available at the original trial.

Changes in the rules of admissibility of evidence

36. The Bill also adopts the SLC’s Recommendation 32 that a second trial should not be justified, in terms of a new evidence exception, on the basis of evidence that was inadmissible at the time of the first trial but that has since become useable following a change in the rules of admissibility. This approach was strongly supported by consultees. However, provided that there is other new evidence to permit a retrial, the Government considers that all evidence that would be admissible according to the rules of admissibility in force at the time of the second trial should be available for use. This will allow the court to assess the case on the basis of all the available evidence properly admissible by law at the time of the second trial, but will not allow a second trial to be held on the basis of previously inadmissible evidence alone.

Test for assessing whether new evidence warrants a new trial

37. The Bill adopts the SLC’s test for a court to use in assessing whether evidence justifies a new prosecution. This test has two elements: (a) that the new evidence substantially strengthens the case; and (b) that, had a reasonable jury heard the evidence at the original trial, together with the new evidence, it is highly likely that the accused would have been convicted. There was general support of the SLC’s test from respondents to the consultation.

Publicity

38. The Bill also adopts the SLC’s proposals aimed to prevent adverse publicity ahead of a second trial. Respondents to the consultation were supportive of this recommendation.
This document relates to the Double Jeopardy (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 7 October 2010

Retrospectivity of the new evidence exception

39. The Bill provides that the new evidence exception will apply retrospectively, (i.e. to past acquittals). The SLC recommended against such a step and consultees were divided. A part of the SLC’s reasoning was focused on a doubt whether there were in fact any existing cases in which making a new evidence exception retrospective would open the possibility of a retrial. The SLC’s full discussion of this issue is contained in paragraphs 5.71 to 5.87 of the Report. Two relevant extracts are quoted below:

“5.82 The core of the principled objection to a retrospective exception is that there is a difference between saying to a person who may in future be accused of a crime that the verdict at his trial may not be final, and saying to a person who has duly submitted to the criminal process that the verdict that he believed, correctly, to be final is only provisional after all.”; and

“5.87 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.”

40. 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 that 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 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. The exception in relation to admissions is to be made retrospective, in line with the SLC’s recommendations. This raises the following question: if an admission justifies a new trial for an old acquittal, why should compelling new evidence not do the same? The main point of difference is that by making an admission, an acquitted person can be said to have “waived” their right to be certain of the historical acquittal. However, the Government’s conclusion is that, in the most serious cases, the interests of justice weigh more heavily in favour of testing significant new evidence before a court than in providing such an absolute degree of protection to the expectations of the acquitted person. The Bill therefore applies a new evidence exception to existing acquittals.
New evidence exception to be used only once

41. The Bill adopts the SLC’s proposal that only one application for a retrial on grounds of new evidence will be permitted in relation to any criminal case.16 This restriction does not apply to the exception to double jeopardy for admissions, so it will in theory be possible to have a third trial if a new admission arose. This is not considered likely, but it will be permitted to avoid any possibility that acquitted persons would be able to admit their guilt with impunity following a double jeopardy retrial.

Maximum sentence

42. Section 6 of the Bill ensures that where a new prosecution takes place on the basis of an exception to the rule against double jeopardy, the maximum sentence that can be passed at the new trial is limited to that which could have been imposed at the time the offence to which it relates was committed. This is in line with the general principle that it should only be possible to try persons for conduct that was criminal at the time it occurred and that they should only ever be liable to the maximum penalty that applied at that time.

Assault Acquittals and Subsequent Retrials

43. The final two questions in the consultation paper were not concerned with a new evidence exception. They were focused on the (extremely rare) question of whether it should be possible to prosecute a person (on a more serious charge, such as culpable homicide) where the victim has died after a conviction or an acquittal for a lesser offence (such as assault) at the first trial. In such circumstances the existing law appears to permit new trials following both a conviction and an acquittal at the first trial.17 The SLC recommended against continuing this position where the first trial ended in an acquittal. The views of consultees in response were mixed.

44. The Government has on reflection decided that the Bill should continue the existing law, permitting a new trial if the first trial ended in acquittal as well as conviction. The subsequent death of the victim means that the court did not hear the full circumstances of the case that have resulted in a death. When the court assessed the matter, the incident was thought to be non-fatal. An assault investigation will inevitably - and quite properly - attract fewer resources than a homicide investigation. A more in-depth inquiry will inevitably take place where the victim ultimately dies as a result of an offence. Given the changed circumstances, the available evidence might be reviewed and its significance reassessed. Additional evidence may also arise that was not available at the original trial. For example, crucial witnesses, who previously thought the incident to be minor and therefore did not come forward to the police, may feel compelled to present themselves when they realise that the victim has died. It may also be the case that the accused at the first trial admitted to assault, but testified that it was necessary: perhaps to protect him or herself. This defence might be less likely to succeed in a murder trial, where the implications of the accused’s actions are of course much more serious. A more in-depth investigation may expose weaknesses in the special defence that were not apparent at the original trial. Under the proposals in the Bill, the Crown would need, as always, to establish the causal link between the death and the actions of the accused. Given the severity of the new

16 See section 8(3) of the Bill appended to the SLC Report
17 Para. 2.38 of the Report
charge there will be an additional evidential burden on the Crown to obtain a conviction in the subsequent trial.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

45. The Bill is focused on criminal prosecutions and has the potential to apply to anyone tried of a criminal offence. Its practical application is however expected to be restricted to an extremely small number of very serious criminal cases. The Bill’s provisions do not discriminate on the basis of gender, race, marital status, religion, disability, age or sexual orientation.

Human rights

46. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights. Part 1 of the SLC’s Report details an assessment that the Commission’s recommendations are compatible with the ECHR. This assessment does not cover the creation of a new evidence exception, where the Government has gone beyond the SLC’s recommendations. However, in doing so, the Government is confident that that the ECHR and the Charter of Fundamental Rights of the European Union do not prohibit the creation of a new evidence exception and that this exception can be applied retrospectively. Further explanation on this point is set out in the Government’s consultation paper18. It should be noted that a similar exception has been adopted in other jurisdictions subject to the ECHR, such as England & Wales and the Republic of Ireland.

Island communities

47. The Bill has no differential impact upon island communities. The provisions of the Bill apply equally to all communities in Scotland.

Local government

48. The Scottish Government is satisfied that the Bill has no detrimental impact on local authorities.

Sustainable development

49. The Bill will have no negative impact on sustainable development.

18 See Scottish Government consultation paper on double jeopardy, paras. 2.7-2.9
DOUBLE JEOPARDY (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Double Jeopardy (Scotland) Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed power. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Double Jeopardy (Scotland) Bill is divided into 16 sections and 2 schedules. The Bill is largely based upon the work of the Scottish Law Commission (SLC), contained within its 2009 Report on Double Jeopardy.1

3. Section 1 of the Bill will restate and reform the law which prevents a person being tried twice for the same offence.

4. There is no general proposal to remove the rule against double jeopardy. However, sections 2, 3 and 4 of the Bill will create certain strictly limited exceptions where a new trial will in future be possible. Only the exception, in section 4, involves a delegated power. The other delegated power in the Bill is contained in section 16, which provides for the Bill to be commenced by order.

1 SCOT LAW COM No 218 http://www.scotlawcom.gov.uk/publications/
DELEGATED POWERS

Section 4(7) – Power to make an order varying the offences to be covered by the new evidence exception to double jeopardy

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

5. The exception set out in section 4 will permit a new trial after a person has been acquitted of an offence where compelling new evidence emerges that substantially strengthens the case against the accused.

Rationale for subordinate legislation

6. Although the new evidence exception is focused upon serious offences, there is legitimate scope for debate on exactly which offences should be covered. The SLC in its Report recommended that the new evidence exception be restricted to rape and murder. However, the Government’s consultation paper on double jeopardy confirmed that there was a strong argument for other serious offences such as culpable homicide to be included. This suggestion received support from MSPs at a Parliamentary Debate on 24 March 2010 and also from most of the respondents to the Government’s consultation exercise. As a result, schedule 1 of the Bill provides a list of offences to be caught by the new evidence exception that goes beyond the SLC’s recommendations. The schedule includes the crimes of murder, rape, culpable homicide, genocide, crimes against humanity, war crimes and serious sexual offences.

7. The Government’s intention is to reach a Parliamentary consensus on the offences to be covered during the passage of the Bill. To that end, the Policy Memorandum indicates that further debate on the extent of schedule 1 will be welcomed. It is clear that there are other offences that merit consideration for inclusion, for example the new evidence exception to double jeopardy adopted in England, Wales and Northern Ireland in the Criminal Justice Act 2003 applies to a wider range of offences such as serious drugs offences, arson endangering life and conspiracy.

8. Although the intention is for schedule 1 in the Bill as passed to reflect Parliament’s concluded view on the offences to be covered by a new evidence exception, it is thought necessary to make provision for altering the list in the future. Future offences may be created or there may be a strong view that a certain type of offence should be included. The list in the Criminal Justice Act 2003 has already been amended to add offences by the Corporate Manslaughter and Corporate Homicide Act 2007 and the Sexual Offences (Northern Ireland) Act 2007.

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2 http://www.scotland.gov.uk/Publications/2010/03/22113128/0
3 http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-10/sor0324-02.htm#Col24875
5 (c.19) http://www.legislation.gov.uk/ukpga/2007/19/contents, section 26 and paragraphs 3(2) and (3) of schedule 2
This document relates to the Double Jeopardy (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 7 October 2010

Order 2008. Section 4(7) of the Bill therefore permits Scottish Ministers to amend schedule 1 so as to add, or remove, the offences covered by the new evidence exception.

9. The power to add offences will only affect future cases. Section 4(8) ensures that for a double jeopardy trial to proceed on the basis of new evidence, the offence in respect of which a verdict was passed at the first trial must have been on the list in schedule 1, at the time the accused was acquitted in the first trial. Therefore, it would not be possible to add an offence to the list in schedule 1 with the specific intention of permitting a double jeopardy retrial in a case that had already been tried.

Choice of procedure

10. Section 14 of the Bill provides that this order would be made by statutory instrument subject to affirmative resolution of the Scottish Parliament. As a change under the order could result in a potentially significant change to the finality of a verdict in any given criminal case, it is considered that the affirmative procedure is appropriate.

Section 16(3) – Short title, interpretation and commencement

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: no procedure

Provision

11. Section 16(3) provides for the sections of the enacted Bill (other than section 16) to come into force on such a day as the Scottish Ministers appoint by order.

Rationale for subordinate legislation

12. This is a standard commencement by order power. As usual with commencement orders, no provision is made for laying the order in Parliament, as the power is to commence provisions which the Parliament has already scrutinised.

Choice of procedure

13. Whilst the order will not be subject to Parliamentary procedure as such, the Subordinate Legislation Committee will, in terms of its remit, have the opportunity to consider the order.

Justice Committee

3rd Report, 2011 (Session 3)

Stage 1 Report on the Double Jeopardy (Scotland) Bill

Published by the Scottish Parliament on 26 January 2011
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Justice Committee

Remit and membership

Remit:

To consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Bill Aitken (Convener)
Robert Brown
Bill Butler (Deputy Convener)
Cathie Craigie
Nigel Don
James Kelly
Stewart Maxwell
Dave Thompson

Committee Clerking Team:

Andrew Mylne
Anne Peat
Andrew Proudfoot
Christine Lambourne
INTRODUCTION

1. The Double Jeopardy (Scotland) Bill was introduced on 7 October 2010 by Kenny MacAskill MSP, Cabinet Secretary for Justice, and was referred to the Justice Committee for Stage 1 consideration. It has also been considered by the Finance Committee and Subordinate Legislation Committee.

2. The Bill, which is based on the Scottish Law Commission’s Report on Double Jeopardy\(^1\), aims to codify in statute the established principle that a person should not normally be prosecuted a second time for the same offence, or on a new charge arising from the same actions. However, the Bill proposes a number of exceptions to this principle, including where the original trial was “tainted” by an offence against the course of justice, where there is new evidence that an acquitted person has confessed to the offence, or where other new evidence of guilt emerges.

Structure of the report

3. This report begins with the background to the current common law rule on double jeopardy and explains the reform suggested by the Scottish Law Commission. It then describes the Scottish Government’s consultation on that report and the subsequent introduction of the current Bill and the scrutiny undertaken by the Committee.

4. The report then considers, in turn, each of the specific proposals implemented by the Bill, including where the proposals keep to or depart from the Commission’s recommendations. It also considers the practical implications of the Bill for the police, prosecution and courts. Finally, it makes its recommendation to Parliament on whether it should agree to the general principles of the Bill at Stage 1.

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BACKGROUND

5. In November 2007 the Scottish Government asked the Scottish Law Commission (SLC) to consider and make recommendations on a number of criminal justice issues, with a view to ensuring "an appropriate balance between the rights of the accused and the ability of the Crown to prosecute in the public interest". One of these issues was the principle of double jeopardy and whether there should be any exceptions to it.

6. The Cabinet Secretary for Justice, Kenny MacAskill MSP, said at the announcement—

"Fairness for both the victim and the accused is at the heart of any good justice system. But so too is public confidence. Questions around Crown appeal rights, double jeopardy and previous convictions, though not new, were raised again after the trial for the World's End murders in September. Good government is about listening to those public and political concerns with a cool head. We made clear that we would reflect seriously and thoroughly on the balance between the rights of the accused and the ability of the Crown to prosecute in the public interest."

7. Mr MacAskill went on—

"That's why I believe we need the expertise of the Scottish Law Commission, with their strong track record of independent analysis and reform of Scots Law, to take on this work. I have asked the Commission to consider all the questions in their broad context and in relation to the law of criminal procedure and evidence in general. It is no threat to our justice system to reappraise historic principles such as double jeopardy. It is to ensure that our law remains fit for purpose in the modern age." ³

Scottish Law Commission consultation and report

8. The SLC subsequently considered the principle of double jeopardy and invited comments on its preliminary proposals. Fourteen individuals and organisations responded to its consultation.

9. Following the consultation, the SLC published its report on double jeopardy in December 2009. Patrick Layden QC, lead commissioner on the issue, said—

"The rule against double jeopardy has protected the citizens of Scotland against repeated prosecutions for hundreds of years. Essentially, it prevents the state from running the criminal prosecution system on a 'Heads we win;"
tails, let's play again until you lose' basis. So we are recommending that it should be kept, and put into legislation."\(^7\)

10. The report nevertheless recommended that there should be a number of exceptions to this rule where the original trial has been corrupted, for instance “by jury-rigging or intimidation of witnesses”, or where the person acquitted had “later admitted committing the offence”.\(^8\) On the question of whether retrials should be permitted on the basis of new evidence more generally, the SLC was unable to reach a firm conclusion and so made no recommendation. However, the Commission did provide a framework for how a general new evidence exception might look in practice, should the Scottish Government decide to pursue it. It also recommended that, if a general new evidence exception were to be introduced, it should not be made retrospective.

11. While the Bill largely follows the recommendations of the Scottish Law Commission, it does at times deviate from them. These differences are highlighted in the remainder of this report.

**Scottish Government consultation and Bill**

12. The Scottish Government responded to the SLC’s report by publishing its own consultation\(^9\) focusing on the establishment of a general new evidence exception, including what tests should be applied in assessing new evidence and what offences that exception should cover. In a subsequent letter to the Chairman of the SLC,\(^10\) the Cabinet Secretary for Justice said—

> “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 … 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.”

13. Fifteen individuals and organisations responded to the Scottish Government’s consultation.\(^11\) The First Minister later announced to the Scottish Parliament, on 8 September 2010, that the Scottish Government would shortly bring forward legislation on double jeopardy—

> “The double jeopardy bill will reform the law to allow an acquitted person to be prosecuted again in certain clearly and carefully defined circumstances.

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That is a highly important change and a change in principle, but its time has come.”¹²

14. The Policy Memorandum explains that in restating the rule against double jeopardy the Bill “seeks to improve and clarify the law, removing the anomalies and uncertainties identified by the SLC and to generally ensure that an ancient and substantially undefined prohibition on multiple trials is codified in a clear, coherent and modern form”.¹³

15. The structure of the Bill is as follows (with substantial departures from the SLC’s report on double jeopardy noted in brackets):

- Section 1 provides for the general rule against double jeopardy.
- Section 2 permits an acquitted person to be prosecuted again where the acquittal was tainted by certain offences against the course of justice.
- Section 3 permits an acquitted person to be prosecuted again where there is new evidence that they admitted committing the offence. (These provisions go beyond what was recommended in the SLC’s report – in that they would apply to pre-acquittal admissions as well as post-acquittal admissions.)
- Section 4 permits an acquitted person to be prosecuted again where there is other new evidence that a person previously acquitted of one of the offences listed in schedule 1 committed the offence. (The SLC did not reach a firm conclusion on whether there should be such a general new evidence exception but recommended that any such exception should only apply to murder and rape, plus other offences added by affirmative order, and should not apply retrospectively. Relevant provisions of the Bill include a longer list of violent and sexual offences and would apply retrospectively.)
- Sections 5 and 6 contain common provisions about the exceptions to the rule against double jeopardy made in sections 2, 3 and 4, including provision about procedure and timescales.
- Section 7 permits a person accused of an offence to make a “plea in bar of trial” aimed at establishing that he or she has already been convicted or acquitted of an offence arising from the same (or largely the same) acts or omissions. The court is required to accept such a plea, if it is established, unless persuaded by the prosecutor that special reasons apply and that a re-trial would be in the interests of justice. Sections 8 to 10 make further provision about a plea in bar of trial in three particular circumstances.
- Section 8 deals with circumstances where a person is charged with murder, having already been tried for a lesser offence arising out of the

same circumstances, on the basis that there is new admission or other evidence that the person committed murder.

- Section 9 applies where the prosecutor claims that the original trial was a nullity and therefore not valid.

- Section 10 applies where the accused was originally tried in a jurisdiction outwith the United Kingdom.

- Section 11 permits a person who has been tried for assault (or certain other offences) to be tried again for homicide if the victim subsequently dies from the injuries, irrespective of whether the accused was originally convicted or acquitted. (The SLC recommended that the provision should only apply where the accused was originally convicted.)

- Section 12 allows the High Court, on the application of the prosecutor, to authorise a fresh prosecution if satisfied that the previous trial was a nullity and that it is in the interests of justice to do so.

- Section 13 provides for the retrospective application of the Bill so that convictions or acquittals prior to the commencement to the Act are subject to the exceptions to the principle of double jeopardy and the provisions on pleas in bar of trial. (This is contrary to the SLC’s recommendation that any general new evidence exception to the general principle should not be made retrospective.)

- Section 14 provides for orders made under earlier provisions of the Bill to be subject to the affirmative procedure.

- Section 15 and schedule 2 make consequential changes to the Contempt of Court Act 1981 and the Criminal Procedure (Scotland) Act 1995.

Justice Committee consultation

Approach and call for evidence

16. The Committee considered its approach to the Bill at its meeting on 5 October 2010 and agreed a number of witnesses to give oral evidence. A call for written evidence was issued on 12 October, inviting submissions by 30 November. The Committee considered the written evidence received on 7 December and agreed to write to the Association of Chief Police Officers in Scotland seeking supplementary written evidence.

Evidence received by the Committee

17. At its meetings on 16 November and 7, 14 and 21 December the Committee took oral evidence from:

- the Scottish Law Commission (Patrick Layden QC, Commissioner)

- the Crown Office and Procurator Fiscal Service (Michelle Macleod, Head of Policy Division, Scott Pattison, Director of Operations, and Gertie Wallace, Head of Criminal Justice Policy)
• the Faculty of Advocates (Richard Keen QC, Dean of Faculty)
• the Law Society of Scotland (Alan McCreadie, Deputy Director Law Reform)
• Scottish Human Rights Commission (Shelagh McCall, Commissioner)
• John Scott (former Chair of the Scottish Human Rights Centre)
• The Right Hon Lord Gill, Lord Justice Clerk (on behalf of the Judges of the High Court of Justiciary)
• The Scottish Government (Kenny MacAskill MSP, Cabinet Secretary for Justice).

18. All of the above (other than the Scottish Law Commission and John Scott in his capacity as former Chair of the Scottish Human Rights Centre) provided written submissions to the Committee. Further written submissions were received from:

• Professor Peter Duff
• Scottish Campaign Against Irresponsible Drivers
• Professor Paul Roberts
• Royal Society of Edinburgh
• Association of Chief Police Officers in Scotland
• James Chalmers
• Victim Support Scotland
• Society of Solicitor Advocates
• Glasgow Community and Safety Services
• People Experiencing Trauma and Loss
• Morain Scott

19. The Committee is grateful to all those who have given evidence on the Bill (who are also listed in Annexes D and E). It is also grateful to the research support provided by Frazer McCallum of the Parliament’s information centre (SPICe).

RULE AGAINST DOUBLE JEOPARDY

Section 1: Rule against double jeopardy

20. The Scottish Law Commission broadly defined the rule against double jeopardy as “prohibiting a repetition of criminal proceedings against anyone who has been previously tried for a particular offence, whether he was convicted or
acquitted in those earlier proceedings".\textsuperscript{14} The term double jeopardy is not, however, directly stated in Scots law. Instead it is known as the rule that a person who has already "tholed an assize" (undergone trial) cannot be required to do so again on the same matter or charge.\textsuperscript{15}

21. Part 3 of the SLC’s discussion paper on double jeopardy outlined the history of the principle in Scots law. While the Commission noted that it had been clear in Scots law for many centuries that no-one could be tried twice for the same crime, it went on to say that it believed that the law lacked clarity and that “the precise boundaries of the present protection against double jeopardy in Scots law”\textsuperscript{16} were unclear.

22. Section 1 of the Bill seeks to implement the SLC’s recommendations that there should be a general rule against double jeopardy and that it should be reformed and set out in statute.

Views of witnesses
23. In evidence to the Committee, Patrick Layden QC reaffirmed the SLC’s position on the importance of putting the rule onto a statutory footing—

“We considered that there were various infelicities—various unclear areas—in the law and that it made sense to restate the position in statutory form. We are entirely persuaded that it is right to restate the rule in statutory form. We had differences about whether that should extend to new evidence or any exceptions, but we were quite clear that it was a good thing to put this into statute.”\textsuperscript{17}

24. Other witnesses were united behind enshrining into law the rule against double jeopardy. The move was “welcomed”\textsuperscript{18} by the Law Society of Scotland and the Scottish Human Rights Commission, while Michelle Macleod, Head of Policy Division at the Crown Office and Procurator Fiscal Service (COPFS), considered that it “befits a modern society to have that well defined, and to have clarity about exactly what it is envisaged that it will cover”.\textsuperscript{19}

25. The Lord Justice Clerk, Lord Gill, said that the Judges of the High Court of Justiciary were—

“unanimously of the view that the double jeopardy rule is of considerable constitutional significance and that, subject to certain exceptions … it should be retained. The bill reaffirms the principle of the double jeopardy rule in section 1, which I think satisfactorily covers the matter.”\textsuperscript{20}

\textsuperscript{14} Scottish Law Commission. (2009) \textit{Discussion paper on Double Jeopardy (DP 141)}.
\textsuperscript{15} Scottish Parliament Information Centre. (2010) Double Jeopardy (Scotland) Bill. SPICe briefing 10/78. Available at: \url{http://www.scottish.parliament.uk/business/research/briefings-10/SB10-73.pdf}
\textsuperscript{16} Scottish Law Commission. (2009) \textit{Discussion paper on Double Jeopardy (DP 141)}.
26. Despite being generally sceptical of double jeopardy law reform, Paul Roberts, Professor of Criminal Jurisprudence at the University of Nottingham’s School of Law, considered that—

“Lending statutory authority to the ancient common law double jeopardy prohibition is a laudable objective, and would – incidentally – make Scots criminal law superior to English law in this regard.”

27. Furthermore, Professor Roberts believed protection against double jeopardy was required because—

“… nobody could be safe and secure in their liberty, person, possessions or reputation if they were constantly at peril of being prosecuted by the state, condemned as a criminal, and subjected to penal sanctions. The government is allowed one attempt at bringing offenders to justice, but acquittals are final. What’s done is done, and we all move on.”

Committee conclusions
28. The Committee recognises the fundamental importance of the double jeopardy rule, in providing certainty about the finality of criminal proceedings and in protecting accused persons against repeated prosecution. In the interests of clarifying and entrenching the rule, the Committee fully supports putting it on a statutory footing.

EXCEPTIONS TO RULE AGAINST DOUBLE JEOPARDY

Section 2: Tainted acquittals
29. Under the provisions in section 2 of the Bill, an acquitted person could face further prosecution if it could be proved by prosecutors that the acquittal had been tainted by certain offences against the course of justice.

30. These provisions implement the SLC’s recommendations based on its consideration of cases where the acquittal “has allegedly been subverted or perverted by someone bribing or threatening witnesses, jurors or, in extreme cases, the judge”. The Commission concluded that retrials should be permitted if the prosecution could convince three High Court judges that, on a balance of probabilities, an offence against the administration of justice had been committed in relation to the original trial, that this had resulted in a tainted acquittal and that a further prosecution was in the interests of justice. The Commission was of the view that the prosecution should not need to establish that the acquitted person was involved in the tainting of the original proceedings in order to justify a new trial. It also recommended that the tainted acquittal provisions should not be limited by whether or not the original trial had taken place under solemn or summary proceedings.

21 Professor Paul Roberts. Written submission to the Justice Committee.
Views of witnesses

31. In supporting the proposals, Patrick Layden QC was satisfied that the Commission’s suggested test for the court to determine, “on a balance of probabilities”\textsuperscript{23}, that an offence against the course of justice has been committed, had been incorporated in section 2(3)(b) of the Bill. He said that “it would be unreasonable to require the Crown to prove beyond reasonable doubt that there had been interference with the trial”, adding that such a requirement had been included in the equivalent English legislation\textsuperscript{24} but that no retrials on the basis of a tainted acquittal had been authorised. When questioned by the Committee on whether such a test increased the likelihood of a case being retried on the basis of a false accusation of interference, Mr Layden said—

“I suspect that there is murky mud at the bottom of the pond here, which will bob up every now and then in cases. The prosecutors, the police, the courts and the judges are probably well able to find their way through it. We have given them a framework. Time alone will tell how it works.”\textsuperscript{25}

32. The Crown Office and Procurator Fiscal Service also believed that the proposals struck the right balance, while the Lord Justice Clerk said that the judges were satisfied with the safeguards in section 2 in dealing with tainted acquittals.

33. The proposals did, however, give rise to a number of concerns. The Law Society of Scotland and the Scottish Human Rights Commission were both uneasy that the proposals applied to all offences, rather than only more serious offences considered on indictment. They also had difficulties with a second prosecution being raised where the acquitted person had nothing to do with the tainting of the first trial. John Scott had similar difficulties with section 2—

“The bill should contain a provision that makes it clear that some standard of proof is required—preferably, proof beyond reasonable doubt—that the accused was involved at all.”\textsuperscript{26}

34. In response, the Cabinet Secretary for Justice said that he believed that it was important that the proposals were not limited to more serious offences—

“However serious the charge, people should not benefit from attempts to pervert the course of justice and criminal trials. That principle should apply as much to a minor charge in a district court as to a more serious charge in the High Court of Justiciary. We have a fundamental interest in justice being served. No matter how many times proceedings are corrupted or who is responsible for the tainting, it undermines the system and its integrity. The fundamental point is that the first trial was not fair.”\textsuperscript{27}

35. On the issue of whether it was unjust to retry a person who may have had no involvement in or knowledge of the tainting of the first trial, Mr MacAskill argued—

\textsuperscript{24} Criminal Procedure and Investigations Act 1996.
“At the end of the day, it is the interests of justice that matter. If a trial has been tainted—for whatever reason—the victims would expect some consideration of that.”28

36. The Committee also questioned the Cabinet Secretary on the appropriateness of using the tainted acquittal provisions rather than utilising the existing law of perverting the course of justice. In his response, Mr MacAskill said—

“That is a matter that we would leave to the Crown and the courts. This is about pragmatism and flexibility. You are right that many minor matters would be dealt with in the manner that you suggest—we would fully support that—but it is important that we retain the principle. There might be circumstances—I do not want to speculate or specify them—in which it is felt appropriate to have a retrial.”29

Committee conclusions
37. The Committee acknowledges the conflicting views of witnesses on the breadth of these proposals and the potential for retrying a person who was not involved in any offence against the course of justice during the original trial. However, the Committee supports the tainted acquittal provisions in the Bill and is satisfied that they should apply whether or not the tainting can be attributed to the acquitted person, given the general importance of maintaining confidence in the justice system. The Committee is also content with the tests that must be met before the acquittal could be set aside. Specifically, on the balance of probabilities test, the Committee is content that it provides an appropriate level of protection in this particular context – that is, where the question to be decided is whether the original trial was tainted by behaviour that is likely to be, by its nature, very difficult to prove to any higher standard.

38. Nevertheless, the Committee highlights the option available to the Crown of charging someone with perverting the course of justice rather than necessarily having to seek a retrial.

Section 3: Admission made or becoming known after acquittal
39. In its report, the Scottish Law Commission recommended that it should be possible to “reprosecute a person who confesses to having committed an offence of which that person has previously been tried and acquitted”.30 In considering the issue, the Commission said—

“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

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something profoundly disquieting about the notion that a person should effectively be able to boast — with impunity — that he has ‘got away with it’.”

40. The Commission, in recommending such an exception to the rule against double jeopardy, proposed that any such application by the prosecution to reProsecute be made to three High Court judges who would require to be satisfied that, on a balance of probabilities, the post-acquittal admission was credible, that corroborating evidence is available, and that a further prosecution was in the interests of justice.

41. As well as adopting the SLC’s recommendations on post-acquittal admissions, section 3 of the Bill widens the exception so that it would also apply to pre-acquittal admissions that were not known (and could not, with reasonable diligence, have been known) to the prosecution at the time of the original trial. The Policy Memorandum justifies making the admissions exception (unlike that for other new evidence) apply to any offence on grounds relating specifically to post-acquittal admissions: that “the accused person, in admitting their guilt, can be argued to have ‘waived’ their right not to be retried”.

Views of witnesses
42. Patrick Layden QC provided further background to the Committee on the Commission’s deliberation of this issue, in particular its distinction between an exception for admissions and a wider new-evidence exception. While the Commission made no recommendation on whether there should be a general new evidence exception, Mr Layden said that that the inclusion of such a provision in section 4 of the Bill called into question whether section 3 was necessary—

“If that is the case, there is little logic in leaving admissions out of the ordinary new-evidence exception. If the provision is to be extended to include admissions made before as well as after the acquittal, there is no logic at all in treating admissions as anything other than another type of new evidence. We suggest that the admissions exception is put into section 4 with the other new-evidence exceptions.”

43. However, he suggested that, should the provisions stay separate, section 3 should mirror section 4 in the respect that only one application might be made for a new prosecution—

“If a chap turns up and says, ‘The accused told me that he did it’, that may or may not justify a second trial, but it should justify only one further trial and no more.”

44. Section 3 was supported by a number of witnesses. ACPOS considered it to be “an important exception with regard to public confidence and in meeting the interests of justice” while Victim Support Scotland and Glasgow Community and

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32 Policy Memorandum, paragraph 28.
35 Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
Safety Services also backed the proposals. Richard Keen of the Faculty of Advocates, while generally content with the provisions, questioned how the court might approach the test relating to the credibility of the admission in section 3(4)(a)—

“It is not possible to judge the credibility of an admission simply by reference to the circumstances in which the admission is made. Somebody might very credibly admit to having done something, but on intense inquiry regarding the original evidence, it might transpire that they could not conceivably have committed the offence because they were not in the country, or whatever.”

45. The Law Society of Scotland also anticipated “procedural difficulties with section 3(4)” and, like the Faculty, felt that the Court would have to take evidence on the case. The Society suggested that as well as testing the credibility of the admission in section 3(4)(a), it might also wish to be satisfied as to its reliability.

46. Others questioned whether any confession could be reliable. Professor Paul Roberts pointed to a number of miscarriages of justice partly resulting from “dubious confessions” as examples of their historical unreliability. Professor Roberts’ view was that, for a confession to be considered authentic, it should include—

“… substantial and properly corroborated ‘new facts’, and I would want substantial guarantees about the way in which these new facts came to light, to rule out confabulation or suggestion by interrogators.”

47. Professor Roberts believed that, ultimately, “cases truly involving compelling post-acquittal confessions are going to be few and far between, and their remote prospect would not induce me to support a ‘new evidence’ exception to double jeopardy prohibition, given what is at stake.”

48. The Scottish Human Rights Commission and John Scott had a number of concerns with section 3, namely that there was no limitation to particular serious offences, no restrictions on the number of subsequent prosecutions and questions as to whether the tests in section 3(4) were sufficiently rigorous. Shelagh McCall pointed to the requirements in Article 8 of the European Convention on Human Rights, which relate to the right to respect for private and family life, and suggested that—

“The more narrowly the list is drawn, and the more serious the offences that are included—which is what the legislation purports to aim at—the more likely it is to comply with article 8.2.”

49. The Lord Justice Clerk, questioned on whether the term “balance of probabilities” in section 3(4)(a) was the right expression to use, said that he believed it to be “easily understood and easy to apply, particularly if a judge is

37 The Law Society of Scotland. Written submission to the Justice Committee.
38 Professor Paul Roberts. Written submission to the Justice Committee.
making the decision”. Lord Gill said that the Judges of the High Court of Justiciary had no view on whether “reliable” should be added to the test but said that, in his personal view, it was the judge’s responsibility to assess whether the admission was credible and the jury’s task to take into account reliability in the context of deciding whether to believe the admission. Lord Gill added—

“A sound practical test would involve the judge asking himself, ‘If this evidence were led, is it the sort of evidence that is reasonably capable of being believed by the jury?”

50. The Cabinet Secretary, asked why the Bill went beyond the SLC’s original recommendations, explained that the Scottish Government did not believe that the provision should apply differently to admissions made post- and pre-acquittal. On the question of whether the exception should be limited to more serious offences, Mr MacAskill said that the same fundamental principle applied in every case, although he acknowledged the concerns that had been raised—

“We recognise that there has to be pragmatism and flexibility within the system. In many instances, minor matters will be dealt with in another way. There is more than one way to skin a cat.”

51. Responding to the SLC’s suggestion of including the admissions provisions currently in section 3 within the general new evidence exception in section 4, Mr MacAskill made a distinction between the sections based on the particularities of post-acquittal admissions (rather than admissions more generally)—

“We think that admissions should be dealt with separately. The accused is specifically waiving his right to be free from further prosecution. That is the approach taken by the Scottish Law Commission. The new evidence section is limited to a specific range of offences. The admissions exception should be capable of covering any offence.”

52. Referring to the Lord Justice Clerk’s support of the tests in section 3, the Cabinet Secretary did agree to give further consideration to bringing the tests closer to those in section 4 so that the bar in both sections would be “set at the same level”. However, Mr MacAskill was “not attracted” to changing the ‘balance of probabilities’ test in section 3(4)(a) to “beyond reasonable doubt”.44

Committee conclusions
53. The Committee recognises the concerns raised in relation to the application of the exception to all categories of offence and the potential for more than one re-prosecution. However, the Committee is content that the provision contains sufficient safeguards to ensure it is only used appropriately and sparingly.

54. With regard to the evidence heard on whether the tests employed in section 3(4) were suitably rigorous, the Committee is, on balance, satisfied that the

provisions would work in practice. It agrees with Lord Gill that the test at this preliminary stage would rightly only be about the credibility of the admission (whether it was reasonably capable of being believed) and not also about its reliability (beyond the existence of corroborating evidence) – that being a matter for the jury if a retrial were to take place.

55. 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. The Committee notes, however, that, at present, different tests apply for each provision, in particular the admissions exception would apply to all offences, whereas the new evidence exception is intended to apply only to the most serious crimes.

56. While welcoming the Cabinet Secretary’s offer to give further consideration, prior to Stage 2, as to whether the tests in sections 3 and 4 could be made more consistent, the Committee also invites the Scottish Government to give further consideration to amalgamating, either wholly or substantially, the admissions exception in section 3 within the proposals on new evidence in section 4 of the Bill.

Section 4 and schedule 1: New evidence

57. Section 4 allows for a further prosecution to take place should new evidence be discovered. Unlike sections 2 and 3, this general new evidence exception only allows for such a prosecution to take place where the original offence is one of those listed in schedule 1 to the Bill. The Policy Memorandum gives the Scottish Government’s reasoning behind this exception—

“Where a person has been acquitted of an offence, the rule against double jeopardy means that he or she cannot be tried again for that crime. However, ‘new evidence’ may have emerged since the original trial. Although it may have physically existed at the time of the initial trial, improved techniques (e.g. with DNA or photographic enhancement) might mean that the material has acquired new value as evidence.”\(^{45}\)

58. The Committee’s consideration of the new evidence exception involved two main strands: whether it is appropriate to have a general new evidence exception and, if so, to what offences such an exception should apply. These are dealt with separately in the paragraphs that follow. The issue of retrospective application for the general new evidence exception is considered later in the report.

New evidence exception – views of witnesses

59. As previously noted, the Scottish Law Commission made no recommendation in relation to whether there should be a new evidence exception, stating that this was the most difficult issue it had faced.

60. The Crown Office and Procurator Fiscal Service supported the general new evidence exception—

\(^{45}\) Policy Memorandum, paragraph 30.
"… new evidence can be compelling and in such circumstances the public would be entitled to expect the Crown to bring the case and the person involved to face the consequences."46

61. On the question of protecting the citizen and providing finality of legal proceedings, the Crown Office believed that the new evidence exception struck a “proportionate balance”47 between the rights of the accused and the rights of victims. It also believed that the tests required to bring forward a fresh prosecution were set “extremely high” and that the legislation would bring some parity with English law as well as that of other jurisdictions outside the UK.

62. The Association of Chief Police Officers in Scotland considered the exception to be in the interests of justice and that “public confidence in the justice process would be served by such a provision”.48

63. Both the Faculty of Advocates and the Law Society agreed that there should be a general new evidence exception, so long as it was sufficiently tightly defined. For Richard Keen QC of the Faculty, the key safeguard was section 4(6)(b), which allowed an exception to be made only for evidence that “could not with the exercise of reasonable diligence”49 have been made available at the original trial. Alan McCreadie agreed with the Faculty about the importance of the section 4(6)(b) test, but reiterated the position of the Law Society, questioning whether the test in section 4(6)(a) that “the case against the accused is strengthened substantially by the new evidence” went far enough. Rather, in his view, the case against the accused “should have to be in some way compelling”.50

64. Victim Support Scotland agreed with the new evidence exception, but with the caveat that a public interest test should be introduced. Its reason was that “while many victims of crime would like to see an offender caught and sentenced, it may not necessarily be in the victim’s interest to hold a new trial”.51

65. PETAL believed that with the recent advances in forensic technology, the time was right for such an exception to double jeopardy. However, the Society of Solicitor Advocates warned that such advances still had limitations—

“Even DNA evidence, which is the example most frequently used, cannot tell us whether someone is guilty. It can clear an innocent person but it provides only probabilities about guilt, not certainty. There is rarely such a thing as evidence which provides conclusive proof of guilt.”52

66. Shelagh McCall from the Scottish Human Rights Commission suggested that, at the level of principle, the test should be: “are there compelling and substantial circumstances necessitating a departure from the rule of finality of judgment?”. Ms McCall suggested that, if the Committee were satisfied there were

48 Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
49 Double Jeopardy (Scotland) Bill.
51 Victim Support Scotland. Written submission to the Justice Committee.
52 Society of Solicitor Advocates. Written submission to the Justice Committee.
Justice Committee, 3rd Report, 2011 (Session 3)

such circumstances, in relation to new evidence, it should ensure that the tests were “sufficiently robust to ensure that the legislation is directed precisely to those circumstances and is not too broad and does not extend in a disproportionate way.” In her view, the current test was not sufficiently robust, as it did not require the new evidence to be compelling, nor for it to be reliable as well as credible. These comments were endorsed by John Scott. The Royal Society of Edinburgh also had reservations with the exception, believing such a change to be a “serious step, one that must not be taken lightly.”

67. Like the SLC, the Judges of the High Court of Justiciary were unable to agreed on whether there should be a new evidence exception. However, the Lord Justice Clerk was confident that the tests in section 4 could be applied by judges—

“New evidence brings with it endless scope for argument about whether it is, strictly speaking, new. In applying the test in new-evidence appeals in the appeal court, we insist that the new evidence must be new not only in the sense that it was not considered at the time of the trial but in the sense that it could not, with reasonable diligence, have been discovered at the time of the trial. I rather get the impression that the purpose of section 4 is to reflect the same approach. If that is the view of Parliament, that is an approach that can be applied, as it is routinely applied in new-evidence appeals in the court of appeal.”

New evidence exception – Committee conclusions

68. 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.

69. During its consideration of the Bill, the Committee learned of the conviction of Mark Weston at Reading Crown Court for the murder of Vikki Thompson in 1995 following the discovery of new forensic evidence—an outcome only made possible by a new evidence exception having been introduced in English law. The Committee has found this to be a helpful example of how a similar law in Scotland might work in practice, although it is aware that there are significant differences in the statutory provisions dealing with what is to be treated as “new” evidence.

70. The Committee would be interested to know whether, in the Scottish Government’s opinion, the conviction of Mark Weston for the murder of Vikki Thompson, had it taken place in Scotland, could have been secured under the provisions in the Bill.

54 The Royal Society of Edinburgh. Written submission to the Justice Committee.
56 Further details about the case were provided by the Crown Prosecution Service in a letter to the Committee. Available at: http://www.scottish.parliament.uk/s3/committees/justice/inquiries/DoubleJeopardy/CrownProsecutionService.pdf
Offences to be covered by a new evidence exception – views of witnesses

71. While divided over the inclusion of a general new evidence exception, the Scottish Law Commission did recommend that if there were to be such an exception, it should only apply to murder and rape (together with any further serious offences added later by affirmative order). The Scottish Government also believed it was appropriate to restrict the offences covered to the most serious cases to “promote certainty in criminal trial”. The Bill, however, goes beyond murder and rape to include in the list of relevant offences in schedule 1 “culpable homicide, genocide, crimes against humanity, war crimes and a broader range of sexual offences.”59 The Scottish Government acknowledged that there was not a consensus view from those who responded to its consultation over the range of offences which should be covered and was open to debate on the point during the Bill’s parliamentary consideration.

72. The Law Society of Scotland’s position was that a new-evidence exception to the rule (or any other exception) should only apply to cases that were prosecuted on indictment. It queried why indecent assault was included in schedule 1 as “this can be tried summarily” and also questioned why “other serious offences such as serious frauds, serious drugs cases and armed robbery are not listed”.60 The Faculty of Advocates agreed with the SLC that a new-exception should be restricted to murder and rape61 and questioned the make-up of offences on the list—

“To take the example of paragraph 11, which refers to “Lewd, indecent or libidinous practice or behaviour”, one could be dealing with offences that are marginal breaches of the peace.”62

73. The Scottish Human Rights Commission believed that the list should be confined to more serious offences as they might—

“provide a stronger justification for interference with the private life of the individual. However, the inclusion of less serious offences is hard to justify”.63

74. John Scott was similarly concerned as the schedule as drafted “suggests that hundreds of cases a year could be affected”64 and therefore backed the SLC’s recommendation.

75. The SLC’s approach was also backed by the Royal Society of Edinburgh, James Chalmers of the University of Edinburgh School of Law and Professor Peter Duff from Aberdeen University Law School. Professor Duff advocated this approach as he believed it would “help to reflect the importance rightly attached to the doctrine of double jeopardy and, consequently, that any exceptions to it are tightly restricted”.65

59 Policy Memorandum, paragraph 33.
61 The Faculty of Advocates. Written submission to the Justice Committee.
63 The Scottish Human Rights Commission. Written submission to the Justice Committee.
65 Professor Peter Duff. Written submission to the Justice Committee.
76. The Judges of the High Court of Justiciary’s view is that “the exception, if introduced, should be limited to cases originally prosecuted in the High Court of Justiciary”.66

77. In response to questions to the Crown office and Procurator Fiscal Service about whether the list in schedule 1 makes sufficiently clear that the new evidence exception would only apply to the most serious of cases, Scott Pattison, Director of Operations, said—

“The concept of a list is … consistent with article 7 of the European convention on human rights, which is about certainty in the law and foreseeable, so that individuals know when they might be the subject of a potential further prosecution. … From the perspective of the Crown Office and Procurator Fiscal Service, we see the provisions as applying to cases that lie at the top end of seriousness and sensitivity in Scottish society.”67

78. The Scottish Campaign against Irresponsible Drivers asked that consideration be given to adding fatal driving offences to the list in schedule 1, although it recognised that the re-prosecution any such cases would be extremely rare. The Association of Chief Police Officers, meanwhile, said that the list of offences should be wider than those recommended by the SLC and provided a number of options, including mirroring the exceptions used in the rest of the UK, the length of sentence the offence would incur or only those cases tried in the High Court.

79. The Cabinet Secretary for Justice said that the Scottish Government was willing to consider the range of offences covered in schedule 1—

“The general view of the Government has been that we should be as open as possible. We accept that it would be possible to go on forever, but we are talking about a limited number of cases. It might be that there would be some cases that, even if we were to live to the same age as Methuselah, would never be prosecuted. Equally, there is a point of principle in the bill, and I understand how people would feel if a situation arose in which there was a manifest injustice. We are genuinely open and are happy to listen to the committee and to others who have made representations. We view the list as not exhaustive.”68

**Offences to be covered by a new evidence exception – Committee conclusions**

80. The Committee again recognises the wide range of views on the offences that should be covered by new evidence exception. It also acknowledges the Scottish Government’s openness to considering changes to the current list of offences in schedule 1.

81. 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

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66 Judges of the High Court of Justiciary. Supplementary written submission to the Justice Committee.
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.

82. 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 (the latter excluding those cases prosecuted on indictment in the sheriff court and hence subject to a maximum penalty of 5 years’ imprisonment). 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. The Committee would welcome the views of the Scottish Government on this alternative approach.

Sections 5 and 6: Common provisions

83. Sections 5 and 6 contain provisions for bringing forward fresh prosecutions under the exceptions to the rule against double jeopardy made in sections 2, 3 and 4. These include allowing the accused to be present at any hearing on an application for a fresh prosecution and that any such application must be considered by at least three High Court judges.

Committee conclusions

84. The Committee received limited evidence on these common provisions and is content with the proposals.

PLEA IN BAR OF TRIAL

Section 7: Plea in bar of trial that the accused has been tried before

85. As well as setting out a core rule against double jeopardy, the Bill provides for a broader principle against the unreasonable splitting of cases. Patrick Layden QC outlined the SLC’s reasoning behind the need for the broader principle—

“You need them both because it is possible to charge a number of offences on the basis of the same facts. One of the cases that we looked at involved a chap who was found walking along the road with a dead hare in his hand. He was charged with poaching because the inference that the court was asked to draw was that he must have got the hare illegally on one of the estates on either side of the road. However, he was found not guilty. He was then charged with being in possession of a hare without a game licence. The facts were precisely the same. He was on the road, with a dead hare, and no licence. He was effectively tried twice, on the basis of the same set of facts.
The more general rule is meant to prevent the Crown from having one shot one way and, if that bounces, having another shot another way.  

86. However, the SLC acknowledged in its report that there may be certain circumstances where there was a ‘special reason’ for a case to be split—

“The most obvious and uncontroversial example is the case in which the accused had sought or consented to a separation of charges, for example where one of the charges arising from the acts which formed the subject of the first proceedings would have involved the disclosure of the accused’s past convictions, prejudicing the fairness of his trial on the remaining charges. A commonplace example would be a case in which one of the possible charges arising from an incident was of driving while disqualified, the proof of which charge would require proof or admission of the accused’s prior driving convictions which led to the disqualification.”

87. The SLC therefore considered that 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”.

88. Section 7 of the Bill would allow a person who had been charged with an offence to argue in court that they had already been tried for an offence arising from the same or similar acts or omissions. However, even if the court were satisfied that this had been the case, it might still allow the case to proceed to trial if persuaded by the prosecutor that there were special reasons for doing so and that continuing to trial would be in the interests of justice. Some particular circumstances where a plea in bar of trial might arise are provided for in sections 8 to 10 of the Bill.

Views of witnesses
89. The Crown Office and Procurator Fiscal Service was content with the approach taken forward in the Bill and believed that it provides a set of safeguards for the accused. When prosecuting, the Crown Office’s general approach is to—

“proceed on indictment or complaint on all charges arising out of the same acts, facts or circumstances. The only exception to that would be where, by doing that, there may be prejudice to the accused or suspect. It restates our current practice for proceeding with prosecutions and does not really cause us any concerns.”

90. The Law Society of Scotland welcomed the broader principle and the placing of it on a statutory footing.

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Committee conclusions
91. The Committee is satisfied with these provisions and welcomes the Crown Office’s assurance that section 7 reaffirms its existing practice in relation to the splitting of cases.

Sections 8 to 10: Further provisions about pleas in bar of trial

92. As supplementary provision to section 7, the Bill makes further provision in sections 8 to 10 about three sets of circumstances in which a person could argue in court that they have already been tried for the same or similar offence.

93. Section 8 deals with the case where the person making the plea in bar of trial is charged with murder, having previously been tried for a lesser offence, and the basis of the new trial is either new evidence, or an admission, that the accused committed the murder.

94. Section 9 deals with the case where the prosecution’s argument against the plea in bar of trial is that the original trial was a nullity and therefore not valid.

95. Section 10 applies where the accused was originally tried in a jurisdiction outwith the United Kingdom, and sets out the factors the court is to consider in deciding whether it is in the interests of justice for a retrial to proceed. The Policy Memorandum says that this could be used “where there is evidence to suggest that the previous foreign proceedings were corruptly contrived in such a way as to provide a double jeopardy protection against future prosecution”. However, section 10(3) prevents the court allowing a retrial on this basis where doing so would be inconsistent with the UK’s obligations under the Schengen Convention. In practice, this means that if the previous trial took place in a Schengen signatory state – namely, an EU member state, Iceland or Norway – the plea in bar of trial must be allowed.

Views of witnesses
96. Although section 8 received little mention from witnesses, Patrick Layden QC was concerned with section 9—

“It provides for a situation in which the previous allegedly null proceedings took place abroad and the Scottish prosecutor did not know that they were null. That seems to be a complication too far. If such a contingency was ever to occur, the court already has the discretion under section 7(4) to allow the trial to go ahead. We suggest that section 9 is simply unnecessary, overcomplicates the legislation, and should be removed.”

97. There was also some comment on section 10. The Faculty of Advocates had no objection to the provisions but did question how they would work in practice—

“I suspect that the outcome of implementing the legislation is the only thing that will give clear guidance. The issue might need to be revisited once we

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73 Policy Memorandum, paragraph 25.
have seen how it works in practice. One of the difficulties will be in establishing the standards that have been applied in the context of a foreign prosecution.”\(^\text{76}\)

98. While accepting that the provisions on foreign proceedings (in section 10 of the Bill) might cause some complexity, the Cabinet Secretary for Justice was confident that they would work in practice—

“A point of principle is involved: our preference is to protect that principle and leave the matter to Crown counsel and, indeed, the court, which may take the view that it is not satisfied with a trial that has been conducted abroad. If it is satisfied that the trial was conducted legitimately and appropriately, the plea in bar of trial will be upheld.”\(^\text{77}\)

Committee conclusions

99. On section 9, the Committee notes Patrick Layden’s concerns and asks the Scottish Government to explain more fully, prior to Stage 2, why it considers the provision necessary in addition to sections 7(4) and 12.

100. With regard to section 10, the Committee acknowledges that determining the details of foreign proceedings may cause courts some practical difficulties. However, it also recognises that some provision must be made for circumstances in which the previous trial had taken place in a foreign jurisdiction that might not offer the same standard of justice as that in Scotland, and is content with the degree of discretion that section 10 proposes to give to the court to assess where the interests of justice lie in such circumstances.

OTHER SUBSEQUENT PROSECUTIONS

Section 11: Eventual death of injured person

101. Section 11 permits a person who had been tried for assault (or certain other offences) to be tried again for homicide if the victim had subsequently died from their injuries, irrespective of whether the accused had originally been convicted or acquitted. In doing so, it broadly codifies the current common law position, which already allows a re-trial in similar circumstances.

102. Respondents to the SLC’s consultation generally agreed that it should still be possible to prosecute a person for murder if, following a conviction for assault, injuries inflicted caused the victim’s subsequent death. However, the Commission found that opinion was mixed “as to whether it should continue to be possible to prosecute for murder where the outcome of the assault trial was an acquittal”\(^\text{78}\). The SLC agreed with the majority of respondents that a new prosecution should only be permitted if the person had been convicted of the original alleged assault.

103. The Scottish Government nevertheless decided, “on reflection … that the Bill should continue the existing law, permitting a new trial if the first trial ended in


acquittal as well as conviction”. It considered that the subsequent death of the victim meant that the court “did not hear the full circumstances of the case that have resulted in a death”; and that an investigation for homicide would result in a more in-depth inquiry which could yield additional evidence or new witnesses. It also argued that a special defence, such as self defence, “might be less likely to succeed in a murder trial, where the implications of the accused’s actions are of course much more serious”.79

**Views of witnesses**

104. Although Patrick Layden QC acknowledged that the Scottish Government’s proposals in the Bill went further than what had been recommended in the SLC’s report, he accepted that there were two views on what the extent of the provisions should be—

> “Both stem from the legal position that murder is treated as an entirely separate offence from any other kind of assault. ... We took what we thought was the equitable view that, if a trial results in a conviction, that is all right. However, if a trial, which is essentially on the same facts, results in an acquittal, it is inequitabl e to proceed to a second trial. The Government disagrees with that.”80

105. The Crown Office and Procurator Fiscal Office (COPFS) did not believe that the provisions in section 11 would be applied very often, particularly when the person had originally been acquitted of assault. It later advised the Committee that Crown Counsel had considered five cases of subsequent death in the past 10 years to determine whether or not a further prosecution for murder would be justified. In each case, the accused had originally been convicted of attempted murder.81

106. Taking a similar position to that outlined in the Policy Memorandum, Gertie Wallace, Head of Criminal Justice Policy at COPFS, argued that a murder inquiry would be more extensive than one following an assault and that witnesses would be more “more likely to come forward in a murder investigation than in an investigation of an assault, even of assault to severe injury”.82 On whether it would be appropriate to re-try someone for homicide if the victim’s death occurred a long time after the assault, and therefore whether section 11 should include a time limit, Michelle Macleod, Head of Policy Division, said that as the death became more remote from the assault, so taking proceedings would become more problematic. However, she did not believe that a time limit would be appropriate as “there would be so many varied facts and circumstances of which to take account.”83

107. Richard Keen QC, one of those who disagreed with the approach in section 11 of the Bill, said that allowing someone who had been acquitted of assault to be tried again for murder caused the Faculty of Advocates “the greatest concern”.84

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79 Policy Memorandum, paragraph 44.
81 Crown Office and Procurator Fiscal Office. Supplementary written submission to the Justice Committee.
He argued that the possibility of re-trying a person originally acquitted of assault should be left to the double jeopardy exceptions set out in section 2, 3 or 4 of the Bill, and went on to say—

“I find the point that the Crown Office or the police made about widening an investigation to be extremely unsatisfactory, not because one would be surprised to find that resources must be applied according to the seriousness of the case—that is understandable—but because the test for new evidence in section 4 refers to evidence that could not reasonably have been obtained prior to the first trial. I see no reason to alter that test in the context of the assault, murder and culpable homicide scenario. The same test should apply.”85

108. The Law Society of Scotland, the Scottish Human Rights Commission and John Scott all associated themselves with the Faculty of Advocates’ position. Mr Scott added—

“If an earlier acquittal has been given, the fact of death does not reflect back and turn what was not an assault as far as the jury in the earlier trial was concerned into an assault or a murder.”86

109. The Judges of the High Court of Justiciary were divided over the issue. While noting that Scots law currently allows a second trial for murder following an acquittal for assault, the Judges pointed to circumstances where such a trial might not be appropriate and believed that there should be an interests of justice test.87

110. The Cabinet Secretary for Justice defended the Bill’s approach, pointing out that it maintained the existing law rather than restricting it. Although admitting that such cases were very rare, Mr MacAskill added—

“It is important that we retain that provision because, to some extent, the basis of the Double Jeopardy (Scotland) Bill is to reaffirm the position that double jeopardy applies and there are only exceptions to it. Equally, it is important that we preserve fundamental principles. Such cases are few, but they cause considerable anguish for the individuals concerned and there is a requirement for the possibility—not necessarily the definitive position—that they can be considered.”88

111. The Cabinet Secretary was also asked about an amendment to section 72 of the Criminal Procedure (Scotland) Act 1995, contained in schedule 2 to the Bill, which would require the court to consider whether it would be in the interests of justice to re-try for murder someone previously tried for assault, but only when the accused had originally been acquitted. Mr MacAskill explained that the distinction was deliberate—

87 Judges of the High Court of Justiciary. Supplementary written submission to the Justice Committee.
“it is about striking a balance. We are keeping the existing law but ensuring that protections are in place. When considering a second trial following an acquittal, rather than a conviction, it seemed right to us to apply a higher test.”89

Committee conclusions
112. 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.

113. 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).

Section 12: Nullity of proceedings on previous indictment or complaint
114. In its report, the SLC argued that the rule against double jeopardy did not apply when the first proceedings were fundamentally null, such as where “the original court was improperly constituted, or the original charge failed to specify the locus of the offence”. The SLC added that this was in accordance with principle, as double jeopardy could not arise where the accused was “never truly in jeopardy at the first trial”. Nevertheless, the SLC went on to suggest that the High Court should still be required to consider whether a re-trial in such circumstances would be in the interests of justice, and so recommended—

“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.”90

115. Accordingly, section 12 allows someone previously acquitted or convicted of an offence to be prosecuted anew if the High Court were satisfied that the original

proceedings had been a nullity and that it was in the interests of justice so to proceed.

Committee conclusions
116. The Committee has heard no evidence objecting to this section, and is satisfied that, in the very unlikely event of it being invoked, it strikes an appropriate balance between the interests of the prosecution and the accused.

GENERAL

Section 13: Retrospective application of the Act
117. The Scottish Law Commission recommended that any general new evidence exception to the rule against double jeopardy “should apply only to cases originally determined after the coming into force of the exception”.91 Section 13 nevertheless provides for all the exceptions in the Bill, including the general new evidence exception set out in section 4, to apply retrospectively. In its consultation paper, the Scottish Government outlined its own view—

“The Government sees the arguments here in broadly similar terms to the case for having a new evidence exception at all. Some of the cases which provide the greatest test of public confidence in the justice system are historic cases, and we have seen how forensic advances have allowed a number of such cases to be reopened and serious criminals brought to justice. It is impossible to rule out the possibility of further forensic advances that would provide significant new evidence in serious cases where there has been an acquittal.

“Again, there are concerns regarding the accused’s confidence in the finality of the first verdict. The Government’s conclusion is that, in the most serious cases, the interests of justice weigh more heavily in favour of testing significant new evidence before a court than in offering an absolute degree of protection to the acquitted person. The Scottish Government therefore believes a new evidence exception should apply retrospectively.”92

Views of witnesses
118. In response to section 13 of the Bill, Patrick Layden QC underlined the SLC’s strongly held view that, should the Bill include a general new evidence exception, it should not apply retrospectively. Mr Layden said that since 1998 there had been 1,500 people in Scotland acquitted of offences listed in schedule 1 to the Bill. He argued that these people currently had a right, by virtue of their acquittal, not to be tried again—

“They are innocent people: they have had a full, proper trial according to the rules of evidence and have been found not guilty. They currently enjoy a right

that is set up by the courts in the teeth of opposition from the executive, and if we make the provision retrospective, we take that away.”

119. In addition, while acknowledging that a scientific advance such as DNA was an “extremely useful technology”, Mr Layden did not believe that making the exception retrospective would have any practical effect—

“When a crime is unsolved and there has been no trial, the police keep the physical evidence as a matter of routine so that it is available if and when evidence turns up. However, we checked with the Crown Office, which confirmed that where there has been a trial and the accused has been acquitted, as a matter of routine the physical evidence is thrown away. There is no point in keeping it. Therefore, it does not matter what scientific advances there may be. Where someone has been acquitted, no physical samples are available for testing.”

120. Finally, the SLC did not know of any cases in Scotland which might be reopened were the legislation made retrospective, and that ultimately it was “neither a principled nor a practical way of proceeding”.

121. The Crown Office and Procurator Fiscal Service, however, supported the retrospective application of the general new evidence exception, believing that the argument for it should apply “regardless of whether the original trial was held before or after the new reforms”. COPFS also considered the retrospective application of the exception to be compatible with the European Convention on Human Rights.

122. On the number of cases that may be brought forward under the retrospective application, Scott Pattison, Director of Operations at COPFS, said that they did not wish to pre-empt the Parliament’s consideration of the legislation and so had not yet identified cases. Mr Pattison only saw the exception applying to—

“cases of the highest seriousness and sensitivity. We do not see there being an avalanche of cases”.

123. The Committee also pursued a point with Scott Pattison on the current practice of the police and prosecution service of retaining evidence following an acquittal. In his response, Mr Pattison said—

“Although labelled productions—the physical evidence—are returned to the owners or destroyed after an acquittal under current law, documentary productions, which often comprise a significant amount of evidence in trials these days, are kept for 10 years in High Court cases. Documentary productions include forensic science reports, photographs of injuries and

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97 Crown Office and Procurator Fiscal Office. Supplementary written submission to the Justice Committee.
such like. A substantial amount of material is kept for quite a long time in the context of our most serious prosecutions.99

124. As well as advising the Committee that not all new evidence is necessarily physical evidence, such as eyewitnesses, Mr Pattison later added—

“We will take cases as we find them. Some real evidence will no longer be available, because we have applied a particular legal regime for all time past. However, it is important for the committee to know that, sometimes, new real evidence becomes available. The good example has been given that sometimes the body of the deceased is found much later, which allows new DNA analysis and other analysis.”100

125. The Association of Chief Police Officers in Scotland (ACPOS) confirmed that after a case is ‘resolved’ (which would include an acquittal) “unless otherwise directed by the Crown or the court” the police would currently “dispose of productions if not actively seeking any other person in relation to the original crime”.101

126. Should the general new evidence exception be applied retrospectively, ACPOS gave the example of a recent audit by Strathclyde Police which identified 102 major incident investigations where productions had been retained, of which 54 of the cases had been classified as resolved. On whether there would be any difficulty in providing evidence for the prosecution service if they begin a process of reviewing cases dealt with under the current law, ACPOS said—

“... this will only be assessable on a case-by-case basis. These productions relate to matters possibly long dealt with and, although retained, it is difficult to standardise the level of preservation, particularly in matters previously deemed to have been dealt with. These measures would have been carried out with no anticipation of the proposed legislation and possibly even without full appreciation of scientific developments that may now render them suitable for review and consideration.”102

127. Richard Keen QC said that “lawyers are instinctively repelled by the idea of retrospective legislation; in any event, there is a presumption against it”.103 He also supported the view that people who had previously been acquitted of an offence were entitled to the certainty given to them under existing Scots law that they could not be tried again for the same crime. Furthermore, Mr Keen questioned whether section 13 impinged on their human rights under Article 8 of the European Convention on Human Rights (right to respect for private and family life).

101 Association of Chief Police Officers in Scotland. Supplementary written submission to the Justice Committee.
102 Association of Chief Police Officers in Scotland. Supplementary written submission to the Justice Committee.
128. When asked by the Committee whether it might be reasonable to apply the new evidence exception retrospectively if there was compelling evidence that someone had committed a crime, Mr Keen said—

“There are already people walking the streets against whom there is compelling evidence of a criminal offence but who, for a variety of reasons—whether it be time limits or whatever—have never been convicted. Therefore, I do not believe that we should generalise about this. The justice system is not and never will be perfect. You will not make it perfect or approach perfection by breaking down the rules on double jeopardy in the way that you suggest.”\textsuperscript{104}

129. On the issue of whether section 13 was compatible with the European Convention on Human Rights, Shelagh McCall of the Scottish Human Rights Commission said—

“It is not the commission’s view that making the provision retrospective in itself violates convention rights—it does not do so. The convention right that is associated with the retrospective application of criminal law is article 7 and it applies to substantive law—it involves making something a crime that was not a crime yesterday and applying that to actions that occurred yesterday and previously, or giving someone a heavier penalty for something that they did in the past. That is not what we are talking about here.

“… The very difficult question that the committee and the Parliament face is whether such an approach is proportionate and indeed necessary in this society. The Scottish Human Rights Commission has been struck by the dearth of either tangible, concrete examples of cases from the profession or anecdotal examples from the public press that have been given in evidence to the committee or the Scottish Law Commission. As I have said, the real question is whether the committee has properly identified the need to make the provision retrospective and whether such a move is proportionate.”\textsuperscript{105}

130. In responding to the concerns raised in evidence on the Bill, the Cabinet Secretary for Justice restated the Scottish Government’s position that it was in the public interest to apply the new evidence section retrospectively. Mr MacAskill referred to the recent case of Vikki Thomson in England, arguing that it would be a “manifest injustice” if such a case were to arise in Scotland but could not be prosecuted. He added—

“I accept that those who operate in the legal field take a strict interpretation of matters, but it is necessary for those of us who represent the public and who must therefore take a broader, public view to recognise that there is a public interest in allowing retrospective application of the new-evidence exception.”\textsuperscript{106}


131. With regard to the queries raised over the human rights implications of section 13, the Cabinet Secretary said—

“I do not think that there is any significant suggestion that the proposed provision is not ECHR compatible. Such matters have to be considered before any bill is introduced. Similar legislation south of the border and elsewhere has not been subject to, or revoked as a result of, ECHR challenges.”

132. On the practical implications of the retention of evidence, the Cabinet Secretary considered that “such matters are dealt with by practice rules between the Crown and the police, which discuss where evidence should go and what evidence should be retained. The issue is best dealt with by them.” Although the Cabinet Secretary acknowledged that current practices would need to be reviewed, he regarded it as “an operational matter for the Crown and the police, rather than a legislative matter for the Government”.

133. The Crown Office and Procurator Fiscal Service later said—

“It is not envisaged that a change in the law of double jeopardy would routinely result in labelled productions and other productions being retained on the basis that an exception to the double jeopardy rule may arise in the future. Whether or not a labelled production would be retained would be considered in light of the individual circumstances of the case and the evidential value of the production. The Crown will always take account of the views of the owner of the production and there is the option of photographing or videoing productions, if it was deemed necessary.”

Committee conclusions

134. With a range of issues emerging from evidence on the retrospective application of the general new evidence exception, the Committee considered each in turn.

135. On the question of whether the section is compatible with the European Convention of Human Rights, the Committee 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.

136. 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. The recent conviction in England of Vikki Thompson’s killer, following the
application of comparable retrospective provision in that jurisdiction, demonstrates
the public interest involved.

137. The Committee accepts that, because of current Scottish rules on the
retention of physical evidence, making the exceptions retrospective may have little
practical effect in relation to many previously tried cases, and that this cannot be
overcome by whatever changes are now made to those rules following the passing
of this Bill. The Committee does not, however, consider this factor, alone, to be a
sufficient reason not to make the new evidence exception retrospective.

138. The Committee therefore supports the retrospective application of the Bill,
whilst recognising some of the practical difficulties which may limit the ability of the
police to obtain new evidence in relation to cases which have already been
decided.

SCRUTINY BY OTHER COMMITTEES

Subordinate Legislation Committee

139. As outlined earlier in the report, schedule 1 lists the relevant offences that
can apply to the general new evidence exception in section 4. Using an affirmative
order, this list can be modified by Scottish Ministers to add or remove offences
under the power in section 4(7).

140. In considering the power, the Subordinate Legislation Committee believed it
to be a significant one, particularly as it had the power to include offences which
might not be considered as serious as the ones currently on the list. While
accepting that there may be a need to modify schedule 1 in future if subsequent
legislation created new offences which might be “considered desirable for the new
evidence exception to apply”, the Committee was nevertheless concerned that
over a period of time the offences listed and their level of severity could differ
“quite substantially from what now appears”. 111

141. While accepting that “the application of affirmative procedure is a safeguard
against unexpected use of the power”, the Subordinate Legislation Committee
noted that the Scottish Government had consulted widely before creating the list of
relevant offences. The Committee considered that a similar consultation
requirement “may be of considerable assistance to the Scottish Parliament in
ensuring that the implications of any change to the list of offences are fully
explored before they are taken forward” 112 and wrote to the Scottish Government
to ask for its view on such a consultation. The Cabinet Secretary for Justice replied
to say that he would like to consider it further and would provide a fuller response
once he had given evidence to the Justice Committee on the Bill.

111 Scottish Parliament Subordinate Legislation Committee. 71st Report, 2010 (Session 3). Double
Jeopardy (Scotland) Bill (SPP 546)
112 Scottish Parliament Subordinate Legislation Committee. 71st Report, 2010 (Session 3). Double
Jeopardy (Scotland) Bill (SPP 546)
142. In accordance with best practice, the Subordinate Legislation Committee reported on the delegated powers provisions in the Bill prior to the Justice Committee’s evidence session with the Cabinet Secretary for Justice so that the Justice Committee could question the lead minister on any points raised in the report. The Subordinate Legislation Committee’s report (please see Annexe A) recommended—

“that the Scottish Government consider imposing a robust consultation requirement as a precondition to making an order under section 4(7) to modify the scope of the new evidence exception to the rule against double jeopardy. The Committee refers further consideration of which consultees would be most appropriate to the lead committee and the Scottish Government but the intention would be to ensure that the Parliament was fully informed of the possible implications of any change to the law on the criminal justice system. The Committee will reconsider the matter after Stage 2.”\(^{113}\)

**Views of witnesses**

143. Before questioning the Cabinet Secretary of Justice on the power in section 4(7), the Justice Committee heard evidence from a number of other witnesses on the matter.

144. Richard Keen QC, although preferring that the relevant offences should be restricted to those cases tried on indictment, said of the power—

“I would not like to impugn the processes of the Parliament, particularly when I am appearing before one of its committees, but I observe that even the process of positive approval of a ministerial order does not give rise to the same sort of intense scrutiny that takes place with primary legislation. We are talking about a significant piece of proposed legislation.”\(^{114}\)

145. While accepting that under section 4(8) of the Bill, Scottish Ministers may not use the general new evidence exception for an offence that was not listed in schedule 1 at the time of the original acquittal, the Royal Society of Edinburgh had the “strongest objection” to allowing the list to be added to by affirmative order, advocating that such a change should only be made by primary legislation. The Society said that as the Bill stood, it effectively allowed the exception “to be applied to any unusual high-profile case”. It added that it is “contrary to sound constitutional principle that the Scottish Government should be entitled to change the substantive law in this way”.\(^{115}\)

146. John Scott was also against the list of relevant offences being altered by secondary legislation—

“The committee has seen evidence of the difficulty of agreeing what should be on a list and I struggle to see how, in this case, that could properly be dealt with by way of an order. If, having given proper consideration to all the

\(^{113}\) Scottish Parliament Subordinate Legislation Committee. 71st Report, 2010 (Session 3). *Double Jeopardy (Scotland) Bill* (SPP 546)


\(^{115}\) The Royal Society of Edinburgh. Written submission to the Justice Committee.
evidence, including the evidence to the Scottish Law Commission, its report and the consultation that followed, we have not been able to come up with other matters that should be included in the list, I do not think that extending it by order would be appropriate.”

147. The Lord Justice Clerk was less concerned about the provision, believing it to be a reasonable approach for the Bill to take—

“I cannot dissent from the principle that it is for the Parliament to decide what the listed offences should be and, if need be, for the ministers to decide if and when the list should be amended.”

148. When the Cabinet Secretary subsequently appeared before the Justice Committee, he said that while he would be happy to listen to the recommendations of the Committee, he considered that the Bill as it stood gave the Parliament “full scope to consider any changes”. Mr MacAskill added—

“If there is to be a consultation requirement, it should be informal—in the interests of avoiding legal challenges based on the consultation process. That comes back to your first point. If we want the flexibility to deal in a pragmatic way with matters such as offences that might arise as technology changes the society in which we live, we must strike a balance. It seems to us that the affirmative procedure provides Parliament with a degree of assurance that matters will not be legislated on or changes dragooned through by an Administration of whatever colour. Equally, I think that including a requirement for a formal consultation process [known as the super-affirmative procedure] might restrict the will of a Parliament that might be keen to deal with a new situation.”

149. The Cabinet Secretary subsequently wrote to the Subordinate Legislation Committee to confirm the Scottish Government’s position of having informal consultation in combination with an affirmative order but that he would “carefully consider” any recommendations in the Justice Committee’s Stage 1 report.

Committee conclusions

150. In light of the issues outlined earlier in the report, the Committee is not yet persuaded that the list set out in schedule 1 is necessary. However, should the list be retained, the Committee is aware of the deep concerns about adding offences to the list without proper consultation and scrutiny. The Committee is therefore undecided over whether adding or removing offences from the list by affirmative order provides the necessary scrutiny. Although welcoming the Cabinet Secretary for Justice’s assurances that any such order would be preceded by appropriate, albeit informal, consultation, it calls on the Scottish Government to give further consideration to the matter ahead of Stage 2.

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Finance Committee

151. The Financial Memorandum\textsuperscript{120} outlines the anticipated costs for the police, the prosecution, the Scottish Court Service and legal aid. These costs were based on the experience in England and Wales since 2003, when similar legislation was passed. The Scottish Government predicted that there would, on average, be one police investigation of a double jeopardy case per year, which would result in roughly one re-prosecution every five years. The Financial Memorandum also includes estimates on the cost of the police storing and preserving evidence from an investigation, the costs of hearings and trials at the High Court and the potential cost of providing legal aid.

152. The Finance Committee agreed to adopt “level one” scrutiny in relation to this Bill and did not therefore take oral evidence or produce a report; however it did seek written evidence from relevant parties. Responses were received and considered from the Crown Office and Procurator Fiscal Service and the Scottish Court Service. Both respondents considered the Financial Memorandum to reflect accurately their associated costs should the Bill be passed and that these costs could be met by their existing budgets. The relevant correspondence is included in Annexe B.

Committee conclusions

153. The Committee acknowledges the difficulties involved in estimating the financial implications of the Bill but is satisfied that any such costs can be met by the relevant bodies.

CONCLUSIONS ON THE GENERAL PRINCIPLES OF THE BILL

154. The Committee believes that it is right to codify in statute the principle of double jeopardy and that the exceptions to this principle are, on balance, appropriate.

155. Accordingly, the Committee recommends to the Parliament that the general principles of the Bill be agreed to.

ANNEXE A: SUBORDINATE LEGISLATION COMMITTEE REPORT

Subordinate Legislation Committee Report on the Double Jeopardy (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 30 November and 14 December 2010, the Subordinate Legislation Committee considered the delegated powers provisions in the Double Jeopardy (Scotland) Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Double Jeopardy (Scotland) Bill (“the Bill”) was introduced in the Parliament on 7 October 2010 by the Cabinet Secretary for Justice, Kenny MacAskill MSP.

3. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

4. Correspondence between the Committee and the Scottish Government is reproduced in the Annex.

5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated power in section 16(3).

Delegated powers provisions

Section 4(7) – Power to make an order varying the offences to be covered by the new evidence exception to double jeopardy

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

6. The Bill sets out exceptions to the general rule against double jeopardy. Different exceptions apply in relation to tainted acquittals, admissions made or becoming known after acquittal, and new evidence. The new evidence exception set out in section 4, which potentially allows for a fresh prosecution where new evidence is discovered, can only apply if both the original offence and the fresh prosecution to be brought are listed in schedule 1 to the Bill. Section 4(7) enables the Scottish Ministers to amend the list in schedule 1 by either adding offences to, or removing offences from it in an affirmative order.

121 Double Jeopardy (Scotland) Bill Delegated Powers Memorandum
7. Schedule 1 therefore has the important function of setting the limits on when the exception to the rule against double jeopardy can apply in relation to discovery of new evidence. The offences currently listed in the schedule are all of a serious nature including murder, rape and some sexual offences.

8. The DPM, in setting out why a power to amend the list has been provided, discusses the difficulties which have arisen in determining what offences should be included within schedule 1. It also cites the example of the “equivalent” provision in the legislation applying to England, Wales and Northern Ireland, contained in the Criminal Justice Act 2003. It refers to the list in that Act having been amended by subsequent legislation to add further offences.

9. The Committee accepts that there is a need to be able to modify schedule 1 since subsequent legislation might create specific statutory offences, which are of a serious nature, and in relation to which it might therefore be considered desirable for the new evidence exception to apply. At the same time, however, the Committee considers that this is a significant power, particularly so far as the power to add further offences is concerned. While at present all of the offences included in the list in schedule 1 concern serious crimes, there is the potential for this power to be used to introduce, on a gradual basis, offences which might not be regarded as being in the same category as those presently listed, and of a less serious nature. Over a period of time, this could conceivably result in the list of qualifying offences, and their level of severity, differing quite substantially from what now appears.

10. The Committee accepts that the application of affirmative procedure is a safeguard against unexpected use of the power. However, in the same way as the DPM explains that the Government has consulted widely on the scope of offences to which this exception should apply, the Committee considers that there should be full consultation before any changes are made to schedule 1. A robust consultation requirement may be of considerable assistance to the Scottish Parliament in ensuring that the implications of any change to the list of offences are fully explored before they are taken forward.

11. The Committee therefore raised the issue with the Scottish Government and the Cabinet Secretary has indicated in his response that he wishes to consider the matter further. No indication was given as to who the Government might consider to be appropriate consultees for this purpose. However, since the Bill proceeds on the basis of recommendations made by the Scottish Law Commission, the Committee considers that consultation with the Commission would be a helpful starting point. The Committee also considers that it would be helpful to obtain representations from other organisations involved in the administration of the criminal justice system such as the Faculty of Advocates and the Law Society of Scotland. However, it considers that the identification of particular bodies is a matter which the lead committee may wish to consider when taking evidence from the Scottish Government at stage 1.

12. The Committee recommends that the Scottish Government consider imposing a robust consultation requirement as a precondition to making an order under section 4(7) to modify the scope of the new evidence exception to the rule against double jeopardy. The Committee refers further
consideration of which consultees would be most appropriate to the lead committee and the Scottish Government but the intention would be to ensure that the Parliament was fully informed of the possible implications of any change to the law on the criminal justice system. The Committee will reconsider the matter after Stage 2.

ANNEXE

Correspondence with the Scottish Government

Section 4(7) - Power to modify schedule so as to add or remove offences

The Committee asks the Scottish Government whether exercise of the power under section 4(7) to modify schedule 1 so as to add or remove offences should not be subject to a consultation requirement. Given that the power to add further offences is a significant one, would there not be merit in making provision within the Bill to the effect that a comprehensive consultation exercise must first be undertaken with a suitable range of interested parties?

Indeed, the Committee asks would a consultation process not be an essential element in ensuring that the implications of any proposed changes are fully scrutinised and evaluated before being finalised (in the same way as the DPM emphasises the value of Parliamentary debate in the shaping of schedule 1 within the Bill itself)?

In responding, the Committee would appreciate the Scottish Government’s views as to the nature of such a consultation process and which interested parties it considers it would be appropriate to consult.

Response from the Scottish Government

I am writing in response to queries raised by the Committee following its 30 November meeting on the Double Jeopardy (Scotland) Bill. These points were raised in relation to section 4 of the Bill, which sets out a power for Scottish Ministers to make an order to modify the list of offences to be covered by the new evidence exception to the rule against double jeopardy.

The Committee questioned whether exercise of the power so as to add or remove offences should be subject to a consultation requirement.

I am grateful to the Committee for raising this point and would like to consider it further. I am due to give evidence to the Justice Committee on the Bill on 21 December and will endeavour to write to the Subordinate Legislation Committee at that time to provide a full response on this issue.
Note by the Clerk: the following letter was sent after the publication of the Subordinate Legislation Committee’s report and its inclusion is intended to assist the reader.

Letter from the Cabinet Secretary for Justice to the Convener of the Subordinate Legislation Committee

I am writing to follow up my response on 6 December to queries raised by the Committee after its 30 November meeting on the Double Jeopardy (Scotland) Bill. These points were raised in relation to section 4(7) of the Bill, which sets out a power for Scottish Ministers to make an order to modify the list of offences in schedule 1.

The Committee questioned whether exercise of the power so as to add or remove offences should be subject to a consultation requirement. I was asked about the issue on 21 December during my Stage 1 evidence on the Bill at the Justice Committee.

As I indicated to the Justice Committee, I think that if consultation is to be required ahead of any changes to the list, then that should be decided by the Government and Parliament at that time and we should not bind them into a formal statutory process. I also indicated that if there was a strict legal requirement to consult, this could invite legal challenges about the consultation process in any trials resulting from the change, even if the amendment adding an offence was merely consequential or removed an offence which had been repealed.

I accept that an amendment to the list might mark a change of policy, but it may not be controversial and could for example be consequential to other reforms such as the creation of a new serious offence. In the second case, statutory consultation might be unnecessary and cause a delay.

I sought to persuade the Justice Committee that the right balance is struck in the Bill by requiring the use of affirmative procedure to ensure that the Parliament of the day would require to consider and positively approve any changes.

The proposed power and form of procedure was recommended by the Scottish Law Commission in its 2009 Report on Double Jeopardy (SCOT LAW Com No 218, recommendation 30) and affirmative procedure should provide an appropriate safeguard for situations where it is proposed to add or remove offences from the list. However, as I indicated to the Justice Committee, I will of course carefully consider any recommendations made in its Stage 1 Report on any issues in relation to the Bill.

I hope that this response is helpful to the Committee. I am copying this letter to the Convener of the Justice Committee.

Kenny MacAskill MSP
Cabinet Secretary for Justice
23 December 2010
ANNEXE B: CORRESPONDENCE FROM THE FINANCE COMMITTEE

Letter from the Convener of the Finance Committee on the Financial Memorandum of the Double Jeopardy (Scotland) Bill

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda. The Committee agreed to adopt level one scrutiny in relation to the Double Jeopardy (Scotland) Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

The Committee received two submissions on the FM, which are attached to this letter.

Andrew Welsh MSP
Convener

SUBMISSION FROM THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

The Crown Office and Procurator Fiscal Service (COPFS) were fully consulted on the Bill and the financial memorandum.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Crown Office and Procurator Fiscal Service officials contributed fully to the information contained in the financial memorandum. COPFS agree with the conclusions outlined in the memorandum on the costs that are likely to arise out of the Bill. The costs principally relate to applications for a hearing before the Appeals Court in Scotland for a second trial, and if allowed, the cost of the second trial. These costs are outlined in paragraphs 4-7 of the memorandum.

In relation to paragraphs 8-10 of the memorandum on the impact of the Bill, it has been difficult to forecast with absolute certainty the number of cases to which the exceptions could apply. However, England and Wales is a good comparator and taking account of the policy intention to restrict applications to the most serious offences, COPFS agree with the assessment that the procedures will only be used infrequently and the estimate of approximately once every 5 years.

3. Did you have sufficient time to contribute to the consultation exercise?

The Crown Office and Procurator Fiscal Service was afforded sufficient time during the consultation process to provide comments and input.
Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

In relation to costs of hearings at the High Court, the information provided was based on previous costings provided by COPFS for the financial memorandum for the Criminal Justice and Licensing Act in relation to Crown Appeals. It is considered that the work involved in preparing for a hearing to apply for a second trial will be similar to that of preparing a Crown Appeal. The financial costs associated with the Bill have been accurately reflected in the memorandum.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

COPFS is content that any costs will be met from existing resources.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

While, acknowledging there is uncertainty regarding the extent that the provisions will be utilised, the intention to restrict applications to the most serious offences, provides some reassurance in relation to costs. This is reflected in the memorandum.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

In relation to paragraph 16 of the financial memorandum, the cost of retaining productions and evidence has been estimated in relation to the numbers of acquittals each year in murder and rape cases. It is unlikely that we would seek to have all productions in all such cases retained. It is not possible to predict the exact number of cases but it is unlikely to include all cases in which there has been an acquittal.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

There are no wider issues at this time that required to be considered.

Catherine Dyer
Crown Agent and Chief Executive
SUBMISSION FROM THE SCOTTISH COURT SERVICE

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

The Scottish Court Service did not participate in the consultation exercise. However, we have liaised with Scottish Government on the financial implications arising from the Bill.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Our views on the potential costs arising from the Bill are reflected in the Financial Memorandum.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Financial Memorandum accurately reflects the financial implications for the Scottish Court Service.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Provided that the number of cases is as projected in the Financial Memorandum, then we would expect that the Scottish Court Service would be in a position to absorb the additional work.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

We have no reason to doubt the projections made in the Financial Memorandum.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

We are unaware of any related wider policy initiative.
8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

We are unaware of any further related costs.
ANNEXE C: EXTRACTS FROM THE MINUTES

27th Meeting, 2010 (Session 3), Tuesday 5 October 2010

Proposed double jeopardy bill (in private): The Committee considered its approach to the scrutiny of the proposed bill at Stage 1. The Committee agreed (1) a draft call for written evidence and to draw this to the attention of a range of relevant individuals and organisations; (2) to invite representatives of the Scottish Law Commission, Crown Office and Procurator Fiscal Service, the judiciary, the Faculty of Advocates, the Law Society of Scotland and the Scottish Human Rights Commission to give oral evidence; (3) to finalise further oral witnesses after the deadline for written evidence has passed and that these were likely to include human rights and victims' rights organisations; (4) to seek to arrange an informal session with Scottish Government officials prior to taking oral evidence; and (5) not to seek the appointment of an adviser.

31st Meeting, 2010 (Session 3), Tuesday 16 November 2010

Double Jeopardy (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

- Patrick Layden QC, Commissioner, Scottish Law Commission;

Double Jeopardy (Scotland) Bill (in private): The Committee considered the main themes arising from the oral evidence heard earlier in the meeting.

35th Meeting, 2010 (Session 3), Tuesday 7 December 2010

Double Jeopardy (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

- Richard Keen QC, Dean of Faculty, Faculty of Advocates;
- Alan McCreadie, Deputy Director Law Reform, Law Society of Scotland;
- Shelagh McCall, Commissioner, Scottish Human Rights Commission;
- John Scott, former Chair of the Scottish Human Rights Centre.

Double Jeopardy (Scotland) Bill (in private): The Committee considered the written evidence received so far and decided not to invite additional witnesses to give oral evidence but to write to the Association of Chief Police Officers in Scotland seeking supplementary written evidence.

Double Jeopardy (Scotland) Bill (in private): The Committee considered the main themes arising from the oral evidence heard earlier in the meeting.
36th Meeting, 2010 (Session 3), Tuesday 14 December 2010

Double Jeopardy (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

The Right Hon Lord Gill, Lord Justice Clerk.

Double Jeopardy (Scotland) Bill (in private): The Committee considered the main themes arising from the oral evidence heard earlier in the meeting and agreed to write to the Lord Justice General seeking supplementary written evidence.

37th Meeting, 2010 (Session 3), Tuesday 21 December 2010

Decisions on taking business in private: The Committee agreed to consider a draft report on the Double Jeopardy (Scotland) Bill … in private at future meetings.

Double Jeopardy (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Kenny MacAskill MSP, Cabinet Secretary for Justice.

Double Jeopardy (Scotland) Bill (in private): The Committee considered the main themes arising from written and oral evidence on the Bill.

2nd Meeting, 2011 (Session 3), Tuesday 18 January 2011

Double Jeopardy (Scotland) Bill (in private): The Committee began consideration of a draft Stage 1 report. Various changes were agreed to.

Double Jeopardy (Scotland) Bill (in private): The Committee continued to consider a draft Stage 1 report. Various changes were agreed to and the Committee agreed to consider a revised draft at its next meeting.

3rd Meeting, 2011 (Session 3), Tuesday 25 January 2011

Double Jeopardy (Scotland) Bill (in private): The Committee considered a revised draft Stage 1 report. Various changes were agreed to, and the report was approved for publication.
ANNEXE D: INDEX OF ORAL EVIDENCE

31st Meeting, 2010 (Session 3), Tuesday 16 November 2010

Patrick Layden QC, Commissioner, Scottish Law Commission

Michelle Macleod, Head of Policy Division, Scott Pattison, Director of Operations, and Gertie Wallace, Head of Criminal Justice Policy, Crown Office and Procurator Fiscal Service

35th Meeting, 2010 (Session 3), Tuesday 7 December 2010

Richard Keen QC, Dean of Faculty, Faculty of Advocates

Alan McCreadie, Deputy Director Law Reform, Law Society of Scotland

Shelagh McCall, Commissioner, Scottish Human Rights Commission

John Scott, former Chair of the Scottish Human Rights Centre

36th Meeting, 2010 (Session 3), Tuesday 14 December 2010

Lord Gill, Lord Justice Clerk

37th Meeting, 2010 (Session 3), Tuesday 21 December 2010

Kenny MacAskill MSP, Cabinet Secretary for Justice
10:03

The Convener: This morning’s substantive item of business is our first evidence session on the Double Jeopardy (Scotland) Bill, which has been introduced by the Cabinet Secretary for Justice. Because of the tight timescale for consideration of the bill, it has been necessary to arrange this evidence session before the deadline expires for the committee’s call for written evidence, which runs until 30 November.

I welcome to the meeting our first panel of witnesses: Patrick Layden QC, solicitor, and Alastair Smith, project manager, both from the Scottish Law Commission. I invite Mr Layden to make a short opening statement.

Patrick Layden QC (Scottish Law Commission): The Scottish Law Commission is always very pleased to see its reports reflected in legislation and is grateful for the opportunity to give evidence.

Although the bill largely reflects the recommendations in the commission’s report, it is framed slightly differently. I wish to highlight certain points of difference, three of which are relatively minor.

The first relates to admissions made before or after acquittal, which are covered in section 3. When we investigated the matter, we found a strong body of opinion that admissions allegedly made by the accused should be put into the same category as other new evidence. We decided to suggest that they should be treated separately, partly because we could see a distinction between them and a straight new-evidence exception. At that time we had not decided, and made no recommendation, on whether there should be a new-evidence exception, but the Government has put such a provision before the Parliament, and we accept that things are going that way.

If that is the case, there is little logic in leaving admissions out of the ordinary new-evidence exception. If the provision is to be extended to include admissions made before as well as after the acquittal, there is no logic at all in treating admissions as anything other than another type of new evidence. We suggest that the admissions exception is put into section 4 with the other new-evidence exceptions.

The second point relates to section 4(5), which states:

“Only one application may be made under”
the new-evidence exception rule. There is no similar provision in relation to the admissions provision in section 3. If our suggestion is followed and admissions go into section 4, there will be no problem. However, if the Parliament decides that admissions will stay as a separate category, we suggest that there should be only one bite at that particular cherry. If a chap turns up and says, “The accused told me that he did it”, that may or may not justify a second trial, but it should justify only one further trial and no more.

Thirdly, with regard to what is now section 12, we suggested that where the prosecutor took the view that previous proceedings had been a nullity, he could still get the court’s agreement to that proposition before starting new proceedings. We thought that that was very unlikely, but we included the provision for the sake of completeness.

Section 9 of the bill goes even further. It provides for a situation in which the previous allegedly null proceedings took place abroad and the Scottish prosecutor did not know that they were null. That seems to be a complication too far. If such a contingency was ever to occur, the court already has the discretion under section 7(4) to allow the trial to go ahead. We suggest that section 9 is simply unnecessary, overcomplicates the legislation, and should be removed.

My principal point relates to retrospection. The Scottish Law Commission, as I said, was undecided on whether there should be a new-evidence exception, but we were strongly of the view that if such an exception was to be introduced, it should not be retrospective.

The reason for that, apart from the general rule about not making criminal legislation retrospective, is that there are currently people in Scotland who have been tried for and acquitted of crimes. Those people have a right, which is recognised by and enforceable in the courts, not to be tried again. They are different from the rest of us. If a crime is committed in Scotland and every person in Scotland is notionally liable to be tried for that crime, they are at present only liable to be tried once. After they have been tried once, they cannot be tried again.

That is a real right that those people have. They are innocent people: they have had a full, proper trial according to the rules of evidence and have been found not guilty. They currently enjoy a right that is set up by the courts in the teeth of opposition from the executive, and if we make the provision retrospective, we take that away. According to our brief survey of the statistics, 1,500 people have been acquitted since 1998 of the sort of crimes that are mentioned in schedule 1 to the bill. Those people all have that right, and the legislation will take it away from them.

The reason for that, we are told, is that this is the area in which it is said that the police and prosecutors may be able to reopen cases in the light of advances in technology. People talk about DNA and so on. Where physical evidence is retained, it can be re-examined in the light of scientific advances. When DNA became a useable technology, it was possible to re-examine blood and other samples in unsolved cases and compare the results against the developing national database. That was how Angus Sinclair was convicted in 2001 of the rape and murder of Mary Gallacher, which happened as long ago as 1978. It is an extremely useful technology.

When a crime is unsolved and there has been no trial, the police keep the physical evidence as a matter of routine so that it is available if and when more evidence more turns up. However, we checked with the Crown Office, which confirmed that where there has been a trial and the accused has been acquitted, as a matter of routine the physical evidence is thrown away. There is no point in keeping it. Therefore, it does not matter what scientific advances there may be. Where someone has been acquitted, no physical samples are available for testing. Making the exception retrospective will have no practical effect. No doubt the Crown Office will be able to tell the committee how it intends to deal with that matter in future, but as far as the past is concerned, there is no evidence. Not only is there a strong, principled objection to making the legislation retrospective, but retrospection will not achieve any noticeable practical effect.

We raised in our discussion paper the question whether anyone knew of any cases in Scotland that might be reopened if the legislation were passed and made retrospective. The police, the prosecutors and the judges were not able to think of a single example. So far as I am aware, that remains the position today.

That concludes my opening statement. If there are any questions that we can help with, we are at your disposal.

The Convener: Thank you, Mr Layden. There are indeed a number of questions, some of which you anticipated in your opening statement.

Patrick Layden: Good.

The Convener: Is it the case that you do not see the need to replace the current common law with a statutory one, except under certain headings?

Patrick Layden: No. We considered that there were various infelicities—various unclear areas—in the law and that it made sense to restate the position in statutory form. We are entirely persuaded that it is right to restate the rule in statutory form. We had differences about whether
that should extend to new evidence or any exceptions, but we were quite clear that it was a good thing to put this into statute.

**The Convener:** You dealt earlier with the practical impact of that, which is what we had been going to ask you about.

**Dave Thompson (Highlands and Islands) (SNP):** Will you explain why we need to have in the bill both the core rule against double jeopardy and the broader principle about unreasonably splitting cases?

**Patrick Layden:** You need them both because it is possible to charge a number of offences on the basis of the same facts. One of the cases that we looked at involved a chap who was found walking along the road with a dead hare in his hand. He was charged with poaching because the inference that the court was asked to draw was that he must have got the hare illegally on one of the estates on either side of the road. However, he was found not guilty. He was then charged with being in possession of a hare without a game licence. The facts were precisely the same. He was on the road, with a dead hare, and no licence. He was effectively tried twice, on the basis of the same set of facts. The more general rule is meant to prevent the Crown from having one shot one way and, if that bounces, having another shot another way.

**Dave Thompson:** So it is basically to stop any manipulation of the system by the Crown.

**Patrick Layden:** Yes. The legislation is all about protecting the citizen.

10:15

**James Kelly (Glasgow Rutherglen) (Lab):** Section 11 deals with circumstances in which a lesser charge than culpable homicide or murder has been brought, and the victim dies subsequent to trial proceedings. Current case law seems to confirm that a subsequent charge can be brought for murder or culpable homicide when the victim dies. You took the view that that should happen only when proceedings for the lesser charge result in a conviction, and that if there has been an acquittal, it would not be relevant to start another case.

The Government goes further than that in section 11. It seeks to allow subsequent retrials when there is either an acquittal or a conviction. How did you arrive at your decision to move away from the existing position in law? What is your view of how section 11 of the bill has been drafted?

**Patrick Layden:** We accept that there are two views on the matter. Both stem from the legal position that murder is treated as an entirely separate offence from any other kind of assault. We could treat all physical violence as if it goes up an ascending scale that goes from bumping into someone in the lift, to hitting him with a fist, to hitting him with a weapon, to killing him. On that view, you might say that murder is an aggravated assault, and you can find the odd statement in cases to that effect. However, some time ago, the courts took the view—by a narrow majority—that murder is a separate crime and can be tried separately. A previous trial for a serious assault does not, therefore, thole your assize in relation to a future charge of murder.

We took what we thought was the equitable view that, if a trial results in a conviction, that is all right. However, if a trial, which is essentially on the same facts, results in an acquittal, it is inequitable to proceed to a second trial. The Government disagrees with that. I understand that the Crown Office is giving evidence later this morning, so I will not go too far down this road, but I recollect that the Government disagrees because the amount of time and effort that is put into a murder prosecution is naturally much more than is put into an assault case. It might therefore be that once the victim dies, something might happen that means a better case is put together. The committee might take that up with the Crown Office. If you ask the same question, it can give you the ins and outs of that.

We took an equitable view, and the Government has taken a different view. I have no comment beyond that.

**Robert Brown (Glasgow) (LD):** Presumably, there will be some potential for such a situation to be dealt with under the new-evidence rule if an enhanced murder inquiry produces evidence that has not been heard before.

**Patrick Layden:** You would have to get round the provision that the evidence not only should be new, but could not have been obtained earlier with reasonable diligence. That is unlikely. More witnesses might be found and—I do not know; I am not an expert on that. You will have to ask the professionals about that.

**The Convener:** I want to pursue that point a bit further. Let us say that, following an incident, an accused is charged on indictment that he did assault so-and-so by punching and kicking him repeatedly about the head and body to his permanent disfigurement and severe injury. After evidence is led, he is found guilty of, or he pleads guilty to, serious assault and is imprisoned for three years. The victim suffers brain damage, as a result of which he develops epilepsy—which happens frequently when someone is kicked or beaten about the head—and, three months later, he has a fatal seizure. As the bill stands, it would
be allowable for the Crown to proceed. Do you agree with that interpretation?

Patrick Layden: I think so. The Crown could then prosecute the man for murder.

The Convener: Would it be useful if the bill provided for some sort of fail-safe position? If the epileptic seizure occurred, say, 10 years later, it might be somewhat less fair then to indict the accused on a murder charge, because of the lack of immediacy.

Patrick Layden: It might. I suspect that in such a case the Crown would exercise its wise discretion and would consider whether it was proper to prosecute and whether the public interest required a prosecution. The Lord Advocate has very wide discretion in relation to whether it is in the public interest to prosecute. I would expect such a case not to be prosecuted, but that is obviously a matter for the Lord Advocate.

The Convener: It is a matter that we can pursue with the Crown.

Patrick Layden: Certainly.

Nigel Don (North East Scotland) (SNP): Good morning. Your report suggested that there should be an opportunity to retry when the original trial has been tainted by any kind of perversion of justice. Will you outline your thinking on how you see the bill carrying that forward? Do you have any concerns about what is in the bill?

Patrick Layden: I do not think that I have any concerns about what is in the bill. If there was some interference with the original trial—so that it was not a fair trial—it is proper that there should be a second one. Interference could happen in a number of ways, and the fact that interference had taken place would have to be established to the satisfaction of the court. The court could then order a second trial. Am I missing the point of your question?

Nigel Don: No. It was an open question, because I was not aware that you had any concerns—I just wanted to close that off.

What thought have you given to the balance of evidence in that regard? It is not that I do not have any respect for a court, but it is apparently very much down to the balance of evidence and the judgment of the court as to whether something should be reopened.

Patrick Layden: The test that we suggested, which is incorporated in section 2(3)(b), is that the court to which the application is made has to be satisfied, on the balance of probabilities, that one of the stated offences against the course of justice has been committed. The judgment is on the balance of probabilities, because the nature of these matters means that they are very difficult to prove. If you find out after or during the trial that somebody has been talking to the witnesses and perhaps threatening them or trying to bribe the jurors, it will all be very fuzzy. There will be a lot of telephone calls made late at night from untraceable mobile phones and so on. It seemed to us that it would be unreasonable to require the Crown to prove beyond reasonable doubt that there had been interference with the trial. The test that, on the balance of probabilities, there had been interference would be a sufficient hurdle for the Crown to get over in order to get a new trial.

The English did it differently. The Criminal Procedure and Investigations Act 1996 provided that it had to be proved beyond reasonable doubt that there was interference. What has happened since is that there have been no trials in England on the basis of tainted acquittals. That might be because nobody tries to interfere with the course of justice in England. If that is the case, I am happy for them, but I doubt that it is.

Nigel Don: Indeed. That is probably the point. I am grateful for that evidence, because I was not aware of it. Perhaps it is right that the test is on the balance of probabilities, given what the result would be otherwise. However, that means that, from the point of view of the ordinary citizen—which is the seat that I sit in—the possibility of a retrial following that route seems far greater than all the other things that we have spoken about. It appears to carry the greatest risk, particularly if somebody wants to set me up as having tried to nobble a witness when, in fact, I did not.

Patrick Layden: I suspect that there is murky mud at the bottom of the pond here, which will bob up every now and then in cases. The prosecutors, the police, the courts and the judges are probably well able to find their way through it. We have given them a framework. Time alone will tell how it works.

The Convener: You mentioned that one issue that might arise in respect of a tainted acquittal would be some pressure being put on members of the jury, whether collectively or individually. Do you foresee any difficulties in the operation of the bill in that regard, bearing in mind the terms of the Contempt of Court Act 1981?

Patrick Layden: I am sorry—in what particular respect?

The Convener: There are restrictions arising from a number of cases—I recollect that one, the case of Pullar, recently went to the European Court of Human Rights—that say that we are not really required to know what goes on within a jury room.

Patrick Layden: I see. The way that these matters tend to come out, looking at recent
reported cases—mostly from England but occasionally from Scotland—is that a juror comes under some pressure or finds that one of his fellow jurors has come under some pressure, reports the matter to the clerk of court, and judges deal with the situation according to its merits. Sometimes they excuse the juror, sometimes they instruct everybody not to pay any attention to the incident and sometimes it seems so minor that they do not do anything about it, so it comes out in the wash in the appeal court. A juror who is concerned about something is encouraged to go to the judge through the clerk of court and tell them, either orally or in writing, that they are having a problem. I think that, in the Pullar case, a juror was a friend of one of the principal witnesses for the prosecution.

The Convener: You have dealt with admissions, but I ask Robert Brown whether there are any other questions on that matter.

Robert Brown: Yes, I have a couple of brief points. You rightly said, Mr Layden, that there is an illogicality if we have the new-evidence exception but do not include admissions within that. First, do any problems or issues cross your mind where the admissions situation poses different considerations from those posed by new evidence more generally?

Patrick Layden: I do not think so. Admissions are always delicate territory because it is so inherently improbable that somebody who has committed a crime—let alone somebody who has got away with it—should go and tell anyone about it. Therefore, when someone turns up and says, “He told me that he did such and such,” you have to treat that with a fair amount of suspicion. No doubt, that would be in the mind of the court when it was considering whether to accept that there was credible evidence that the admission had been made. I do not think that it raises any particular issues.

Robert Brown: My second point is that I think the exception that is set out in section 3 goes a bit further than the SLC’s proposal, because it includes the possibility of new evidence of pre-acquittal admissions that come to light later on. Do you have any view on that? That provision clearly goes against the SLC’s view. Do you accept the Government’s reasoning on the matter, or do question marks remain?

Patrick Layden: Once that provision went into the bill, that tipped us into thinking that there was no logic in leaving admissions out of the general new-evidence exception, because an admission made before the trial is simply evidence. If the Crown had found out about the admission, it would have led that evidence in the trial.

We saw a different point involving somebody who, having been tried and having conducted his trial on the basis that he did not do it, goes around afterwards saying, “I did it, and I got away with it.” The last man we know about who did that in Scotland was a chap called Cairns in 1967. He could not be retried for the murder, which he had denied having committed, but he was tried for perjury and got 18 years. You could do him under the new-evidence exception and achieve the same result, but give him a conviction for murder.

The Convener: Again, you dealt with the issue of exceptions, but perhaps Cathie Craigie wants to follow some points up.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Patrick Layden anticipated many of the questions that the committee would have asked this morning. The SLC did not reach a firm conclusion in its report on whether there should be a more general new-evidence exception. Could you tell us in a bit more detail about your difficulty in reaching a conclusion on that?

10:30

Patrick Layden: The difficulty that the commission was unable to get over—others get over it much more easily—is that the rule against double jeopardy is an affirmation of the status of the individual against the state.

We all know that we must pay our taxes, have controls on our land use and so on. There are various ways in which society, the state or the Government—however we like to put it—is required to control the individual and channel what he or she does in the interests of society generally.

When the rule against double jeopardy started, the state—the executive or the Crown—saw no problem in carrying on with court cases until it got the result that it wanted. The judges put a stop to that and said, “No—if you have tried a man once for an offence, you cannot try him again.” The prosecution gets one bite at that cherry. It can lead all the evidence that it wants and have a fair trial but if, at the end of it, it has failed, it cannot prosecute again because that would be persecution.

That works out as an affirmation of the status of the individual. The individual does not simply exist to be processed by the Crown—the prosecution—again and again until it gets the result that it wants; he has freedom and a status that means that the prosecution is entitled to try him once but, once it has done that, he is home free, he is clear of the accusation and the prosecution cannot come bothering him again.
There are all sorts of complicated provisions in the bill about how the Crown will have to go to the court and get three judges to agree that the case is good before it can start the process of trying the accused. At a much lower level, the possibility exists that the police, say, could put pressure on acquitted persons on the basis that they will re-examine and reopen the case. That may never happen but, in the real world, it might. That is the kind of pressure that somebody who has been tried and acquitted can simply ignore because he knows that he cannot be tried again. The commission thought that that was an extremely important right for every individual citizen in Scotland. That was why it was difficult for us to reach a conclusion on it. As the committee knows, the vast majority of those who responded to our discussion paper were in favour of having an exception to the rule, but the position at the moment is that that principle—the status of folk in Scotland to be clear of prosecution following them round the place—is extremely important.

That is one of the more important questions with which the Parliament has to grapple. It is not only the fact that the rule against double jeopardy has existed for hundreds of years that is important, but the fact that it matters. It matters just as much now as it ever has.

If you look at the general picture of how citizens’ rights are constrained, you can see all the bother that the authorities in England are having over control orders. We are told that they are vital. I am not in a position to judge one way or the other, but the net effect is that the freedom of citizens is being constrained without a proper legal process in a court and on the basis of evidence that they do not get to examine.

Liberty is not something that we can come and go with. The new-evidence exception in the bill is a marked diminution in the status of individual Scots people. That is why the commission was not able to come to a conclusion on it.

Cathie Craigie: That was a very full answer. Perhaps, rather than speaking for the whole commission, you could give me your views on my next question. I understand that the citizen needs to be protected and that people who have been acquitted should not spend the rest of their lives looking over their shoulders wondering whether the prosecutors will come for them again. However, when it comes down to the interests of the general public, it seems to me reasonable to say that, if there is new evidence, it is in the public interest to bring a person to trial again.

Patrick Layden: That, of course, is the point. There is a public interest in preserving the freedom of the individual and a public interest in bringing criminals to justice. Another public interest is to provide finality and certainty in legal proceedings. If you have a civil case against somebody and it comes to a conclusion, you cannot come back next year and say, “I want to try that one again, because I have thought of some new evidence.” The life of society and the country must be able to move on.

We have a system for solving disputes and, once they have been solved, that is the end of it. That applies in civil and criminal cases. There is an exception to the rule for the accused person because of yet another public interest, which we treat as very important: we do not want innocent people in jail. The criminal justice system is always balanced in favour of the accused person.

I accept as a matter of principle that there will be cases where new evidence comes up after the trial has happened. However, as I have said to the committee, nobody has produced a single live example of such a case in Scotland. There have been very few cases in England, even though England has 10 times as many people as we have. In theory, yes, it would be terrible if new evidence came up, but no one has produced a case where that has happened.

The Convener: You dealt with the 2001 case involving Angus Sinclair.

Patrick Layden: Yes.

The Convener: He was, of course, involved in another murder trial—the World’s End murder trial—that failed following the submission of no case to answer. When the Government’s intentions in the bill were made clear, one individual commented that it would result in Angus Sinclair being made eligible for prosecution again. Do you agree that that is not the case because the evidence was available at the time?

Patrick Layden: Yes, I would agree with you. There is an old saying that might apply in this case, which is that hard cases make bad law. It was right to re-examine the rules on double jeopardy and similar fact evidence and the Moorov doctrine and so forth and, if that was sparked by the Angus Sinclair case, that is fine. However, it would be very wrong to change the law for the sake of retrying any individual, in particular Angus Sinclair, who will spend the rest of his life in Peterhead prison unless there is some contingency that I would prefer not to contemplate.

The Convener: I think that we are all in that position.

Stewart Maxwell (West of Scotland) (SNP): I want to pursue the discussion on the rights of the individual. I understand completely your argument and the commission’s concern about new evidence. I know that you accept that there is a balancing act, but surely it is not just between the individual and the state. It is more of a triangle, in
which the rights of the individual are balanced against the rights of the state and the rights to justice of the victim and their family. There are more rights involved than just those of the state and individual accused. If a new scientific technique is found—such as DNA, as we have seen in recent years—that provides new and compelling evidence of the guilt of an accused, it would seem perverse not to use that evidence. I am still slightly confused about why the commission ended up coming down in the way that it did.

Patrick Layden: As I said earlier, DNA is useful if you have a physical sample to test. If you get a knife with fingerprints on it from the murder scene, but fingerprint technology has not yet started and you have no one to try because you cannot find the guy, you put the knife carefully to one side and hope that enough evidence will emerge. In due course, along comes whoever the chap was who thought about fingerprinting and says, “We can now distinguish between fingerprints.” You then can compare the fingerprints on the knife to those of the chap who was brought in two weeks ago for an unrelated crime and say, “Oh, they are the same.” You can now try the man for the murder because you have his fingerprints on the knife.

If you have tried somebody and acquitted him, the police throw away the knife and the blood samples. You have nothing to test for fingerprints. If DNA is used, you have bits from the fingernails of the victim or whatever other samples, such as bodily fluids. If you have those samples but have not prosecuted anybody, you keep them because you might get evidence that will enable you to pin the crime on somebody. However, if you have tried somebody and acquitted them, those things are of no use any more and they are thrown away. That means that, when the new technology arrives, there is nothing to test it on.

Stewart Maxwell: Although the scenario that you paint may be correct, it is based on a view that the prosecution is not looking for anybody else. If there were any doubt about that, the prosecution would retain the evidence; if they were in no doubt about it, they would dispose of the evidence as you say. There is still a possibility of the evidence being retained in some cases, even if a trial has taken place.

There is a wider point about the retrospective nature of the bill. Even if what you say were correct in all cases and there were no past cases in which a prosecution could be brought, from the point at which the bill became an act onwards, all that would be required is a slight change in the procedures of the prosecution and the police so that they retained the evidence. Then, if there were a future scientific breakthrough, the provision could be applied retrospectively at that point. Retrospection is therefore necessary.

Patrick Layden: Retrospection is not necessary—that is precisely my point. If you want to change the law to provide for a new-evidence exception, that is a decision that the Parliament can make having struggled with the dilemma about the rights of the individual. I am sure that I have heard that the Crown Office and the police are in discussions about how best to keep evidence in acquittal cases. You will be able to find out about that from the witnesses from the Crown Office and Procurator Fiscal Service later this morning. However, there is no practical point in making the provision retrospective.

Stewart Maxwell: Let us move on to what the report says about the new-evidence exception. Initially, you thought that that should apply only in murder and rape cases. Why did you propose that limitation? Perhaps you can give us your thoughts on the list of offences that are contained in the bill, which goes wider than murder and rape and includes genocide and other sexual offences.

Patrick Layden: It is extraordinarily difficult to find a logical, principled selection of offences to which we should apply a new-evidence exception. There were various possibilities. The exception could have applied in any case that was prosecuted in the High Court, although almost any case can be prosecuted in the High Court if it is serious enough in its own terms. The offence could be anything punishable by life imprisonment, but that is every common-law offence in Scotland. Where would we draw the line? It would have to be a matter of judgment.

The bill contains a perfectly reasonable list of serious offences. One of my colleagues wondered why incest between consenting adults would be regarded as a very serious offence, but it is on the list. Also, I see no mention of drugs offences or serious money laundering. There are various ways in which one could look at the list and say, “We don’t want anyone to get away with this”—whatever it is. We looked at the list in the English legislation, but that seemed a bit clunky. The commission could not come to a view on the list, so we suggested what we regarded as the basic minimum and invited the Government—as we are now inviting the Parliament—to consider whether that was the correct list. The Government added to it, and there is the potential for adding further offences to it if that is thought to be desirable. However, I cannot provide any guidance about how you should approach the matter.

Stewart Maxwell: No, I understand that. Different people will have different views on what should and should not be included. I just wondered why your initial suggestion was so restrictive.
Patrick Layden: The list should be restricted. We think that the exception to the rule against double jeopardy should be very limited.

Stewart Maxwell: But why so limited? You originally suggested that it should apply only in cases of rape and murder as opposed to cases involving some of those other offences. Why did you take that view?

Patrick Layden: The commission thought that those were the two offences that everyone would agree on. Obviously it would be possible to put in a further list of offences that people may agree on.

Stewart Maxwell: So it was just for certainty. There was no disagreement over those two offences, whereas there might or might not be with regard to others.

Patrick Layden: Precisely so.

10:45

Stewart Maxwell: On the number of tests that must be met before there could be a second prosecution on the basis of any general new-evidence exception, does the bill reflect or deviate from the commission’s thinking? If it does deviate in some way, what are your views on that?

Patrick Layden: Our impression was that the bill reflects our thinking on the matter. The tests are difficult—as they should be, given the importance of the process. Three judges should be involved and that is the provision in the bill.

Stewart Maxwell: You think that the bill strikes the right balance and that the number of tests and hurdles that it contains is entirely reasonable.

Patrick Layden: Yes.

Dave Thompson: I wonder whether you can help me to understand the retroactive aspect more fully. You said that retrospection would not have a practical effect because if, after a person had been tried and acquitted, the authorities did not think that anyone else was involved, they would not keep the evidence. I presume that that means that, in certain cases, the evidence will be kept on the basis that they think that something might come of it in the future. I am not sure that I understand the difference between the current system for keeping evidence from previous cases and any new system set up under the bill for keeping evidence in future. After all, if we are talking about the authorities keeping evidence after a person has been acquitted because they think that someone else might be involved—and it might well be many years before a new person would be tried—surely that is exactly the same as the present situation, apart from the fact that, in the past, they might have kept much less evidence or evidence from fewer cases. Do you understand what I am getting at?

Patrick Layden: Yes. We start from the principled position that criminal legislation should not be retrospective; that, at the moment, people have the right not to be tried again; and that we should not take that right away from them. However, in practical terms, if the evidence used in their trial has been thrown away, the application of new technology will not help us. Retrospection is neither a principled nor a practical way of proceeding.

Dave Thompson: But what if the evidence has been kept?

Patrick Layden: The Crown Office cannot have thought that it would be able to prosecute the same person, because of the rule against double jeopardy, and if it thought that it could prosecute someone else, one might well wonder why it had prosecuted the first chap. If the question is as open as that, should the prosecution have been brought in the first place? This is a very grey area for someone such as me who is not a prosecutor and I think that you should take it up with the Crown Office. I can think of no reason why it would keep evidence—unless, of course, something emerged in the course of the trial to make it think that it was X not Y and it then decided to chase X.

Dave Thompson: What is the difference between the Crown Office keeping evidence, for whatever reason, in the past and the Crown Office keeping evidence in future? After all, if someone is tried and acquitted, the same argument holds. The evidence would be kept only if it was felt that someone else—or more than one person—was involved. I do not see the difference in principle between the situation from now on and the situation prior to now.

Patrick Layden: The difference is that, if Parliament passes the bill as it is and changes the law, everyone in Scotland will know that the position is different and they will be liable to be tried for a crime not once but twice. At the moment, 1,500 people in Scotland have been tried for and acquitted of the kind of offences set out in schedule 1 and each of those people has a right, enforceable in the courts, not to be tried again. You can either take away their right or leave them with it. That is the difference: they have a right at the moment, while all that the rest of us have is a notion of what the law is. If you change the law, we will know what it is, but no one is taking our rights away from us; you are just adjusting our position in the future.

Dave Thompson: But the fact remains that, if the legislation is passed, we will have fewer rights in future than we had in the past. Those 1,500 people would retain their rights, but from then on
those rights would not be there for people in future.

Patrick Layden: Yes, that is precisely the point.

The Convener: Although one could advance the argument that they could be prosecuted only on cause shown, on the basis of a decision taken by three judges, which would put in place the checks and balances that may be necessary.

Patrick Layden: Just so. There are a lot of checks and balances in the bill, and I have no doubt that everything will be done to ensure that nothing is undertaken irresponsibly or frivolously. However, the end result is still the same: someone who has a right at the moment will have it taken away from him. It is a serious point in principle, but also in practicality. If you are going to take away someone’s right, you should do so on the grounds of solid evidence that it will make a difference. There is no evidence that such a provision would make a difference to cases in the past.

Nigel Don: I will pursue the theoretical possibilities, because I am not a criminal lawyer and do not know the cases. Suppose a person has been tried for the murder of someone whose body has never been found, which I think happens occasionally—

Patrick Layden: Yes, it has happened quite recently.

Nigel Don: Okay. Suppose that person is found innocent, which I imagine is quite likely, and the body is subsequently found, complete with enough evidence to connect the two otherwise unconnected people. That is surely one of the cases in which retrospection in the bill might well be entirely appropriate. I cannot name a case, but that is the type of situation that might turn up.

I am sure that you are right in saying that no one has yet thought of a case, but there is therefore no harm in making the provision retrospective, because it would pick up only that type of situation. If that was to happen, it would be good that we could pick it up.

Patrick Layden: That is the argument. The contrary argument is that you should not take away people’s rights. They have a right, which the judges gave to them, which protects them from being prosecuted again. If there were a number of cases in which the police, prosecutors or judges were able to say that they could rerun the trial and get a different result, and that that would be in the interests of justice, the argument would be much more balanced. One can think of theoretical cases in which that might happen, but we are lacking practical examples.

Nigel Don: If it is any consolation, I can tell you that I have written down your reference to “an affirmation of the status of the individual against the state” on my piece of paper. It is a lovely line, and I entirely understand what you are saying. This is about status. It is exactly the same when people get married: they become married people and they are no longer individuals, and their status in the world changes.

Patrick Layden: I am not sure that I want to go into whether marriage is a conviction or an acquittal.

Nigel Don: Well, you can argue whether it is a conviction or an acquittal, but it changes one’s status in society against the state. The issue that we are discussing is about status, and I understand that.

The Convener: I see that there are no more questions. Mr Layden, we are much obliged to you for giving evidence this morning. You have given us a lot to think about, and it has been a most useful evidence session.

10:53

Meeting suspended.

10:59

On resuming—

The Convener: We welcome the second panel of judges—[Laughter.] In the case of all three of you, I am sure that that is premature. The next witnesses are from the Crown Office and Procurator Fiscal Service: Michelle Macleod is the head of the policy division, Scott Pattison is the director of operations and Gertie Wallace is the head of criminal justice policy.

I invite Ms Macleod to give a short opening statement.

Michelle Macleod (Crown Office and Procurator Fiscal Service): The Crown supports the general principles that underpin the bill. It is recognised that the double jeopardy rule is an important safeguard against individuals being prosecuted repeatedly for an offence of which they have been acquitted. However, it is also important that a criminal justice system strikes an appropriate balance and delivers justice for victims and bereaved next of kin.

In a modern criminal justice system, it is incongruous to have a rule that prevents a new trial when a person who has been acquitted later confesses to having committed the crime, where the original proceedings were tainted in some way or where new evidence of a compelling nature becomes available. It has been recognised by jurisdictions throughout the world that a rule that prevents a second trial in such circumstances can have the unintended effect of undermining public confidence in the criminal justice system and that,
in a prescribed set of circumstances limited to the most serious of offences, it is necessary to provide some exceptions to the double jeopardy rule.

The Crown also supports the intention, as set out in the bill, for the exceptions, including the new-evidence provision, to be applied retrospectively. If it is accepted that public confidence may be weakened where compelling evidence emerges and a new trial cannot be held, the argument applies regardless of whether the original trial was held before or after the new reforms.

There has been detailed consideration by the Scottish Law Commission, followed by a consultation process. From the Crown's perspective, the resulting bill is measured, proportionate, workable and sits well with similar legislation that has been enacted in other jurisdictions. The Crown recognises the intention for the exceptions to be used sparingly and only in relation to the most serious offences. Indeed, the bill provides a number of checks and balances that are aimed at securing that objective.

Overall, it is the Crown's view that the bill potentially represents an important and welcome addition to the law of Scotland.

The Convener: Thank you. Clearly, you are of the view that the existing common law is not sufficient and that statute is required.

Michelle Macleod: Yes. It is appropriate that the double jeopardy rule be placed on a statutory footing. It befits a modern society to have that well defined, and to have clarity about exactly what it is envisaged that it will cover. The rule needs to be defined in order for exceptions to be applied.

The Convener: Fine. We will proceed to further questions.

Dave Thompson: The Scottish Law Commission proposes a core rule against double jeopardy, supplemented by the broader principle against unreasonable splitting of cases. Are you happy with that approach and how it is being taken forward in the bill?

Michelle Macleod: From a practical perspective, as prosecutors, it is always the principle of the Crown to proceed on indictment or complaint on all charges arising out of the same acts, facts or circumstances. The only exception to that would be where, by doing that, there may be prejudice to the accused or suspect. It restates our current practice for proceeding with prosecutions and does not really cause us any concerns.

Dave Thompson: You have never been tempted to try a case again.

Michelle Macleod: The bill provides a number of safeguards for the accused. The plea in bar of trial is reinstated, as well as there being the double jeopardy rule, so the accused person would be in a position to take a plea in those circumstances.

James Kelly: Section 11 of the bill would restate in statute the current position in common law that if someone is charged with a lesser offence than homicide but the victim subsequently dies, the accused can be tried again. That is the case whether there has been a conviction or an acquittal. That is at odds with the position of the Scottish Law Commission, which stated earlier in evidence and in its report that situations in which someone had been acquitted over a previous offence should not be subject to a retrial where a victim subsequently dies. What is your position on those conflicting views?

Gertie Wallace (Crown Office and Procurator Fiscal Service): We do not imagine that the exception would be used very often, especially in an acquittal situation, but there are merits in having it on the statute book. Our justification for supporting that section is that following an assault, an investigation would not necessarily be as extensive as it would be in a situation where it was clear at the outset that there had been a murder. The victim could have serious injuries from which he might seem to be recovering—that is more likely these days due to advances in medical treatment. If the accused was tried within custody time limits for the original assault, the trial could take place while the victim was still alive. If the evidence did not convince the court to find the accused guilty and he was acquitted and the victim subsequently died, it might be that further investigations would bring out more evidence. Witnesses might be more likely to come forward in a murder investigation than in an investigation of an assault, even of assault to severe injury. It would be appropriate in those circumstances for the accused to be placed on trial again and to be held accountable for the full extent of his actions.

In response to the consultation, the Association of Chief Police Officers in Scotland illustrated the point quite nicely. It gave the example of an incident at a football match involving opposing fans, after which the victim gets up, shakes himself down and is fine. The accused is brought to court the following day and the plea of not guilty to the major charges is accepted—they can all be rolled into one—but the victim subsequently dies. It is important for the person to be held accountable for the full extent of their actions and to bring in the interests of the victim and the next of kin, so that the full circumstances of the incident can be played before a court, in public.

James Kelly: Thanks a lot for that full answer.

Do you think that, when the victim dies, a time limit should be placed on bringing a subsequent charge? The example was given earlier that
somebody might be assaulted and go into a coma and 10 years might pass before they die. After that time, the evidence might not be as readily to hand as it would be in the example of the incident at a football match that you gave. Do you think that it is worth considering amending section 11 to put a time limit on when retrials can happen?

Gertie Wallace: Do you mean in a case where there was an acquittal originally?

James Kelly: Yes.

Gertie Wallace: As time goes on, it might be seen as being less and less in the public interest to bring somebody to justice. In the interim, perhaps no subsequent charges had been brought and they might have gone on to live their life to the full. In those circumstances—depending on the original charge—the balance of interests might not lie with prosecuting again.

I do not really know how a time limit would be applied and I do not know what time limit one would choose. There would always be a plea of oppression against the Crown in bringing proceedings a long time after the incident had occurred. You would expect that the Crown would not necessarily bring proceedings in those circumstances, given the facts and circumstances of the case. A court would have the overall ability to say that it was not in the public interest to bring proceedings because the individual had gone on and lived his life.

Nigel Don: I have some concerns about what you have just said. It seems to me that you are happy to confuse causation and public interest, which does not sound right in principle. It might be that using the public interest test would be a useful way of dealing with a matter of causation, but surely in principle that is not where we should be going. Assuming that we pass the bill, surely the only reason for not bringing a charge of homicide would be that it did not appear that the homicide could be connected with the previous event. Surely that is what we should be saying in statute, is it not?

Gertie Wallace: There are real difficulties with causation, especially when death occurs a long time after an incident. You would have to weigh that in the balance. I take your point that in principle it should not matter that time has passed, but you have to balance that with the interests of the accused as well as the strict letter of the law.

Nigel Don: Do you have any evidence on what would be a sensible time delay? English law always said a year and a day, which was essentially a year plus an overnight period to ensure that we knew what the date was. Is that still English law? I suspect that it is; I do not think that it would have been changed in a hurry. I am sorry—I am not worried what English law says, but if that has lasted them for centuries, would it not do us?

Michelle Macleod: The issue of a person being charged initially with an assault and then, when he is convicted, being charged with a more serious charge if the victim dies, is a circumstance that the Crown Office deals with and on which we assess the evidence on a day-to-day basis at present. It is not uncommon for the Crown Office to proceed to a murder charge following an assault when we have secured a guilty plea; it is much less common for us to do so when we have prosecuted someone for an assault and not achieved a guilty plea. However, as my colleague says, there may be circumstances in which witnesses come forward after they have realised the seriousness of the matter, in which case we may consider it appropriate to take proceedings.

In doing that, the Crown Office must always have regard to all the factors that we normally take into account, and you are right to suggest that those would include whether we could prove a causal link between the assault and the person’s subsequent death. It may be easier to do that in some circumstances than in others, and it would involve a lot of medical reports and an investigation. Also, as the death became more remote from the assault, that would become more problematic.

We would have to weigh up all the factors, as we do in any prosecution—we take account of the circumstances, a person’s record and the accused’s own position. In those circumstances, we would continue to apply the same considerations that we always apply, with the evidential consideration being paramount. However, it would be inappropriate to apply a time limit because there would be so many varied facts and circumstances of which to take account. We would have to continue to take the appropriate factors into account in determining whether a prosecution was in the public interest, and causation would play a critical role in that.

Nigel Don: In any public statement, however, you would still rely on the public interest. If you were required to say why a case had not been prosecuted, you would say that it had not been in the public interest to do so.

Michelle Macleod: In some circumstances, when a person has been acquitted, depending on the evidence, prosecution may not be in the public interest. As I say, the more time that passes between an assault and the person dying, the more difficult it is for the Crown Office to be successful in a prosecution. We have regard to the circumstances of every individual case, so I cannot say categorically that we would never take proceedings as the death became more remote.
from the assault. It would depend on the circumstances of the individual case.

Scott Pattison (Crown Office and Procurator Fiscal Service): I will make two points on that, the first of which is on the question of a time limit. I confess that I am not on top of English law regarding that issue, but it is difficult to see how we could apply a time limit that was not somewhat arbitrary. With the constant advances in medical science, individuals and victims can be kept alive for a significant period of time. On that basis, I would be reluctant to go down the road of introducing a time limit.

Secondly, you are correct to say that in the context of a public statement about a prosecution decision, the public interest would play a significant part in our consideration of what the right decision was. As you know, we often issue statements in which we say that that has been part of the Crown counsel’s consideration of the overall facts and circumstances of the case. It is a fundamental part of the reasoning behind our prosecutorial decisions.

Robert Brown: Can you give us an idea of how often—leaving aside the theory of the matter—somebody dies after a trial has been concluded and how often the question of a retrial for murder arises following an acquittal?

Scott Pattison: I will venture an answer. I am happy to come back to the committee with further information on the matter because I do not have the statistics to hand but, in my experience, although it happens it is somewhat rare. If you can accept a heavy qualification to what I am about to say, it is perhaps one or two cases a year. However, even that may be overstating it. I am happy to come back to you if the committee would find that to be of interest and help, but we are not talking about many cases at all.

11:15

Robert Brown: For the avoidance of doubt, you are talking about cases in which a prosecution for murder has been taken after a prosecution for assault has been concluded. However, I also asked about whether the question of fresh proceedings for murder has arisen in cases in which the accused has been acquitted of an assault charge.

Scott Pattison: I would have to come back to the committee on that. It would be even rarer than the numbers to which I referred.

Robert Brown: Have you any experience of that?

Scott Pattison: I cannot recall a case in which there has been an acquittal for assault and a subsequent prosecution for murder, but I am happy to consult colleagues and come back to the committee on that.

Robert Brown: It would be helpful to know.

The Convener: The witnesses heard what Mr Layden said earlier. Clearly, the Crown would not commit the same time and resources to investigating a simple assault as it would to investigating a murder. Could any difficulties arise in that respect?

Scott Pattison: There are potential difficulties. As the committee will be aware, if there is a prima facie case of homicide, significant police and law enforcement resources are deployed to that. It is different if, on the face of it, the case looks like a simple assault, albeit one in which the victim is in hospital for some time. Of course, some victims do not go to hospital initially and the aftereffects are very much aftereffects, albeit significant ones. The scenario that you mentioned would involve a substantial subsequent investigation and, as Michelle Macleod indicated, a substantial medical investigation with consideration of detailed expert medical reports. That would not be without difficulty: it is not without difficulty, when we encounter it.

Robert Brown: I do not know whether you heard the earlier evidence from the Law Commission that, given that we are now including in the bill arrangements on new evidence, admissions should be dealt with on the same basis—as one particle of the new evidence that might arise. Do you agree?

Michelle Macleod: I heard the earlier evidence. In any case, our approach would be to apply to admissions the same principles that we would apply to considering new evidence. For example, the test for the new evidence is more stringent in that it limits the prosecution to one opportunity to proceed. I find it difficult to envisage our being tempted to prosecute a person on more than one occasion due to a series of admissions. That would not cause us any difficulties.

Similarly, the exception for new evidence is restricted to the most serious offences, as laid out in schedule 1. The Crown recognises that the exceptions are to apply only to such offences, so that would not cause us difficulty.

Having looked at some of the evidence that was given to the Scottish Law Commission and at the commission’s report, we find it difficult to justify a distinction between the approach taken to new evidence and the one taken to admissions, which have been treated differently. On one view, objective scientific new evidence may be equally compelling to, or even more compelling than, admissions, depending on the context in which the admission is made.
We do not see the justification for the distinction that the Law Commission has previously drawn. It would not cause us too much difficulty to apply the same rules to admissions as we do to new evidence because we would take that approach to ensuring that admissions evidence was credible and reliable.

Robert Brown: Do I hear you say that you envisage no problems in running the two themes together as one new-evidence rule?

Michelle Macleod: The tests are clearly a matter of policy for the Parliament but, operationally and practically, it would not cause us too much difficulty.

Robert Brown: The exception in section 3 goes further than the commission’s proposal by including new evidence of pre-acquittal admissions that come to light later. That fits with the new-evidence provisions. Do you have any preference for which approach should be adopted—the commission’s or the slightly different approach in the bill?

Michelle Macleod: The approach that is set out in the bill is appropriate. The test is that, without due diligence, the police could not reasonably be aware of the previous admission, so the balance is right in the bill.

Nigel Don: I would like to pursue Ms Macleod’s point about the provision applying only to the most serious cases. That is where I have a problem. Schedule 1 to the bill contains a long list of relevant offences, and I understand that it has to be a long list because a lot of prosecutable offences might be serious offences. What can we do within the bill to make it clear that this really is about the most serious cases without reducing the list to the point at which it covers only the most serious cases and misses out other ones?

This might be a drafting issue, but how can the Parliament tell you as prosecutors that this will happen only in the most serious of cases and that we are not the slightest bit interested in being manipulated by your successors and assigns? You are wonderful and honourable people, but perhaps Scottish society needs to protect itself from people who might not be quite as scrupulous.

Scott Pattison: I will answer, but again with the heavy qualification that I am not a draftsman. We are talking about cases of the highest seriousness and sensitivity in Scotland and Scottish society. It is appropriate to have a list because it gives legal certainty and foreseeability, and it is right that the Parliament should do that if it so minded. The concept of a list is also consistent with article 7 of the European convention on human rights, which is about certainty in the law and foreseeability, so that individuals know when they might be the subject of a potential further prosecution.

I am not sure that it is for me to venture anything further than that. From the perspective of the Crown Office and Procurator Fiscal Service, we see the provisions as applying to cases that lie at the top end of seriousness and sensitivity in Scottish society, if that helps. I hope that it does help to some extent.

Nigel Don: It reassures me that you see it that way because everyone who is talking about the point sees it in that way. We are making Scottish law. That is our job. It is not your job. I am bothered as a citizen, not as an MSP, and I want to make it absolutely clear to the state, of which you are the prosecuting arm, that the provision will apply only to the most serious of offences. It should not matter what someone is charged with; the provision will apply only to the most serious of cases and must not be used otherwise. We are not in the business of doing that. I speak for myself rather than my colleagues, but I think that is where we are all coming from. I am bothered to know how we can set down clearly within the statute or elsewhere that that is what the provision will apply to.

Scott Pattison: The list helps with defining that, to a large extent, because it covers matters at the top end of the scale. The fact that the bill proposes the tests that it proposes is also helpful, and it sends a strong signal about the state of Parliament’s intentions, should Parliament be disposed to pass the bill as it stands. The fact that the Lord Advocate has to make an application to the High Court sitting as a court of criminal appeal is hefty, and it will send to the prosecution service a strong signal of Parliament’s intentions.

The Convener: We turn to the question of acquittals.

Bill Butler (Glasgow Anniesland) (Lab): Are you happy with the provisions in the bill that will allow an acquitted person to be prosecuted again when the acquittal is tainted by certain offences against the course of justice?

Gertie Wallace: Yes. The test is somewhat lesser because there does not have to be a conviction for an offence against the course of justice. That reflects the fact that jury intimidation is done covertly: it is not open or out there. Various people could be intimidating various members of a jury, and those members might come forward separately to say that they were intimidated during the trial and so came up with their verdict. In that case, a conviction is not likely to happen, but again, we would have to go to the High Court sitting as the court of criminal appeal and convince it that what we are alleging has happened, and it would have to found that on the balance of probabilities.
Bill Butler: So, are you content with the tests that are set out in section 2(3)(b)?

Gertie Wallace: Yes.

Bill Butler: Is there anything in the bill that you would like to be changed or are you content with the proposals?

Gertie Wallace: We are content with the proposals, which we think strike the right balance. A fair comment that has been made is that subversion of the trial process is very serious and undermines not only Scottish justice itself but public confidence in that justice.

Bill Butler: That is very clear. Thank you.

The Convener: Alternatively, of course, one could simply charge the individual involved with attempting to pervert the course of justice, which itself carries a fairly high-tariff sentence.

Gertie Wallace: Yes, but securing the conviction of an individual involved in the trial process for attempting to pervert the course of justice would enable us to go back to the court with stronger evidence.

Cathie Craigie: The Scottish Law Commission did not reach a firm conclusion on the question whether there should be a general new-evidence exception to the rule. Why do you believe that such an exception is needed?

Michelle MacLeod: A new-evidence exception must be among the exceptions to double jeopardy that we have to consider. As I have pointed out, an admission that is made by someone who has been acquitted, and objective scientific DNA or fingerprint evidence that is discovered and which implicates a person who has been acquitted, can be of equal strength. In fact, the latter might well be stronger, given the circumstances.

The previous witnesses referred to murder cases that the Crown had prosecuted but in which the body had not been recovered. Persons have been acquitted in such cases, although it is entirely possible that at some future date the body might well be recovered. An example that is not exactly on point is the case of Peter Tobin; Vicky Hamilton's body was not recovered until many years later, by which time, as a result of scientific advances, we were able to prove that fingerprints on plastic were related to the accused and to link the accused to DNA from the body. It would not have been possible to benefit from those advances had Vicky Hamilton's body been found soon after the tragic circumstances of her death.

That example shows that new evidence can be compelling and in such circumstances the public would be entitled to expect the Crown to bring the case and the person involved to face the consequences. Of course, that evidence would be subject to the tests that are set out in the bill and, ultimately, the extremely high test of high likelihood of conviction to which the jury would subject the new evidence, combined with the original evidence. Public confidence would certainly be undermined if we were not able to proceed with cases in which such compelling new evidence became available.

Cathie Craigie: I do not know whether you heard the Scottish Law Commission's strong evidence, which was about protecting the citizen. As I pointed out, someone who had been acquitted would always be looking over their shoulder and wondering whether the prosecution service would come for them again. After taking evidence from academics and looking at the balance of arguments from both sides, the commission itself, which comprises experienced people, could not agree on the matter or reach a conclusion. Your answer does not really challenge that in any way.

11:30

Scott Pattison: I will try to address that point, as it is fundamental. The bill is about finding the right balance between rights in Scotland. The rights of an accused person are, of course, fundamental in our law and in the European convention on human rights, but I think that the search in Scottish society is for a balance between the rights of the accused person and the rights of victims and witnesses of crime and those who are bereaved as a result of crime. They also have rights that they can assert under the European convention on human rights. I suppose that it is for the Parliament to find a proportionate way through all that.

We can find some signals from the experience of other jurisdictions. The bill will bring the Scottish jurisdiction to parity with the jurisdiction south of the border to some extent and with Commonwealth and European jurisdictions. As framed, it also strikes a proportionate balance in the sense that the tests are hard to satisfy but they allow, in appropriate cases, where the Lord Advocate can satisfy the appeal court, an intrusion into the rights of the accused where that is right, where there is strong evidence and where a conviction would be highly likely on the basis of the new evidence. The rights of bereaved relatives, next of kin and victims of crime are always borne in mind. We feel comfortable with the balance that is struck in the bill and feel that it is proportionate. It feels right for Scotland at this time. We can find guidance from experience elsewhere around the world. The preponderance of democratic jurisdictions have such provision.

Cathie Craigie: I presume that some of the evidence that you have gathered is contained in
the responses to the Government’s consultation. Is that evidence available? Can you supply it to the committee?

Scott Pattison: We would be more than happy to provide the committee with what we know about the experiences of other jurisdictions. I am sure that colleagues in the justice directorate would be equally happy to provide a summary of that. Please let us know if we can provide anything that would be helpful.

The Convener: It would also be useful to have comments from you on ECHR compatibility, particularly in respect of retrospectivity, bearing in mind that other European legislators have similar laws.

Scott Pattison: Absolutely. I think that I am right in saying that what has been proposed would be consistent with article 4.2 of protocol 7 of the ECHR. I should say that I do not think that the United Kingdom is a signatory to that part of the ECHR, but it is a signpost of international standards, with which the bill appears to be compatible.

The Convener: It would be helpful if the comments that I mentioned were supplied.

Scott Pattison: Absolutely.

Cathie Craigie: In allowing for the retrospective application of a general new-evidence exception, the bill departs from the Scottish Law Commission’s recommendations. What practical difference is that likely to make in relation to the prosecution of people acquitted before the provisions become law?

Scott Pattison: Obviously, we were part of the consultation process. I have already said that we see that exception applying only to cases of the highest seriousness and sensitivity. We do not see there being an avalanche of cases. If the bill is passed as it is, or pretty much as it is, we, as a responsible prosecution service, will, of course, begin a process of reviewing cases. I think that the estimate in the financial memorandum is that perhaps one case every five years might proceed on that basis. I give the heavy qualification that that is an estimate. Obviously, it will be for the prosecution service and the Lord Advocate to apply the tests to cases as they stand and in the light of anything new that emerged.

I hope that that is helpful, but I am happy to expand on it.

Cathie Craigie: You clearly do not think that many cases will be brought forward if the bill becomes law. Have you done any work to identify any such cases?

Scott Pattison: We have not progressed work as yet; we do not want to pre-empt what Parliament might do in that regard. However, it is fair to say that we have in mind a very small number of cases—I am sure that the committee will not want to draw me on the detail or the names of cases—that we will review if the bill is passed as it stands. We will review those cases on the basis of the evidence as a whole and in light of new advances in technology and science. I am sure that the committee would expect that from a responsible prosecution service.

The Convener: We cannot go down that particular route, as it is a matter that requires Crown Office discretion and confidentiality.

Scott Pattison: Indeed.

Robert Brown: With regard to present practice, what is currently retained by the police and the prosecution service following an acquittal? The commissioner raised that issue earlier.

Scott Pattison: Patrick Layden, as ever, made very good points in that regard, and he liaised closely with the Crown Office during the Scottish Law Commission’s consideration of the subject.

It is important to be clear on the matter. Although labelled productions—the physical evidence—are returned to the owners or destroyed after an acquittal under current law, documentary productions, which often comprise a significant amount of evidence in trials these days, are kept for 10 years in High Court cases. Documentary productions include forensic science reports, photographs of injuries and such like. A substantial amount of material is kept for quite a long time in the context of our most serious prosecutions.

It is important to say that not all new evidence is scientific evidence; some is eyewitness evidence that becomes available at a later stage. It is not unreasonable to postulate that a victim of or a witness to an offence that is committed by a serious and organised crime group might feel reluctant to speak up today, whereas 10 years down the line circumstances may have changed or someone may be in jail for something else. Sometimes witnesses disclose very relevant crucial evidence at a later point.

That is one point that relates to the evidence that the committee heard earlier. The second point is that not all cases are production dependent, if I can put it like that. Some cases are eyewitness dependent and are not dependent on examination of what we call real evidence, such as labelled productions or scientific evidence.

With regard to documentary and other productions, we have a process whereby copy productions that have been retained by the Crown can be certified, which means they can be admissible at a later date. As the committee will be
aware, we have conducted retrials under the current law, for example in cases in which there was a successful appeal and the Crown sought authority to retry the individual. We have some experience of doing that in cases in which productions are not, by the time of the retrial, available to the Crown in the same way that they were at the start of the process. That happened in the Duncan Edwards case in 2001. The original trial took place in 1999, and was followed by an appeal process and a retrial in the absence of a significant number of productions. The evidence in the case was a mixture of eyewitness evidence and other types of evidence, and the case proceeded successfully in 2001, even though there were some difficulties with the productions.

Robert Brown: I want to clarify two points. You say that documents are bunged out after 10 years under current rules. There would therefore appear to be no case whatsoever for retrospectivity going back beyond 10 years, because so much of the evidence would not be available and information such as witness names would have been lost.

Michelle Macleod: Discretion is available. Ten years is the minimum time but, for some high-profile cases or other cases—perhaps those that have achieved notoriety—papers are kept for longer. Keeping papers for only 10 years is not a blanket rule; that is the minimum time for High Court cases. We have probably kept papers for many cases for quite a bit longer than 10 years, which is the minimum standard.

Robert Brown: I will ask about real evidence—the scientific stuff. The purpose of having a real evidence rule is to ensure that such evidence is available for examination as appropriate. A report does not help much, because it does not allow people to re-examine the evidence in the light of whatever new scientific discoveries have been made. If the potential prosecution depends on such an interpretation of the real evidence, is that a fatal flaw?

Scott Pattison: We will take cases as we find them. Some real evidence will no longer be available, because we have applied a particular legal regime for all time past. However, it is important for the committee to know that, sometimes, new real evidence becomes available. The good example has been given that sometimes the body of the deceased is found much later, which allows new DNA analysis and other analysis.

My colleague Michelle Macleod mentioned the case of Vicky Hamilton and Peter Tobin. The committee might be aware that the murder weapon in that case was found many years after the fact and then examined for DNA. That was a major part of the Crown case.

It is right to say that real evidence will no longer be available in some cases, but it is conceivable and consistent with our experience that, in some cases, new real evidence will become available and be able to be subjected to the sophisticated forensic and scientific techniques that are available to us now. I hope that that helps.

Robert Brown: Yes, thank you.

Dave Thompson: When we pursued the point with Mr Layden, his objection related to the principle that people who have been tried in the past will lose a right that they currently have. Will you elaborate on whether the right for people who have been tried is different from the right that the rest of us will have in the future? We have not been tried, but we might well be tried and acquitted. Is there a difference in principle between a right that some people have because they have undergone a trial and a right that others will have in the future when they go through a trial? In principle, is the position of people who have been acquitted in the past different from that of people in the future? Many years hence, evidence that goes back 10 or 15 years might be pulled up.

Michelle Macleod: Mr Layden gave evidence about a person’s right at present not to be pursued by the state for an offence of which they have been acquitted, which is the essence of the double jeopardy rule. That right has been enshrined in Scots law for centuries. It was conceived in historical times as a right of the individual against the state. As my colleague Scott Pattison said, the bill considers the balance more between the right of a suspect and the right of victims and the bereaved next of kin. In a modern society, we must examine the balance between the state, the suspect and the rights of victims and the bereaved next of kin.

I will describe the principle that underlies the exceptions to the double jeopardy rule, which other jurisdictions recognise. In the handful of rare cases in which the most serious and heinous crimes are committed and in which a person is acquitted but new and compelling evidence implicates them or an admission is discovered, the bill strives to rectify the balance with the rights of the next of kin who suffered the deprivation of a loved one’s life and who perhaps considered that they saw no justice when the accused was acquitted. The principle that underpins the bill is that the balance has to be looked at again in very rare and serious cases, and in such circumstances the balance may fall on the side of the next of kin. If that principle underpins the bill, it makes no sense to say that there should be a cut-off date or that the provision should apply only to certain people, particularly as we do not know what will happen in future.
11:45

It is time in Scots law to rectify the balance in our system. The provision should apply retrospectively as well as to all future cases. If, a week or two after the act came into force, we found compelling new evidence in a case where someone was acquitted, it would neither make sense nor fit with the principles that we are trying to achieve to bar the application of the act’s provisions. This is about the balance between the three sectors not, as Mr Layden had it, the state and the accused. We have another set of interests that we must take into account. That is the basis for our argument. The provision should be retrospective and apply with all the checks and balances that are set out in the bill.

Dave Thompson: So you see no distinction in principle between past and future cases in that respect.

Michelle Macleod: No.

Stewart Maxwell: Good morning. From your evidence thus far, I think that you are relatively content with the balance that has been struck in terms of the tests that have to be met before a second prosecution can be brought forward on the basis of new evidence. Is that correct?

Michelle Macleod: Yes.

Stewart Maxwell: What comments do you have on the newness of evidence? I understand that the evidence cannot be something that you should have known about first time round and which you did not use; it has to be evidence that is genuinely new. How easy will it be to distinguish between genuinely new evidence and something that was around at the time but that you missed?

Scott Pattison: For me, this goes back to the correct balance of rights. It is right that the state should investigate thoroughly the crime that is before it. The forces of law enforcement and the police must do that as effectively as they can in the context of the investigation. They must uncover everything that they reasonably can at the time using the resources that are available to them. The right test is that the evidence has to be genuinely new or could not reasonably have been obtained at the time. The scenario must be that the state did its best at an earlier stage but that something new comes out later that could not reasonably have been available at the time. From our perspective, the bill strikes the right balance on that front.

Stewart Maxwell: You referred to the Crown doing its best in prosecuting the case. What about the scenario in which the Crown did not do its best? What if an individual had failed to do their best—I am sure that no one in the room would fall into that category—because they had had an off week for whatever reason and had not done their job properly? If someone was acquitted because of a mistake of that sort, and that was found at a later date, would it be reasonable to bar a new trial because the evidence had been available?

Gertie Wallace: That goes back to the idea that the state should not be allowed to rely on its own errors to have a second bite at the cherry. It is instructive to look at the English provisions under which new evidence can be used if it was not made available at the initial trial. However, the director of public prosecutions and the Attorney General have stated that they will not use such evidence if it was available at the time but not led for tactical reasons, which is presumably their understanding of the fairness element. I do not think that we would rely on errors.

Stewart Maxwell: I agree; I just wanted to hear your opinion. Clearly, it would be unreasonable to rely on errors and—I am sure that this would not happen—for the bill to lead to sloppiness and people thinking, “Well, I can always get it next time if I’m not particularly bothered this time.”

Gertie Wallace: The exceptions to the rule against double jeopardy will be absolutely exceptional, and any taking away from that would not recognise the gravity of what we try to do.

Stewart Maxwell: I will move on to a slightly separate subject. You may have heard Mr Layden talking earlier about the list in schedule 1 of the offences covered by the exceptions. Mr Don pursued a point about the seriousness of the offences, and I would like to ask about a couple of the offences in particular. Mr Layden commented on incest between consenting adults. No matter what our view is on that particular offence, does its inclusion strike the right balance in terms of seriousness?

Gertie Wallace: My understanding is that that offence is included because of the Crown’s charging practice. When a victim is abused by a close relative, it is often from a very young age until they leave home or even beyond then. Charges can therefore start with the crime of rape before they are 12 years old and then move on to unlawful sexual intercourse, but after the age of 16 the activity may be consensual, so the inclusion of incest in the schedule is to allow the Crown to charge throughout the whole period. That is how the bill strikes the balance. It is not a case of prosecuting incest on its own; more than anything, it is a matter of charging practice.

Stewart Maxwell: That explanation is helpful. I do not want to go through all the offences in schedule 1, as most of us would agree with most of them, but I wonder about your view on the sexual offences under common law, which are listed in paragraphs 6 to 12 of schedule 1. Rape,
clandestine injury to women, abduction of a woman with intent to rape and so on are clearly very serious offences, but I wonder about lewd behaviour. I do not want to underestimate the issue, but is lewd behaviour in the same category?

Gertie Wallace: That reflects the historical nature and difficulty of charging sexual offences. Lewd, indecent or libidinous practice or behaviour can range from touching right up to almost prior to intercourse. It is a wide offence; it is almost indecent assault, but for children. That is why that offence is included, and again it probably relates to charging practice and allowing a victim to give all their evidence in court. If we charged only the rape, we would not be allowed to lead the full evidence.

Stewart Maxwell: Thank you, that is very helpful.

The Convener: There is a slight inconsistency of approach that will cause difficulty. Sexual offences and rape are clearly horrible crimes that in many cases have a profound impact on the victim, but so does attempted murder when the victim is left brain damaged or paralysed. As I read the bill, attempted murder would not be included.

Gertie Wallace: That is right: attempts are not included. These are difficult matters, because attempted murder can range from a fairly minor situation in which the consequences of actions could have led to somebody’s death to somebody just about dying as a result of a person’s actions—

The Convener: And being left permanently disabled.

Gertie Wallace: Yes. Again, it is a matter of striking the right balance. For instance, the bill does not cover assault to severe injury, permanent disfigurement or permanent impairment. In some cases, those offences can be charged similarly to attempted murder—they are just below it—but in other cases they are charged in the sheriff court at sheriff and jury level.

The Convener: Perhaps there is an argument that the criterion should be the impact that the alleged crime has on the victim, irrespective of the charge that is libelled.

Gertie Wallace: That would lead away from certainty and finality, and it would bring in a much more subjective approach. It might be difficult to frame.

The Convener: I think that this is altogether fraught with difficulties.

We will go to questions from Nigel Don, bearing in mind that the bulk of questions have been asked.

Nigel Don: There is just one other issue. We have talked an awful lot about historical evidence, but I imagine that you will be talking to the police about the future and the implications of holding on to evidence for longer—assuming that the bill is passed. Is there anything that you would like to tell us about what you are discussing?

Scott Pattison: We will discuss matters with the Scottish forces and ACPOS. During Mr Layden’s evidence, the issue was raised of the retention of real evidence post acquittal in relation to the offences covered in the list in schedule 1. There is a major piece of work for the police and the prosecution service in looking carefully at the rules that should apply to retention.

Nigel Don: Do you see any conceptual problems, or is it just a matter of doing some work and having some slightly bigger cupboards to hold a few more things? I am being slightly flippant, but is it simply a practical issue?

Scott Pattison: For me, it is a practical issue. It is a significant one, as I am sure it will be for the police, and we will have to work together to find a solution.

Nigel Don: Thank you.

The Convener: I thank the witnesses for coming this morning and giving evidence in a clear manner. We would be grateful to have further written evidence along the lines that Mr Pattison undertook to provide.
Double Jeopardy (Scotland) Bill: Stage 1

10:06

The Convener: We turn to the principal business of the morning, which is consideration of the Double Jeopardy (Scotland) Bill. This is the second of our scheduled evidence sessions on the bill. I welcome the first panel of witnesses, who are Richard Keen QC, the dean of the Faculty of Advocates, and Alan McCreadie, the deputy director of law reform with the Law Society of Scotland. We are particularly grateful to them for coming this morning. I know that, for Mr McCreadie, it was not done without considerable difficulty. The dean lives somewhat more locally but, even still, it is very good of him to attend.

We will go straight to questioning. The first batch of questions relates to the general rule against double jeopardy. The Scottish Law Commission recommended a core rule against double jeopardy supplemented by a broader principle against the unreasonable splitting of cases. Leaving aside, for the moment, issues relating to the proposed exceptions, does the bill effectively capture the important elements of a general rule against double jeopardy?

Richard Keen QC (Faculty of Advocates): I am content that the principal objective of the bill reflects the wish of the Law Commission to have the matter of double jeopardy expressed in clear statutory form. However, I have material reservations about certain aspects of the bill that depart from the recommendations of the Law Commission. In particular, I refer to the bill’s retrospective effect and, more particularly, to section 11. Those aspects materially undermine the intention of the bill and confuse the issue in a way that I regard as being unsatisfactory.

The Convener: Obviously, that is an issue of some import and we will revisit it at greater length. Mr McCreadie, do you have any comments?

Alan McCreadie (Law Society of Scotland): The Law Society’s position on section 1 has been consistent. Like the Faculty of Advocates, the society welcomes the setting into statute of the rule against double jeopardy in section 1. That was our position when we responded to the Scottish Law Commission’s discussion paper and to the Scottish Government’s consultation earlier this year. We recognise that the rule should be set in statute. Thereafter, as my colleague said, there are certain exceptions with which the society has some issues.

The Convener: Will you outline how the proposals in the bill would affect the possibility of
prosecuting in Scotland cases that have already been prosecuted in other countries? Are you content that that would work in practice?

Richard Keen: There are two questions there. As a matter of principle, the faculty has no objection to the exception that is provided for in the bill with regard to an earlier foreign prosecution, but there is a question about whether it will work in practice. I suspect that the outcome of implementing the legislation is the only thing that will give clear guidance. The issue might need to be revisited once we have seen how it works in practice. One of the difficulties will be in establishing the standards that have been applied in the context of a foreign prosecution.

Alan McCreadie: We have no particular difficulty with section 10, bearing in mind that it refers to the Schengen convention.

The Convener: The current common-law rule is subject to a proviso that allows a person who has been tried for assault to be tried again for homicide if the victim subsequently dies from the injuries. In restating that proviso in statute, the bill takes a different approach from that which was recommended by the Law Commission. Which approach do you prefer and why?

Richard Keen: In my submission, it is not just a matter of personal preference. It seems to me that the proposal in the bill simply cuts a swathe through the rationale for the legislation. The whole point of the legislation is to express in statutory form the rule with respect to double jeopardy and to clearly identify exceptions to that rule, which turn, essentially, on the issue of new evidence. That new evidence may also embrace, for example, the idea of an admission.

We now have reflected in section 11 a proposal whereby a person who has been tried for assault and is acquitted may then be tried on a charge of murder or culpable homicide. The only change is with respect to the consequence of the act: the actus reus remains the same and there is no new evidence and no admission. You are inviting a situation in which the first jury, having heard all the evidence and no admission, you are inviting a situation where they have to clearly identify exceptions to that rule, which turn, essentially, on the issue of new evidence. That new evidence may also embrace, for example, the idea of an admission.

When I use the term “victim”, it normally applies to the person who has been the immediate recipient of a criminal act, whether it be assault or something else. However, we must remember that the victims of crime include the family and the immediate partners of those who have been the recipients of criminal acts and also those who are accused of a criminal act, tried and acquitted and found not guilty. I count them as victims of the criminal act because, although they have been found not guilty, they have gone through the process of being stigmatised, charged and tried. It seems to me that there are perfectly sound reasons for allowing a charge of murder in circumstances in which someone has been convicted of an assault, but that there are fundamental problems with extending section 11 to include cases in which someone has been acquitted. I must say that that is the section of the bill that causes the Faculty of Advocates the greatest concern.

The Convener: Before we hear from Alan McCreadie, I will allow further exploration of this point, which is important.

Nigel Don (North East Scotland) (SNP): Thank you for that outline, Mr Keen, because it was not what I thought the bill said. This is where I need your advice. My expectation was that section 11 allowed the possibility of a case being reopened when the first accused had been found not guilty, but still only where there was new and compelling evidence. I might have been wrong about that, but that was my expectation of what it would do. In other words, it covers the single exception in which the accused had originally been found not guilty.

Richard Keen: That is not my reading of section 11, which is not expressed in that way. The draftsmen may wish to comment on the matter but, if that was their intent, it is not evident from the product of their efforts.

Nigel Don: I am grateful to you for those comments, because I agree entirely with your previous point—that the principle is that a case cannot be brought twice on the same evidence. My expectation was that new evidence would be required. Section 11 deals with an exceptional circumstance, in which someone has died and it is appropriate to have another go at someone who has been found not guilty.

Richard Keen: It is not apparent to me that section 11 is needed in such circumstances. One view is that the earlier sections provide some modifications to deal with that outcome. Section 11, especially section 11(1), is so clearly worded as to lead to a situation in which a person who had been acquitted of an assault may be charged with murder, although no new compelling evidence had been identified.
Nigel Don: Thank you for that clarification. Assuming that the draftsmen reword the provision as I think it should be worded, how would you good gentlemen react to the idea that section 11 creates an exception to the general principle that someone must be convicted the first time before they can be retried? People are innocent until proven guilty. However, section 11 says that, despite the fact that someone was found not guilty the first time around, they may, on the total evidence that is subsequently available, be found guilty of homicide the second time around.

I will rationalise the provision to you as the Crown Office or the police rationalised it to us; I apologise for the fact that I cannot remember where the argument came from. The point was made that what appears to be a relatively minor assault will be investigated at one level, but that the moment that it is known that the victim is dead, the investigation will normally be a great deal wider and may throw up evidence that was not produced the first time around. Whether that is the way in which to police the world is another question, but I would be grateful for your comments.

Richard Keen: First, it seems to me that the issue can be dealt with properly under sections 2, 3 and 4. Secondly, I find the point that the Crown Office or the police made about widening an investigation to be extremely unsatisfactory, not because one would be surprised to find that resources must be applied according to the seriousness of the case—that is understandable—but because the test for new evidence in section 4 refers to evidence that could not reasonably have been obtained prior to the first trial. I see no reason to alter that test in the context of the assault, murder and culpable homicide scenario. The same test should apply.

If the Crown wishes to make the argument that evidence could not reasonably have been recovered because the resources that were available to deal with an apparently minor assault were not such as to disclose that evidence, then so be it, but I see no reason to change the test.

The Convener: You have identified a difficulty that we will pursue in due course.

Alan McCreadie: I endorse the dean’s comments on section 11, with which the Law Society also has some difficulty. I understand what has been said about new evidence, but one could look at section 4 rather than at section 11. The Law Society notes that the provision is a departure from the Scottish Law Commission’s recommendation that a subsequent prosecution should be made available only where there has been a conviction, rather than where there has been either a conviction or an acquittal.

Nigel Don: I turn to the provisions that relate to tainted acquittals. You will be aware that, essentially, the bill says that a tainted acquittal can always be overturned. Does that make sense to you?

Alan McCreadie: The Law Society’s position has been consistent throughout, in its evidence both to the Scottish Law Commission and to the Scottish Government. A number of issues arise in respect of section 2, on tainted acquittals, and section 3, on subsequent confessions. In particular, the society has mentioned the fact that the provisions will apply to all offences, regardless of whether they are prosecuted on indictment or on summary complaint.

The Law Society also has difficulty with regard to the phrase “some other person”, as opposed to the acquitted person. There could be circumstances in which the acquitted person had nothing to do with the offence against the course of justice. Also, the offence against the course of justice might not have had a bearing on the acquittal. Against that background, the Law Society respectfully suggests that section 2 be amended.

Nigel Don: Are you saying that there is no test in the system that asks whether the result would have been the same?

Alan McCreadie: It appears that such a test would have to be incorporated into section 2. When a case is brought back for the court to determine whether there should be a retrial, there must be consideration of whether the offence had any bearing on the acquittal in the original trial.

Nigel Don: Is there no provision in the bill that requires the judge who considers whether there should be a retrial to consider that point? I do not yet know every word of the bill.

Alan McCreadie: I am focusing on section 2(3). Perhaps that is the place for provision for the test to be met.

The Convener: How is a tainted acquittal going to arise? There could be undue pressure on witnesses to change their evidence or not to give evidence at all, but another possibility is that the jury might be suborned in some way. Will we get ourselves into difficulties in the context of the Contempt of Court Act 1981, in that we are not allowed to know what goes on in a jury room?

Richard Keen: I do not think that we will. I do not entirely agree with the Law Society’s point on the matter—I should make that clear before I answer the question. I will make two comments. First, where we are dealing with tainted acquittals, I see no reason why that should be limited to matters on indictment.
Secondly, although one might have reservations about extending the approach to the acts of a third party, one has to be practical. Very often, it might be difficult to determine whether a third party was acting on the instructions—implicit or otherwise—of the accused. It seems to me that it would be too easy to elide the consequences of section 2 by ensuring that it was always a third party who suborned the jury, rather than the accused himself. As a matter of practice, if the accused is not on bail, it will be a third party who ends up suborning the jury, anyway. Therefore, if section 2 is to be effective, it must be as wide as it is.

On the question of there being a test, section 2(3) invites the court to conclude

"on a balance of probabilities that the acquitted person or some other person has ... committed such an offence against the course of justice."

I see no reason why the court should not also be invited to conclude—by whatever test, whether that be probability or otherwise—that but for that offence the outcome of the trial could have been materially different. That would not offend against the idea of not going into the jury room; it would be the court expressing its objective stand-alone view, which would not influence a second jury.

The Convener: We are talking about serious offences, in any circumstances. Would it be simpler to leave it so that someone who was guilty of such practices would find themselves charged with an attempt to pervert the course of justice?

Richard Keen: The difficulty with that is that we might charge the third party who was directly implicated in the actings in question, but the actings had an effective outcome in so far as the original accused might have been acquitted. The objective of section 2 is to ensure that the accused does not secure the benefit of a third party's actings in suborning a jury.

The Convener: Cynic that I am, I find it difficult to envisage circumstances in which the third party had carried out the acts without the active knowledge and compliance of the accused, albeit that he is in custody.

Richard Keen: One might want to arrive at that conclusion, and one might readily infer that. The difficulty is that, particularly in the context of organised crime, if someone at a high level in the pecking order is the accused and someone further down the pecking order is the third party carrying out the relevant act, we are likely to find that both the accused and the third party will stand before a jury and disown the idea that the accused had anything to do with it. I regard the proposed measure as an anti-avoidance provision, if I may put it that way.

Nigel Don: If I have got you alright, you are still suggesting that section 2 might say that the court is invited to conclude whether or not an offence has taken place. The offence might have taken place, but that still might not have changed the result in the jury room.

Richard Keen: The court could conclude that, on the balance of probability, the offence took place. However, the nature and circumstances of the offence could be such that it would not have had any bearing on the outcome of the original trial. If the court is in a position to say that, it should be able to stop the proceedings there and then.

Nigel Don: So, you really do want something in section 2 that splits those two things, so that the court knows.

Richard Keen: I think that section 2(3) should have a paragraph (c) that says that the court must be satisfied that, on the balance of probability, there would have been an impact on the outcome of the original trial.

Nigel Don: Thank you. That was extremely helpful.

Let me move beyond tainted acquittals—unless there is anything else that you particularly wish to refer to in that respect, Mr McCreadie.

Alan McCreadie: No. I do not think that there is anything else on that.

Nigel Don: Let us turn to admissions. I had thought that they would be a much more vexing subject, but there was quite a lot to say on tainted acquittals.

Could you outline, gentlemen, your current position on where we should be when it comes to admissions?

Richard Keen: I am content with the provisions in section 3. How they will work in practice is another matter. Under section 3(4), the court must be in a position to be satisfied

"on a balance of probabilities that the person credibly admitted having committed the original offence."

That is “credibly admitted”—not just admitted.

I wonder how the court would approach that test without having to rehear the entirety of the evidence relating to a case. It is not possible to judge the credibility of an admission simply by reference to the circumstances in which the admission is made. Somebody might very credibly admit to having done something, but on intense inquiry regarding the original evidence, it might transpire that they could not conceivably have committed the offence because they were not in the country, or whatever.

I quite understand the reasoning behind section 3, and I do not disagree with it. It is necessary to have a test such as that which is set out in section
3(4)(a), but I wonder how easily the courts will be able to deal with that test. Could we end up in a situation in which the court essentially has to rehear all, or at least a major part, of the evidence pertaining to the original crime? What do we have in mind as far as the test of credible admission is concerned?

The Convener: Let us suppose that the actual indictment was fairly detailed, as these things tend to be, and that the admission revealed special knowledge, which only the perpetrator of the crime could have. That would obviate the problem, would it not?

Richard Keen: Yes, but that is only one type of case. We are not relying on special knowledge as the test of a credible admission. I am not unsympathetic to the entire notion, but I wonder how, in many circumstances, the court would be able to make its judgment.

Nigel Don: I would like to hear from Mr McCreadie at this juncture, and I might then come back to Mr Keen on that last point.

Alan McCreadie: In its written evidence, the Law Society stated that there are "procedural difficulties with Section 3(4)".

We have referred to the standard of proof and the balance of probabilities—the civil standard. The instance was given in another written submission of a fellow prisoner who said that the accused did, in fact, do it. I take on board entirely what the dean of the faculty has said about issues of credibility in that regard, however. Perhaps, as well as credibility, reliability of the evidence should also come under section 3(4)(a). Procedurally, the way forward would have to be for the court to hear evidence before it was able to determine the matter.

10:30

Nigel Don: Am I right in thinking that you two gentlemen have had the benefit of reading Professor Paul Roberts’s written submission to the committee?

Richard Keen: I cannot say that I have.

Nigel Don: I commend it to you, although there is no point in asking you to read it just now. He is seriously critical of the historical reliability of confessions, which leads me to wonder whether we should have some kind of test of confessions. You gentlemen suggested that special knowledge would be one indicator, and that another test might be that the court has to be satisfied—I am trying to make the words from something else fit—"beyond all reasonable doubt" rather than "on a balance of probabilities".

Would it be appropriate to consider some test for such evidence that goes well beyond mere credibility so that the court has to exercise some serious judgment in deciding whether to bring a case back on the basis of an admission?

Richard Keen: We need to make the provision workable. I just find it difficult to envisage how the court will deal with this issue without finding itself saying, "We need to hear fresh evidence before we can form a view under section 3(4)." That will mean an inordinately long and expensive process. On the other hand, if we were to set the bar somewhere else, such as a reliable admission disclosing special knowledge, or something of that kind, then that is a test that the court could apply quite effectively without hearing myriad fresh evidence.

Alan McCreadie: There is nothing that I can usefully add to that. There has to be some addition to section 3(4). However, perhaps a special knowledge test would obviate the need for evidence to be heard in court again.

Dave Thompson (Highlands and Islands) (SNP): The Scottish Law Commission did not reach a firm conclusion on whether there should be a general new-evidence exception. Leaving aside the issue of retrospective application for a moment, do you support the inclusion of such an exception in the bill? If so, what are your reasons for that view?

Richard Keen: Let us be clear that the exception to the rule against double jeopardy arises in circumstances where there is fresh evidence. The test is that it is not evidence that could reasonably have been secured at the time of the original trial. I would be in favour of that exception as expressed, and the faculty would not have a difficulty with that. However, it is important to underline the requirement that the evidence could not have been reasonably obtained at the time of the original trial. That goes back to a point that was made earlier about the police or the Crown saying, "Well, some crimes are more thoroughly investigated than others." There must be a question mark over whether evidence was not reasonably available simply because the investigation was not as thorough as it might otherwise have been.

Alan McCreadie: The society would agree with that. We would accordingly endorse section 4(6)(b), which states that the evidence "could not with the exercise of reasonable diligence have been made available".

On section 4(6)(a), the society's position has been consistent throughout the consultation process that new evidence should have to be in some way compelling rather than just evidence that was not available at the original trial or evidence that just
“strengthened substantially” the case against the accused. The society has other issues with regard to section 4, but I do not know whether this is the appropriate time to mention them. Unlike sections 2 and 3, section 4 is tied into schedule 1 offences, which the society stated in its written evidence are “offences against the person”. The society’s position has been that any exception to the rule against double jeopardy should apply to serious cases that are prosecuted on indictment. It questions at least some of the offences to which schedule 1 refers, and the fact that the schedule 1 list can be amended by Scottish ministers rather than by primary legislation.

Dave Thompson: That was the next point that I was going to come to. Do you believe that any of the offences on the list should not be there? Are there others that should be on the list?

Alan McCreadie: We have mentioned that all the relevant offences that are listed in schedule 1 are offences against the person. We have no difficulty with paragraphs 1 and 2, which relate to murder and culpable homicide respectively, or with the paragraphs on genocide. We have some difficulty with regard to indecent assault, which can be tried summarily. The society respectfully suggests that, if there is to be such a list, the starting position should be that it contains offences that are triable on indictment only. The society questions why other serious offences such as serious frauds, serious drugs cases and armed robbery are not listed.

Richard Keen: Reference was made to schedule 1. To take the example of paragraph 11, which refers to “Lewd, indecent or libidinous practice or behaviour”, one could be dealing with offences that are marginal breaches of the peace. It seems that there is a disparity between the type of offence that may come under paragraph 11, and the other offences to which schedule 1 refers.

I would not disagree with Alan McCreadie’s observation with regard to other serious offences that relate to drugs or armed robbery. Why are those not in the list?

The Convener: It is not envisaged that we will have a great many cases in Scotland; it would frankly be unworkable if there was to be a plethora of cases. Rather than seeking to limit the type of case to specific crimes of murder, rape or whatever, should we simply leave it as a matter for the Crown? It would presumably seek to invoke the double jeopardy provisions only in cases in which there was a very marked public interest in doing so or in which the impact on the victim had been particularly cruel.

Richard Keen: I believe that one would then have to balance the terms of the bill by limiting the provisions to crimes that had been charged on indictment. That sends the appropriate message that the provisions apply only in respect of serious crime.

The Convener: I think that that is a given. I cannot for a moment envisage circumstances in which a matter that had been dealt with in summary complaint would be subject to the revised rules in this respect. However, it can be argued that we should simply not specify the type of crime, and leave it to the Crown. Their lordships would look askance at any effort to restate matters that were not of the utmost gravity.

Alan McCreadie: There may be some difficulty with that, in that any exception to the rule against double jeopardy is an exception to the principle of finality of proceedings to which an accused person is entitled. It is clear to my mind that any departure from that must not be taken lightly. The view can be taken that there should not be a schedule to section 4, and it should simply—as with sections 2 and 3—apply to all crimes and offences. However, there is some difficulty with that with regard to a new-evidence exception in that it departs from the principle of finality.

Dave Thompson: Picking up on that point, I note that you mentioned the ability of ministers to add to or take away from the list in schedule 1 by order. Could you elaborate on that a wee bit? You said that you would perhaps prefer primary legislation. Would it make any difference if the order had to go through the positive rather than the negative procedure?

Alan McCreadie: I am not sure that it would. The society’s position has been consistent: the provision should apply to anything that has proceeded on indictment, and section 4 could simply say that. That would obviate the need for schedule 1 but, if there is to be such a schedule, given my previous comments on the principle of finality, perhaps it should be for the Parliament to determine which other offences should be included in the list in schedule 1.

Dave Thompson: Would stipulating that such an order would be subject to the affirmative procedure—in other words, ensuring that it had to be approved by the Parliament—not deal with that?

Alan McCreadie: It might do, but our principal position is that the provisions should apply to all crimes prosecuted on indictment. On the procedural issue of how offences would be added, the society’s view would be that the process that you have described might be another method of dealing with the matter. In normal circumstances, if it were decided that there should be new-
evidence exceptions with a particular crime or offence and that it would be appropriate to add that to the list, how that would be done is not a concern, as long as the appropriate safeguards were in place and it was not the case that the list was simply added to.

**Dave Thompson:** Mr Keen, do you have a view on that?

**Richard Keen:** I would not like to impugn the processes of the Parliament, particularly when I am appearing before one of its committees, but I observe that even the process of positive approval of a ministerial order does not give rise to the same sort of intense scrutiny that takes place with primary legislation. We are talking about a significant piece of proposed legislation.

I believe that the faculty would align itself with the Law Society’s view that it would be more appropriate for section 4 to be limited to cases tried on indictment. That would underlie the serious nature of the offence that will be the subject of section 4, and it seems to me that it would give a degree of clarity to the Crown on when it should proceed and to the court on how it should tackle the matter when it comes before it.

Is there any compelling public interest in making cases that were taken on complaint the subject of the new-evidence rule and therefore exceptions when it comes to double jeopardy? No is the opinion that I would venture.

**Dave Thompson:** Thank you very much for that extremely helpful answer.

A number of tests are built into the bill that must be met before there can be a second prosecution. What are your views on that approach? Do you think that the tests are adequate?

**Richard Keen:** I think that we are referring, in particular, to the requirement that the court should be satisfied that the outcome would be materially different. I approve of that test and of the requirement that it is in the interests of justice that the case should proceed. I believe that, if we are entertaining exceptions to the well-entrenched rule on double jeopardy, we should give the court some margin of appreciation in applying that test.

**Alan McCreadie:** I agree. I am not sure that there is anything that I could usefully add on the tests that are set down in sections 5 and 6.

**The Convener:** Nigel Don has a point that he wanted to raise earlier.

**Nigel Don:** I have several, which have arisen as we have gone along.

I will begin by referring you to a point that the Royal Society of Edinburgh made in its submission, with which you may not be familiar. It said that, in a retrial, there could be two crucial bits of evidence. One might be a small one that has recently come to light and the other a substantial piece of evidence whose significance was appreciated only in the light of the small piece of evidence that has subsequently become available. I suspect that that would cause the prosecutor no problem, but I just want to ensure that that is the case. If there was a new piece of evidence, albeit small—classic television drama stuff—that told you that something that you had previously ignored was significant, surely that new evidence should enable you to use all the evidence, even if it had not been led the first time, in the second trial. Is that a fair interpretation?

**Richard Keen:** It appears to me that it is necessary to take a global view of what is meant by “new evidence”. If some piece of evidence—some adminicle—is discovered that you could not reasonably have discovered before that casts other evidence in a wholly different light, it seems to me that you are entitled to adduce that new adminicle and to invite the court to cast the existing evidence in a different light. I do not see a problem with that.

10:45

**Nigel Don:** Neither do I, but—

**Richard Keen:** You might have an adminicle in which two eye-witnesses claimed that the perpetrator had a beard. If the perpetrator had given evidence that he did not, surely you would be entitled to look at the adminicle’s impact on the evidence as a whole.

**Nigel Don:** Indeed.

Returning to the question of what constitutes a serious crime, I am entirely clear that with this legislation we are talking about the exception rather than the rule. We have to get it right because it will probably not be considered again for a generation or two. You have suggested that an indicator of a crime’s seriousness is whether the original trial was on indictment. I accept that, but is such an indicator adequate? Is there a better way of making clear in the bill that its provisions are only for very serious cases?

**Richard Keen:** I would venture that it is the only objective criterion that can be applied after the event. If the Crown has decided to proceed on indictment, it is because the offence is serious. If we start to introduce other categories of serious offence, we will be in danger of confusing matters.

We are relying on—and will have to defer to—the Crown’s judgment on these matters. The Crown will decide whether to proceed and, even if a case was tried on indictment, it might determine that the matter was not sufficiently material to justify an attempt to secure a new trial.
Alan McCreadie: I agree that it is the only objective test.

Dave Thompson: Will the bill encourage the Crown to look at, say, more marginal cases and think, “Well, we’ll proceed on indictment, just in case”?

Richard Keen: I do not believe so. For a start, although, unlike the majority of the population, the Crown Office might want to make more work for itself, the reality is that it has finite resources and will apply them in consideration of the need not only to prosecute past offences but to have the capacity to prosecute future offences. I suspect that the legislation will be used sparsely and employed by the Crown only in quite exceptional cases.

Nigel Don: Before I ask the question that I am supposed to be asking, I wonder whether we can go back to the list in schedule 1. We take your point about armed robbery but, if the list were to be retained, should it include attempted homicide or murder?

Richard Keen: I am not particularly in favour of the list. For example, cases in which juries have been seriously suborned probably involve considerable sums of money. The two things tend to go together and they might well lead directly to, say, serious drug cases, which probably have a more obvious place in the schedule than attempted murder.

Nigel Don: Forgive me, but I suspect that the schedule applies not to tainted acquittals but to the new-evidence rule.

Richard Keen: You are quite right to correct me—it applies only to section 4.

Nigel Don: But should attempted crimes be included in the list? As I understand it, under Scots law you would regard such crimes as separate offences—

Richard Keen: You would.

Nigel Don: —whereas, curiously, south of the border they are regarded as the same offence. If we are going to have the list, should we in principle think about adding such crimes to it?

Richard Keen: The more fundamental question is whether we should have the list. My view—and the view of the Faculty of Advocates—is that the list is probably redundant if section 4 is limited to crimes tried on indictment.

Alan McCreadie: I agree entirely. I see no need for the list at all if section 4 is to be limited to crimes on indictment.

Nigel Don: Forgive me, but I want to push you on this. After all, we do not answer the questions. If we are somehow or other persuaded by others that we should have the list, should it include attempted homicide?

Richard Keen: Yes. Why include the “Lewd, indecent or libidinous practice or behaviour” mentioned in paragraph 11 of schedule 1, which could be marginal and just a breach of the peace, and not include attempted murder? There is no balance there.

Nigel Don: I will move on to the issue of retrospectivity—if that word is in the English language; if it is not, it will have to get there. You will be aware that the bill disagrees with the Scottish Law Commission’s original proposals, and I think that it is fair to say that both of you disagree with what is in the bill. Will you explain why?

Richard Keen: Lawyers are instinctively repelled by the idea of retrospective legislation; in any event, there is a presumption against it. Putting that to one side, however, I will go back to the question of who the victims of crime are.

In a broad sense, the victims of a crime include persons who are arrested, investigated, tried and acquitted, because that experience has an immense impact on their personal lives. Those people are entitled to certainty, and to date they have had certainty conferred on them by the common-law rule against double jeopardy. The bill proposes to take that away, with the result that someone who has been acquitted of a serious offence may now be told that the police are still looking and still pursuing them and may come back. I wonder in general whether that is appropriate.

We must also remember that those people have article 8 rights under the European convention. They have a right to a private and personal life and, if you introduce retrospective legislation, you may be impinging on their article 8 rights. It is rather different if the legislation is not retrospective: people who go through the same process in future will know that they are amenable to the terms of the double jeopardy act, as it will become. However, you need compelling reasons to make provisions retrospective, and it is not obvious—notwithstanding the Tobin case, for example—that there are compelling reasons for section 13. You must take care, because the persons who would be impacted by retrospective legislation have convention rights, particularly under article 8.

Alan McCreadie: I agree. To my mind, the article 8 rights will be impinged on to a greater extent if section 13 remains.

The Law Society’s position has been consistent throughout the consultation process and now at the bill stage that retrospective application would
not be in the interests of justice for the reasons that the dean has referred to. The Scottish Law Commission’s position was that it may be justifiable under article 8, but Parliament would want to consider public policy grounds for whether section 13 should remain.

That takes me back to my point about finality. There will be cases before the bill becomes law in which the accused person, having been acquitted, will have been entitled to the finality of proceedings. To my mind, such a person’s article 8 rights may be impinged on to a greater extent than in a case that occurs after the bill has been placed on the statute book.

**Nigel Don:** I understand that point entirely, and I suspect my colleagues do too, but I will put a proposition to you that I do not think is unreasonable. I wonder whether, first, you will agree that it is not unreasonable and, secondly, you will reflect on what we should do with it.

I imagine that there are cases in which a woman is murdered, no body is found, and the man who killed her is the prime suspect but—despite being tried using all the other available evidence, including circumstantial evidence—he is not convicted. Subsequently, the victim’s body is found, and there is enough DNA evidence to confirm the identity of the victim and the fact that the man—the killer—was close to her in her dying moments. Is there not a matter of public policy that says that justice is done by bringing that man to trial and convicting him?

**Richard Keen:** One could answer that in the affirmative without altering the views that have already been expressed about section 13. The point is that there will be hard cases on both sides of the divide, however section 13 is expressed—whether it is retrospective or not. There will be hard cases, but one must make a judgment. It seems to me that to apply this fundamental legislation retrospectively and, therefore, to make a major inroad into the common law without proper regard to rights under article 8 of the convention is a dangerous course to take. The faculty would be against that. However, I readily acknowledge that one can bring up difficult cases, particularly those involving developments in DNA testing.

**Nigel Don:** Do you accept that it might be reasonable in that specific circumstance—which is rare, mercifully—to allow retrospectivity? Otherwise, somebody could be walking the streets against whom there is compelling evidence. Does justice not demand that we should be able to apprehend and convict him?

**Richard Keen:** There are already people walking the streets against whom there is compelling evidence of a criminal offence but who, for a variety of reasons—whether it be time limits or whatever—have never been convicted. Therefore, I do not believe that we should generalise about this. The justice system is not and never will be perfect. You will not make it perfect or approach perfection by breaking down the rules on double jeopardy in the way that you suggest. If you start singling out cases because they seem particularly unjust, you are moving into dangerous territory. One person’s subjective view of what is particularly unjust may differ radically from someone else’s.

**Nigel Don:** With respect, I am not suggesting that it is unjust; I am suggesting that it is very serious. The example that I have cited is homicide. I am deliberately going there because I would be with you absolutely if we were talking about anything else. I am trying to look at the matter from the position of the ordinary citizen. If we know, or think we know because the newspapers tell us—although that is another problem—that a person is guilty of an offence and, once the body has been found, there is enough evidence, why should that person be walking the streets on what 99 and a bit per cent of the population would say is a technicality?

**Richard Keen:** It may be a technicality, but it seems to me that we must approach this as a matter of principle, and the principle is such that there may be hard cases on both sides of the divide. It would be equally unfortunate if that person were to be tried for that serious offence only for us to discover, in 10 years’ time, following further developments in DNA testing, that the DNA evidence was not reliable.

**Nigel Don:** I accept entirely that there are limits to DNA evidence and that we must be careful. The person who is most likely to have the same DNA as me is my brother, and it is quite easy to get these things wrong.

**Richard Keen:** I am not saying that. I am merely pointing out that further developments may throw in doubt that which appears compelling at the time. There is an issue of fairness to those who are put on trial and those who are acquitted—they have rights as well. I believe that it was Jeremy Bentham who observed that, although he had great faith in the system of juries, he would not like to be tried for murder once a week.

**Dave Thompson:** Is there any real difference in principle between a situation in which someone commits an offence after the legislation comes into force—maybe five, 10 or 15 years down the road—and gets off only for the evidence then to be uncovered and a situation in which someone commits an offence a week before the legislation comes into force?

**Richard Keen:** There is a difference in so far as the legislation, if retrospective, carries with it
certain issues regarding people’s rights. I recognise that it can be pared down to that sort of distinction—the day before and the day after. Parliament must take a view and it appears to me that, as a matter of principle, Parliament should only in the most exceptional cases contemplate retrospective legislation, especially in the sphere of criminal law. I do not find—and, in considering the matter, the faculty has not found—a compelling case for retrospectivity. I take comfort from the fact that the Scottish Law Commission arrived at the same conclusion.

**The Convener:** Mr McCreadie?

**Alan McCreadie:** There is nothing that I can usefully add.

**The Convener:** You adopt his arguments.

**Alan McCreadie:** I absolutely adopt them.

**The Convener:** Gentlemen, thank you very much indeed for coming this morning. I know that it has not been without its difficulty, but it has been an interesting session from which the committee—albeit in depleted numbers—has derived considerable value.

11:00

*Meeting suspended.*

11:04

*On resuming—*

**The Convener:** I welcome the second panel of witnesses, which comprises Shelagh McCall, a commissioner in the Scottish Human Rights Commission, and John Scott, former chair of the Scottish Human Rights Centre. I thank you both for turning out in somewhat difficult circumstances.

I ask Mr Scott for his view on the first question. The Scottish Law Commission recommended a core rule against double jeopardy, supplemented by a broader principle against the unreasonable splitting of cases. Leaving aside issues that relate to the proposed exceptions, does the bill capture effectively the important elements of a general rule against double jeopardy?

**John Scott (Former Chair, Scottish Human Rights Centre):** Yes.

**The Convener:** We will come to the exceptions presently.

The current common-law rule is subject to a proviso that allows a person who has been tried for assault to be tried for homicide if the victim eventually succumbs to his injuries. In restating that proviso in statute, the bill takes a different approach from that which the Scottish Law Commission recommended. Which approach do you prefer, Mr Scott? I ask you to justify your answer.

**John Scott:** I associate myself with the comments that were made by the first panel of witnesses. I do not mean this callously, but the death is an irrelevance in such circumstances. If an earlier acquittal has been given, the fact of death does not reflect back and turn what was not an assault as far as the jury in the earlier trial was concerned into an assault or a murder. In rejecting the Law Commission’s approach and altering the position from the common law, the bill goes too far.

**Shelagh McCall (Scottish Human Rights Commission):** The Scottish Human Rights Commission’s perspective is that any second prosecution—whether under section 11 or another exception—is an interference with an acquitted person’s right to private and family life. As such, it must be justified under article 8.2 of the European convention. The test for that is whether the interference “is necessary in a democratic society”—that is, does it serve a pressing social need and is it proportionate?

The SHRC’s concern about section 11 is similar to what the dean of faculty and Mr Scott said. The section contains no criteria for a test that the courts would apply, such as the new-evidence test. Like Mr Scott, we struggle to see the difference when an acquittal has been given and the only change in circumstance is that the victim has—unfortunately—subsequently died.

**Nigel Don:** Good morning. I will pursue where I went with the Faculty of Advocates and the Law Society. You have all identified an issue. I think that the bill does the wrong thing; indeed, I will presume that it does and take us to what it should do. The bill should provide for an exception to the requirement that the accused must have been found guilty the first time round, to allow new evidence to be brought. If the bill did that—in other words, when an assault turned into a homicide, the accused’s acquittal the first time round would not help them if new evidence was available—would that be unreasonable? That is not in the bill but, if we amended the bill to say that—which is probably what it should say—how would you feel about that?
John Scott: I would not be entirely sure why it was necessary to have such a provision over and above section 4. If new evidence was available anyway, that would be the reason for the Crown to make an application for the court to consider—unless you suggest that the death would in some way be new evidence.

Nigel Don: I guess that the problem is that that takes us back to the schedule 1 list. The original assault might not be in that list, and the list allows the new-evidence rule to apply. Perhaps an addition should be made to schedule 1 to ensure that, if a victim dies subsequently, what the accused was originally charged with does not matter.

John Scott: In the context of an acquittal and in terms of section 4, there would have to be some new evidence that could not have been located with “reasonable diligence” at the time. The death does not really have anything to do with that.

Nigel Don: Right. Let us say that someone is convicted of assault and found not guilty. Subsequent evidence says that they probably were guilty of the assault—an assault that resulted in a death. I am aware that I am almost pushing the bill aside in putting the question. Do you have a problem with a person in that situation being tried again?

John Scott: I drafted the Society of Solicitor Advocates submission. I do not agree with the bill other than in its stating the rule against double jeopardy in statutory form. I am not comfortable at all with the exceptions. The schedule is a list of serious charges. I heard the discussion with the previous panel on ways of adding to it, but I cannot think of any serious charges that are not already included. Obviously, all parties have indicated their support for the principle. If this has to be done, my preference is that the provisions should be restricted to murder and rape, as the Scottish Law Commission suggested. The bill is in serious need of being tightened up in terms of the exceptions. That would ensure that it intrudes only to the limited extent that is necessary. In terms of the human rights aspect, the bill goes much further than necessary.

Dave Thompson: Do you agree with the previous witnesses that there should not be a list and that the bill should relate only to cases that are dealt with on indictment? Does that idea attract you more than a list that spells out particular offences?

John Scott: That would be an improvement to the extent that some offences on the list can be prosecuted at summary level. I would prefer the bill to be restricted to the old Crown pleas of murder, rape and treason, although there have not been many prosecutions for treason for a while.

Dave Thompson: I accept that you do not want to add to the list. The suggestion has been made that the list—even the truncated list that you mentioned—should be added to or reduced not by order but by primary legislation.

John Scott: Absolutely. The committee has seen evidence of the difficulty of agreeing what should be on a list and I struggle to see how, in this case, that could properly be dealt with by way of an order. If, having given proper consideration to all the evidence, including the evidence to the Scottish Law Commission, its report and the consultation that followed, we have not been able to come up with other matters that should be included in the list, I do not think that extending it by order would be appropriate.

The Convener: Is there an argument for having no list at all? Why not just leave it up to the Crown? Clearly, it would not invoke the legislation unless the matter was of considerable public interest and portent.

John Scott: I am sorry, perhaps I am trying to answer too many of the questions.

I see the point, but such legislation should be as tightly drawn as possible. I am not comfortable with the idea of simply leaving it to the Crown to decide. To that extent, there should be a list on which, from my point of view, there should be murder and rape. That would be an improvement on the bill. Leaving things entirely to the Crown could allow matters to be included that no one has considered. For example, the Crown may want to test a matter, perhaps because of pressure to do so. It is inevitable that the cases that we are talking about will be those that attract a fair degree of publicity. Those cases could be of any description.

11:15

Shelagh McCall: The committee has already heard from the dean of faculty and the Law Society on the importance of the principle of legal certainty and finality of judgment. We are talking about how to justify exceptions to that important principle.

From the SHRC’s perspective, there are two lenses through which the committee should be asking itself the question about the list of offences. The first is whether those particular exceptions—and the offences that they are meant to cover—are shown to be necessary because of substantial and compelling circumstances or serious, legitimate concerns that outweigh the principle of legal certainty. The second is the lens of article 8.2 of the ECHR, which the dean of faculty and I have already mentioned. Can one say that there is truly a pressing social need for particular offences to be identified and included? Is it proportionate to
identify particular offences or just the level at which offences are prosecuted? The SHRC advises that one is likely to fall on the right side of the line and enact proportionate legislation when one draws the list of offences as narrowly as possible, and the gravity of offences as high as possible. We agree with the view that including cases on indictment satisfies that requirement in respect of gravity.

It is for the committee and Parliament to consider whether there is particular social concern about offences against the person of the type that are included in the list, or whether there is another social concern to do with serious fraud, drugs offences, money laundering and the other crimes that have been mentioned. That question is about what

“is necessary in a democratic society”,

and there is no straightforward answer that one way is definitely right and one way is definitely wrong. The more narrowly the list is drawn, and the more serious the offences that are included—which is what the legislation purports to aim at—the more likely it is to comply with article 8.2.

Stewart Maxwell (West of Scotland) (SNP): I apologise if what I am going to ask has been covered. I was late because of my rather extended journey this morning.

I go back to the questions that Nigel Don asked on section 11 and the “Eventual death of injured person”, and the comments that have been made about section 4 and “New evidence”. We have heard evidence that the amount of resources that is applied to particular cases varies for obvious reasons. Let us take a case in which someone who is accused of assault is acquitted, the person who is injured subsequently dies of their injuries, and the case becomes a murder case. Do you accept that additional resources would be applied to that case, and it might well be that the Crown would wish to take the same person to trial for the murder? Does section 4 cover that eventuality because of the level of resource that is applied to the case, and because the publicity of a death tends to bring forward witnesses who had not noticed the case before?

John Scott: I do not think that section 4 would cover a case when the only additional matter was the fact of the death. I have been trying to think of an example of someone being prosecuted on summary complaint for an assault, and the victim dying some time later, apparently from the injury involved. I cannot see how what you describe would happen. If someone is involved in an incident in which the alleged victim has been assaulted or injured and the case is taken at summary level, we would be talking about six to eight months for the trial. If there was any change in the alleged victim’s situation in relation to their injuries or their extent or effect, the matter could be reviewed, the summary complaint could be deserted, and the case could be re-raised and proceedings taken on indictment. If, however, the original assault was thought to be sufficiently serious to be dealt with on indictment, the resources that were applied to it would have been pretty serious anyway. I accept that yet more resources are applied to murder cases, but that is probably because of the different types of evidence that are examined.

I cannot see a situation in which someone is prosecuted on summary complaint for assault and the victim succumbs, apparently because of the same injury some time after the trial has taken place. There are no examples of such situations. This is another aspect of the evidence on which the committee is being asked to consider the bill not justifying the changes that are being proposed. I struggle to see the argument. In a previous evidence session, the Crown almost seemed to suggest that, some time after an incident and the summary prosecution, the victim could succumb to their injuries without there having been any warning of that at all during the period before the summary trial.

A point that has been overlooked, even by the Crown, is that, to a significant extent, the Crown has control over when it starts proceedings. If there was any uncertainty about the matter, the Crown would not take summary proceedings; it would wait and see. That also applies in other areas that are affected by the bill: the Crown can wait and see if it does not think that the evidence is good enough. If necessary, it can wait for years. There might be issues with that, but corroborating evidence might come to light only several years later. The Crown has been allowed to bring proceedings in the past in such situations.

The Convener: Let me put forward a scenario that might arise. There is a street brawl involving a rough sleeper, who eventually finds himself charged with a simple assault—of punching and kicking an individual—plus the ancillary breach of the peace, which is inevitably contained in such a complaint. He has no fixed abode, and he has a criminal record, but not one that would justify prosecuting on indictment. Because he has no fixed abode, he is put through the custody court. He gets weighed off by the sheriff or, in Glasgow, by a stipendiary magistrate, for six months. What we do not know at that point is that the victim, who appeared simply to be bruised and to have superficial injuries, is suffering from a haematoma that, three days later, kills him. Such a situation can arise, in which the prosecution proceeds and is completed but, subsequently, the victim dies. It is perhaps not entirely far fetched.
John Scott: I am not sure. Even in the sort of incident that you are talking about, there will be a police investigation. It depends on whether there is any doubt about the state of the victim. If the victim cannot be contacted or disappears—if they are a rough sleeper, for instance—and then dies without anyone knowing about it, that would come to light when they did not appear to give evidence at the summary trial. You are talking about something happening without any forewarning after a summary trial has taken place.

The Convener: Yes.

John Scott: Although I am sure that that is medically possible, if there is any doubt or any warning about the case, the Crown will not approach it in that way.

The Convener: It is a Saturday night in Glasgow following a Rangers v Celtic football match. Police resources are stretched. It appears that there has been a simple case of assault, and a guy has some bruising. He is not examined fully, and he does not require hospital treatment. The accused is of no fixed abode and is put through the custody court. He pleads guilty, and the case is disposed of. The difficulty could arise.

John Scott: But if the accused has pled guilty, that is not the situation that we are discussing. The difficulty lies where someone has been acquitted.

The Convener: It would mean revisiting a prosecution. The law at present would allow for that.

John Scott: Yes. I have found it hard to identify my main difficulty with the bill, but this is one aspect of it. I am talking about a situation in which there has been a judicial determination and a person has been acquitted. They can be prosecuted again, once the Crown has decided that it is in the public interest, on a sufficiency of evidence, to proceed with a prosecution. The point is that the Crown should not be given another shot at it.

The Convener: We turn now to the subject of tainted acquittals.

Nigel Don: We will proceed in the same order as earlier, so the witnesses will know what is coming.

What do you feel about the tainted acquittal provisions in the bill and all that comes with them, particularly from the human rights perspective?

John Scott: Given the amount of talking that I have been doing, I wonder if Ms McCall might start on that.

Shelagh McCall: The commission has a number of concerns about the tainted acquittal provisions. First, there is no limitation on the offences to which the provisions might apply, nor is there a limitation on the level of seriousness of those offences. Secondly, the provisions do not restrict subsequent prosecution to once only, as the bill does in relation to new evidence. The bill would allow for repeated prosecutions of an acquitted individual—and repeated acquittals of that individual every time he subsequently confessed.

The commission’s third concern relates to the particular tests that are set out in section 3. First, there is the balance of probability test—is the court satisfied, on the balance of probability, that the person made the admission?

Nigel Don: Sorry, but can I drag you away from admissions for the moment and go back to tainted acquittals? We will come to admissions.

Shelagh McCall: I am sorry. I have gone on to a slightly different tack.

Nigel Don: That is okay. We are going there, but if you just stick to the issues in order and deal with tainted acquittals, that will help us.

Shelagh McCall: Yes. I reiterate that our first concern is the lack of restriction in relation to the offences to which the provisions apply. The commission also has a concern about the terms in section 2 that allow for a second prosecution in circumstances in which the interference with the course of justice in the first trial has nothing to do with, or cannot be shown to have anything to do with, the accused who ends up being acquitted. There was some discussion earlier with the dean of the Faculty of Advocates about that.

An example that may or may not be helpful is that of a multiple-accused trial, in which accused person A incriminates accused person B as the perpetrator of the crime, but a third party, with the knowledge of and at the behest of A, interferes with the course of the trial in an attempt to have A acquitted and B convicted, with A’s defence being that B did it. It may be as a result of that interference that A is indeed acquitted; it may be that person B is also acquitted in spite of the interference because he is genuinely innocent of the offence. The difficulty with the provisions is that both A and B will fall liable to a second prosecution as a result of that interference with the administration of justice. The question for the committee is whether that is a proportionate interference with B’s rights that is necessary in pursuit of the bill’s aim of securing against the sort of activity in which A was involved in my example.

There are perhaps two ways in which the matter can be dealt with in the bill. The first is to include in section 2(3) an additional condition that the court must consider: that the offence against the administration of justice is shown to have occurred with the knowledge of the acquitted person. Secondly, section 2(7)(b) perhaps requires to be
amended to require there to be a link between the effect on the outcome of the proceedings and the accused, which would allow the court to separate out A and B in a proportionate way.

Nigel Don: Thank you. I think that I understand in principle, but I am not quite sure. None of us is a draftsman, of course, and I am not quite sure how we can separate those effects without having the subsequent trial. That may be a problem that we need to consider.

The Convener: At the end of the day, that will not be our problem, but it certainly is an issue.

11:30

Stewart Maxwell: I have two questions, the first of which Nigel Don has just touched on. How can you separate out A and B in the scenario that you described, given the individuals involved and their propensity to lie and cheat—some of them, anyway—without having a fresh trial?

Secondly, irrespective of who tainted the trial, or how it was tainted, it must be accepted that it has been tainted. There has not been a fair trial, so it could be suggested that the trial should be treated as if it had never happened. You have suggested that there could be one trial after another— with the accused acquitted and retried, acquitted and retried, acquitted and retried—if it was continually proved that a trial had been tainted. However, if a trial is tainted, it should surely be wiped from the record. The trial was never fair in the first place, and there has to be a fair trial. The situation is therefore not quite the one that you have suggested, with a person being continually retried.

Shelagh McCall: I should perhaps clarify my comments. I apologise, but I strayed slightly into consideration of the admissions provision while glancing at my notes. My point about repeated trials related more to admissions than to tainted acquittals.

From the Scottish Human Rights Commission’s point of view, the fundamental point is this: any criminal prosecution is, by its nature, an interference with one’s right to private and family life. That is a given, and such interference is justified, under article 8.2 of the European convention on human rights, in relation to the prevention and detection of crime, for example. Under our current system, we allow one prosecution. The question that the committee will have to grapple with is whether it is proportionate, in pursuit of the aim of the prevention and detection of crime, to prosecute someone for a second time when there has been some interference in their trial—an interference of which they have been blissfully ignorant—and when they have subjected themselves to what, from their perspective, has been a valid and fair trial, only for them later to discover that it has not, at the hand of some third party, been valid and fair.

I acknowledge that such a scenario might be rare, but we feel that it is one that the committee will have to tackle. If possible, it will have to be wrestled with in the provisions of the bill.

John Scott: A few years ago, the appeal court dealt with a situation in which there were allegations that jurors had become involved with someone who was connected to one of the accused in a multiple-accused case. An investigation was carried out, and the appeal court appears to have accepted that one person connected to an accused, who I think was acquitted, had developed a relationship with at least one juror—I think that it was two separate jurors. However, because the appeal was at the instance of a separate accused, who was not involved in this odd situation, the appeal court felt that there was no reason to think that the jurors who had become involved in those relationships would necessarily be influenced in their views of that separate accused. They might be influenced in their views of the accused who was connected to the person with whom they were in a relationship, but not in their views of another accused. The court made that distinction. Even though the trial had clearly been tainted, the court decided that that would not have affected matters relating to the appellant.

The cause and effect aspect is very important—cause and effect showing that the accused was involved in any attempt to pervert the course of justice, and that any attempt to pervert the course of justice, or any perversion of the course of justice, was the reason why the trial proceeded as it did.

Stewart Maxwell: Is your problem only with cases in which there are multiple accused? Just as Nigel Don struggled earlier, I am struggling to imagine a situation involving a single accused in which, unbeknown to them, some third party somehow became involved in trying to get them acquitted.

John Scott: My difficulty is that the bill works on the assumption that, in such a case, the accused person must have known about it and must have been involved. The bill should contain a provision that makes it clear that some standard of proof is required—preferably, proof beyond reasonable doubt—that the accused was involved at all.

Shelagh McCall: I can perhaps postulate an example for you of a single accused. I accept that this, too, may be a rare example. Let us imagine that a complaint of rape is made against Mr A that is later withdrawn as being false; in the meantime, Mr A has been stigmatised as having been accused of rape, but the matter does not proceed
to trial. The same complainer then makes a complaint of rape against Mr B that Mr A finds out about. Mr A then interferes with Mr B’s trial—not out of any interest in whether Mr B is guilty but out of a desire to obtain revenge against the complainer by undermining her and the impact that her evidence may have on the jury. Mr A succeeds in doing that, but Mr B is entirely unaware of the situation. He has subjected himself to what in his mind is a fair and valid trial, yet he may find himself exposed under the provisions in section 2 to a second prosecution. The question is whether the bill is sufficiently precise to enable those examples to be weeded out from the aim that it seeks to achieve.

Stewart Maxwell: I accept that, but I think that we are really stretching the bounds of several of these questions into strange and very unlikely theory rather than providing a practical example—nobody seems to have a practical example for any of these cases.

John Scott: That is indeed a problem, but the examples showing why the bill is necessary are thin on the ground, too.

Stewart Maxwell: Okay. Thank you.

The Convener: Let us move on to the issue of admissions.

Nigel Don: The issue of admissions is obviously much more contentious in principle. Will you both give us the benefit of your views on the issue? You will already have heard what the lawyers had to say—forgive me: what the Faculty of Advocates and the Law Society of Scotland had to say.

Shelagh McCall: I simply go back to what I said earlier about this particular provision to try to make my view as clear as I can. First, the Scottish Human Rights Commission has concerns that the admissions provision applies to all offences prosecuted at any level of gravity. From that perspective, the provision is very broad. The question is whether such interference in article 8 rights is justified.

The commission’s second concern about the provision is that it is not confined to only one subsequent prosecution. As I said before—at the wrong time—under the bill someone could confess over and over, be prosecuted over and over and be acquitted over and over, until by chance a jury believes the admission.

The commission’s third concern has to do with the tests to be applied under section 3. The test is, first, that the court is satisfied on the balance of probabilities that the admission was credibly made. As I think the dean of faculty mentioned this morning, it would perhaps be appropriate to consider whether that test should be one of beyond reasonable doubt. Mr Don referred earlier to the written submission of Professor Roberts, who set out some of the history on the unreliability of confession evidence; the English experience of similar legislation has brought that unreliability to light in the Miell case, to which the commission referred in its written response. Setting the test higher, at beyond reasonable doubt, would perhaps begin to address that issue.

The commission also has concerns about the second part of the test and the fact that there is no requirement for the confession to be reliable as well as credible. That is part of the test in England and the Miell case is a very good example of repeated confessions by an individual that were found to be manifestly untrue and unreliable when the application for second prosecution was considered. A requirement for an admission to be reliable as well as credible would also deal with the commission’s concern about the situation of vulnerable individuals who have been acquitted and who may make admissions not because they are truthful and reliable but because they are suffering from a mental illness or something of that nature. The court needs the ability to weed out the vulnerable and unreliable acquitted person.

Mention was made earlier of whether a special knowledge condition would address those issues. I observe that there will have been a public trial in which the circumstances of the crime will have been publicly revealed, recorded and, probably, reported, so I am not sure that there would be any vestige of special knowledge left for a second prosecution to use that as the test.

One final issue, which we raised in our submission, is that the current provision in the bill does not require the source of the evidence about the admission to meet any particular standards. For example, if a cell mate comes forward to say that Mr A, the acquitted person, confessed to him, who set out some of the history on the unreliability of confession evidence; the English experience of similar legislation has brought that unreliability to light in the Miell case, to which the commission referred in its written response. Setting the test higher, at beyond reasonable doubt, would perhaps begin to address that issue.

The changes we have suggested are ways in which one might be on safer territory with regard to that particular exception and its interference with article 8 rights.

John Scott: I associate myself with Ms McCall’s comments and the written submission from the SHRC. On the possible special knowledge condition that was discussed earlier, beyond the fact that there will already have been a public trial, given that the Crown says that the power will be exercised sparingly, the type of cases involved will inevitably be those that have attracted the most publicity.

There is a trial in the High Court in Glasgow at present and not only are the public benches
packed, with people queueing to get in, but there is a very detailed blog associated with the trial. Having been present one morning, I know that the blog is a very full and pretty accurate reflection of the evidence that has been given.

That is the sort of trial that we are talking about these days. There was a queue round the block for the Luke Mitchell trial. Many more people will know far more about such a case than they would about a typical situation. In effect, special knowledge has become a fairly devalued expression, in our appeal court in any event.

On the possibility of admissions involving old confessions as opposed to post-acquittal confessions, there is nothing in the bill to require a reasonable explanation from the person who claims to have heard the admission as to why the information was not brought forward at an earlier stage. I included that point in the written submission from the Society of Solicitor Advocates. In other areas, if the defence wants to bring forward such evidence, it needs to provide a reasonable explanation. Such a test should be a requirement in the bill in relation to pre-trial or pre-acquittal admissions as well, because otherwise there could be serious issues of unreliability.

The possibility of having to hold, in effect, a trial before the trial has been mentioned in relation to admissions, tainted evidence and new evidence. The committee should be in no doubt that evidential hearings will be absolutely necessary in order to deal with such matters. That will not simply be a matter of going through a paper exercise before proceeding straight to a trial. Inevitably, admissions will be hotly contested and will come from sources that might have question marks over their credibility and reliability. Reliability must be included in the requirements.

Admissions will usually come from people who are acquainted with the accused or who are from the criminal fraternity, and who may have expectations about things that will happen in prosecutions against them. All that will have to be flushed out when the High Court is considering whether to allow a case to be reopened, rather than be left for the trial. It should be part of the whole decision about whether a second trial should go ahead.

Nigel Don: On that basis, is there anything left? You have shot the idea of admissions being acceptable more or less to pieces; I am not sure that the plane is actually flying now that you have shot it. Is that your intention? Do you believe that there is scope for admissions evidence? If we are allowing the law on double jeopardy to be changed and if we can write the legislation properly, might there be circumstances in which it would be appropriate, subject to the long list of safeguards that you have spoken about, to allow a trial on the basis of an admission, should it be sufficiently credible, reliable and so on?

11:45

John Scott: I struggle to see how anything would survive the tests that we are suggesting, particularly evidence that has a sort of unreliability associated with it. It is not as if the committee is being given examples of people who are wandering around confessing to things, whom the Crown wants to be able to prosecute. If someone had given evidence in their own trial and been acquitted and then confessed to things later, there might be other steps that could be taken.

Dave Thompson: We have already spoken about the general new-evidence exception. It is important that we do not forget that the provisions will be used only in exceptional circumstances—evidence from elsewhere suggests that such a case would be taken once every five years or so. We are talking about serious matters. The prosecutors would have to go to the High Court to get approval for a case, and the High Court would have to set aside the acquittal or grant authority for a new prosecution. Section 4(6) lists the various tests that would have to be met before a case could be taken. What is your view of that approach? Could you elaborate on the tests? It strikes me that there are a lot of hurdles that people must get over before a case can take place.

Shelagh McCall: A number of places do not allow for any exceptions to the rule against double jeopardy in international law. It is an absolute rule in the International Covenant on Civil and Political Rights and the European Union’s charter of fundamental rights. Under the European convention on human rights, however, some exceptions are permitted, including one concerning new evidence. The United Kingdom has not ratified that particular protocol but, leaving that aside, new evidence is an exception that is envisaged in the convention.

You mention that the provision is directed at serious matters. We have had some discussion of the list in schedule 1 and we have identified that it is perhaps not a sufficiently robust way in which to pinpoint those serious matters. That is the issue on which the commission would suggest that the committee should focus its attention.

One of the principal concerns that the commission has about the new-evidence exception is its retrospective nature. You heard evidence from the Faculty of Advocates and the Law Society about that. To apply the provision retrospectively fundamentally alters the relationship between the state and the individual that has been set up over centuries in this country,
and the Scottish Law Commission's work traced that—

Dave Thompson: Can I just stop you there? Are you saying that the tests, as laid down, are irrelevant, as you do not think that the provision should be passed anyway or are you saying that the tests should be strengthened?

Shelagh McCall: One can view the matter on two levels. The first is the level of principle, and I have already set out the test that the committee should apply when considering that principle, which is: are there compelling and substantial circumstances necessitating a departure from the rule of finality of judgment? The Parliament, as the committee is aware, has recently reaffirmed the importance of finality of judgment in criminal proceedings, in the emergency legislation that followed Cadder, so it is clearly a principle that the Parliament values. At that level of principle, the committee has to consider whether there are compelling circumstances requiring the consideration of new-evidence exceptions.

If the committee is satisfied that that is the case, in certain circumstances, we should then ensure that we make the tests sufficiently robust to ensure that the legislation is directed precisely to those circumstances and is not too broad and does not extend in a disproportionate way.

The commission has some concerns that the current test, which is that the new evidence substantially strengthens the case, might not be sufficiently robust. In particular, there is no requirement for that new evidence to be compelling or persuasive or for it to be capable of being regarded as credible and reliable—that last phrase is the test that is used in relation to a convicted person who seeks to overturn a wrongful conviction using fresh evidence. Those are two principal ways in which it might be possible to strengthen the test.

John Scott: I associate myself with Ms McCall’s comments. On the point about the legislation being used sparingly, the schedule suggests that hundreds of cases a year could be affected. I would prefer the legislation to be drafted in such a way that it was even more obvious—in the legislation itself, rather than through assurances during the passage of the bill—that the provisions are not supposed to apply to hundreds of cases. That probably means that the bill should state that it is concerned only with murder and rape, as the Scottish Law Commission has said.

Dave Thompson: Is it not the case that the list is similar to the one that is used in England? It has not led to hundreds of cases a year.

John Scott: It has not, but I would prefer legislation that would not allow that possibility, instead of simply relying on practices developing that do not use it in that way.

Shelagh McCall: In England, the legislation confines the exception to offences prosecuted on indictment, which is not what is envisaged here. This would cover—

The Convener: It is highly unlikely that summary cases would be covered by the provisions. Would it be acceptable to people who come from your perspective if the bill said that the provision should be used only in exceptional circumstances?

John Scott: That would help.

Shelagh McCall: Throughout the bill, efforts should be made to make the provisions as narrow as possible and as robust as possible in terms of the article 8.2 test of proportionality that I have mentioned. That test applies at three stages: first, in the legislature, requiring the bill to be sufficiently well drafted to make it compliant with article 8.2 and to ensure that those who give it effect are in compliance with article 8.2; secondly, in the exercise of the Crown Office’s discretion as regards the cases that it brings—what cases and at what level—which the bill should confine as far as it can; and thirdly, in the courts’ decisions on which particular cases will get through to a second prosecution. At all of those stages, the obligation is on the state to justify the interference and be satisfied that any interference is proportionate and necessary.

Dave Thompson: From what you are saying, I imagine that you are not happy with retrospective application. However, there has been a retrospective application of the provision in England, Wales and Northern Ireland and I know that there are such proposals in Australia, although I do not know how the individual states have dealt with the matter. There are precedents for retrospective application. Will you elaborate on your views on that?

Shelagh McCall: It is not the commission’s view that making the provision retrospective in itself violates convention rights—it does not do so. The convention right that is associated with the retrospective application of criminal law is article 7 and it applies to substantive law—it involves making something a crime that was not a crime yesterday and applying that to actions that occurred yesterday and previously, or giving someone a heavier penalty for something that they did in the past. That is not what we are talking about here.

Such a protection indicates the value of legal certainty and the requirement for the law to be specific and precise enough to ensure that individuals can regulate their conduct and organise their affairs in such a way that they do
not violate the law and expose themselves to sanctions—unless, of course, they choose to do so. As far as interference with the right to private and family life is concerned, the provision’s retrospective application essentially says that every verdict of acquittal for a scheduled offence is no longer a final but a provisional verdict and therefore sweeps away the principle of legal certainty from every such verdict. I agree with the dean of the Faculty of Advocates that that undermines the rationale behind the principle of legal certainty.

The very difficult question that the committee and the Parliament face is whether such an approach is proportionate and indeed necessary in this society. The Scottish Human Rights Commission has been struck by the dearth of either tangible, concrete examples of cases from the profession or anecdotal examples from the public or press that have been given in evidence to the committee or the Scottish Law Commission. As I have said, the real question is whether the committee has properly identified the need to make the provision retrospective and whether such a move is proportionate.

David Thompson: Surely the legislation’s purpose of allowing people to look back at evidence and to retry cases some time in the future is itself somewhat retrospective in nature. Does it make any difference if someone is tried either just after or a week or a day before the legislation comes in? After all, in both cases, people will be looking at evidence that will have come to light in a case that happened many years before.

Shelagh McCall: The difference is this: acquittals made before the legislation is enacted will be regarded as the final verdict by the individuals in question, who will organise their affairs accordingly and get on with their lives. The same is true of the victims and witnesses in such cases, because their Article 8 rights will be interfered with in any subsequent prosecution. I note that in its written submission Victim Support Scotland repeats our point that it cannot be assumed that all victims and witnesses will welcome a second prosecution years from now with regard to an incident that they might very well have put behind them and from which they have moved on to reorder their lives. Prior to the enactment of this legislation, acquitted persons and victims and witnesses will proceed on the basis that the matter will never raise its head again; indeed, they are entitled to rely on that state of affairs. The retrospective application of this provision turns that on its head and says, “However long you have been proceeding on that assumption, it is all irrelevant because the verdict is now provisional. Should we come across further evidence, you might be open to a subsequent prosecution.”

David Thompson: But if the legislation goes through as it is, all verdicts from then on will be provisional.

Shelagh McCall: Yes.

David Thompson: So in that sense—

Shelagh McCall: But people who go to trial or give evidence after the legislation is enacted will know that that is the case and will order their lives accordingly. The fundamental difference lies in what the individuals do in their private lives following the verdict. That is what we are interfering with. It is less of an interference if they know that a subsequent prosecution is a possibility than if they have been told that it is definitely not a possibility.

12:00

John Scott: A lot of what is said in court at the moment is going to have to change. As the commission’s submission points out, every jury is told that three verdicts are open to it. The guilty verdict is discussed but the other two—not guilty and not proven—are verdicts of acquittal and mean that the accused is forever free from further prosecution. That is everyone’s understanding, although over the years there have been one or two people, such as Mr. Duffy, who have campaigned about verdicts in particular cases. Everyone has approached the issue on exactly the same basis. As I have said, much of what is said in court will have to change and, as I suggest in the Society of Solicitor Advocates submission, what is said to the accused who is acquitted in a trial will also have to be different. They will have to be told, “You’re acquitted. That’s the end of the matter—unless the Crown decides to make an application under the double jeopardy legislation.” That makes a huge difference.

I am troubled by that because I was deeply unconvinced by the Crown’s evidence to the committee on whether old cases would ever be prosecuted. It might well be argued that we are debating a point of only academic importance, but I do not agree. It is an important matter of principle. After all, the principle of finality was recognised in the emergency legislation that followed the Cadder decision. We cannot have it both ways: finality cannot be important only when it suits us and when it does not suit us we simply reopen cases.

Although you will be able to tell every accused person something different from the day the legislation comes into force, you cannot do anything to ensure that accused people who have been acquitted on the understanding of finality are
made aware of what has happened. It is, for example, unlikely that they follow the proceedings of this bill, but what happens in future cases can be determined through judicial studies and other matters to ensure that no one is labouring under any misapprehension. Like Ms McCall, I am sure, I have spoken to clients. Once they are acquitted, that is it. They are told, “Forget about it—you never need to come back to court.” I and the system itself have played our parts in allowing people to have that understanding. We should not be ashamed of the fact that we might have gone further than other countries in allowing that safeguard to develop over hundreds of years—indeed, we should be proud of it—and in changing that situation through this legislation we should go no further than is considered necessary. Obviously, the Parliament seems to have agreed on the need to go much further than we have suggested but the legislation should look not back, only forward.

Stewart Maxwell: I accept that. I certainly do not think that anyone is ashamed of the law that, as you say, has developed over hundreds of years in this area, which in effect seeks to protect an individual from a state that might overstep its bounds. Much of this, though, comes down to the development of modern scientific techniques. If some new technique for analysing DNA evidence were to be invented tomorrow that produced almost undeniable evidence proving the guilt of a previously acquitted individual, how would one strike a balance in ensuring that justice was done?

John Scott: I would prefer to legislate after such devastating scientific techniques were developed. They just do not exist at the moment.

People often cite the example of DNA evidence, but it does not tell you whether someone is guilty. When forensic scientists give evidence about DNA in courts, the lawyers—and perhaps the jurors—want more from them than they should be prepared to offer, if they are doing their jobs properly. They will talk about probabilities; they might point in the right direction; and they will certainly be able to exclude the innocent. However, the science is not as good as it should be yet and I am not sure that it is safe to legislate for prosecutions to go ahead in anticipation of being able to come up with evidence of guilt beyond any doubt. It happens in courtrooms all the time: we have elevated science beyond its place and I am not sure that we yet have the means to get the evidence that is required to do as you have suggested.

Stewart Maxwell: That is an interesting point of view.

The Convener: The whole concept is interesting.

I think that the committee has got all the answers that it sought. I thank Mr Scott and Ms McCall for their exceptionally useful evidence, which will give us considerable food for thought. I hope that attending the meeting has not been too much of an inconvenience.
Scottish Parliament
Justice Committee
Tuesday 14 December 2010

[The Convener opened the meeting at 10:02]

Double Jeopardy (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I begin with the usual admonition to everyone to ensure that their mobile phones are switched off. We have received apologies from Cathie Craigie who, unfortunately, has had a family bereavement, and from Robert Brown, who is in the building but is engaged on other parliamentary business. I welcome to the meeting Mr Brown's substitute, Mike Pringle.

The first item is our third scheduled evidence-taking session on the Double Jeopardy (Scotland) Bill. I am particularly pleased to welcome today's witness, the Rt Hon Lord Gill, the Lord Justice Clerk.

I will move straight to questions. Leaving aside the proposed exceptions, which we will come to presently, do you think that the bill effectively captures the important elements of a general rule against double jeopardy?

Lord Gill: Yes, I think so. The judges are unanimously of the view that the double jeopardy rule is of considerable constitutional significance and that, subject to certain exceptions to which, as you say, we will come, it should be retained. The bill reaffirms the principle of the double jeopardy rule in section 1, which I think satisfactorily covers the matter.

The Convener: That seems to be the fairly solid consensus in the evidence that we have taken over the past couple of weeks.

Section 11 would allow a person acquitted of what, on the face of it, appeared to be a simple assault to be tried again for homicide if the victim subsequently died from the injuries. Are you happy with that provision? One would presume that the Crown might justify it on the basis that fairly limited resources would be devoted to investigating a simple assault and its traditional accompaniment of breach of the peace but there would be a much more thorough investigative process in the event of a fatality.

Lord Gill: The provision is not really that novel. After all, Scots law has always contemplated the competence of prosecuting someone for murder if death follows some time after their conviction for assault and if the assault itself causes the murder.

As far as I can make out, section 11 seems to be in line with the Scottish Law Commission's recommendation, with which the judges agreed.

The Convener: That deals with that aspect. Bill Butler has some questions about tainted acquittals.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, Lord Gill. Some witnesses have expressed concern about the scope of the tainted acquittal provisions in section 2. For example, it has been suggested that the possibility of a further prosecution should be limited to more serious offences and apply only to an accused who can be shown to have benefited from the alleged taint. Do you share those concerns?

Lord Gill: The judges support the principle of an exception to the rule against double jeopardy where the acquittal is tainted. The safeguard is that, in the application of the rule, the judge should have the discretionary power to bar a second prosecution and that, in general, there should be a presumption against a second prosecution unless the Crown can make a case for special circumstances that would justify such a move. It seems to the judges that any acquittal that has been obtained by means of what has been in effect an offence against the administration of justice should not be to the benefit of the accused in a second prosecution in cases where, for example, the accused organised for evidence to be suppressed or arranged for perjured evidence to be given by himself and other defence witnesses.

Bill Butler: That is very clear. Are you saying, then, that the interests-of-justice test that is set out in section 2 deals with those concerns?

Lord Gill: That was the overriding idea behind the Scottish Law Commission's recommendations and it appears to us to be a sound practical rule to apply.

Bill Butler: You have no concerns about that.

Lord Gill: I do not think so.

Bill Butler: I am obliged, Lord Gill.

Stewart Maxwell (West of Scotland) (SNP): As a supplementary to Bill Butler's question, I wonder how you view the evidence that we received last week on the difference between section 2 and other sections. The provisions in section 2 are not limited to the list of offences in schedule 1—in other words, they are not just for more serious offences. As a result, a tainted trial could be prosecuted again for any offence.

Lord Gill: I think that, in that respect, the bill goes beyond the original recommendation at paragraph 3.15 of the commission's "Report on Double Jeopardy". As I understand from its
original “Discussion Paper No 141” on Double Jeopardy, the commission was considering the matter in the context of more serious charges.

The specific question whether the provision should apply across the board was not considered by the judges. We gave our consultation response to the commission when it published the discussion paper, but we have not given further consideration to the published bill. I am sorry if that is unhelpful.

Stewart Maxwell: It would perhaps have been more helpful if you had had the opportunity to consider it, but I accept that your original discussions with other judges were on the SLC report rather than the bill.

I will push you a little on a connected issue, which is that there is no limit in the bill on the number of times that a person can be retried in the case of a tainted trial. In other cases, retrials are limited to one more go, if I can put it in that way, but there is no limit in the section on tainted trials. Do you have a view on that?

Lord Gill: I do not really have a view, because my impression is that the commission never contemplated the idea when it formulated its proposals. As far as I know, certainly in England where the legislation has operated for some little time, it has never arisen as an issue. The judges in Scotland were certainly not required to consider it in responding to the commission’s discussion paper.

However, if a series of acquittals were to be obtained by tainted means, there is a certain logic in saying that each time there is a tainted acquittal, the provisions should kick in. That thought has just occurred to me as you have raised the matter, but I cannot speak for the judges on that.

Nigel Don (North East Scotland) (SNP): Good morning, Lord Gill—it is good to see you again. We have heard evidence that suggests that the provisions on admissions in section 3 should apply only to serious cases—I think that we believe that a lot of the bill should apply only to serious cases. Can you reflect on the appropriateness of that criterion, which is not in the bill? As far as I can see, the provisions in that regard cover any circumstance.

Lord Gill: That is right. The judges considered that point in general terms rather than in relation to specific offences. The only point that I would make about the section on admissions is that the judges were quite happy with the idea of founding on a subsequent admission. The question of a prior admission leads us on to a different issue, which is whether it is new evidence, and whether that is a separate exception.

Nigel Don: I was going to come to that issue but, as you have raised it, we will discuss it now.

The commission concluded that an admission that was made before the trial is in effect just new evidence and might as well be treated as such. Do you concur with that view?

Lord Gill: Yes. If there is to be an exception for new evidence, that would constitute new evidence if it passed the test that a verdict that was returned in ignorance of it must be regarded as a miscarriage of justice. That is the usual rule.

10:15

Nigel Don: Yes, and there would be no reason to change that.

I will come back to the general issue. I hesitate to challenge a High Court judge, but I am here to do so. Your comments so far have been on what the judges in general have thought, because you put together a response to the discussion paper. Given that I have got you here, I want to ask you for your thoughts on whether the exceptions to the double jeopardy rule—in particular, because it is where we have got to, the exception for admissions—should apply only to what I shall describe as serious cases, or whether we should write a law that will cover all cases just in case, even though we recognise that it will be used rarely.

Lord Gill: There is no consensus view among the judges on that point. If you are asking for my own view, it is my impression that, if the principle is a good one, it should logically apply across the board. However, a more pragmatic view would be that, if the courts are not to be flooded with minor retrials in which the inconvenience and public cost are out of all proportion to the seriousness of the conviction, there must be some arbitrary limit. That brings us into the political arena, as it is a judgment for the legislature to make.

Nigel Don: Some of my colleagues may want to come back to that issue, so I hope that they will forgive me for jumping ahead.

Would a sensible cut-off point be cases in which the original charge and trial were taken on indictment?

Lord Gill: If we were to confine it to trials on indictment, that would certainly cut down the scope of the problem enormously. Although indicted crime tends to be reported more in the newspapers, it is a very small proportion of the total amount of prosecuted crime in Scotland. As far as public perception of the problem is concerned, it is my impression that these controversies always arise in respect of murder acquittals.
Nigel Don: That would be one way of keeping them there. I will pick up on one other issue in relation to admissions. Section 3(4)(a) refers to “a balance of probabilities” and a credible admission. There are clearly two different concepts in there. First, is “a balance of probabilities” the right expression to use at that stage of proceedings?

Lord Gill: Yes. It is a test that is easily understood and easy to apply, particularly if a judge is making the decision.

Nigel Don: I am grateful to have that on the record. On the issue of credibility, other witnesses have suggested that any admission should be more than credible. The word “reliable” should perhaps be in there, given that we know that many “credible” admissions prove to be terribly unreliable in the light of history. Should the bill say something about the admission including significant information? Should the provision be strengthened, given that the history of admissions in legal systems is not good?

Lord Gill: The judges have no view on that, because they have not had occasion to consider it. Under section 3(4)(a), if the judge is to make a decision on that question and thereby set aside the acquittal, is the test to be whether the judge believes that the admission was made, or must the judge conclude that the evidence is capable of being believed, which may be rather different? The committee will have to consider that point.

Nigel Don: In the particular case of admissions, is it reasonable for us to ask the court that is considering whether there should be a retrial to give some serious thought to the credibility, reliability and significance of that admission instead of drawing the conclusion that we should allow a retrial merely because a jury could believe the admission?

Lord Gill: If evidence of that kind is to be admitted, it will be admitted for the purpose of having it believed by the second jury. That must be right. The admission is being put forward as a missing piece in the evidence that was before the previous jury. Therefore, it would seem to me that section 3 is getting at the fact that the Crown is producing evidence of an admission and saying that, given the opportunity to rephrase, it will ask the jury to take the admission into account. If that is the purpose of the provision, it would seem to me that the judge’s task is to decide whether the admission is capable of being believed rather than whether he or she believes it.

I am beginning to express personal views, and I have to be careful about that, as I am here to give the views on which my colleagues and I have reached a consensus.

Nigel Don: I look to the convener for his agreement, but I think that I am actually asking the Lord Justice Clerk for his views. Where he can speak for others, that is fine but, where he cannot, I am happy to have his view, because it is not often that we get the Lord Justice Clerk before us.

You are suggesting that it is the judge’s job to sort out whether the admission would be credible and it is the judge’s task to decide whether it believes it, how reliable it is and, therefore, how much notice it takes of it. Is that correct?

Lord Gill: Yes. A sound practical test would involve the judge asking himself, “If this evidence were led, is it the sort of evidence that is reasonably capable of being believed by the jury?”

The Convener: I think that we can see the sense in that.

I should underline that we are quite happy for you to express a personal view as well as the agreed views of the High Court bench—you may, of course, give a caveat when you do so.

One of the aspects that would be considered in an assessment of whether a case should be subject to a retrial on the basis of an admission would be whether the admission included any special knowledge. That would probably be a material consideration. However, of course, at the stage when the appeal court is hearing the submission from the Lord Advocate, only one view—the Crown position—is being advanced. The defence, through representations, could say that it does not think that the admission should be accepted or form grounds for a retrial. Therefore, the matter must go back to a second jury, which will hear the evidence in the manner in which it is presented. Do you agree?

Lord Gill: I agree with that general comment. However, you should remember that, under section 3(4)(d), the defence has the fallback position that, even if the other requirements are satisfied, it might still not be in the interests of justice to have the second prosecution. Quite rightly, the bill expresses that in general terms, because it is not possible to predict all the circumstances in which it could be said to be against the interests of justice to go ahead with a second prosecution.

The Convener: It is very much a judicial point.

Lord Gill: Exactly, and it would have to be considered in the light of the circumstances that were known at the time of the application to rephrase.

James Kelly (Glasgow Rutherglen) (Lab): The general new-evidence exception was something that the Scottish Law Commission did not come to a firm conclusion on. Leaving aside the issue of retrospective application for a moment, do you support the inclusion of such an exception in the bill?
Lord Gill: I am not quite sure about what you have just said. My understanding was that the Law Commission did not reach a view on whether the new-evidence exception should apply.

James Kelly: That is what I thought I said.

Lord Gill: I am sorry, in that case. The Law Commission was quite clear that it did not want to make a recommendation either way, and the judges were unable to reach an agreement on that point. The views of the judges were divided on the question.

James Kelly: The bill proposes that there should be a general new-evidence exception. As Nigel Don did, can I ask you for your position on that?

Lord Gill: It is a much more difficult point than the tainted acquittal exception. I find the tainted acquittal exception easy to understand, and I think that it is based on a sound principle. As you will have realised from your previous consideration of the bill, the general new-evidence exception raises a host of problems. New evidence brings with it endless scope for argument about whether it is, strictly speaking, new. In applying the test in new-evidence appeals in the appeal court, we insist that the new evidence must be new not only in the sense that it was not considered at the time of the trial but in the sense that it could not, with reasonable diligence, have been discovered at the time of the trial. I rather get the impression that the purpose of section 4 is to reflect the same approach. If that is the view of Parliament, that is an approach that can be applied, as it is routinely applied in new-evidence appeals in the court of appeal. However, it would undoubtedly widen the scope of applications for a reprosecution considerably.

James Kelly: The Scottish Government has indicated that a general new-evidence exception should apply only to a limited number of very serious offences. Is that stated intention effectively implemented in the list of offences set out in schedule 1, coupled with the power of ministers to amend that list by order?

Lord Gill: It is not a matter that I have had occasion to consider in detail, but I cannot dissent from the principle that it is for the Parliament to decide what the listed offences should be and, if need be, for the ministers to decide if and when the list should be amended. That is a perfectly reasonable approach to the legislation.

You will have gathered from what I am saying that I feel that there are dangers in terms of what new evidence could lead to.

The Convener: I am intrigued by what you are saying, and I have some sympathy with it. Will you detail circumstances in which you think that there could be an adverse consequence?

Lord Gill: There must be many acquittals in the past that are potentially subject to reconsideration in the light of advances in the field of DNA, for example; indeed, I think that there has been such an example in England in the past few days. On the whole, it would seem reasonable to say that acquittals in the past that were reached in ignorance of advances in scientific knowledge could almost be regarded as miscarriages of justice. In a sense, if DNA evidence absolutely rivets guilt on to an individual who was acquitted 20 years earlier, in the days before DNA was known about, their acquittal was a miscarriage of justice, although it was probably not a miscarriage of justice on the basis of the evidence that was led at the time. That seems to be a perfectly reasonable argument in favour of the new-evidence exception.

However, my difficulties are more pragmatic. I wonder about what repeated applications for reprosecution could lead to. The committee may think that the issue of resource implications should not properly be raised if we are dealing with principles, but there could be significant resource implications. We might find that there will be many more applications for reprosecution than grants of authority to reprosecute.

The Convener: A material aspect in the granting of that authority in such a case would surely be whether it would be in the interests of justice for a trial to proceed where the forensics were a material part of the prosecution case, but other aspects of both the defence and the prosecution cases would be tainted by the passage of time. Witnesses’ recollections of events that happened 20 years ago cannot be regarded as being accurate to the same extent as more contemporary recollections.

Lord Gill: I agree with that entirely. That is where there is the considerable safeguard of the interests-of-justice test. If there is to be a reprosecution, it will not just be a hearing of the new evidence; it will be a rehearing of all the other evidence, too. That evidence could have become very stale, and witnesses’ recollections may have become much less reliable.

Stewart Maxwell: You seemed to suggest that there could be a substantial impact on resources. What was that comment based on? Do you have evidence from somewhere else?

Lord Gill: No, not at all. It simply seems to me to be reasonable to predict that there could be many more applications than grants. We simply do
not know what the outcome of the new-evidence exception will be.

Stewart Maxwell: The changes in the double jeopardy laws in England went through some time ago—in 2005, I think—so we have five years of evidence. In your experience, have many applications been made in England?

Lord Gill: My understanding of the English experience is that the exception has been used very little.

Stewart Maxwell: That is my understanding as well.

Lord Gill: However, I have not gone into the matter in any depth.

Stewart Maxwell: You referred to the Mark Weston case from yesterday, which was the first such case in five years.

Lord Gill: I would like to make it clear that I am not here to advocate the saving of public resources if it is necessary that those resources should be spent. However, I thought that I should put that factor into your consideration.

Stewart Maxwell: You said that you thought there could be a substantial impact on resources. I simply wondered whether you had something particular in mind.

Lord Gill: No, absolutely not.

Nigel Don: I would like to follow up on your point about the need for a complete retrial if there was a reprosecution. Does that mean that, if evidence in the first trial had come from somebody who, 20 years later, is dead and there is literally no way of getting their evidence again, people will not be able to say, “Well, 20 years ago, this witness said the following”?

Lord Gill: There are ways of leading evidence about what was said by someone who is dead. That is not a conclusive difficulty. The much greater danger is that the witnesses are alive and give evidence. [Laughter.] If they have only the vaguest recollection of what happened, because it happened a long time ago, that will make life very difficult for the judge who is trying to control the trial, put the issues fairly to the jury, and explain to it how it should approach the evidence.

Dave Thompson (Highlands and Islands) (SNP): Good morning, Lord Gill. There is always a great danger with politicians—alive or dead. I suppose that the thing changes all the time anyway.

I want to ask about the limited serious offences that would fall under the general new-evidence exception, the list and the power in the bill for ministers to change the list by order. We have received evidence that suggests that even if the affirmative procedure were used, that would not be as good as requiring the ministers to come back with primary legislation, which would mean that there would be more scrutiny of additions to the list or deletions from it. Do you have an opinion on that?

Lord Gill: Not really. The idea of ministers being authorised to amend schedules such as schedule 1 is perfectly familiar and routine. There is no objection in principle to that; it happens quite a lot. However, I cannot properly express a view on whether it is better for the matter to be the subject of primary legislation. I am sorry if that is unhelpful.

Dave Thompson: No, that is fine. I simply wondered whether you had a view on that matter, as a number of comments were made about it last week in particular, and we have received written comments on consultation on orders.

Nigel Don mentioned cases on indictment in relation to tainted acquittals and admissions. It has been suggested to us that one way of getting rid of the list, which perhaps is too restricted, or includes too much, would be to say that all cases that are taken on indictment should be open to the new-evidence exception. I cannot remember the figure that has been quoted for the number of cases that are taken on indictment a year—I think that it was 15,000 or 16,000, so potentially a lot of cases would be included. Everyone who was tried on indictment would not have certainty; in a sense, their verdicts would be provisional, in that if new evidence came along, they could all be open to retrial. Do you have a view on whether using cases on indictment rather than a list would be a better approach, or would it be a not-so-good one?

Lord Gill: I have no view one way or the other on that. You are absolutely right, though. The moment that the legislation is passed, a lot of people who have been acquitted in the past will immediately be potentially liable to be reprosecuted in certain circumstances. The Scottish Law Commission made the point in its discussion paper that, in this and other jurisdictions in the world, it has been regarded as an important point that people who are acquitted should not be haunted for the rest of their lives by the fear of reprosecution. That is why there is value in the rule against double jeopardy and why exceptions to it should be carefully limited.

Other than that, I am sorry but I do not have a firm view one way or the other on whether there should be a list or whether all indicted cases should be covered; the judges have no view on the matter, either.

Dave Thompson: I want to ask about the retrospection aspect of the general new-evidence exception. In a sense, there is little difference
between a case that is dealt with a day before the bill becomes law and one that is dealt with a day later. If, 10 or 20 years down the line, new evidence emerges, is there any reason why the legislation should not be applied retrospectively? England, Wales and Northern Ireland have agreed to retrospection. I believe that Australia has also done so, and has allowed individual states to deal with the issue.

**Lord Gill:** The judges considered the matter in the context of the new-evidence exception and opinion was divided on whether the exception should be introduced. However, on the assumption that there would be such an exception, the judges were of a consensus view that it ought not to be retrospective. I have the judges’ consultation response in front of me. I notice that the matter was not the subject of any detailed discussion. The judges’ response simply said that the exception “should not be retrospective”.

All that I can say to supplement that is that there is general opposition among the judiciary to the idea of retrospective legislation because it raises difficult constitutional matters. I should think that it raises human rights matters as well.

**Dave Thompson:** Is it not the case that as soon as you have exceptions to the rule against double jeopardy, they are all retrospective because they can go back and deal with something that could not be dealt with before? A cut-off date is neither here nor there in that respect.

**Lord Gill:** You are absolutely right. If the legislation is passed, there will be an immediate difference between the position of a person on the day before the legislation is passed and their position on the day after it is passed.

**Dave Thompson:** The views of victims and of society in general should be taken into account. I stand to be corrected, but I understand that the English case yesterday was retrospective. If retrospection had not applied, am I correct in saying that there would have been no justice for the victim and that therefore society in general would have suffered?

**Lord Gill:** Forgive me, Mr Thompson—I do not mean this to be an unhelpful answer but it seems to me that that is pre-eminently a question for legislators. It is exactly what you are elected to decide, not me. [*Laughter.*]

**Dave Thompson:** That is very helpful.

**The Convener:** On the basis that the buck stops here, perhaps I could probe matters a little further, although you may be inhibited from responding. You stated that there were constitutional issues attached to retrospective legislation. Will you expand on that?

10:45

**Lord Gill:** It is just the general point that is made in relation to any retrospective legislation, which is that you create a liability that applies to someone—but it is a liability that, at the relevant time, did not apply to him and was not imagined to apply to him. It is a simple, general point that applies throughout the whole sweep of legislation.

Of course, there are examples in which retrospection is introduced in legislation—it has been done in other statutes—so it is not unthinkable that you can do it here. However, my point—and I am putting the matter very cautiously—is that you have to consider carefully the implications of retrospection. There could be human rights implications in the field of criminal prosecution. It may be different in the world of tax, for example, but we are talking about criminal liability and liability to imprisonment.

**The Convener:** For substantial terms.

**Lord Gill:** Yes.

**The Convener:** I listened to what you said about summary matters, but if the legislation is passed, we are totally reliant on the Crown applying it with a degree of common sense. It is only the more serious cases that are likely to be subject to the provisions in the bill.

**Lord Gill:** Absolutely. Of course, you also have a considerable safeguard overhanging all of this, which is the position of the Lord Advocate, who exercises wise judgment in the public interest. The office of Lord Advocate is a considerable constitutional safeguard.

**The Convener:** We are totally reliant on the Lord Advocate and her successors adopting an attitude towards the provisions that will ensure that they are used sparingly.

**Lord Gill:** Yes. That is why, in this country, prosecutions are not conducted oppressively. The office of Lord Advocate is such that before any prosecution is launched, the public interest is carefully considered.

**The Convener:** You dealt with the human rights implications. Mike Pringle would like to pursue that a bit further.

**Mike Pringle (Edinburgh South) (LD):** Before I come to that I want to pursue the issue of retrospective legislation. The scientific evidence in the trial that concluded yesterday did not exist 15 years ago. My understanding, if the news last night was correct, is that the person was convicted because there have been considerable scientific advances. DNA evidence was presented at the trial that could not have been presented previously. Given the advances in science, what is your personal view—I do not ask for the judges’
view—on whether it is right that, in such a situation, victims and others should be given closure in a case and should at least know what happened to their loved one? The scientific evidence that emerged is extremely strong. Is that not a reason for having retrospectivity?

**Lord Gill:** Absolutely. I entirely see the logic of that. For many onlookers and members of the public that is a very cogent consideration. I tried to make that point earlier.

**Mike Pringle:** Let us turn now to the question of human rights, to which you have referred. Do you have any concerns about the compatibility of a retrospective new-evidence exception with the various rights that are protected by the European convention on human rights? How do you think that is going to play out?

**Lord Gill:** It is impossible to predict how the arguments will be advanced in any individual case. Protocol 7 to the European convention on human rights has not yet been signed by the United Kingdom, but it recognises the double jeopardy rule and the possibility of an exception for new evidence.

I am not suggesting for a moment that the new-evidence exception per se is not convention compliant—I make it absolutely clear that I am not saying that. However, how it applies in an individual case is a different matter because, under article 6, the overriding question is whether the accused is going to receive a fair trial. One of the problems about legislation of this kind is that it is impossible to foresee all the possible ways in which the fair trial question could arise. Experience teaches us that it arises in many unexpected ways.

**Mike Pringle:** Absolutely.

**The Convener:** Yes, we have been caught out a few times under that heading. Let us turn now to applications to the High Court.

**Stewart Maxwell:** Lord Gill, you earlier touched on the protections that are in place. Before bringing a new prosecution on the basis of one of the exceptions that are set out in 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. Do the judges believe that the bill provides a robust framework for the proper consideration of such applications and do you foresee any practical difficulties with the bill as it is currently drafted?

**Lord Gill:** The judges have not had occasion specifically to consider that section. All that I can say to you is that there seems to be a useful safeguard in the fact that the decision would be made by a bench of three members of the court, not by a single judge. That would give an added measure of authority to the decision, whichever way it was made.

**Stewart Maxwell:** You are only speaking for yourself, but you have no problems with that.

**Lord Gill:** Yes. I have no personal objection to that.

**Stewart Maxwell:** Okay. That is very clear. Thank you.

**The Convener:** I have a couple of final questions. Let us go back to the answer that you gave on section 11. You said that you are content with that section, as it is in line with the current law to allow someone who has been convicted of assault to be retried for murder if the victim subsequently dies. However, it is new and beyond the Law Commission’s original recommendations to allow a retrial when the assault trial led to an acquittal. Last week, we had the dean of the Faculty of Advocates before the committee. He and other witnesses are concerned about that provision and have pointed out that the circumstances of the assault and the evidence that would be led would be identical—only the consequences would have changed. Is it the judges’ view that the provision is justified?

**Lord Gill:** I regret to say that the judges have not had occasion to consider that specific provision. Also, it is not entirely clear to me what the competing arguments are on both sides of the controversy; therefore, I have not reached a view of my own. If you consider the matter of sufficient importance, the committee might ask the Lord President if he would be prepared to invite the judges to consider the matter and submit a supplementary memorandum of some sort.

**The Convener:** We will consider the matter.

My colleagues around the table have heard me say, over the years, that hard cases sometimes make bad law. Inevitably, any case that is likely to be subject to any of the provisions in the bill will be a high-profile one that will almost certainly cause great public indignation and concern. In the circumstances, are you satisfied that even members of a jury that is properly directed—as, I am sure, it would always be in our High Court—would be able to apply their minds to consideration of the case without their views having been tainted by the inevitable publicity surrounding the case?

**Lord Gill:** There are safeguards against the influence of publicity if a second prosecution is being contemplated, are there not?

**The Convener:** Yes, but publicity would have surrounded the first prosecution and acquittal.

**Lord Gill:** Absolutely. If the Parliament passes the bill, it will be for the presiding judges at any retrial to give the jury strong directions on the
matter of concern that you have just expressed. It is not a novelty. At the moment, if there is a successful appeal against a conviction, the Crown can, in certain limited circumstances, apply for authority to reprosecute and, if the court grants authority to reprosecute, the trial judges are confronted with the same problem. They deal with it by giving suitable directions to the jury in the normal way.

The Convener: The committee has no further questions. I thank the Lord Justice Clerk for his attendance this morning. It has been an exceptionally valuable evidence session that has given us much food for thought, to which we will apply our minds in private session.
10:19

On resuming—

Double Jeopardy (Scotland) Bill: Stage 1

The Convener: Item 4 is our final scheduled evidence session on the Double Jeopardy (Scotland) Bill. A Scottish Parliament information centre briefing on the interests of justice test has been circulated, and members also have copies of the Subordinate Legislation Committee’s report on the delegated powers in the bill. Mr MacAskill is accompanied by Iain Hockenhull, the bill team leader; Danny Kelly, from the criminal justice and parole division; and Anne-Louise House, from the Scottish Government legal directorate. I understand that Mr MacAskill is content for us to move straight to questions.

Nigel Don (North East Scotland) (SNP): Good morning, cabinet secretary and colleagues. I will start with section 11, which you will recognise relates to the position when someone, having originally been accused of assault, is considered for retrial for homicide on the basis that his victim has subsequently died.

You will be aware that the Scottish Law Commission suggested that, when the accused had originally been found not guilty, that would be the end of the matter and he could be reprosecuted only if he had been found guilty first time round, but that is not the position in the bill. What is the justification for that?

Kenny MacAskill: We are maintaining the existing law, whereas the Scottish Law Commission proposal to restrict a second trial in this situation would change it, because currently a prosecution can follow. The subsequent death of the victim means that the court did not hear the full circumstances of a case that resulted in a death. Additional evidence may arise that was not available at the original trial and it appears to us that it is entirely reasonable for assault investigations to be less intensive than murder ones. Clearly, the police would go over matters significantly more in a case of murder or homicide than they would for a simple assault. The police have limited resources, so that is not a criticism in any way; they are required to make a pragmatic judgment.

Witnesses who might be silent about an assault are also more likely to come forward in the case of a murder and, as we all know, medical investigations provide a different perspective on the accused’s stated defence, so a special defence that was used at the first trial, such as
self-defence, might seem less applicable and less credible in the light of the victim's death.

Such cases are very rare. The Scottish Law Commission identified only a handful of cases and the Crown Office has identified five cases in the past 10 years in which Crown counsel's instructions were sought following the death of a victim after an earlier prosecution. It seems to us that the reform of double jeopardy in England and Wales did not make provision for such circumstances, but it remains possible there for a person who was acquitted of assault to be retried for murder.

Nigel Don: I am grateful to you for putting all that on the record. What is confusing me slightly is that, although we have recently had a few figures, nobody has indicated why this might have been a problem. There seem to be no notorious cases and nobody seems to be saying that we should be doing this or should not be doing that because of cases that have arisen. All the arguments that we have heard are essentially philosophical ones about whether it is right or wrong, and people's views have varied. Are you aware of any cases that have thrown this up as a real issue or are we, to a large extent, speaking in a vacuum?

Kenny MacAskill: I am aware of one constituency case—I will not go into details—that I have written to the Crown about, when a death occurred following an assault and a conviction for assault.

This has been a fundamental tenet of Scots law; we are not seeking to vary by legislation what has been a principle of Scots law ever since I studied at the University of Edinburgh in the 1970s. These matters may be theoretical and I think that most people who have studied law will accept that sometimes the theory is vastly different from the practice, but it is important that we retain the provision for consideration to be given to someone being retried in these circumstances. It is important that we retain that provision because, to some extent, the basis of the Double Jeopardy (Scotland) Bill is to reaffirm the position that double jeopardy applies and there are only exceptions to it. Equally, it is important that we preserve fundamental principles. Such cases are few, but they cause considerable anguish for the individuals concerned and there is a requirement for the possibility—not necessarily the definitive position—that they can be considered.

Nigel Don: On what may seem to be a technicality, are you aware of the fact that there are different tests of the public interest in the bill? I refer to the SPICe briefing on the interests of justice test—I am not sure whether you will have seen it. If I am reading things correctly—I will need to check this—a consequence of the bill is that the court is to be directed to apply the interests of justice test only when the accused was originally acquitted. No public interest test is set out if the accused was originally found guilty of the assault. Was that deliberate, or is it just the way it seems to have been written?

Kenny MacAskill: That was the intention, and it is about striking a balance. We are keeping the existing law but ensuring that protections are in place. When considering a second trial following an acquittal, rather than a conviction, it seemed right to us to apply a higher test.

In cases in which there was a conviction at the first trial, the emergence of new testimony or new evidence is likely to be less relevant. We are talking about a case in which the victim has been found guilty of causing the fatal injury has not been tried for causing their death. It could be argued that the second trial is a retrial with perhaps more intensive scrutiny and with consideration of slightly different matters. However, it is not double jeopardy: the second trial is the first time it has been possible to prosecute as a result of a death. The provision in the bill is the same as that proposed by the Scottish Law Commission.

The SLC did not think that the interests of justice test was required when the first trial ended in conviction, so it is only our provisions on acquittal that differ from the SLC’s approach. We have to bear in mind that Crown counsel will consider all the facts and circumstances of the case before instructing proceedings for a homicide charge. Those facts will include the evidence from the first trial, the sentence received and any factors relevant to the public interest. It is fair and legitimate to consider a situation in which the accused was convicted but the situation then changed because of the death of the victim. That situation is different from one in which there was an acquittal but other matters then came to light. We are striking a balance between protecting the existing law and providing additional safeguards.

Dave Thompson (Highlands and Islands) (SNP): I want to ask about previous foreign convictions, as covered by sections 7 and 10. Trials in other parts of the United Kingdom are clearly covered, and Schengen pools the UK with other EU states, Iceland and Norway. Obviously, we also have to consider other foreign convictions.

In evidence to the committee, the Faculty of Advocates has questioned whether the bill will work in practice. Will the cabinet secretary elaborate on how he thinks it will work?

Kenny MacAskill: As Mr Thompson suggests, there is scope to disregard foreign verdicts where corruption is suspected. We agree with the dean of the faculty that there may be difficulties establishing the details of a foreign case, but that
does not mean that we should not legislate. The provisions will have to be applied case by case, and it will be for the courts to decide. As I have said, we are establishing a principle. We concede that the numbers will be very limited; the number involving foreign cases will be more limited still.

In the event of there being a valid previous trial elsewhere, including south of the border, accused persons would be able to make a plea in bar of trial under section 7 and the prosecutor would need to establish a special reason for the trial to proceed. We accept that cases from abroad would cause complexity and it is fair to say that the law of Scotland, in contrast to the law south of the border, has always been loth to interfere in matters that occur in other jurisdictions, but it is important that we preserve our opportunity. We must acknowledge the complexity, but we provide in section 7 the opportunity for a plea in bar of trial.

Dave Thompson: I suppose that some cases cross a number of jurisdictions. Are you concerned about the standards that might be applied in some countries, as compared with ours? If the bill is passed, are you happy to revisit it after a period?

10:30

Kenny MacAskill: Absolutely. We recognise that there is variation from jurisdiction to jurisdiction. I think it is fair to say that the states that you worry most about in terms of the nature of convictions are usually those from which you get the least information.

We have had discussions—I am not sure whether in committee or elsewhere—on fatal accident inquiries abroad. I think there is recognition in Scotland that if something happens in a state that we recognise as having an appropriate, balanced and fair jurisdiction, we leave things to that state. We think that it is much better that the state investigates the matter; it has the resources on the ground and linguistic issues, including interpreting, are not involved. Equally, we are aware of matters of significant concern in that regard.

We are always happy to keep the matter under review. I think that it is fair to say that the situation will vary from state to state and case to case. A point of principle is involved: our preference is to protect that principle and leave the matter to Crown counsel and, indeed, the court, which may take the view that it is not satisfied with a trial that has been conducted abroad. If it is satisfied that the trial was conducted legitimately and appropriately, the plea in bar of trial will be upheld.

The Convener: I envisage some excitement on the diplomatic front if there is a view that the trial process in certain jurisdictions is not as we might wish it.

Before we move on to our next line of questioning, Robert Brown has a supplementary to an earlier question.

Robert Brown: I am sorry, convener; I was slow in asking to put it.

You may agree, cabinet secretary, that section 11, on acquittal, raises slightly different issues from those that apply to convictions. The conditions in section 4 talk of the court setting aside the conviction if “the case ... is strengthened substantially by the new evidence” that could not with “reasonable diligence” have been found beforehand. Would that apply to an assault case in which the victim subsequently died? If not, why not? Surely the principles are pretty much the same.

Kenny MacAskill: We should return to the principle. This is not double jeopardy. The second trial is caused by someone’s death; it is for something that could not have been prosecuted at the time of the first trial. The nature of the case is that the injuries the victim received resulted in death. The provision is about codifying an area of the common law. Neither the Scottish Law Commission nor the Government consider that double jeopardy is involved in such a situation. Contrary to suggestions from the Faculty of Advocates and the Law Society of Scotland, the provisions on new evidence do not apply in that situation; special justification is not necessary when the first trial ended in conviction. We believe that the interests of justice test should be enough when the trial ended in acquittal. We differentiate between acquittal and conviction. In the latter situation, the only change is the death of the victim. In the case of acquittals, we accept that there is significant change not only in the status of the victim—it is now a homicide—but the outcome. That is why a higher test has to apply.

Robert Brown: We can argue whether double jeopardy is involved, but the principle seems to be pretty similar for acquittal and conviction. Someone has been put on trial for an act that they committed, an act that has lead to a death. The accused was acquitted—normally, that is a final state of affairs. In effect, he is brought back to court to thole his assize again. What is the difference in practical terms between that and the new evidence situation? I do not follow the distinction that is being made.

Kenny MacAskill: The distinction is where we are coming from. As I said, the position in Scotland has always been the same when there is a death. We are seeking to codify common law. In doing that, we accept that we have to preserve the principle of Scots law that double jeopardy is not the norm—it does not happen. We are making
exceptions to that principle. Equally, in the bill, we recognise instances where people have been prosecuted and acquitted. When the victim subsequently dies, another trial can apply. This is both a theoretical and practical matter, albeit one that applies in limited situations. We see a practical difference: the status of the victim moves from having suffered injuries—severe or otherwise—to death. In that situation, we have to differentiate between acquittal and conviction. It seems to us that, in the case of an acquittal, matters have to be made clear. That is why we think that this is covered by the interests of justice test.

The Convener: We will now deal with tainted acquittals.

Stewart Maxwell (West of Scotland) (SNP): Section 2 deals with tainted acquittals. Some committee witnesses have raised concerns about the scope of the bill. For example, it has been suggested that the possibility of further prosecution should be limited to more serious offences, as it is in section (4)(3)(d), which talks about the offences listed in schedule 1. What is the thinking behind the fact that that is not the case in tainted acquittals?

Kenny MacAskill: We disagree with the suggestion that the possibility of further prosecution should be restricted to more serious cases. However serious the charge, people should not benefit from attempts to pervert the course of justice and criminal trials. That principle should apply as much to a minor charge in a district court as to a more serious charge in the High Court of Justiciary. We have a fundamental interest in justice being served. No matter how many times proceedings are corrupted or who is responsible for the tainting, it undermines the system and its integrity. The fundamental point is that the first trial was not fair.

The Scottish Law Commission concluded that it is unrealistic to require definite proof that the accused person was involved in the corruption. Lord Gill and the Faculty of Advocates supported the bill on that point. We have to put the caveat that acquittals are to be set aside under section 2 only if that is possible in the interests of justice. That should offer sufficient protection from abuse of process. The fundamental point is that at whatever court and at whatever level, if the acquittal is tainted, justice is undermined—and we do not think that there should be any restriction, for example to offences on indictment.

Stewart Maxwell: That is clear. You said, “No matter how many times” in your response, so I assume your answer to the suggestion that further prosecutions should be limited to one more time, as is the case in other parts of the bill, is the same; that no matter how many times a trial has been tainted, the slate should be wiped clean and another trial held, irrespective of the number of previous trials.

Kenny MacAskill: Yes. As I said, the Scottish Law Commission suggests that it could be argued that someone who makes an admission is consenting to a new trial. When an accused boasts that they have “got away with it”, there should be no limit to the seriousness of the offence or the number of trials. Any undermining of the judicial process taints the system and undermines its credibility. We have to protect it at every level and over whatever period of time.

Stewart Maxwell: I will push you slightly on whether the individual who was tried was involved in the tainting. Some of the opinions that we heard said that it would be unjust to retry an individual if they had taken no part in an attempt to taint the trial. The example that was used was of someone who had been accused of rape and an individual from outwith that situation decided to, if you like, get even by trying to taint the trial, irrespective of the fact that the individual who was on trial had no idea that such a tainting was going on. If he were acquitted, it is suggested that it would be unjust to retry him. What is your view?

Kenny MacAskill: That is a factor that Crown counsel and the court would take into account. At the end of the day, it is the interests of justice that matter. If a trial has been tainted—for whatever reason—the victims would expect some consideration of that. What you have described would be a factor relevant to the consideration, but the trial’s not being tainted by the person who was being tried should not undermine the possibility that the trial was tainted.

Stewart Maxwell: So that factor should not be an automatic bar to a retrial, but it should be relevant to the consideration of whether it is in the interests of justice to go ahead with a retrial?

Kenny MacAskill: When a court considers a tainted trial it will consider the situation in the round. What you have described will be one factor, but it should not be an absolute bar.

Stewart Maxwell: Thank you.

The Convener: Although I agree that where there is an acquittal that has been tainted there must always be a legal remedy, I think that there would be a view that this legislation would be used sparingly. I do not imagine that there would be many summary prosecutions that would result in an attempt to retry.

Could this matter be dealt with quite simply by libelling a charge of attempting to pervert the course of justice?

Kenny MacAskill: That is a fair point. If somebody gets their brother or somebody else to
take the rap for them in a road traffic offence or something like that, from a pragmatic point of view that might well be dealt with through a charge of perverting the course of justice. That is a matter that we would leave to the Crown and the courts. This is about pragmatism and flexibility. You are right that many minor matters would be dealt with in the manner that you suggest—we would fully support that—but it is important that we retain the principle. There might be circumstances—I do not want to speculate or specify them—in which it is felt appropriate to have a retrial.

**The Convener:** Let us now turn to admissions. There might be fairly general agreement, but I would like us to tidy up one or two points.

The proposals outlined in section 3 go beyond what was in the Scottish Law Commission’s report, in that they would apply to pre-acquittal admissions as well as post-acquittal admissions. Why did the Government decide to depart from the commission’s recommendation on that point?

**Kenny MacAskill:** The general principle that the commission stated in its report was that somebody should not be able to boast with impunity about their guilt. We accept that; the Government agrees with that principle. However, we do not believe that it should be applied differently simply because of the date on which the admission was made. All double jeopardy admissions should be considered by the courts in the same way, whether they are made before or after an acquittal. The extension is only for admissions that the prosecutor could not have reasonably expected to know about.

**The Convener:** As you are probably aware from the evidence, there has not been universal approval of the provisions in section 3. Indeed, it has been argued that the exception should be limited to more serious offences and that tests relating to the potential significance of an alleged admission should be strengthened. You have dealt with the type of case to which this should apply. What is your response to the other concerns?

**Kenny MacAskill:** Our response to the other concerns is that these matters affect the fundamental principle and tenet of justice by which—without quoting any advocate deputes or whatever—our system is sustained. It is important that we sustain the principle. We recognise that there has to be pragmatism and flexibility within the system. In many instances, minor matters will be dealt with in another way. There is more than one way to skin a cat.

A variety of other matters were raised, such as requiring witnesses to explain why they did not come forward earlier. We do not think that a specific provision is needed. Under section 3(4), the court has to be satisfied that the admission could not, with the exercise of reasonable diligence, have become known to the prosecutor at the time of the original trial and that it is in the interests of justice to set aside the acquittal. We think that the suggestion that there requires to be some explanation is not appropriate there.

The same applies to raising the standard for the credibility of admissions under section 3(4) to beyond reasonable doubt. We are not attracted to the suggestion of changing the test for credibility. On the balance of probabilities is satisfactory. “Beyond reasonable doubt” is the test that is applied to the criminal case as a whole, not to each isolated piece of evidence. That is a fundamental matter in any trial, which would be pointed out by any sheriff. The Lord Justice Clerk thought that the bill’s test was appropriate. We have to differentiate between individual matters that are part of the causal chain and the fundamental matter that would ultimately be the consideration by the sheriff or the matter for the charge to the jury.

**The Convener:** As you know, section 3 seeks to cover both post and pre-acquittal admissions. In its evidence, the Scottish Law Commission suggested that there is no longer any justification for having separate sections dealing with admissions and other forms of new evidence. It suggested that all new evidence should be dealt with using the provisions in section 4 and that, from a drafting point of view, section 3 is redundant. Do you have any comments in that respect?

**Kenny MacAskill:** We think that admissions should be dealt with separately. The accused is specifically waiving his right to be free from further prosecution. That is the approach taken by the Scottish Law Commission. The new evidence section is limited to a specific range of offences. The admissions exception should be capable of covering any offence. Again, that is the approach taken by the SLC. In light of the committee’s stage 1 report, we will give further consideration to bringing the tests in section 3 closer to the tests in section 4, so that the bar in both sections is set at the same level.

**The Convener:** There is an issue in that. It is no great issue of principle, but the bill could be re-examined and strengthened by changing one or other section.

Bill Butler will ask about the general new evidence exception.

10:45

**Bill Butler (Glasgow Anniesland) (Lab):** The Scottish Government has indicated that a general new evidence exception should apply only to a limited number of very serious offences. It has
been argued that that stated intention is not effectively implemented in the list of offences that are set out in schedule 1, because for example of the inclusion of very broad offences such as sexual assault. Are such concerns valid?

Kenny MacAskill: Those are matters that we are happy to consider and reflect on. The bill covers murder, rape, culpable homicide and serious sexual offences, and I am aware that Patrick Layden of the Law Commission acknowledged the difficulty of the issue. The Law Commission could not come to a resolved view on what should be on the list and therefore recommended a minimum, leaving it to Parliament to consider that remainder position. We welcome the views of the committee and await its report.

Bill Butler: So you are willing to consider the issue as matters proceed?

Kenny MacAskill: Absolutely. We have all been contacted by various organisations in relation to driving offences and other matters. The general view of the Government has been that we should be as open as possible. We accept that it would be possible to go on for ever, but we are talking about a limited number of cases. It might be that there would be some cases that, even if we were to live to the same age as Methuselah, would never be prosecuted. Equally, there is a point of principle in the bill, and I understand how people would feel if a situation arose in which there was a manifest injustice. We are genuinely open and are happy to listen to the committee and to others who have made representations. We view the list as not exhaustive.

Bill Butler: You will be aware that the Subordinate Legislation Committee’s report recommends that the Scottish Government consider imposing a robust consultation requirement prior to laying an order to alter the list of offences in schedule 1. Do you intend to modify the bill at stage 2 in light of that recommendation?

Kenny MacAskill: Obviously, we listen closely to what the Subordinate Legislation Committee says. However, the bill uses the affirmative procedure, so Parliament would have full scope to consider any changes and it would be for Government and Parliament to consider what would be appropriate for each case.

If there is to be a consultation requirement, it should be informal—in the interests of avoiding legal challenges based on the consultation process. That comes back to your first point. If we want the flexibility to deal in a pragmatic way with matters such as offences that might arise as technology changes the society in which we live, we must strike a balance. It seems to us that the affirmative procedure provides Parliament with a degree of assurance that matters will not be legislated on or changes dragooned through by an Administration of whatever colour. Equally, I think that including a requirement for a formal consultation process might restrict the will of a Parliament that might be keen to deal with a new situation.

Bill Butler: If your preference is for informal consultation, are you ruling out the use of the super-affirmative procedure, which would involve formal consultation?

Kenny MacAskill: We are happy to bow to the will of Parliament and to take on board the view of the committee. We think that having informal consultation in combination with the affirmative procedure is appropriate. If, after consideration, the committee feels that use of the super-affirmative procedure is necessary, we will be happy to accept that. It comes back to the point that for us to be able to deal with manifest injustices there has to be an element of pragmatism and flexibility. We are not giving an absolute no; we are trying to strike a balance. If the committee feels that we have not struck the right balance we would be happy to consider the matter, but we would be loth to tie the hands of a future Administration by making it have to go through an extensive consultation process and a significant legislative process when the whole Parliament might agree that a particular offence that was not covered by the new double jeopardy provisions should be covered by them.

Bill Butler: So your preference is to have the flexibility that you have described?

Kenny MacAskill: Yes. We think that use of the affirmative procedure, along with informal consultation, strikes the right balance.

Bill Butler: Thank you.

The Convener: I call James Kelly, although the cabinet secretary has to some extent anticipated his questions.

James Kelly: I want to continue the focus on the general new-evidence exception. In allowing for it to be applied retrospectively, the Government has departed from the view of the Scottish Law Commission. In evidence, some witnesses have sided with the commission and opposed the retrospective application of the general new-evidence exception. How do you respond to those who have adopted that position?

Kenny MacAskill: We fully accept that they are entitled to take that position. We always listen but, equally, we are conscious that most of the witnesses seemed to accept that the issue is one for the Parliament to take a decision on. Lord Gill, the Faculty of Advocates, the Scottish Human Rights Commission and the Scottish Law Commission all gave evidence. Although some, if
not all, of them indicated that they opposed retrospectivity, they conceded that it was a matter for the Parliament to come to a view on. There are some issues that are fundamentally legalistic and there are other, much broader issues relating to the interests of justice that need to be considered by the Parliament.

We must set the matter against the backdrop of the concerns regarding public confidence in the justice system. If the new-evidence exception did not apply retrospectively, it would mean that when compelling new evidence emerged—as happened in the Vikki Thompson case in England, which resulted in a prosecution just last week—there would be no prospect of bringing a similar case in Scotland. If such a situation arose in Scotland and we could not deal with it because the general new-evidence exception could not be applied retrospectively, each and every member of the Parliament would receive a considerable amount of mail, electronic or otherwise, from people complaining.

I accept that those who operate in the legal field take a strict interpretation of matters, but it is necessary for those of us who represent the public and who must therefore take a broader, public view to recognise that there is a public interest in allowing retrospective application of the new-evidence exception. I can understand why lawyers do not like retrospectivity—indeed, many lawyers do not like the new-evidence exception, full stop—but we must take cognisance of the public’s view. If a situation such as the one that arose in the Vikki Thompson case south of the border arose north of the border, but there could be no prosecution, that would be a manifest injustice. It would not satisfy people who complained to us, as elected members, that that was the law; they would expect the law to be changed.

James Kelly: Another issue that was raised was whether the proposed retrospective application of the general new-evidence exception would be compliant with the European convention on human rights. What steps has the Government taken to ensure that the proposed provision would be ECHR compliant?

Kenny MacAskill: It is ECHR compatible. The safeguards that are contained in the bill mean that double jeopardy prosecutions will be rare. As we have said, only a small number of persons will face further prosecution. The new-evidence exception will affect only a small number of offences. Those whose acquittals have been tainted or who admit their offence should not expect immunity from justice. I do not think that there is any significant suggestion that the proposed provision is not ECHR compatible. Such matters have to be considered before any bill is introduced. Similar legislation south of the border and elsewhere has not been subject to, or revoked as a result of, ECHR challenges.

James Kelly: You declare that you are confident that the legislation is robust and ECHR compliant. Can you give us a bit of detail on some of the work that the Government has undertaken to ensure that that is the case?

Kenny MacAskill: We do that through our lawyers. Any legislation that is to be approved by the Scottish Parliament must be ECHR compatible and that issue has been considered by those who drafted the bill and by the SLC.

The SLC looked at a broad swathe of jurisdictions that have double jeopardy legislation. I concede that not all those countries—I am thinking of New Zealand and the USA, for example—are subject to the ECHR as we are, but the Republic of Ireland, and England and Wales, have reflected on the broader European context. We are in no doubt: there is no question of the legislation not being compatible with the ECHR.

James Kelly: To be clear, the Government lawyers examined the legislation and briefed you accordingly that, in their view, it would be ECHR compliant.

Kenny MacAskill: Yes. We are satisfied that it is ECHR compatible.

The Convener: Let us hope that if the matter is ever challenged that view prevails, although in light of some of the judgments, I cannot be confident.

Nigel Don: I want to come back to the new-evidence exception. As we discussed, schedule 1 lists the offences for which that might be appropriate. It has been suggested that, rather than using that list, we should simply say that any case in which the trial was first brought on indictment would be open to the new-evidence exception.

Kenny MacAskill: We will consider that further, but as most offences can be tried on indictment that would make the potential for further prosecutions on new evidence much wider than the list in the bill.

It may be appropriate in adopting such a test to retain the list, so that the offence would have to have been previously prosecuted on indictment as well as being on the list. We are happy to consider that, but there is good reason to have a list rather than simply saying that the exception should apply to any trial that was brought on indictment rather than on a summary complaint.

Cathie Craigie: At present, an acquitted person gains an assurance from a judgment that they cannot be tried or prosecuted again for the same crime. It may be argued, as we have heard in
We have the interests of justice test and a variety because each case will be fundamentally different. The best test is to leave the matter to the courts, which will have a clear view of the wish has gone. The best test is to leave the matter to representations may be made if defence evidence of the starting block. Equally, I accept that one might argue that it would be difficult to get out for example, all the evidence has been destroyed, the court must view that as one of the factors. If, we would be more than happy to examine them.

We believe, however, that there is a fundamental point of principle, which goes back to the reference that we made to the Scottish Law Commission early in the current parliamentary session, following the World’s End case. As we all know, there is in Scotland a desire to see justice served. Justice is not served if the submissions from m’learned friend A outweigh those from m’learned friend B, and someone who is manifestly guilty and has tainted evidence or corrupted the process subsequently boasts about it.

We recognise that the provision must be limited and sparing, and that it should apply only in the most serious cases, but justice would not be served if we did not bring in this bill.

Robert Brown: I want to discuss some of the practical implications of the legislation. If the evidence in the previous case has been bunged out by the time the new case comes along, that presents obvious difficulties. Can you give us some feeling for the rules or arrangements that apply to the retention of evidence in cases in which people have been acquitted?

Kenny MacAskill: The same rules as we currently have must apply. There will be complexities, but those matters are more for Crown officials. If representations are made that the current arrangements on disclosure or retention of DNA are inadequate or inappropriate, we would be more than happy to examine them. The court must view that as one of the factors. If, for example, all the evidence has been destroyed, one might argue that it would be difficult to get out of the starting block. Equally, I accept that representations may be made if defence evidence has gone. The best test is to leave the matter to the courts, which will have a clear view of the wish of the Parliament.

11:00

The bill cannot cross every t or dot every i, because each case will be fundamentally different. We have the interests of justice test and a variety of other provisions. We are also well served by our judiciary. At the end of the day, we must remember that it is not simply a matter for the Crown and that the judiciary must weigh the evidence in the scales of justice. We should leave it at that. I am happy to take on board particular representations from the committee on what may need to be done, but I am wary of anything that would impose further bureaucracy on the police by requiring them to retain more evidence than they currently retain, which is significant.

Robert Brown: Perhaps I did not phrase the question as well as I might have. I was looking not so much at the court test as at the practical implications of physically retaining evidence for the police and the prosecution. It would be helpful if you could tell us what currently happens with regard to the retention of evidence when people are acquitted. Does the sheriff clerk normally keep the evidence for a certain period, is it thrown out or does it go back to the police?

Kenny MacAskill: Such matters are dealt with by practice rules between the Crown and the police, which discuss where evidence should go and what evidence should be retained. The issue is best dealt with by them. It would be inappropriate for me to interfere in the discussion of whether evidence should be retained by either the Crown or the police. If you need more information on the issue, I can ask the Lord Advocate or the Solicitor General for Scotland to advise you. We understand that arrangements will be made and discussions entered into between the Crown and the police about how such matters should be dealt with.

Robert Brown: It might be helpful if you could provide us with some information in writing after the meeting. More to the point, I was trying to get at whether the proposed change in the law will have practical implications for the Government and the various agencies that must deal with it. Will it affect how they store evidence and how they look at cases in which there have been acquittals in the past? How will they identify cases that may be worth looking at again? Will issues simply emerge from the woodwork? Is the Government looking at mechanisms to ensure that we make appropriate use of the new law, without imposing the big bureaucratic burden to which you rightly refer?

Kenny MacAskill: You are right to say that we are wary of imposing a big burden. We understand that the likely costs will be fairly de minimis. The issue will be subject to practice notes and discussions between the Crown and the police. You were correct to refer to the fact that there are practical matters that must be addressed. We are wary of going anywhere near that, as we could reach the point almost of giving directions to the
Crown and the police, which we do not, would not and constitutionally cannot do.

Although the Parliament legislates on disclosure and a variety of other matters, we believe that the issue is best dealt with through discussion between the Crown and the police. If they believe that there is a legislative lacuna, we will be more than happy to consider that. However, we understand from discussions with both the Crown and the police that they already have procedures in such circumstances. Those will have to be reviewed and, doubtless, modified as a consequence of double jeopardy proceedings, but that is an operational matter for the Crown and the police, rather than a legislative matter for the Government.

Robert Brown: I am not sure that that is entirely the case. Presumably someone who has been acquitted is entitled, after a certain amount of time—for example, the period of appeal—to get back physical evidence such as clothing or a computer that has been taken away from them. I do not want to dwell on the issue too much today, but it would be helpful to the committee if you could provide us with an understanding of the current rights of people in that position and whether the Government is looking to change them in any way.

Kenny MacAskill: We will be more than happy to consider the issue. I assure you that the bill is not seeking to change in any way the legislation and regulations that govern DNA retention and so on, which will continue to apply. All that is changing is the possibility, theoretical or practical, of a matter being considered in due course. We are happy to reflect on the issue and to advise the committee. As I say, there will be no legislative change as a consequence of this. Nobody would have their rights on DNA retention changed on the whim or fancy of a police officer or prosecutor—that just would not happen.

The Convener: You see the problem that Mr Brown raises. Let us suppose that there was an allegation of a murder in which the weapon was a motor vehicle. If the prosecution failed and the accused was acquitted, he would be entitled to get his car back irrespective of the Crown’s view. The practicality is that we cannot have a massive warehouse somewhere to store bulky productions.

Kenny MacAskill: I fully accept that. That would be a pragmatic decision for the Crown to take. I would have thought that, in such instances, the Crown would first consider an appeal, for which the vehicle may be retained.

Ultimately, it is a matter for the Crown and the police. If there are implications, there may have to be legislative changes, but we will cross that bridge if we come to it. Normally, however, if the murder weapon was a vehicle and there was an acquittal, unless an appeal was being marked and proceedings were being held in some way or other, the vehicle would be returned and any prosecution that followed months or years thereafter would perhaps have to proceed in the absence of the vehicle, as it may have been crushed, destroyed or sold abroad. That is simply one of the hoops and hurdles that result in retrials being few and far between.

Stewart Maxwell: Let us continue with the convener’s example of the murder weapon being a vehicle. I presume that, even if the vehicle was not available for any future trial, lots of evidence about the vehicle would be available, such as photographs, film, swabs, the results of any chemical tests that were done, samples of fibres and all sorts of other things.

Kenny MacAskill: Absolutely. We live in a world of best evidence, which is how it has been ever since I entered the legal profession. The best evidence would be the vehicle but, in the absence of the vehicle, it would not be impossible for a retrial to proceed on the basis of a photograph. In the absence of a photograph, something else could be docketed. These are simply procedural matters. They will cause some inconvenience and difficulties for police, prosecution, court and defence, but they will be sorted out in due course.

The Convener: I anticipate some best evidence points being raised. It would be useful, in the generalities, if you could arrange for the appropriate correspondence to be sent to us detailing what precisely is happening at the moment.

I suspect that the committee may largely be with you in quite a lot of what you have said this morning. The one issue that arises is that—as you rightly say—there are cases that attract great public concern, indignation and anger because of a perceived miscarriage of justice. If that miscarriage of justice falls under some of the headings in the bill, which I personally agree with, we will still have difficulty in holding a fair trial, bearing in mind the extent of the publicity surrounding the initial proceedings. Is there a way around that?

Kenny MacAskill: We already have that. The Parliament passed the Judiciary and Courts (Scotland) Act 2008, which enshrined the independence of the judiciary. The judiciary was always independent, but the act makes it clear that it is free from any political interference, whether by the Government or by Opposition members, and that it will act without fear or favour entirely impartially. Equally, the separation of powers and the fact that the Lord Advocate acts in the public interest provide reassurance.
So we have checks and balances, as well as a public prosecutor who is independent from Government and the body politic and who acts in the public interest—not on the basis of being a prosecutor, but on the basis of the public interest being served. We also have a judiciary that is entirely independent from the Government and the body politic. That provides the separation of powers that is necessary in any democracy.

The reason for that is the old adage that hard cases make bad law. That is why we ensure that those matters are not dealt with by the Government or politicians, but by an independent prosecutor and an entirely independent judiciary.

**The Convener:** I fully accept and agree with what you say. My concern would be finding a jury that has not been affected by the publicity.

You mentioned the World’s End case, which caused considerable public concern. As I see it, the bill would not cover an eventuality such as that case, but how would you get round the situation in which potential jurors read about the case and then, within a couple of years, something arises that allows permission for a retrial to be sought? How can a jury, even if properly directed, apply the appropriate detachment?

**Kenny MacAskill:** First of all, schedule 2 mentions the Contempt of Court Act 1981, which covers that issue. An issue such as that would legitimately be raised by the defence. The judiciary would have to decide whether it felt that a fair trial could take place in the circumstances. I have no doubt that, on occasion, it would take the view that a fair trial could not take place.

Secondly, there are occasions on which empanelled jurors would need to declare an interest. Jurors would be asked about their involvement and so on.

There is a variety of factors, therefore, starting with whether the case would get across the first hurdle of being able to be dealt with. There are then further checks and balances, including when a jury is being empanelled. Finally, I would have thought that at each stage the judge would be making clear the caveat that the jurors have to consider the case on the evidence and the facts as they see them and not on any prejudices or views that they may have picked up elsewhere.

Retrials are more difficult, although the media age in which we live affects every trial. That is why the judiciary ensures that strictures are brought to bear on reporting and jurors are given counsel and warnings about how they are expected to behave.

**Robert Brown:** Surely one of the difficulties here is the provision in section 4(6)(c), which is one of the conditions that apply to whether the High Court would allow a new trial to be brought. It says that the court has to be satisfied that

"on the new evidence and the evidence which was led at that trial, it is highly likely that a reasonable jury properly instructed would have convicted the person of—

(i) the original offence."

With great respect, it is extraordinarily difficult to envisage how a decision by the court, preliminary to the case going before a new jury, could be anything other than prejudicial if the case has been reported in the press. Regardless of anything else, before the case even gets across first base the view of the court has to be that a reasonable jury properly instructed would have convicted. That is extremely significant.

Bearing in mind the terms of that section, do you envisage that there would be publicity about the request for the new trial or any restrictions in that area?

**Kenny MacAskill:** Again, those powers do exist. It is an issue for the court. It is not dealt with by the justice secretary, by Government or by politicians. It would be a matter for the good sense of the judiciary. If the judiciary felt that publicity would impact on any possible proceedings, it might seek to restrict it. We would be perfectly comfortable with that and would fully support it.

The matter is dealt with in schedule 2, which says:

"In paragraph 4 (initial steps of criminal proceedings), after sub-paragraph (e) insert—

"(f) the making of an application under section 2(2) (tainted acquittals)".

My understanding is that, when Lord Gill appeared before you, he was content with the provisions. Those are legitimate points to raise. Doubtless, at some stage, a judge may feel that a fair trial could not possibly take place for the reasons that you say, but we must leave that to the facts of the case and the presiding judge.

**11:15**

It is for us to ensure that the appropriate checks and balances exist in the bill, that we do not interfere with the broader checks and balances and that, if additional checks and balances are necessary, we add them. However, I believe that the reason that Lord Gill is content is that, for contempt of court, we have the facility for proceedings to be in camera and for no reporting to take place. That would allow a trial to proceed.

We have the opportunity to ensure that, as any judge would do at any instance, any potential juror who might be empanelled but had an interest would not go on the jury and that those who serve the public interest on the jury are counselled and
warned about what it is appropriate for them to bear in mind, what they should reflect upon and what they are being asked to do. That is why the charge to the jury remains a significant and important part of a judge's responsibility.

The Convener: There are no further questions. This has been a useful evidence-taking session. Is there any point that you feel has not been raised, Mr MacAskill?

Kenny MacAskill: No. We are happy to provide the additional information requested. Some of the questions that the committee raised are correctly matters for the Crown and the police. There are procedural issues, but we are happy to provide the information.

On the broader issues, we look forward to reading the committee’s report. On the areas that we mentioned, we are happy to take its advice.

The Convener: Thank you for that.

Before the cabinet secretary departs and as this is the last public agenda item with which the committee will deal in a fairly exciting year, it is appropriate to wish the compliments of the season to all those who have serviced the committee so well over the past year and those who have given evidence before the committee. We are grateful indeed.
ANNEXE E: INDEX OF WRITTEN EVIDENCE

Association of Chief Police Officers in Scotland
Association of Chief Police Officers in Scotland (supplementary submission)
James Chalmers
Crown Office and Procurator Fiscal Service (supplementary submission)
Crown Office and Procurator Fiscal Service (further supplementary submission)
Professor Peter Duff
Faculty of Advocates
Glasgow Community and Safety Services
Judges of the High Court of Justiciary
Law Society of Scotland
People Experiencing Trauma and Loss
Professor Paul Roberts
Royal Society of Edinburgh
Morain Scott
Scottish Campaign Against Irresponsible Drivers
Scottish Human Rights Commission
Society of Solicitor Advocates
Victim Support Scotland
Justice Committee

Double Jeopardy (Scotland) Bill

Written submission from the Association of Chief Police Officers in Scotland

I refer to your correspondence dated 12 October 2010 in connection with the above subject, which has been considered by members of the Crime Business Area and Criminal Justice Business Area, and can now offer the following by way of comment.

The proposals in the Bill, to bring the law in Scotland in line with the reforms previously adopted in England, Wales and Northern Ireland, are generally welcomed. It is believed that this approach best represents the interests of justice and the victims of crime.

In relation to Disclosure there appears to be no guidance around this area. It is unclear, should the decision be taken for a retrial, if there would be any requirement for the original evidence to be the subject of Disclosure. If it were the case that Disclosure was implemented, this may have financial implications.

The case for an exception where the original acquittal was "tainted", and the merits of the exception as given effect to in the Bill

This exception applies particularly to organised crime, where high level criminals may seek to influence legal proceedings in their favour.

If the original trial was found to be tainted, in the manner outlined in the Bill, it is agreed this would be in the interest of justice for the original trial disposal to be annulled and a new, fair, trial to commence.

It could also be argued that, due to the actions of the defendant in a ‘tainted’ trial, for example through jury rigging, witness intimidation etc., the defendant was never in jeopardy of conviction and a subsequent trial would be the first time they were actually at risk of conviction.

In the Bill, Sections 2, 3 and 4 only apply to a person who ‘has been acquitted of an offence (the ‘original offence’). While that may be an obvious statement, given the nature of the Bill, it is entirely feasible that a person may stand trial for a substantial crime or offence but, due to tainted testimony or process, lack of admission or non-availability of subsequently available material evidence, they are found or plead guilty to an amended and greatly reduced libel. In such circumstances the provisions of this Bill would not then be available to the Crown and this may not be the intention of the legislation. It may be that the ‘special reason’ in terms of Section 7(4) could be utilised, but that is far from clear, and such a catch-all would, in effect, make the terms of Sections 2, 3 and 4 practically redundant.
The case for an exception where an acquitted person subsequently confesses to the offence, and the merits of the exception as given effect to in the Bill

This is an important exception with regard to public confidence and in meeting the interests of justice. It is unacceptable that an individual acquitted of a grave crime and who subsequently confesses to the crime should escape justice. Clearly, such admissions should be significant and unequivocal in terms of committing the act and not merely an inference that they were present at the crime.

The case for an exception where new evidence of guilt emerges

This aspect is of particular importance, considering the ever-advancing range and sensitivity of investigative techniques, including forensic tests, which may uncover compelling evidence after the conclusion of a trial. Again, the interests of justice and public confidence in the justice process would be served by such a provision.

The range of offences to which this exception should apply

In line with the Bill, it is agreed that the restrictions provided by the SLC are too limited and that offences should be extended beyond simply murder and rape, with a number of options worth considering. In England and Wales and Northern Ireland offences are specified according to their seriousness, for example, murder, culpable homicide, rape, kidnapping, serious sexual offences (including against children), serious drug offences, acts of terrorism, certain cases of attempts or conspiracies to commit defined offences. It is agreed that Scottish Ministers should have the power to amend this list, when appropriate. In parts of Australia the offences in the exceptions apply by the length of sentence that the offence carries. Another option is to include all cases originally tried at the High Court, given the seriousness of the crime. Over-restricting the applicable range of offences may be counter productive but there is an argument for some limitation, to ensure capacity, sustainability and proportionality.

It should also be considered that there are indications there may be an increase in the number of rapes reported under the Sexual Offences (Scotland) Act 2009; an estimated increase of 26% has been suggested. This may result in a greater number of double jeopardy cases than presently expected.

Whether the application of this exception should be retrospective

It is the ACPOS position that the new evidence exception, whether through admission or material evidence, should apply to all cases, including retrospective cases. This is considered essential to maintain public confidence in the justice system and respect for all victims of crime.

The human rights implications of the Bill (and, in particular, of the retrospective application of some of its provisions)

ACPOS believes that the provisions of the Bill are compatible with human rights. In terms of the retrospective application of the legislation, this must be balanced against the rights of victims and the interests of justice. The Bill clearly outlines that
it should only be possible to try persons for conduct that was criminal at the time and they are only liable to the maximum penalty that could be applied at that time – this therefore covers the following from Article 7 of the ECHR:

‘…prohibits not only the criminalisation of conduct which was not criminal at the time when it was committed, but also the imposition of a more severe penalty than was competent at that time’ (Article 7 of the ECHR)

It is important, however, that the presumption of innocence is upheld during the trial.

I trust that the foregoing is of assistance to you.

Cliff Anderson
Assistant Chief Constable
ACPOS General Secretary
29 November 2010
Justice Committee

Double Jeopardy (Scotland) Bill

Supplementary written submission from the Association of Chief Police Officers in Scotland

I refer to your correspondence dated 8 December 2010 in connection with the above subject, which has been considered by members of the Crime Business Area and Criminal Justice Business Area, and can now offer the following by way of comment.

Investigations
With respect to the investigation of assault cases, it is difficult to be completely prescriptive in this regard, as clearly there are a number of variables that will influence the resources allocated to a particular assault enquiry. The circumstances and the injuries sustained by the victim will in themselves dictate the scale of the enquiry, for example, whether the injuries are life threatening, whether there was a deliberate attempt to injure or kill, whether a weapon was involved and the type of weapon etc. The motive is therefore important, as is the potential vulnerability of the victim, who may be relatively defenceless due to age, disability, gender etc. These factors must then be balanced against the investigative needs and opportunities, such as whether there is a suspect or if the attacker is unknown. Decision making is also influenced by other factors, such as competing demands that are resource intensive and require priority.

As can be seen, each investigation requires to be resourced dependent on the individual circumstances that are presented. As a base line there is an expectation that assaults resulting in serious injury will be investigated by trained Detective Officers, who are capable of utilising the various investigative tools necessary. The rank of the Senior Investigating Officer (SIO) and the size of the enquiry team will be dependent on the scale and individual circumstances of the incident as detailed above.

Should death be attributable to a prior assault where there was no indication that serious injury had occurred, it is likely that the enquiry will have been carried out by uniformed officers; however, as soon as a link between the assault and death was established, the case would be allocated to an SIO for further investigation.

In relation to the police providing evidence as part of the review of cases, I would suggest that this would not present any difficulties as this process has already taken place throughout many forces in the form of Cold Case Reviews. Such reviews involve scrutiny of all retained evidential material to establish any further investigative opportunities. This has been most relevant in recent years where advances in forensic techniques have required many cases to be revisited. The same processes would require to be followed in Double Jeopardy to ensure the same test of evidence is carried out.

Following the initial court proceedings resulting otherwise than with a conviction, there is a likelihood that some forensic samples obtained from the accused may be disposed of, preventing any future ability to utilise these samples for evidential
purposes on the instigation of a Double Jeopardy case. In order to ensure samples are available, it would assist the process if the necessity to obtain new samples was clearly intimated within the newly issued Petition Warrant for the arrest of the accused.

Retention of productions
Scottish forces adhere to the retention timelines according to ACPOS policy, which makes a broad distinction between Resolved and Unresolved cases. In instances of unresolved matters (for major/serious crime), in general, productions will be retained indefinitely until resolution.

In relation to resolved matters, including serious crime, the direction is to dispose of productions at the conclusion of criminal proceedings, unless otherwise directed by the Crown or the Court. A definition for ‘Resolved Cases’ is included in the Policy; however, in practice, where a case has been reported, no production will be disposed of without a Production Release Note (PRN) i.e. a direct instruction to do so from the Procurator Fiscal.

It is recognised that these guidelines were not drafted in anticipation of the proposed Act and they will require to be revisited should the Bill become enacted. For example, where a person is reported to the Procurator Fiscal but criminal proceedings result in an acquittal or other non-conviction disposal, it would still be classed as a Resolved matter and we would, under current guidance, be seeking to dispose of productions if not actively seeking any other person in relation to the original crime. These, of course, are the very type of cases in the remit of the proposed legislation. Revisiting the guidance in light of the proposed legislation should not provide any significant challenge, as it should be possible to build in further guidance and/or consultation on cases falling within the proposed Schedule I, outlining a strict category of case susceptible to Double Jeopardy. Difficulties may arise if this list was subsequently amended, and included retrospective cases.

In relation to the question on retrospectivity, to put the matter into some degree of perspective a recent audit in Strathclyde Police identified that the force was retaining productions in 102 Major Incident investigations. Of those, 54 of the cases had resulted in a criminal trial and were classified as Resolved. This, of course, does not cover every potential Double Jeopardy case. The Committee asks if we foresee any difficulty in providing productions to the Crown for any future review of cases. I would respectfully suggest this will only be assessable on a case-by-case basis. These productions relate to matters possibly long dealt with and, although retained, it is difficult to standardise the level of preservation, particularly in matters previously deemed to have been dealt with. These measures would have been carried out with no anticipation of the proposed legislation and possibly even without full appreciation of scientific developments that may now render them suitable for review and consideration.

On the question of the practicality of retaining productions and issues around the reopening of previously closed cases, forces are responsible for the retention and storage of all such productions in the absence of a Production Release Note and must bear all associated costs. This has a significant impact on budget, production personnel and estates. In serious cases the volume of productions can be very
significant and it needs to be appreciated that, although the legislation would be welcomed in general, there are likely to be adverse impacts on other areas of business should there be a blanket requirement that all productions in serious crime be retained in perpetuity, whether the matter is resolved or unresolved and resulted in a conviction or acquittal.

I trust that the foregoing is of assistance to you.

George Hamilton
Assistant Chief Constable
Secretary, ACPOS Crime Business Area
10 January 2011
This is a response to the call for written evidence in respect of the Double Jeopardy (Scotland) Bill. I write to express broad support for the aims and objectives of the Bill. The exceptions to the double jeopardy rule which the Bill proposes are likely to be rarely used. Indeed, it would not surprise me - particularly given the English experience - if some decades were to elapse before either the new evidence or confession exception was invoked. That does not seem to me, however, to be an argument against their introduction: the damage to public confidence in the criminal justice system which could result from a single high-profile case where a re-prosecution would be justified but impossible should not be underestimated, particularly in a small jurisdiction.

I have four points to make on matters of detail, as follows:

1. **The offences to which the new evidence exception would apply.** Schedule 1 of the Bill seems excessively broad, particularly insofar as it includes offences such as indecent assault which may be relatively minor in nature. As matters stand, it could permit a prosecution on the basis of new evidence in a relatively minor indecent assault which was considered on both occasions to merit only summary proceedings in the sheriff court. Given the underlying justification for the proposed reforms, which the Policy Memorandum acknowledges is concerned with a small number of serious cases, the range of offences to which a new evidence exception reform may be applied should be narrowly drawn in line with the Scottish Law Commission's initial recommendations.

2. **The procedure for modifying the list of offences to which the new evidence exception applies.** Given the constitutional importance of the double jeopardy rule, it is entirely unsatisfactory that the Scottish Ministers should have the power to modify the relevant list by order (section 4(7)). This should require primary legislation.

3. **Retrospectivity.** I appreciate that there may be some dispute about whether section 13 (retrospective application of Act) is appropriate. In my view, it is entirely appropriate. Retrospective legislation is generally objectionable because it can mean that individuals’ conduct may be judged according to rules which they had no fair opportunity to comply with. That objection does not seem to arise in the present case. A failure to apply the legislation retrospectively would be inconsistent with its underlying rationale.

4. **Section 3(4)(b).** This section provides that where a fresh prosecution is sought to be justified on the basis of a pre-acquittal confession which has newly come to light, the application will fail if the confession's existence was not known and could not reasonably have been known to the prosecutor at the time of the acquittal in respect of the original offence. This is a rather technical point, but I wonder whether the test should refer to the time of the trial which led to the accused's acquittal, rather than to the time...
of the acquittal. It is possible to imagine a case where the acquittal takes place on the disposal of an appeal some considerable time after the trial. It would seem wrong in principle if any fresh prosecution, otherwise justified, were to be barred because the prosecutor could have found out - or even did find out - about the confession between the trial and the appeal, even though they could have done nothing with it at this stage.

James Chalmers
Senior Lecturer and Director of Postgraduate Studies
University of Edinburgh School of Law
30 November 2010
Justice Committee

Double Jeopardy (Scotland) Bill

Supplementary submission from the Crown Office and Procurator Fiscal Service

On 16 November the Committee asked for further information from the Crown Office and Procurator Fiscal Service on three issues. These were: firstly, information on cases where there had been prosecutions following an earlier prosecution for a lesser charge when the victim subsequently dies; secondly the convener asked for comments on the ECHR compatibility particularly in respect of retrospectivity of the draft provisions and thirdly, information about similar double jeopardy provisions in other jurisdictions.

Robert Brown MSP enquired about the numbers of prosecutions raised for murder or culpable homicide where the victim dies after a first prosecution for a lesser offence. The Crown Office and Procurator Fiscal Service does not hold detailed statistics for these cases and any numbers are only approximations based on our experience and recollection. Such cases are rare. There have been 5 cases in the last 10 years where Crown Counsel’s instructions have been sought in relation to the raising of proceedings following the death of a victim after an earlier prosecution [please see the annexe for a summary of each case]. In at least 3 cases there have been prosecutions for murder following the death of the victim. It is apparent from those cases which have been reported that even where the accused was found guilty of the lesser offence at the original trial, Crown Counsel will consider all the facts and circumstances of the case before instructing proceedings for a homicide charge. Such factors include the nature of the evidence at the first trial and the sentence received and any other factors relevant to the public interest.

The Committee also requested a view from COPFS on the ECHR compatibility of the provisions and in particular our view on the issue of retrospectivity. We are satisfied that the bill is compatible with the Convention Rights.

During my evidence I referred to the rule against double jeopardy which is enshrined in Article 4 of Protocol 7 to the Convention. Article 4 of Protocol 7 provides that:

1 “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2 “The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings which could affect the outcome of the case”
Although the United Kingdom has not ratified this Protocol to the Convention, the exceptions to the rule against double jeopardy in the Bill conform to the exceptions outlined in paragraph 2 above. We consider therefore that the exceptions seem consistent with the European Convention on Human Rights.

In relation to retrospectivity, the provisions do not of course criminalise behaviour which was not previously criminal (which would of course breach Article 7 of the Convention). The concern about extending the new evidence provisions to cases concluded prior to the passing of the bill into law was outlined by Patrick Layden QC of the Scottish Law Commission in his evidence. He indicated that the difficulty was that those who had previously been acquitted would have lost their right not to be tried again as they would have considered that the acquittal in their case would have been final. However we consider that there is no principle which would justify treating cases completed prior to any change in the law differently from cases which are heard at first instance following the coming into force of any change in the law (and where a verdict of acquittal is returned), where new and compelling evidence emerges at a later date. The tests in the Bill which would allow new evidence to justify a second prosecution are strict and relate to a very limited number of offences which are outlined in Schedule 1 to the Bill. Further, the requirement to seek the authorisation of the High Court, sitting as Court of Appeal, provides a further protection to the accused person. The Court can decline to order a second prosecution even if the stringent tests are met if it considers that it would not be in the interests of justice to allow the case to be tried again.

The Policy Memorandum states that the criminal justice system is at risk of being brought into disrepute when there is compelling new information or a clear post-trial confession in a significant case and no new prosecution can be brought against an accused. We consider that the exceptions should apply to past and future cases for the same reason – namely, the enhancement of public confidence in the system. There is a need for the system in Scotland to strike an appropriate balance between the rights of the accused and the public interest which includes the rights of victims and the families of the bereaved. The system must also ensure that its rules do not conspire to create the possibility of a manifest injustice. We consider that the Bill strikes the appropriate balance and that to remove the possibility of past cases being open to review would be to disturb that balance unduly and render the Convention rights of victims and bereaved relatives less than effective.

It is noteworthy that the new evidence exception to the rule against double jeopardy in England and Wales contained in the Criminal Justice Act 2003 is also retrospective. The effect of the retrospective nature of the exception was demonstrated most recently in the case of R v Weston where an accused was found guilty of the murder of Vikki Thompson which occurred in 1995. The accused was acquitted at his first trial back in 1996. The new and compelling evidence was small bloodstains found on the accused’s boots, which matched the victim’s DNA. Weston had always denied knowing the victim or being at the scene on that day. He could not explain to the jury in the second trial how the blood had got on to his boots. It is reported that at the time of
sentence the judge in the case commented that “it has taken 15 years for justice to
catch up with you but it has done so at last today.”

Other cases in which there have been successful applications for a retrial include the
case R v D [2006] EWCA Crim 1354 in which the English Court of Appeal allowed the
prosecutor to retry an accused where he had confessed to a murder having originally
been tried and acquitted in 1991. This application followed the accused’s confession of
the crime. The Court of Appeal stated in that case that the particular features of the
crime of murder provided a unique justification for an exception to the double jeopardy
rule on the basis that the public would be outraged were that exception not to be applied
in the instant case simply because D would not have confessed if he had appreciated
that it might have led to his retrial. We consider that the sense of public outrage in
Scotland would be no less if there was compelling new evidence against an accused
who had been acquitted in the past if a retrial could not be sought simply because of a
rule which rendered them immune from prosecution.

The convener asked for information about the experience of other jurisdictions in
relation to double jeopardy.

Experience in England helpfully shows how the exceptions to the double jeopardy rule
have been used to bring accused persons to justice through the use of new and
compelling evidence, which in England includes confession evidence which is new.
Although we are aware of 7 applications to quash convictions in England and seek a
retrial on the basis of new evidence, we understand that in only 4 cases has this been
successful. Firstly the case of R v D which is discussed above and also the case of R v
Weston. The other successful applications were in the case of R v A [2009] 1WLR1947
where the accused had been acquitted of the rape of a victim known as S. New
evidence came to light following the acquittal involving offences of sexual misconduct
with multiple complainants. The Court of Appeal allowed a fresh prosecution of the rape
allegation again on the basis of the new evidence. The other successful case of a retrial
based on new evidence is R v Celaire [2009] EWCA Crim 633 which involved a retrial
on the basis of new and compelling evidence of a man for a charge of murder of his ex -
girlfriend of which he had previously been acquitted. This evidence came from a second
victim of similar attack which occurred after the acquittal. It can be seen from this
successful application that new evidence can take the form of subsequent victims of an
accused which lends weight and strength to the evidence which was led in the first trial.
These cases also demonstrate the use of the new evidence exception to allow
perpetrators of serious and serial offences to be held liable for their full conduct.

The Committee may also find it helpful to consider the cases in which applications have
been unsuccessful in England and Wales. These included cases in which the new
evidence derived from co-defendants who had a self interest in providing evidence
against the defendant in that this could reduce their sentences (R v B [2009] EWCA
Crim 1306 and R v B and G [2009] EWCA Crim 1207). The Court of appeal also refused
an application for a retrial in a case in which, although the defendant had confessed, the
confession was manifestly and demonstrably untrue in parts and the new evidence was not compelling, reliable or highly probative (R v Miell [2007] EWCA Crim 3130).

I hope that this is helpful to the Committee.

Scott Pattison
Director of Operations
29 November 2010

Annexe

Summary of cases in the last 10 years where Crown Counsel’s instructions have been sought in relation to the raising of proceedings following the death of a victim after an earlier prosecution

Case 1
The accused pled guilty to attempted murder.

Case 2
The accused pled guilty to an attempted murder charge.

Case 3
The case involved 2 accused. The first accused pled guilty to the attempted murder charge and the second accused was found guilty of attempted murder after a trial.

Case 4
There were 2 accused who were found guilty of the attempted murder after trial.

Case 5
The accused was found guilty of attempted murder after trial.
Justice Committee

Double Jeopardy (Scotland) Bill

Supplementary submission from the Crown Office and Procurator Fiscal Service

I refer to the Committee’s request to the Cabinet Secretary for Justice, during his evidence at the session on 21 December, for information on the current policy in relation to the retention of evidence where there is an acquittal.

I can advise that the current practice following an acquittal is to return labelled productions to their owners. If, the production is contaminated or is in any way hazardous, it will generally be marked for destruction.

It is not envisaged that a change in the law of double jeopardy would routinely result in labelled productions and other productions being retained on the basis that an exception to the double jeopardy rule may arise in the future. Whether or not a labelled production would be retained would be considered in light of the individual circumstances of the case and the evidential value of the production. The Crown will always take account of the views of the owner of the production and there is the option of photographing or videoing productions, if it was deemed necessary.

The non-retention of labels and productions has not unduly hampered prosecutions arising from retrials. During his evidence to the Committee Mr Pattison highlighted the case of Duncan Edwards where the original trial was in 1999 and following a successful appeal a retrial took place in 2001 in the absence of many productions. Further, in many cases other sources of evidence such as documentary productions, eyewitness and scientific evidence, is of greater significance than physical productions.

I hope this information is of assistance to the Committee.

Gertie Wallace
Head of Criminal Justice Policy
18 January 2011
In general, I am in favour of all the provisions in this Bill for the reasons given some time ago in Dr Campbell’s and my response to the Scottish Law Commission’s Discussion Paper. However, I would wish to make three points about the ‘new evidence’ exception.

First, I would like to emphasise that I support section 13 of the Bill which makes the legislation retrospective for all three exceptions. This provision is likely to be particularly controversial but I think it is both justified and important. While at the moment no cases have been identified where this power is likely to be exercised, it is not beyond the bounds of possibility that compelling new evidence – probably scientific in nature – might come to light in a case where the suspect has already been acquitted, perhaps some years ago. It is vital that our criminal justice system retains the support and respect of the public and there might well be public outrage if double jeopardy were to prevent a new prosecution of someone suspected of a very serious crime where there is strong fresh evidence of guilt. It is essential to note that the number of ‘re-prosecutions’ is likely to be minimal; as stated in the ‘Explanatory Notes’ at para 77, there have only been six such cases in England in the five years since the law there was changed. It should also be noted that, as time goes on, the retrospective effect of section 13 will diminish and eventually disappear.

Second, it is worth pointing out that this legislation is extremely unlikely to facilitate a fresh prosecution in the ‘World’s End’ murder case, a prospect which some members of the media seem to anticipate. This is somewhat ironic because of course it was the acquittal of Angus Sinclair in that case which prompted the reference by the Justice Secretary to the Scottish Law Commission, and this ultimately led to the present legislation. Nevertheless, so many years after the crimes took place, it is unrealistic to hope that any compelling new evidence will emerge (or has emerged since the recent unsuccessful prosecution) nor does it seem very likely that the suspect will confess. Thus, neither of the relevant double jeopardy exceptions will be applicable in this case, despite their retrospective force.

Finally, as the ‘Policy Memorandum’ notes at para 33, there is likely to be some controversy over the offences to be covered by the new evidence exception. At the moment, Schedule 1 strikes me as rather broad, particularly because of the inclusion of various less serious sexual assaults. Critics might ask why, for instance, attempted murder or robbery are not included? Of course, everyone will have their own views and where the line is to be drawn must inevitably be arbitrary; there is no right answer. On reflection, however, I do think there is some merit in the Scottish Law Commission’s original proposal (Report on Double Jeopardy, paras 5.2-5.6) that the new evidence exception should be limited to what are generally regarded as the most serious of crimes, namely murder and rape. This would help to reflect the importance rightly attached to the doctrine of double jeopardy and, consequently, that any exceptions to it are tightly restricted.
Justice Committee

Double Jeopardy (Scotland) Bill

Written submission from the Faculty of Advocates

Note by the Clerk: This submission follows the structure of the Scottish Government consultation.

Question 1
Do you agree that there should be an exception to the rule against double jeopardy when new evidence has emerged?

We are of the view that there should be an exception to a general rule against double jeopardy on the basis of new evidence.

Question 2
Do you think that a new evidence exception should be limited to offences of murder and rape? If not, what other offences should be included?

We agree that any exception should be restricted to offences of murder and rape. If the exception to double jeopardy is to apply to a wider range of offences we are of the view that it should be restricted to cases to be re-prosecuted on indictment in the High Court.

Question 3
Do you think that evidence should be regarded as “new” only if it was not available at the original trial?

We agree that in order to justify a retrial on the basis of “new” evidence it should be a requirement that the “new” evidence was not available at the original trial. This is in accordance with the test set out in section 106(3)(a) of the Criminal Procedure (Scotland) Act 1995.

Question 4
Do you think that there should be an exception to double jeopardy where a disputed judicial ruling has resulted in a case not being put to a jury?

We are of the view that any proposed changes to the rule on double jeopardy should not be retrospective. That being the case we are of the view that in relation to any future prosecutions this would be unnecessary in light of the proposed right of appeal of the Crown set out in sections 55 to 57 of the Criminal Justice and Licensing (Scotland) Bill.

Question 5
Do you agree that common law changes to the rules of admissibility should result in evidence being treated as “new” for the purposes of a new evidence exception? Do you agree there is a case for extending this to statutory changes to rules on admissibility?
We agree with the Scottish Law Commission recommendation number 32. We agree that evidence which was available but inadmissible at the original trial should not be regarded as “new” evidence in light of a subsequent change in the rules relating to admissibility of evidence.

Question 6
Do you agree with the Scottish Law Commission proposed test for the court to apply in deciding if the new evidence is sufficient to justify a retrial? If not, what alternative test should be used?

We agree with the test proposed by the Scottish Law Commission in recommendation 33.

Question 7
Do you agree with the Scottish Law Commission proposals aimed to prevent publicity ahead of a second trial?

We agree with the Scottish Law Commission proposal that steps should be taken to limit publicity of the results or courts consideration with view to preventing publicity of the results which may influence the jury in any subsequent trial.

Question 8
Do you agree that a new evidence exception should apply retrospectively?

We do not agree that a new evidence exception should apply retrospectively. We agree with the Scottish Law Commission Recommendation number 36 on this point. We come to this conclusion in light of the fact that juries in past prosecutions will have been directed that their verdict was final. We also consider that standard directions to the jury as to the effect of an acquittal or a not proven verdict will require to be reconsidered in any case which potentially falls within the exception.

Question 9
Do you think it should 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? Are there any difficulties where the acquittal was as a result of a special defence?

We agree with the Scottish Law Commission Recommendation number 6. We do not agree that it should be possible to re-prosecute a person who has been acquitted of an assault which has subsequently led to the death of the victim.

Question 10
Do you think it should be possible to prosecute a person for culpable homicide or for a statutory offence of causing death where that person has previously been acquitted prior to the victim’s death for an offence relating to the act or omission which is alleged to have led to the victim’s death?

We agree with the Scottish Law Commission Recommendation number 7. We are of the view that it is in the public interest that Scots law permits a trial for culpable
homicide or a statutory offence even if there has been a previous trial for an offence relating to the act or omission said to have caused the death.

**Note:** We note that Scottish Law Commission Recommendation 31 refers to “reasonable diligence” and recommendation number 32 refers to “ordinary diligence”. We see no particular or obvious reason for such a distinction to be made. We consider that the word “reasonable” should be used in both instances.

29 November 2010
Justice Committee

Double Jeopardy (Scotland) Bill

Written submission from Glasgow Community and Safety Services

Introduction

Glasgow Community and Safety Services (GCSS) welcomes the opportunity to comment on the proposed Double Jeopardy (Scotland) Bill. GCSS is a charitable organisation formed by Glasgow City Council and Strathclyde Police to prevent crime, tackle antisocial behaviour and promote community safety in the city. GCSS has specific responsibility for taking forward work on violence against women on behalf of the Council. Furthermore, a core element of GCSS business involves working with and supporting victims of crime. Our victim services include ASSIST (domestic abuse advocacy and support), Routes Out of Prostitution and TARA (supports women who have been trafficked into Scotland for sexual exploitation).

Our work reflects the Scottish Government’s National Outcomes including No.9 “We live our lives safe from crime, disorder and danger” and No.11 “We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others”. GCSS supports the need to make the law surrounding the double jeopardy rule in Scotland clear. Although the principle is already well established in Scots Law, by placing this rule onto a statutory footing it allows greater clarity and consistency in application.

General Comments

GCSS supports the general principle of the Bill that affirms the existing prohibition on placing a person in jeopardy of criminal prosecution twice for the same offence. We agree that in general, a person should not be subjected to repeated criminal proceedings for the same incident. However, it is clear that no individual case is every the same and occasionally situations will arise whereby this rule shall be challenged.

We support the creation of four clear exceptions to the rule against double jeopardy, namely tainted acquittals, admission made or becoming known after acquittal, new evidence discovered and eventual death of injured person. It is clear that these exceptions will be applied rarely and stringent criteria will be in place to prevent abuse. We would hope that sufficient protection for the accused would be found in the proposed role of the High Court to assess for example new evidence and whether a new trial will be granted. However, it is clear that if there is new evidence which strengthens the case against the accused, in the interests of justice this must be pursued. Not permitting a prosecution for serious crimes in such circumstances risks loss of public confidence in the justice system. We would also expect that due to developments of a scientific nature, compelling new evidence of this kind may increasingly come to light.
It is clear that due to the nature of this Bill that the law will apply retrospectively otherwise it would become a dormant instrument. It seems apparent that exceptions to the double jeopardy rule and the granting of a retrial on the basis of new evidence would only be available to the most serious of crimes e.g. murder, rape, culpable homicide. We fully support the strict conditions for a new trial to take place as if the exception rule was to be used to frequently this could place the justice system on shaky ground i.e. the worry that no court outcome could ever be regarded as absolutely final. There must be sufficiently strong grounds in order to ever justify application of the exceptions.

To conclude, creating exceptions to the rule against double jeopardy is a serious step, one that must not be taken lightly. There is a fine balance between undermining the integrity of the justice system by exposing individuals to the risk of a second prosecution and strengthening it by ensuring that the public see justice as having been done. We would hope that introduction of this Bill would not lead the way for countless retrials and the legal system caving in to pressure from distressed families or the media in terms of high profile cases. The law must not allow individuals to pursue the case for a retrial endlessly until they get the desired verdict. However, it is clear that situations do arise whereby the exception may be justified. GCSS supports the Bill on the understanding that it is a mechanism which will be used rarely, monitored closely and only within very strict criteria.

Glasgow Community and Safety Services
2 December 2010
Introduction

When the Lord Justice Clerk gave evidence to the Justice Committee of the Scottish Parliament on 14 December 2010 a number of points were raised with him by members of the Scottish Parliament, upon which the judges of the High Court of Justiciary in their response to the Scottish Law Commission (SLC) Paper on Double Jeopardy, had not expressed a concluded view. The Justice Committee has advised the Lord President that it would be interested in having the general judicial view on these issues. We are grateful for the opportunity to submit our response:

Responses to issues raised with the Lord Justice Clerk

The first issue which was raised with the Lord Justice Clerk was this: section 2 of the Double Jeopardy (Scotland) Bill (the Bill) applies where the original criminal proceedings were on indictment or complaint, should the application of the section be in such wide terms or should it only apply to more serious offences?

We would adopt the view expressed by the Lord Justice Clerk in his evidence when commenting on this section, namely: that if in principle there is good reason for an exception to the Double Jeopardy Rule then "it logically should apply across the board". This view expressed by the Lord Justice Clerk corresponds to the view that we expressed in our response to the discussion paper of the SLC, which was to the effect that there should be no limitation to the type of offence to which the tainted acquittal exception should apply.

Such an approach clearly gives rise to the issue of whether the court would be flooded with applications and minor retrials. It is our view that this would not occur in that we believe first, that there will not be a large number of cases which will fall within the terms of this exception. Secondly, we believe that the good sense of the Lord Advocate, when acting in the public interest, would provide an appropriate safeguard against a flood of applications. Thirdly, in addition there is the protection of the interests of justice test which would require to be satisfied before there could be a retrial.

The second matter raised with the Lord Justice Clerk was this: should it be competent for a person in terms of section 2 of the Bill to be retried on each occasion there was a tainted acquittal? This is a matter which in practice is unlikely to arise as an issue. However, we would again adopt the view expressed by the Lord Justice Clerk that as a matter of logic we believe it should be competent for there to be a number of retrials.

The third matter raised with the Lord Justice Clerk related to section 3(4)(a). We would agree with the views expressed by the Lord Justice Clerk that the test for the court in deciding whether to set aside the acquittal in light of an admission would be:
if this evidence relating to the admission were led, is it the sort of evidence that is reasonably capable of being accepted by the jury?

The fourth matter which was raised with the Lord Justice Clerk was whether the new evidence exception should apply to all cases tried on indictment or a more limited list of cases. The judges' view remains as set forth in their response to the SLC paper, namely: that the exception, if introduced, should be limited to cases originally prosecuted in the High Court of Justiciary.

In relation to the issue of the new evidence exception the question of its retrospectivity was raised with the Lord Justice Clerk. The judges remain opposed to the new evidence exception being retrospective. Their reasons for opposing this are broadly as set out by the Lord Justice Clerk in the course of his evidence.

The last issue raised with the Lord Justice Clerk related to section 11 of the Bill. Scots law as it presently stands allows the holding of a second trial where death has supervened following a trial for assault where there has either been an acquittal or a conviction (see: *HM Advocate v Stewart* 1866 5 Irv. 310 per Lord Ardmillan and *Tees v HM Advocate* 1994 JC 12 per Lord Justice Clerk Ross at 15).

The judges remain divided as to whether the principle enunciated in *HM Advocate v Stewart* by Lord Ardmillan could be supported in so far as it applies to second trials following acquittals.

An example of circumstances in which a second trial following an acquittal may not be appropriate is given by Sir Gerald Gordon in his commentary to *Tees v HM Advocate* 1994 SCCR 458 para 2:

"With respect, I would find it a bit surprising if a person who had been acquitted of assault could always be subsequently tried for homicide where the victim of the assault dies. It may be that he could be tried for culpable homicide if the reason for the acquittal was the lack of proof of intention, but I would suggest that if he was acquitted for lack of evidence as to his involvement in the *actus reus*, he could not be tried thereafter for homicide ...".

The issue raised by Sir Gerald in his commentary, emphasises the point made by the judges in their response to the SLC paper in which the judges stated as follows:

"In the case of an acquittal at the original trial it is the view of this group (namely the group which favoured allowing a second trial following an acquittal) that before there should be any further trial it would require to be authorised by the High Court of Justiciary sitting as the court of criminal appeal on application by the Lord Advocate, the court having discretion to refuse authorisation where it appears to the court not to be in the interests of justice."

The judges are accordingly of the view that, where there has been a prior acquittal, the leave of the High Court should be a pre-condition to the bringing of a subsequent prosecution and that section 11 should be amended accordingly.
The above are the further comments which the judges would wish to make in response to the request made to the Lord President.

Judges of the High Court of Justiciary
13 January 2011
Justice Committee

Double Jeopardy (Scotland) Bill

Written submission from the Law Society of Scotland

The Criminal Law Committee of the Law Society of Scotland ("the Committee") welcomes the introduction of the Double Jeopardy (Scotland) Bill into the Scottish Parliament and should like to provide the Scottish Parliament’s Justice Committee with the following comments upon its terms.

General Comments

The Committee was involved in discussion with the Scottish Law Commission in February 2009, prior to the publication by the Scottish Law Commission of its Discussion Paper on Double Jeopardy in March 2009. The Committee responded to the terms of this Discussion Paper in March 2009.

This led to publication of the Scottish Law Commission’s report on Double Jeopardy, which included a draft Bill in December 2009.

The Committee responded in May 2010 to the Scottish Government consultation paper on Double Jeopardy. This paper focused upon the establishment of a new evidence exception, having accepted the recommendations contained within the Scottish Law Commission’s report 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); and
- It should be possible to retry an acquitted person who subsequently admits to having committed the offence.

The Committee remains of the view that the rule against Double Jeopardy should be retained.

The Committee recognises, however, that the principle of the rule against Double Jeopardy is evolving and this has been taken into account in other jurisdictions.

The Committee is of the view therefore that, in certain limited circumstances, there should be an exception to the rule against Double Jeopardy, and agrees that this
exception should apply both to tainted acquittals and to an admission made or becoming known by the accused after acquittal, and be restricted to solemn procedure.

The Committee also believes that there should be a new evidence exception to the rule against Double Jeopardy, but that this should be restricted to solemn procedure.

With regard to new evidence, the Committee believes that the evidence could not, with the exercise of reasonable diligence, have been made available at the trial in respect of the original offence.

The Committee noted that the Scottish Law Commission’s Discussion Paper raised doubts over whether a new evidence exception would be compatible with certain international obligations, such as Article 50 of the Charter of Fundamental Rights of the European Union and Article 4 of Protocol 7 to the European Convention for the Protection of Human Rights (ECHR).

The Committee notes from paragraph 2.8 of the Scottish Government’s consultation paper that the Scottish Government considered carefully whether these two provisions would prohibit any new evidence exception to the rule against Double Jeopardy and that at paragraph 2.9 the Scottish Government considered the inter relation of ECHR which specifies particular circumstances where Members States will not be found to have breached the general prohibition against Double Jeopardy and Article 4(1), such circumstances including the situation where the case has been re-opened as a result of the identification of new evidence, and also the Charter (Article 50) which does not contain a similar qualification in respect of new evidence.

The Committee notes the Scottish Government’s position that, having considered the background papers to the Charter, it is confident that ECHR and the Charter do not prohibit the creation of a new evidence exception against the rule against Double Jeopardy.

In all the circumstances, it is the Committee’s view that any new evidence exception to the rule against Double Jeopardy should of course be compatible with both Article 4 of Protocol 7 to the European Convention for the Protection of Human Rights and also Article 50 of the Charter of Fundamental Rights.

The Committee has the following specific comments:-

**Section 1 – Rule against double jeopardy**

The Committee welcomes the policy objective of section 1 of the Bill to place on to a statutory footing the principle against Double Jeopardy, in that a person should not be prosecuted on more than one occasion for the same offence.
Section 2 – Tainted acquittals

The Committee remains of the view that a tainted acquittal would be one of the limited circumstances where there should be an exception to the rule against Double Jeopardy.

The Committee notes, however, that both sections 2 and 3 of the Bill (Admission made or becoming known after acquittal) will apply to all offences whether on indictment or complaint, and questions whether, as with regard to the new evidence exception at Section 4 of the Bill, there should be a limitation to the offences to which this provision applies.

The Committee also notes that at section 2(3)(a) of the Bill, the High Court, on the application of the Lord Advocate, may not set aside the acquittal unless it is satisfied that the acquitted person or some other person has (or the acquitted person and some other person have) been convicted of an offence against the course of justice in connection with the proceedings on the original indictment or complaint.

The Committee notes the Scottish Law Commission’s recommendation 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 on the basis that the justification for a second trial is the defective nature of the original proceedings, not the desire to punish the accused for his involvement in the tainting offence.

The Committee reiterates its position with regard to its submission to the Scottish Law Commission’s Discussion Paper. The Committee remains of the view that an exception to the rule against Double Jeopardy on the basis of a tainted acquittal should be limited to cases prosecuted under solemn procedure, that it is shown that the offence against the administration of justice actually had a bearing upon the acquittal at the original trial, and also that the accused played a part in the offence against the administration of justice which affected the original trial.

The Committee is also concerned that from a practical point of view the Court, in the absence of a conviction against the accused, would be required to conclude on the balance of probabilities that the acquitted person, or some other person, has (or the acquitted person and some other person have) committed such an offence against the course of justice. The Committee questions the standard of proof given the absence of a conviction.

Section 3 – Admission made or becoming known after acquittal

The Committee reiterates its comments with regard to Section 2 in that an exception to the rule against Double Jeopardy should be limited to cases prosecuted under solemn procedure and not to all offences. The Committee again questions the standard of proof at section 3(4)(a) in the absence of any conviction for perjury where the accused chose to give evidence.
The Committee, in response to the Discussion Paper, stated that not all confessions or admissions are credible and that appropriate safeguards would be necessary to ensure that the confession was properly established and true. The Committee anticipates certain procedural difficulties with Section 3(4) in that a Court would be required to hear evidence on the basis that the confession was not true.

Section 4 – New Evidence

The Committee believes that, any new evidence exception should be restricted to solemn procedure, apply on the basis that the new evidence is compelling and was not, and could not with the exercise of ordinary diligence, have been available at the original trial.

The Committee notes that unlike sections 2 and 3 which excepts the rule against Double Jeopardy with regard to all offences, section 4 is restricted to original offences being ones listed in schedule 1 or relevant offences, being offences other than the original offence of which it would have been competent to convict the person on the original indictment or complaint, or an offence which arises out of the same or largely the same acts or omissions as gave rise to the original indictment or complaint, and is an aggravated way of committing the original offence.

With regard to original offences as listed in schedule 1, the Committee notes that these offences are limited to offences against the person, genocide, sexual offences at common law, sexual offences in terms of the Sexual Offences (Scotland) Act 2009 and other sexual offences.

The Committee notes that in terms of section 4(7) of the Bill that Scottish Ministers may by order modify schedule 1 so as to add or remove offences from there, but questions why schedule 1 at present is limited to the offences as referred to above.

The Committee remains of the view that a new evidence exception, together with all exceptions to the rule against Double Jeopardy should be limited to solemn procedure and accordingly questions why serious offences of fraud, serious drug offences and armed robbery etc. are omitted from Schedule 1 at present.

Sections 5 and 6 - Exceptions to Rule against Double Jeopardy: Common Provisions

The Committee notes the provisions at sections 5 and 6 of the Bill which set out the procedure for making applications in terms of sections 2, 3 and 4.

In particular, the Committee welcomes the provision at section 5(2) and whereby the acquitted person is entitled to appear or to be represented at any hearing of the application. The Committee also welcomes the provision at section 6(3) of the Bill whereby a new prosecution following upon a Section 5 application is to be commenced within two months after the date on which authority to bring the prosecution was granted.
Section 7 – Plea in Bar of Trial that accused has been tried before

The Committee notes the provisions at sections 7 – 11 appear to restate the rule against Double Jeopardy.

The Committee notes that the Scottish Law Commission proposed that there should be a broader principle to 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.

The Committee welcomes the placing on a statutory footing of the practice of the Crown to bring all charges relating to a particular incident in the same proceedings wherever possible in order to prevent the prosecutor from splitting offences in order to circumvent the rule against Double Jeopardy.

The Committee welcomes this broader principle which should follow the “same acts” test as already required by the Schengen Convention.

Section 11 - Eventual death of injured person

The Committee questions why section 11 will apply to a person who has been either convicted or acquitted of the original offence and notes that this is a departure from the Scottish Law Commission’s recommendation that the statutory limitation to the rule against Double Jeopardy should apply in circumstances where a person is prosecuted 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.

The Committee reiterates its previously stated position in that a second prosecution should be permitted only in cases where the accused was convicted at the original trial.

The Committee questions the exception at section 11(2)(c) of the Bill applies to any other offence of causing death as opposed to murder and culpable homicide.

Section 12 - Nullity of proceedings on previous indictment or complaint

The Committee notes that this section applies in order to remedy situations where the original proceedings on the indictment or complaint were a nullity and that it is in the interests of justice to proceed and accordingly welcomes this provision.

Section 13 – Retrospective application of Act

The Committee reiterates its previously stated position to the Scottish Government in terms of its consultation response and to the Scottish Law Commission’s Discussion
Paper and remains of the view that it would not be in the interests of justice to allow any exception to the principle of Double Jeopardy to be retrospective.

The Committee notes that this is a departure from the Scottish Law Commission recommendation that the exception should not apply retrospectively.

The Scottish Law Commission in arriving at this recommendation considered that a retrospective application may be justifiable in terms of Article 8 of ECHR (right to respect for private and family life, home and correspondence) on the basis of proportionality of the public interest.

The Scottish Law Commission also noted the more general question of retrospective application on general public policy grounds and noted in its report that they had seen no evidence of any reason on general public policy grounds to make such a provision retrospective.

The Committee notes paragraph 5.87 of the Scottish Law Commission's Report which stated:

“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.”

The Committee notes and endorses the Scottish Law Commission’s proposal at 5.88 of the Report which states:

“Any exception to the rule against Double Jeopardy on the basis of new evidence should apply only to cases originally determined after the coming in to force of the exception.

Criminal Law Committee
The Law Society of Scotland
1 December 2010
From a victims organisation perspective

PETAL (People Experiencing Trauma and Loss) is an organisation specifically supporting those affected by murder and culpable homicide. We believe that there should be exceptions to the rule against double jeopardy.

This is one very specific area where the rights of the accused are deemed to more important that of the victim or the victim’s family.

At present it is not possible to retry a person who has been acquitted of a crime even if new evidence emerges in relation to the case or if it appears that the original trial was "tainted" in some way, such as by intimidation or bribery of jurors or witnesses.

We do agree that the existing rule prevents a person from being tried twice for the same offence is recognised in Scotland and across the world as a fundamental protection for the citizen against the state.

However, we believe that the time is right to carry out this review to see whether modern conditions justify exceptions to It especially when, new, fresh evidence emerges.

With the major advances in forensic technology in recent years, material not formally usable as evidence could now be pivotal.

We are now in a new era of criminal detection, with DNA and other scientific evidence available so surely it is only right that this issue should be fully explored.

There should be a mechanism that in cases where new or compelling evidence becomes available, a retrial should be allowed at the discretion of the Lord Advocate and the Scottish Court of Criminal Appeal.

We believe that the existing criminal procedures are heavily in favour of the accused and that the rights of the victim and the victim's family are less than secondary.

There can be no clearer argument or in fact justifiable reason for not proceeding with the Double Jeopardy Bill.

To introduce changes to Scots law that clearly signifies that justice will not only be done, but also be seen to be done will ensure the rights of the victim.
There are constant discussions related to human rights so surely the introduction of this Bill will ensure the human rights of both the accused and the victim. It will provide confidence in the judicial process to the victim and send out the message to those accused of serious crime that manipulation of the system is no longer permissible.

The system is so balanced in favour of the accused that there are rights to appeal on numerous grounds such as the verdict and the length of sentence. This is because society does not want innocent people in jail and we wholeheartedly agree with that. However, this process is regularly manipulated by those convicted and appeals can last for a number of years and at all times the priority lies with the rights of the perpetrator. This is an area where the rights of victims and victims’ families are rarely if ever considered.

The constant emphasis on the criminal justice system being always balanced in favour of the accused person continues to highlight the imbalance between the rights of the victim and the rights of the accused.

Especially in the case of serious crime: instead of providing satisfaction and solace the criminal justice process exacerbates the trauma for victims and victims’ families.

The introduction of the Double Jeopardy (Scotland) Bill and the possibility of a retrial if the acquittal was tainted by an offence against the course of justice categorised as:

- Bribery or intimidation of witnesses or jurors
- The acquitted person, following the acquittal, credibly admitting to having committed the offence to which the acquittal relates
- The discovery of significant new evidence of guilt would represent a positive step in the modernising of Scots law and also help to reduce the considerable imbalance between the rights of the accused and the victim.

The only genuine area for discussion should be which crimes the Double Jeopardy (Scotland) Bill will relate to and the period of time applied retrospectively.

PETAL
3 December 2010
Introduction

You were kind enough to solicit my views on the Double Jeopardy (Scotland) Bill, SP Bill 59. Thank you for this opportunity to comment.

I have written at some length on issues surrounding reform of the traditional common law double jeopardy prohibition, and will not attempt here to summarise arguments that can be examined in full in previously published work, especially:

- “Justice for All? Two Bad Arguments (and Several Good Suggestions) for Resisting Double Jeopardy Reform” (2002) 6 International Journal of Evidence & Proof 197-217

It is fair to say that, generally speaking, I am sceptical about the supposed merits of double jeopardy law reform. My arguments were canvassed and examined both by the Law Commission in relation to law reform in England and Wales (Law Com No 267, Double Jeopardy and Prosecution Appeals, 2001) and more recently by the Scottish Law Commission (Scot Law Com No 218, Report on Double Jeopardy, 2009), though neither Commission ultimately endorsed the case I presented for a more limited approach to reform – specifically rejecting any “new evidence” exception.

I. Rationale for Reform?

The prohibition on retrying an acquitted person for the same offence is a well-entrenched foundation stone of common law criminal procedure, lauded by Blackstone¹ and elevated to a constitutional guarantee by the eighteenth century American revolutionaries.² Before substantially weakening the prohibition or carving out major exceptions to it, it would seem sensible – if not ethically obligatory – to clarify the values underpinning the prohibition, so that we may take a clear-eyed view of what could be lost, as well as what might be gained, through reform.

¹ “[T]he plea of autrefoils acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime”: Sir William Blackstone, Commentaries on the Laws of England (1765-9), Book IV, ch 26.

² The Fifth Amendment to the US Constitution contains the “Double Jeopardy Clause”: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...”
As in most major aspects of criminal procedure, competing interests are at stake and must be balanced in the reformer’s cost-benefit analysis. There are no simple resolutions or knock-down arguments, but rather subtleties and shades of reasonable opinion. The majority of academic commentators appear to disagree with me, and on balance support reforms such as those introduced in England and Wales by the Criminal Justice Act 2003 and are now contemplated for Scotland.

In brief, I rest the rationale for the double jeopardy prohibition on a theory of criminal justice requiring that a democratically accountable state must appropriately respect the dignity and personal autonomy of the people within its jurisdiction. This is, roughly speaking, a theory of liberal politics, democratic freedoms, basic human rights and the rule of law to which, I take it, just about everybody in this debate, and certainly the UK government, subscribes.

Protection against double jeopardy is required, on this view, because nobody could be safe and secure in their liberty, person, possessions or reputation if they were constantly at peril of being prosecuted by the state, condemned as a criminal, and subjected to penal sanctions. The government is allowed one attempt at bringing offenders to justice, but acquittals are final. What’s done is done, and we all move on. There is no logical inconsistency in applying different rules to appeals against conviction, or in making provision for exceptional post-conviction remedies. This simply reflects a judgement of political morality that greater efforts need to be made to prevent or remedy wrongful convictions. This in turn reflects a crucial moral difference between omitting to bring the guilty to justice, and inflicting wrongful conviction and punishment on the innocent. In some sense, the state can be regarded as ‘responsible’ for both, but in radically different ways. When the state omits to bring the guilty to justice, it is not the primary wrongdoer and it cannot normally be criticised for attending to its other priorities. But wrongfully convicting the innocent is something that the state itself does, and this brings with it a special responsibility to go to considerable lengths to correct such errors, to the extent that they can be detected and remedied after the event.

The finality of acquittals underpins the security and autonomy of all citizens, factually innocent or otherwise. True enough, it is easy to imagine that at least some additional convictions of the guilty might be secured by re-trying acquitted defendants. The point is that the criminal justice costs of doing so are exorbitant. One might as well argue that more convictions of the guilty could be secured by reducing the criminal standard of proof to the balance of probabilities. Once we allow major inroads into the double jeopardy prohibition, no acquittal can be regarded as absolutely final (except the – presumably tiny – minority that have gone through the quashing process and been sustained). Nobody could be secure in the knowledge that a jury verdict of acquittal entails that the state is done with examining their conduct and calling them to account for particular alleged wrongdoing.

In conclusion, I would want to say that the double jeopardy prohibition absolutely, without exception, prevents repeat prosecutions for the same wrongs. If the justification for having the prohibition lies in the support it lends to personal autonomy, political security and democratic constraints on public power, then these values are maximally promoted by an absolute prohibition that says: once
tried to a final conclusion, the matter is at an end (subject to considerations of ‘tainted acquittals’; see below).

Not everybody finds this rationale convincing, even when it is articulated much more fully than this truncated summary allows. However, I think the point can be made more directly without insisting on every element of one - necessarily controversial – interpretation of the double jeopardy prohibition.

Virtually everybody agrees that protection from double jeopardy is a valuable feature of legitimate criminal procedure. It is also enshrined in international human rights law. The argument revolves around whether any competing considerations should lead to the creation of exceptions, and if so how those exceptions should be formulated and delimited.

Yet in all the years I have been examining and debating proposals for reforming the law of double jeopardy, I have yet to see persuasive evidence for the necessity of a “new evidence” exception.

It is revealing that, in the Scottish context, these debates often provoke anxious meditations on the ‘World’s End murders’. Of course, the example is completely beside the point. This was not a case in which the accused was acquitted at the time only for new incriminating evidence to come to light many years later. In this case, a prosecution was launched only after new evidence was secured more than three decades after the original offence. In fact, prosecution of the World’s End murders is the paradigm case where the prohibition should bite. Those arguing for a retrial are basically saying that they don’t accept the court’s recent verdict, and would like to see the case run again – presumably until a conviction is secured, this being, to them, the only acceptable outcome.

In England and Wales meanwhile, there have been very few cases in which the new power to quash acquittals under the CJA 2003 has actually been invoked. The Court of Appeal has rejected a significant percentage of the Crown’s applications; and in the few cases of which I am aware in which an application to quash an acquittal has been granted, the accused has actually pleaded guilty – so there has been no contested retrial following an acquittal. (These outcomes could have been secured, therefore, by a more modest reform permitting a previously acquitted accused to make an application to change his plea to guilty, rather than taking the more radical step of permitting full-blown contested retrials of previously acquitted offences.)

This is the ultimate question for law reformers: does perhaps a handful of additional guilty pleas warrant undermining the finality of every single criminal acquittal and in the process recasting the basic political relationship between citizens and the state in the direction of an illiberal constitution?

II. Reliable New Evidence of Factual Guilt

It might be thought easier to answer this question in the affirmative if we could absolutely guarantee that any person whose acquittal is quashed is factually guilty. But no such assurance can be given.
Public and policy discussion about “new evidence” is too often frankly naïve. It typically proceeds from the assumption that “new evidence” is somehow already “out there” waiting to be discovered, and when it appears it delivers irrefutable proof of guilt by blinding revelation. The reality of criminal evidence is a lot more messy and equivocal and correspondingly less reassuring.

To begin with, evidence is “constructed” through the activities of witnesses, police investigators, forensic scientists, prosecutors, and defence legal representatives. It does not fall from the sky: it is the outcome of a conscious process. Of course, the process is designed to produce good evidence, and if criminal procedure is well-designed and everybody does their job properly, and perhaps with a bit of luck, we can hope to get at the truth of contested events. By the same token, much can go wrong at each of these stages, occasionally through impropriety or malpractice but almost certainly much more often through carelessness, oversight or sheer bad luck. Key evidence is overlooked, witnesses forget or become confused, physical samples get contaminated at the scene or mixed up in the laboratory, etc, etc. These are all documented occurrences, not mere flights of fancy. This is why, however hard we try to avoid it, every criminal trial (including retrials) involves the risk of convicting the innocent, a risk that common law systems of criminal procedure are committed to minimizing as much as reasonably possible.

Confessions

Whilst this methodological point applies to all evidence adduced in criminal proceedings, it pertains with especial force to confessions. It is therefore particularly disturbing to note how quickly those who favour double jeopardy reform slip into relying on post-acquittal confessions as supposedly ‘compelling’ evidence of guilt. It is as though we have forgotten how unreliable confession evidence can be: that dubious confessions have been partly to blame for some of the most notorious miscarriages of justice in modern British legal history – the Confait case, leading to the Philips Royal Commission; the Guildford Four, Birmingham Six and Judith Ward cases, leading to the Runciman Royal Commission; the Cardiff Three case; the police wanted to proceed against Colin Stagg on the basis of partial admissions supposedly made to his undercover paramour (see below), etc. I fear that law reformers have dangerously short memories in this regard.

These worries are compounded in the types of case that involve post-acquittal admissions, as R v Miell [2008] 1 WLR 627, CA, nicely illustrates. We tend to be dealing with individuals who not especially psychologically robust or stable, often compounded by custodial settings laced with all manner of more-or-less corrupting incentives. One minute these people say they did it, then they claim they didn’t. Can we really pull ‘compelling’ evidence out of such an evidential miasma? The Court of Appeal clearly did not think so in Miell. I would be looking for an authentic confession to include substantial and properly corroborated ‘new facts’, and I would want substantial guarantees about the way in which these new facts came to light, to rule about confabulation or suggestion by interrogators. I think cases truly involving compelling post-acquittal confessions are going to be few and far between, and their

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4 Royal Commission on Criminal Justice, Report, Cm.2263 (HMSO, 1993).
remote prospect would not induce me to support a ‘new evidence’ exception to double jeopardy prohibition, given what is at stake.

The figure of the penitent offender having undergone a religious conversion smacks to me of desperation on the part of reform advocates. How many such cases really exist? Can those who claim to have ‘found God’ in gaol really be trusted, either in respect of their professed conversion or in terms of any post-acquittal admissions? Mr Miell, on his own account, was merely faking it to improve his prison conditions and accelerate his parole date by exhibiting remorse. This is what the Court of Appeal concluded about the reliability of his serial confessions:

“We have found it very difficult to know what to make of all this and, were there a retrial, we think that the jury would be in the same position. The fact that parts of the confession statement are manifestly untrue would be likely to leave the jury in doubt as to whether Miell was telling the truth when he said that he had murdered Mr Burton. The admissions that the jury heard that Miell had made after the murder to Karen Smith and to two other witnesses were more credible than his confession statement, for they did not include demonstrable untruths, yet at the first trial the jury were in doubt as to his guilt. We think it likely that they would be in the same doubt if they received the new evidence of Miell’s confessions and retraction. It will be apparent from these comments that we have not found the new evidence compelling, reliable and highly probative of the case against Miell. The evidence suggests that either Miell or James Rollinson or both stabbed Mr Burton, but the new evidence has not left us persuaded that Miell was wrongly acquitted. Cases where the truth of a voluntary confession against interest is successfully challenged are rare, but they can occur: see R v Ward (Judith) [1993] 1 WLR 619. In this case there are grounds to doubt the veracity of the confessions that Miell has made.”

This was a man, remember, who had repeatedly confessed to the murder to various officials and family members, both before and, more pertinent, after his original trial and acquittal. It is the type of situation that might easily be viewed, on a cursory and ill-formed analysis, as the (mythical) “open and shut case.”

But that is not all. Assume that an offender has truly seen the light, and wishes to unburden his soul. There are plenty of ways that s/he might find to make recompense to his/her victims, their families or society at large. Assume further that only a criminal conviction and condign punishment will suffice for these purposes. In that case, all that is required is an administrative procedure to allow the acquittal to be expunged in return for the offender pleading guilty. There is no persuasive reason to make provision for another contested trial in such circumstances, any more than in the first instance we can force an offender who wants to plead guilty to the full charge to undergo a contested trial. Such an administrative procedure would dispense with all the highly dubious talk of ‘compelling evidence’, which only arises in expectation that a second prosecution will be contested.

For these reasons, it is very puzzling to me why section 3 of the Bill picks out admissions as a special class of ‘new evidence’ rather than subsuming them within the general provisions contained in section 4.
It may be that this drafting choice reflects a point of Scots criminal law of which I am ignorant. It may even be the intention to make the test applicable to confessions more rigorous and exacting, inasmuch as section 4(4)(c) refers to the need for corroboration – albeit I was under the impression that all types of evidence require corroboration in Scots criminal law.

Be that as it may, my worry would be that singling out confessions (including alleged confessions to third parties) as a special case of new evidence might lend to admissions of guilt a spurious authority and credibility, when in fact experience (including recent English experience of utilising a novel double jeopardy exception) demonstrates that we have reason to be especially circumspect in relying on confessions as reliable evidence of guilt.

**General tests of probative value**

I have been referring to “compelling” evidence, which is the test adopted in England and Wales for quashing acquittals on the basis of new evidence under the CJA 2003. However, the phraseology employed in sections 3 and 4 of the Scottish Bill arguably creates (even) less demanding tests of probative value as a basis for quashing acquittals.

Section 3 states that confession evidence must satisfy the court “on a balance of probabilities that the person credibly admitted having committed the original offence”. So the court must be satisfied (i) that the admission in question was actually made and (ii) that it is “credible”. The more generic section 4(6)(a) and (c) require that “the case against the accused is strengthened substantially by the new evidence” such that “it is highly likely that a reasonable jury properly instructed would have convicted the person” had jurors heard all the evidence now available at the original trial.

It is always difficult to predict how tests of probative value will be applied in practice. One person’s credible proof is another’s reasonable doubt. But I think it is a fair prediction that the standards contained in the draft Scottish legislation would in practice establish a lower evidential threshold for quashing convictions than the English standard of “compelling” evidence.

To say of a confession that it is “credible” does not appear to say very much. It could well be credible, but still false, mistaken or contradicted by other evidence. Credibility directs attention to the character and reputation of the confessor as much as to the believability of the contents of the confession. However, accomplished liars can appear highly credible. Moreover, the judges quashing the conviction need only be convinced of the confession’s credibility on the balance of probabilities, a standard of persuasion which obviously falls far short of proof beyond reasonable doubt at a retrial.

I am not sure what to make of section 4(6)(c) “highly likely” standard. Application of the standard is necessarily counterfactual – “what might a jury have done if only...?” – and a high degree of likelihood certainly sounds less convincing than “beyond reasonable doubt”. I am inclined to think that the English standard requiring “compelling” evidence to be “reliable, substantial and highly probative” sets the bar somewhat higher, but this cannot be a confident empirical prediction. Even if the
Scottish test, as interpreted in practice, equates to the English “compelling” standard, it is notable that there have been several cases in England and Wales in which the Director of Public Prosecutors (no stranger to making judgements of evidential weight) thought the standard was satisfied but the Court of Appeal emphatically disagreed.⁶

I conclude that the tests of probative value contained in sections 3 and 4 of the Bill are likely to prove less demanding than the corresponding tests for quashing acquittals in England and Wales, and at any rate will not establish a sufficiently robust threshold for the exceptional procedure of quashing acquittals and ordering retrials in Scotland.

III. Tainted Acquittals

None of the foregoing discussion is intended to imply any principled objection to setting aside tainted acquittals. However, I do not regard this as any true ‘exception’ to double jeopardy protection, but rather as an aspect of the prohibition’s proper application.

A tainted acquittal should be regarded as a nullity, with no legal effect. Citizens against whom there exists an answerable case of criminal wrongdoing have a political obligation to submit themselves to the socially and legally authorised procedures for resolving disputed allegations of criminal conduct. The obligation is to do this once and once only. We are only entitled to call citizens to account⁷ and expose themselves to the irremediable risk of wrongful conviction once. But a person who jury tampers or pays witnesses does not discharge that political obligation. Rather, s/he attempts to cheat the system by fixing its outcome. Such a person is not entitled to benefit from their own wrongdoing. An acquittal procured in this way is meaningless, and should not bar further valid proceedings to test evidence-backed allegations of criminal conduct.

The harder case is where the proceedings are a nullity, but the accused did not themselves procure that result. On balance, I would still say that the double jeopardy prohibition is not violated by another prosecution in such circumstances. This might be somewhat hard on the accused, but it might well be harder on the (alleged) victim simply to abandon proceedings, e.g. because the judge falls ill before verdict can be pronounced. It is certainly possible to envisage cases where it would be inappropriate for a second prosecution to be brought, especially where some default of the prosecution has put the accused at an appreciable disadvantage. But this

⁶ In addition to R v Miell [2008] 1 WLR 627, CA, see R v B(J) [2009] EWCA Crim 1036; R v G(G) and B(S) [2009] EWCA Crim 1207 (in which the Court of Appeal described the witness proffering new confession evidence as “a fluent and circumstantial liar who says whatever suits him and is adept at tailoring it to the known facts. His previous accounts of this killing have been garnished with much colourable but invented material... He may this time be telling the truth but it is far from plain that he is, and his evidence is in no sense the kind of compelling new material which can justify the reversal of an acquittal”).

⁷ The idiom of “calling to account” is borrowed from Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, The Trial on Trial Volume 3 – Towards a Normative Theory of the Criminal Trial (Hart, 2007).
would be an application of the residual discretion to halt prosecutions where a fair trial would be impossible, rather than a facet of double jeopardy protection *per se*.

A trial does not become a nullity, however, simply because the prosecutor or the judge makes a mistake of law or strategic error in the presentation of the case. That the prosecution’s evidence might have been stronger if more effort or ingenuity had gone into building the case is not a reason for declaring a trial producing an acquittal void. The accused has stood his trial, been called to account, has been exposed to the risk of wrongful conviction, and pronounced “not guilty” by a validly constituted court. This is the full extent of the citizen’s obligation as we have traditionally understood it, and the prohibition against double jeopardy states that he cannot be tried again for the same offence.

It is perhaps worth adding that procedures to quash tainted acquittals will probably not be invoked very often. This power was introduced in England and Wales by the Criminal Procedure and Investigations Act 1996, ss.54-57, but – so far as I can ascertain – has never once been utilised since. However, limited practical utility is not an argument against law reform if it is right in principle that such a procedure should exist.

In any event, it is politically and symbolically important that procedures to deal with tainted acquittals should not be styled “exceptions” to double jeopardy protection, but rather straightforward applications of an absolute prohibition that admits of no true exceptions.

**IV. Conclusions**

Generally speaking, I endorse the broad ambitions of the English and Scottish Law Commissions to clarify and modernise the law, and to place it on a consolidated (if not strictly “codified”) statutory footing.

Lending statutory authority to the ancient common law double jeopardy prohibition is a laudable objective, and would – incidentally – make Scots criminal law superior to English law in this regard.

There is also no objection of principle to creating a procedure for quashing tainted acquittals. However, for the reasons explained in the preceding section, this is not properly characterised as an “exception” to the double jeopardy prohibition, and for reasons of clarity, transparency and public education, it would be best to avoid describing it in the misleading language of “exception” employed by cl 2’s title.

Notwithstanding the recent wave of similar reforms in common law jurisdictions including England and Wales and their apparent compatibility with international human rights law on the meaning of “fair trial”, I remain opposed in principle to the creation of a “new evidence” exception to the double jeopardy prohibition. In essence, the supposed benefits are few and highly speculative, whereas the costs are real and potentially serious.

In all likelihood (taking account of comparative experiences to-date), very few cases will result in acquittals being quashed on the basis of new evidence. The impetus for
reform in England and Wales appears to have been the failure of the private prosecution of individuals accused of the murder of Stephen Lawrence. This case remains unsolved to this day, and it is unlikely that it could ever be judged to be in the public interest for the acquitted suspects to be re-tried (as legal officials have consistently said all along). In Scotland, double jeopardy reform is associated in the popular media with the World’s End murders. But this is not a case raising typical “new evidence” issues. Many people, including relatives of the deceased, are understandably dissatisfied with the outcome of proceedings and, rightly, insist that justice has not been done. However, private anguish and distress are not necessarily a sound basis for law reform; and justice sometimes eludes our grasp.

Many protesters and critics of the existing law apparently would like to see retrials until the accused is convicted. This is, in effect, jury-shopping. Don’t like one verdict? Ask for another (and another…)! The Scottish draft Bill (cl 4(5)), like the English legislation (CJA 2003, s.76(5)), limits proceedings for applying to quash an acquittal to a single attempt. If one must have exceptions to the double jeopardy prohibition, it is right in principle that repeated applications should not be permitted. However, does anybody seriously think that critics, campaigning journalists and “public opinion” will be placated by this constraint? In reality, it will be a fig-leaf – and efforts to reform the law will then concentrate on abolishing cl 4(5) (this may indeed be the real lesson of the World’s End case in this context).

On the other side of the equation, the costs of a new evidence exception are far more substantial and considerably less speculative:

(i) All jury acquittals will henceforth be provisional. There could be an application to quash the acquittal in just about any case. It only requires that some witness come forward claiming (for whatever reason) that an acquitted person has made a confession.

(ii) Symbolically, this represents an erosion of common law ideals of justice. We have traditionally regarded jury verdicts as final and sacrosanct. We have said that this commitment to liberal freedom distinguishes us from authoritarian regimes, in which the state can always be counted on – in one way or another, sooner or later – to “get their man”. Creating a new evidence exception to the double jeopardy prohibition is a step in the direction of illiberal authoritarianism.

(iii) In more immediately practical terms, it may pave the way for certain targeted individuals to be reinvestigated to the point of persecution, by the police and/or the press, despite their acquittal. It is instructive to consider, for example, what might have happened to Colin Stagg if the CJA 2003 had been in force at the time of his acquittal. Is it too cynical to imagine that, in a case in which police and prosecutors are convinced of a suspect’s guilt of a serious crime, “new evidence” would indeed be found or generated, one way or

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another? This is not intended to be as sinister as it may sound. After all, defence teams are frequently able to come up with various species of “new evidence” in launching serial appeals against conviction. Constructing evidence is a routine part of police work. If courts and juries cannot be trusted to “do their job” in convicting the “obviously” guilty, it is only human nature to try to ensure that there will be no mistake next time around.

(iv) In addition to and reinforcing the preceding point, it is — to say the least — highly questionable whether the police and prosecutorial authorities should be devoting additional resources to trying to get acquittals of those who have already stood their trial overturned, when there are many unsolved crimes in which suspects have never stood trial and many more new crimes occurring all the time. The argument that scarce law enforcement resources should be diverted to reinvestigating and challenging acquittals, on the basis that (in accordance with Blackstone’s celebrated ratio) our system is calibrated to producing more erroneous acquittals than wrongful convictions,\(^9\) strikes me as simply perverse, even without having to contend with looming cuts across the public sector.

If the argument of principle is rejected, and the Scottish Parliament is determined to follow the dubious precedent set by other common law jurisdictions in creating a “new evidence” exception to the double jeopardy prohibition, I suggest that the wording of the current Draft Bill fails to establish a sufficiently robust evidential standard for triggering the exceptional procedure of quashing an acquittal.

It is difficult to predict with any confidence how the statutory wording might be interpreted in practice, but it seems likely that the Draft Bill’s evidentiary thresholds are not as exacting as the English “compelling” evidence standard — which itself has already been exposed to attempted erosions by prosecutors. The situation will be further exacerbated in Scotland if, as it appears, there is no bar on serial applications based on new confessions under cl. 3.

My prognosis for a “new evidence” exception to the double jeopardy prohibition in Scotland is gloomy. Either it will hardly ever be used, in which case it will have been an empty political gesture with largely symbolic costs (by which I do not mean to underestimate the significance of symbolism for securing legitimacy in criminal justice); or alternatively, it will be used far too often and precipitate injustice, at the same time as it indubitably facilitates convicting the guilty in other cases. Comparative experience suggests that the first alternative is more likely than the second. I have yet to encounter any empirical data or normative arguments capable of satisfying me that the price is truly worth the cost.

Paul Roberts
Professor of Criminal Jurisprudence
University of Nottingham, School of Law
23 November 2010

The rule against double jeopardy has stood in legal systems across the world for centuries. It is based upon the principle of finality: that society as a whole has an interest in the final judgements of the courts being treated as conclusive.

If the decision is taken to qualify the rule then there must be a sufficiently strong case to justify such action. We note the arguments put forward in respect of cases where a confession has been made, but this is not a new situation and there is no obvious reason why the law should be changed at this time. While DNA and other advances in science and technology introduce new forms of evidence, even DNA evidence cannot be regarded as axiomatically definitive and beyond some very specific circumstances, the case for making an exception to the rule is as weak as it ever was. We do not consider that a convincing case for the reform of double jeopardy has been made.

We are of the view that the proposed distinction between the treatment of a confession and that of other forms of new evidence is neither realistic nor useful. It is more likely that the accused makes an admission which, whilst it is not a confession, makes a critical difference to the proof of guilt when it is taken along with other evidence. To observe a distinction between the treatment of a confession and that of such admissions seems artificial. It would have the unfortunate consequence that the latter could be used only where new evidence could be used, that is, for example, only in regard to certain offences. Self-incriminating statements by an accused should be treated in the same way as other instances of new evidence which may justify qualifying the rule against double jeopardy.

We recognise that there is popular disquiet when new evidence appears unequivocally to demonstrate guilt, carrying the risk that confidence in the justice system will be undermined as justice is seen not to have been done. However, there must be recognition that the justice system does not and cannot deliver perfect results. The cost of maintaining the integrity of the system and upholding the principle of finality is that a proportion of the guilty are acquitted and cannot be re-tried.

We agree 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.

However, when considering the test to be applied in assessing new evidence, the RSE would highlight that the current formulation appears to exclude evidence which was available at the time of the original trial but was not led by the prosecution because its significance could not have been recognised until new
evidence came to light. It may be preferable to proceed on the basis that the prosecutor should have only one opportunity to exercise his judgement as to the evidence which is significant, but it should be noted that this may restrict the use of new evidence in some cases.

- We are of the view that it is inappropriate to expect the Court to make judgement on whether it would be “highly likely” that a jury would have convicted. We suggest that it would be sufficient if the Court is satisfied that the jury would have regarded the new evidence, together with evidence at the trial, as compelling evidence of guilt.

- If an exception to the rule against double jeopardy is to be made this should apply only to the offences of murder and rape. Any broader list of exceptions will tend to undermine confidence in the finality and quality of the criminal justice system.

- It has been said that the proposed changes will only apply to a small number of cases. This is highly unpredictable, particularly given the potential for significant pressure from victims, their relatives, support groups and indeed the media to bring an individual to a second trial.

- We have strongest objection to permitting the Scottish Government to add to the list by way of affirmative order, effectively allowing for the exception to be applied to any unusual high-profile case.

- Opinion on whether the new evidence exception should be applied retrospectively is divided. In any case, we are in favour of all exceptions against the rule of double jeopardy being treated equally, whether this means that all should be applied retrospectively, or none.

Introduction

1. The Royal Society of Edinburgh has previously commented on the proposed reforms to the rule against double jeopardy, in a response to the Scottish Government’s March 2010 consultation paper. It now welcomes the opportunity to comment on the Double Jeopardy (Scotland) Bill as introduced to the Scottish Parliament on 7 October 2010. As the Justice Committee will no doubt appreciate, many of the comments that we provided earlier to the Scottish Government are directly relevant to this call for evidence.

The rule against double jeopardy

2. The rule against double jeopardy, preventing a person from being put in jeopardy of criminal prosecution twice for the same offence, applies in legal systems across the world. It is supported by a number of rationales. At its heart lies the principle of finality, which is a matter of public policy. As the Scottish Law

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Commission (SLC) pointed out in its discussion paper on the issue\(^2\), society has a general interest in the final judgments of the courts being treated as conclusive (paragraph 2.30). Linked to this is the importance of the integrity of the relationship between the citizen and the state (paragraph 2.32). These considerations by themselves justify the rule against double jeopardy. To them may be added further considerations, of avoiding continued anxiety and insecurity to acquitted persons (paragraph 2.29) and avoiding highly selective, populist campaigns for re-trial.

**Exceptions to the rule against double jeopardy**

3. In recognition of the foregoing principles underlying the rule against double jeopardy, we have reservations about the creation of any exception to it. The fact that this rule has been well recognised and respected for centuries does not mean that it should be immune from scrutiny, but is there a sufficiently strong case to justify change?

4. The Scottish Government suggests that advances in science and technology, such as DNA and enhanced photo imaging, can obtain unequivocal evidence of guilt that previous generations would never have thought possible. It is important to note however that there are serious concerns amongst scientists about the extent to which such evidence can be presumed to be unequivocal. Moreover, there seems to be little likelihood of such discoveries in cases where the accused has been acquitted after the proposed legislation has come into force, and even if the exception is to be applied retrospectively none of the responses to the SLC's discussion paper identified any existing cases to which it would apply.

5. Instances where the accused confesses after his acquittal are likely to be rare and in any case this is not a new situation. The case for making an exception to the rule in this case appears to be as weak as it ever was. There are good reasons why the rule against double jeopardy has stood for centuries and a decision to qualify it must be based on thoroughly considered and carefully balanced arguments. We do not consider a convincing case for the reform of double jeopardy has been made.

6. It has to be recognised that the criminal justice system is neither actually nor potentially perfect. It has always been recognised that a proportion of the guilty will be acquitted (and an even greater proportion will never be charged). Imposing new burdens on a system which is already overloaded requires strong justification. There will be public concern when an acquitted person subsequently flaunts his guilt, or when scientific developments make new kinds of evidence available, but we do not see that the scope to do anything about this in practice justifies qualifying this fundamental rule. If, nevertheless, the Scottish Parliament considers that the maintenance of public confidence requires change of this sort, then we put forward our comments below for consideration.

7. It has been said that the proposed changes will affect only a small number of cases. We are wary of this claim which has an uncertain basis. It is impossible to predict how widespread the use of the anticipated exceptions will become, particularly bearing in mind that there may well be significant pressure from victims, their relatives, support groups and indeed the media to bring an individual to a second trial.

8. Qualifying the rule against double jeopardy is a serious step, one that must not be taken lightly. There is a fine balance between undermining the integrity of the justice system by exposing individuals to the risk of a second prosecution and strengthening it by ensuring that the public see justice as having been done. If the Scottish Parliament are to proceed with such a change, there must be a cogent and thoroughly considered argument to support this. This also affects the conditions for the applications of such a change.

An exception where an acquitted person subsequently confesses to the offence

9. We have reservations about the distinction drawn between the treatment of a confession and that of other forms of “new” evidence. It is said that the accused who confesses should forfeit the equitable justification for the rule against double jeopardy. For such cases it is proposed that the legislation should apply to any crime or offence.

10. We are not persuade that this difference in approach is realistic or useful. First, not all cases of a post-acquittal confession by an accused mean that his defence has been dishonest. He may simply have put the prosecutor to the proof of his guilt without challenging the credibility of the evidence which was said to have incriminated him. Secondly, to accord special treatment to cases of post-acquittal confessions is artificial. As we have already said, such cases are likely to be rare. Less infrequent may be cases in which the accused makes an admission which, while it is not a confession, makes a critical difference to the proof of his guilt, when it is taken along with other evidence. He may, for example, disclose that he was at the scene of the crime at the time of its commission, or that he had hidden a weapon which can be shown to have been used in the commission of the murder.

11. To observe a distinction between the treatment of a confession and that of such admissions seems artificial. It would have the unfortunate consequence that the latter could be used only where “new” evidence could be used, that is, for example, only in regard to certain offences. Self-incriminating statements by an accused should be treated in the same way as other instances of new evidence which may justify qualifying the rule against double jeopardy.

12. There are concerns about the proposal that the later discovery of pre-trial admissions should be a ground for a retrial. Given the unsatisfactory nature of confessions as evidence, as set out above, and in the interest in the finality of the court’s ruling, it may be preferable that only post-trial confessions should be relevant.
An exception where new evidence of guilt emerges

13. We can see the argument that there may be popular demand for a person to be tried when evidence emerges as to his guilt even where he has previously been acquitted of the charge. Advances in DNA evidence may lead the public to conclude that there is now technology available that is able to give a degree of certainty that ties an individual to a crime or crime scene. Where this certainty exists, public opinion may not, generally, find it acceptable that the individual can be protected from prosecution. It may be said that there is a risk of confidence in the justice system being undermined.

14. Greater public awareness of the administration of justice is of benefit, but it carries the risk of unrealistically high expectations that the system can deliver perfect results. Clearly the views of the public cannot merely be dismissed. There are, however, many, including those within the justice system, who hold deep reservations about creating an exception to the rule against double jeopardy, even in these circumstances. The immediate concern is that the rule must remain a priority in order to preserve the integrity of the justice system. There is also concern that advances in science are being used to open the door much more widely to any type of evidence which has come to light since the acquittal of the accused.

Conditions for the use of “new” evidence as an exception

15. In accordance with the recommendation made by the SLC, the Bill (s4(6)(a)) states that evidence will be considered as “new” for the purposes of a second trial where “the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence”.

16. This definition of “new” evidence rules out the ability of the prosecution to rely on evidence which was available at the time of the original trial but which it did not lead for tactical reasons.

17. We agree with this definition of “new” evidence. It has, until now, been widely accepted that the prosecution should have one opportunity to make the case against an individual based on the evidence available. This evidence must be sufficient, of course, to warrant a trial in the first place. It is undesirable that “new” evidence should include evidence which should have been, but was not, obtained or examined in the course of police investigation or the preparation of the prosecution case. “New” evidence should be defined with at least the same restrictions as apply to the appeals against convictions.

18. We would point out, however, one of the possible consequences of this formulation. It appears to exclude evidence which was available at the time of the trial but has assumed significance only because of the “new” evidence. For example, if after the acquittal a murder weapon is discovered and is found to bear traces of the accused’s DNA, it would not be possible for the prosecutor to use evidence as to the accused’s DNA if at the time of the original trial it had been available but was regarded, correctly, as of having no bearing. On balance it may
be preferable to proceed on the basis that the prosecutor should have only one opportunity to exercise his judgement as to the evidence which is significant, but it should be recognised that under the terms of the current Bill, this situation could arise.

19. We would also comment on s4(6)a of the Bill, stating the condition that “the case against the accused is strengthened substantially by the new evidence”. We are in no doubt that it is not enough that the case against the accused is strengthened substantially by the new evidence. By itself this would open the door to a second trial where the original case was very weak.

20. With regard to s4(6)(c), we consider that it is impractical and inappropriate for the Court to have to decide whether a reasonable jury would have convicted. The expression “highly likely” implies a highly subjective approach. We would suggest that it would be sufficient if the Court is satisfied that a reasonable jury, properly instructed, would have regarded the new evidence, together with evidence led at the trial, as compelling evidence of guilt.

The range of offences to which an exception where new evidence emerges should apply

21. It is widely accepted that any new evidence exception should apply only in the most serious of cases. The SLC noted that “there is no direct, objective and uncontroversial test of seriousness”, and recommended that the exception should only be applied to the offences of murder and rape.

22. We note that the United Kingdom Parliament, in passing the Criminal Justice Act 2003 for England and Wales, adopted a significantly broader list of crimes to which such an exception can apply, including a range of sexual offences, drug and criminal damage offences. We also note that Schedule 1 of the Bill similarly sets out a wider list, incorporating a range of sexual offences.

23. We agree with the SLC’s recommendation and suggest that murder and rape should be the limit of the offences to which the exception would apply. It may be noted that, along with treason, they are the Pleas of the Crown, which can be prosecuted only in the High Court. While anecdotal evidence from England and Wales suggests that the actual number of cases brought to second trial is small, the extent of the list adopted under the 2003 Act would, in our view, tend to undermine confidence in the finality and quality of the criminal justice system.

24. We previously voiced the strongest objection to permitting the Scottish Government to add to the list by way of affirmative order, effectively allowing for the exception to be applied to any unusual high-profile case. It is contrary to sound constitutional principle that the Scottish Government should be entitled to change the substantive law in this way. While noting that the Bill prohibits Scottish Ministers from using this power to permit a double jeopardy retrial in a case where the offence was not on the list at the time of the first trial, we continue to advocate that if widening the list is to be considered then this should only be done through primary legislation.
Retrospective application of exceptions to the rule against double jeopardy

25. The Bill currently allows for the retrospective application of exceptions to the rule against double jeopardy whether that be due to the original acquittal being “tainted”, an admission of guilt, or the emergence of new evidence. The question of whether exceptions should be applied retrospectively is a difficult one, and one on which opinion is divided.

26. The SLC recommended that an exception on the basis of new evidence should not be retrospective, on the grounds that an accused who was tried at a time when a second trial was not permitted should have the right to be confident that his acquittal was indeed final. There is significant support for this position. In principle criminal legislation should not be retrospective. Nevertheless, it may be questioned whether a second trial on scientific evidence should be ruled out merely because the acquittal was on the day before, rather then on the day after, the enactment of the legislation.

27. We have previously stated our reservations about the distinction drawn between an exception based on the admission of guilt and that based on the emergence of new evidence. For this reason we are in favour of all exceptions to the rule against double jeopardy being treated equally, whether this means that all should be applied retrospectively, or none. We note that the most likely candidates for retrial will be historic cases where DNA or other scientific advances now fairly conclusively prove guilt. Nevertheless, we also note that the SLC, during its own consultation on double jeopardy, was not made aware of any cases in Scotland in which a second trial would be pursued should the proposals be applied retrospectively.

The human rights implications of the Bill

28. We do not consider that of themselves the provisions in the Bill offend against human rights, such as those to which Article 8 of the ECHR relates. That is not to say that questions of human rights could not arise in individual cases. It would be for the High Court in such cases to take these matters into account when considering the exercise of the powers granted under the provisions of the Bill.

Additional information

This paper has been prepared on behalf of Council by an expert group of Fellows and signed-off by the General Secretary on behalf of the Society.

Any enquiries about this submission and others should be addressed to the RSE’s Consultations Officer, Ms Susan Bishop (evidenceadvice@royalsoced.org.uk).

Responses are published on the RSE website www.royalsoced.org.uk
In reply to your email dated 12 October 2010 I have nothing more to add to my previous response in June this year [Mr Scott’s response to the Scottish Government’s consultation on possible reforms to the rule against double jeopardy in Scottish criminal cases is available at: http://www.scotland.gov.uk/Resource/Doc/254429/0105354.pdf].

However I wish to make a personal comment regarding the Bill.

Retrospectivity must be included. I see no difference between a person convicted and sentenced for a crime and later being acquitted on appeal for whatever reason and someone who has already been acquitted and then retried.

I feel I am a victim of crime as my daughter Helen was brutally murdered in 1977 and it was 30 years later before a person was charged and tried for the crime. The trial was supposed to last approximately six weeks but collapsed under two weeks on 10 September 2007.

I feel there was crucial evidence which the jury did not have the opportunity to hear and the case should have at least been left for a jury verdict.

I am sure there are other families who feel the same as me and I am only seeking justice for my daughter which I feel I have not had as yet.

Retrospectivity could be the only answer to all this.

29 November 2010
SCID welcomes the opportunity to submit our views on the Double Jeopardy (Scotland) Bill before the Justice Committee.

It may be helpful to provide a brief background on SCID.

SCID, (Scottish Campaign against Irresponsible Drivers) was formed in 1985 by Wendy Moss as a result of a fatal road crash in which her only son was killed. Since that time SCID has helped and advised hundreds of Scottish families who have lost a loved one as a result of a road crash.

SCID Objectives:

- To help and advise victim families of road crashes
- To seek to restructure the Law as it applies to Criminal Traffic Offences which have caused death or injury
- To deter irresponsible drivers by the imposition of more relevant sanctions
- To encourage drivers, through education, to adopt safer standards.

1. SCID welcomes the proposed reform to the rule against double jeopardy. SCID upholds the fundamental legal principle which prevents an accused person being retried but when there is new and compelling evidence we agree that there should be a legal provision to allow a retrial in the public interest. We ask that fatal driving offences be included in the exceptions to the Double Jeopardy rule.

2. We understand that the offences to be covered in the new Bill have not been settled. We would ask that consideration be given to include in the crime categories, specific motor vehicle offences which have resulted in a fatality. It is worth adding that as far as these offences are concerned we would envisage that the possibility of a re-trial, like all the crime categories listed in the Bill, would be an extremely extraordinary occurrence. However, we would ask you to consider the following examples of when, following a fatal road crash and subject to the Lord Advocate’s instigation and the Scottish Court of Criminal Appeal, a re-trial could be deemed appropriate;

2.1 Following an accused person’s conviction or acquittal of a statutory “Causing death by driving” offence (see appendix 1), new and compelling evidence emerges which indicates that the accused used the vehicle as a weapon with intent to kill i.e. Retrial for the Common law offence of murder (“wickedly reckless”) or the lesser charge of culpable homicide.

2.2 Following an accused person’s conviction or acquittal of the lesser statutory offence of dangerous or careless driving (Section 2 or Section 3 of the Road Traffic Act (see appendix 1)), new and compelling evidence emerges which indicates that the accused used the vehicle as a weapon with intent to kill i.e.
Retrial for the Common law offence of murder ("wickedly reckless") or the lesser charge of culpable homicide.

**N.B** In fatal road crash trials, juries can frequently have the option to convict on a lesser charge of dangerous or careless driving. The judge or sheriff, on sentencing, can not take into account the consequences of death only the standard of driving.

2.3 Following a road crash which results in a victim sustaining injuries and an accused person is convicted or acquitted of the lesser statutory offence of dangerous or careless driving (see appendix 1) and the injured party subsequently dies, new and compelling evidence emerges which indicates that the accused used the vehicle as a weapon with intent to kill i.e. Retrial for the Common law offence of murder ("wickedly reckless") or the lesser charge of culpable homicide.

23 November 2010
Appendix – Criminal charges which can be brought following a road death.

**Murder and Culpable Homicide (Common Law)**

It is possible to charge someone with murder or culpable homicide if their driving has killed. Murder is committed when there was intention to kill a victim or the accused’s conduct was ‘wickedly reckless’. A charge of murder may, for example, be brought if someone used a vehicle as a weapon with intent to kill.

Culpable homicide is committed when the accused caused loss of life through wrongful conduct, but there was no intention to kill nor ‘wicked recklessness’.

**Penalty**

**High Court: Murder** – mandatory life imprisonment.
**High Court: Culpable Homicide** – Maximum sentence of life imprisonment.

**Relevant Sections of the Road Traffic Act (Statutory Offences)**

The penalties listed are maximum penalties. Where there are no aggravating circumstances the minimum sentence will be handed down.

**Section 1 of the Road Traffic Act 1988 (as amended by the RTA 1991 s.1)**

“Causing death by dangerous driving”

The law states that; “A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence”

The definition of dangerous driving is that:

- (a) the way a person drove fell far below what would be expected of a competent and careful driver; and
- (b) It would be obvious to a competent and careful driver that driving that way would be dangerous.
- (c) It is also dangerous driving if it would have been obvious to a competent and careful driver that driving a vehicle in its current state would be dangerous.

**Maximum penalty**

**High Court:** 14 years imprisonment, an unlimited fine, a minimum period of two years disqualification, endorsement of 3 – 11 penalty points with an order to re-sit driving test.

**Sheriff Solemn Court:** 5 years imprisonment, an unlimited fine, a minimum period of two years disqualification, endorsement of 3 – 11 penalty points with an order to re-sit driving test.

**Section 2 of the Road Traffic Act 1988 (as amended by the RTA 1991 section 2)**

“Dangerous Driving”

This charge does not mention death or injury but can be brought against a driver who was involved in a fatal or serious injury road crash.
In some cases, there is evidence that a driver was driving dangerously before or after the crash, but there is no evidence that this dangerous driving caused the death.

**Maximum penalty**

**Sheriff Solemn Court:** 2 years imprisonment and or unlimited fine, 1 year minimum disqualification with an order to re-sit driving test.

**Sheriff Summary Court:** 1 year imprisonment and or fine (maximum fine £5,000), 1 year minimum disqualification with an order to re-sit driving test.

Section 2B of the Road Traffic Act 1988 (as amended by the Road Safety act 2006, s.20)

“Causing death by careless or inconsiderate driving”

The law states that “A person, who causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, is guilty of an offence.”

The definition of careless and inconsiderate driving is that the standard of a person’s driving fell below what is expected of a careful and competent driver.

**Maximum penalty**

**Sheriff Solemn Court** - 5 years imprisonment and an unlimited fine, minimum 1 year disqualification and endorsement of 3-11 penalty points.

**Sheriff Summary Court** – 6 months imprisonment, maximum fine of £5,000, minimum 1 year disqualification and endorsement of 3-11 penalty points.

First offenders will receive community service.

Section 3 of the Road Traffic Act 1988

“Careless and Inconsiderate Driving”

**Maximum penalty**

**Sheriff Summary Court:** £2500 fine, discretionary disqualification, 3-9 penalty points.

This charge does not mention death or injury but can be brought against a driver who was involved in a fatal or serious injury road crash.

In some cases, there is evidence that a driver was driving carelessly before or after the crash, but there is no evidence that this careless driving caused the death.

Section 3A of the Road traffic act 1988 (as amended by the RTA 1991, s.3)

“Causing death by careless driving under the influence of drink or drugs”

The law states that: ‘If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and s/he is, at the time when driving, unfit to drive through drink or drugs, or s/he has consumed so much alcohol that the proportion in his/her breath, blood or
urine exceeds the prescribed limit, or s/he refuses to submit a specimen, s/he is guilty of an offence.’

The offence is committed if the driver has more than the legal limit of alcohol or refuses to provide a specimen. This means the police do not necessarily have to show a person’s driving ability was impaired, only that he or she had more than the permitted amount of alcohol.

**Maximum penalty**

**High Court:** 14 years imprisonment, unlimited fine, minimum of 2 years disqualification, 3-11 penalty points, order to re-sit driving test.

**Sheriff Solemn Court:** 5 years imprisonment, unlimited fine, minimum of 2 years disqualification, 3-11 penalty points, order to re-sit driving test

**Section 3ZB of the Road Traffic Act 1988 (as amended by the Road Safety Act 2006, s. 21)**

‘Causing death by driving: unlicensed, disqualified or uninsured.’

The law states that: ‘A person is guilty of an offence if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under:

(a) Section 87(1) of this Act (driving otherwise than in accordance with a licence),

(b) Section 103(1)(b) of this Act (driving while disqualified), or

(c) Section 143 of this Act (using a motor vehicle while uninsured or unsecured against third party risks).’

**Maximum penalty**

**Sheriff Solemn Court:** 2 years imprisonment and an unlimited fine, minimum of 1 year disqualification, 3-11 penalty points.

**Sheriff Summary Court:** 6 months imprisonment and a fine of up to £5000, minimum of 1 year disqualification, 3-11 penalty points.
Justice Committee

Double Jeopardy (Scotland) Bill

Written submission from the Scottish Human Rights Commission

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of its functions. The Commission’s mandate is to promote and protect human rights for everyone in Scotland. The Commission is a national human rights institution, established according to the United Nations Principles relating to the Status of National Institutions (The Paris Principles), one of over 80 in the world and three in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission.

1. Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to comment on the Double Jeopardy (Scotland) Bill (the Bill). The Commission notes that the Bill was informed by the work of the Scottish Law Commission (SLC), although there are a number of significant differences between the SLC recommendations and the Bill.

The work of the SLC comprehensively covers the history of the protection against double jeopardy in Scots law and notes that some recognition of the finality of criminal verdicts could be found in the earliest written materials of Scots law and that a rule against multiple trials was recognised by the 13th or 14th Century and perhaps significantly earlier.1

The Commission does not intend to duplicate the work of the SLC, but would like to make a number of points in relation to the principles, substance and process set out in the Bill.

The human rights found within the European Convention on Human Rights (ECHR) which are relevant to the Committee’s consideration of the Bill are:

<table>
<thead>
<tr>
<th>Article</th>
<th>Right against torture, inhuman or degrading treatment or punishment</th>
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<tbody>
<tr>
<td>Article 6</td>
<td>Right to a fair trial</td>
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<tr>
<td>Article 7</td>
<td>Right against retrospective criminalisation</td>
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<tr>
<td>Article 8</td>
<td>Right to private and family life</td>
</tr>
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</table>

This response will address each of these rights. However, the Commission draws the Committee’s attention in particular to the right to respect for private and family life as set out in Article 8 of ECHR. This Article is the one most obviously engaged by the

provisions of the Bill relating to exceptions to the rule against double jeopardy. Interference with the right to private and family life is only permitted if it meets the conditions set out in Article 8(2).

2. The rule against double jeopardy in international law

The Commission welcomes the statutory restatement of the Scots law rule against double jeopardy set out in the Bill.

The rule is found in international law. It is contained within Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR):

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The United Kingdom ratified the ICCPR in 1976. However it has not been incorporated into domestic law.

The rule is also set out in Article 4 of Protocol 7 to ECHR:

(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

(3) No derogation from this Article shall be made under Article 15 of the Convention.

In terms of the legislative competence of the Scottish Parliament, it is important to note that the UK has not yet ratified Protocol 7. It is therefore not included in the definition of convention rights in terms of the Scotland Act 1998.

3. The Importance of the Rule against Double Jeopardy

The Commission agrees with the SLC that there are a number of features of the rule against double jeopardy which make it indispensable:

- The fundamental recognition of the finality of criminal proceedings.
• The expression of the limits of the power of the state vis-à-vis the citizen.

• The protection from the anxiety and humiliation that repeated trials would undoubtedly cause accused persons.\(^2\)

These features engage various protections provided under ECHR.

In relation to the fundamental recognition of the finality of criminal proceedings, the European Court of Human Rights, referring to the Preamble to ECHR, has stated that the principle of legal certainty is one of the fundamental aspects of the rule of law, requiring that where courts have finally determined an issue, their ruling should not be called into question.\(^3\) The fundamental recognition of the finality of criminal proceedings engages Articles 8 and 7.

The expression of the limits of the power of the state vis-à-vis the citizen engages Article 8.

The protection from the anxiety and humiliation that repeated trial would undoubtedly cause accused persons engages Article 8, and in extreme situations, potentially engages Article 3.

4. Article 8: The right to respect for private and family life

The protection provided for private and family life by Article 8 is a modern articulation of the limits of power of the state vis-à-vis the citizen. The first part, Article 8(1), sets out the precise rights which are guaranteed to an individual by the State:

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

The second part, Article 8(2), makes it clear that interference with the Article 8 rights by public authorities is only permitted in certain limited circumstances.

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.

Only interferences which are in accordance with law and necessary in a democratic society in pursuit of one or more of the legitimate aims listed in Article 8(2) will be considered to be an acceptable limitation by the State of an individual’s Article 8 rights.


\(^3\) Xheraj v Albania Application 37959/02, Judgement 29 July 2008, paragraph 51
The test under Article 8(2) for whether any particular interference is “necessary” involves consideration of whether it is justified by a pressing social need and, in particular, is proportionate to the aim pursued. It is not sufficient that the measure is “useful”, “reasonable” or “desirable”.4

Where, as with the Bill, the interference being contemplated involves departure from the principle of legal certainty and finality of judgement, the European Court of Human Rights has stated that it is only permitted “when made necessary by circumstances of a substantial and compelling character or if serious legitimate considerations outweigh the principle of legal certainty.”5

It is in this context that the whole Bill should be considered. The rule against double jeopardy protects the acquitted individual against arbitrary interference with their private and family life and any derogation from that rule through exceptions must be shown to be justified – both as a matter of principle and in relation to the particular exceptions proposed. The Commission recommends that the Committee considers whether, as a matter of principle, it is satisfied that departure from the rule against double jeopardy has been shown to have been made necessary by circumstances of a substantial and compelling character or where there are such serious legitimate considerations as to outweigh the principle of legal certainty.

The Commission then recommends that the Committee considers whether the exceptions as currently framed can be justified under Article 8(2). The Commission also recommends that the Committee considers whether the various tests by which an application to invoke an exception will be met are sufficiently rigorous to meet the requirements of Article 8(2).

The Commission recommends that the Committee considers, in particular, whether the proposed exceptions satisfy the test of being necessary in a democratic society in the following respects:

- The decision not to limit in any way the type or gravity of offences for which the exception for tainted acquittals and admissions may be invoked6;

- The decision to include within Schedule 1 offences which have been, and at a second trial will again be, prosecuted under summary procedure7;

- The inclusion in the exception for tainted acquittals of the situation where an offence against the administration of justice has been committed by someone without the knowledge of the acquitted person8;

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4 See e.g. *Dudgeon v UK* (1981) 4 EHRR 149
5 *Xheraj v Albania* Application 37959/02, Judgement 29 July 2008, paragraph 52
6 The list of offences in Schedule 1 applies only to cases where there is said to be new evidence. Any offence, however minor, will be capable of being subject to an application under the exceptions for tainted acquittals and admissions.
7 Schedule 1: New Evidence: Relevant Offences
The retrospective application of the exception relating to new evidence\(^9\);

The introduction of the ability to prosecute for murder following a trial for an offence involving physical injury where the injured person later dies, even where the first trial resulted in an acquittal.\(^{10}\)

**The Exceptions:**
The consideration of when exceptions should apply is an exercise of careful balance.

In relation to new evidence, more serious offences may provide a stronger justification for interference with the private life of the individual. However, the inclusion of less serious offences is hard to justify.

The failure to place any limits of the type of offences to which the tainted acquittal and admissions exceptions apply may be construed as arbitrary and consequently unjustifiable.

Similarly where the tainted acquittal exception arises through no fault on the part of the acquitted person and indeed without any knowledge on his part of an offence against the course of justice, it will be harder to justify the interference with private and family life that a second prosecution would involve.

**Article 7:**
The retrospective application of the exception relating to new evidence engages both Article 8 (and so requires to be justified as necessary in a democratic society) and also Article 7. Article 7(1) states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

The Commission does not suggest that the retrospective application of the new evidence exception is incompatible with Article 7(1). However the SLC drew attention to its concern that an individual acquitted in the past was entitled to rely on the legal position that his acquittal was a final verdict. Similarly juries who returned such verdicts were directed that the acquittal was final. The application of the new evidence exception is undoubtedly an interference with the acquitted person’s private and family life and in the future, individuals will know that their acquittal may not be final. However, in deciding whether or not retrospective application is justified under Article 8(2), the Committee may wish to bear in mind that the principle behind Article 7 is that the law should be sufficiently clear to allow an individual to know his obligations and when the

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\(^8\) Section 2(3)(a) and (b)
\(^9\) Section 4
\(^{10}\) Section 11(1)
state may sanction him (and in what way) for his conduct. Applying the exception to past cases will fundamentally alter the relationship between the state and those individuals who, at the time of their acquittal, were told that they were free for all time from any further action by the state against them for the particular conduct.

The ability to prosecute persons acquitted of (for example) assault where the victim subsequently dies also demands scrutiny in terms of Article 8(2). The Bill contains no limit as to the time period between the original trial and the death. The relevant provision will have retrospective effect. There are no criteria set out by which the prosecution would have to satisfy a court that such subsequent prosecution was warranted. The burden is placed on the acquitted person to successfully raise a plea in bar of trial. The Commission would recommend that the Committee consider carefully whether this provision can be justified as being in pursuit of a pressing social need and as being proportionate.

The Tests:
The Commission further recommends that the Committee considers whether the tests to be applied by the High Court are sufficiently rigorous to justify the exceptions. In particular:

- The test for setting aside an acquittal on the basis of an admission is satisfied on the balance of probabilities and that the admission need only be “credible”\(^{11}\);
- The test for the new evidence exception that the case against the accused is “strengthened substantially”\(^{12}\).

The test relating to an admission notably does not require that admission to be reliable as well as credible.\(^{13}\) Nor does it require that the source of the evidence of the admission (for example, the cell mate to whom the admission has allegedly been made) be capable of being regarded as credible and reliable.

The test that new evidence substantially strengthens the case against the accused does not require the new evidence in itself to be compelling or persuasive. Nor does the new evidence have to be capable of being regarded as credible and reliable. This latter test must be satisfied by a convicted person to introduce fresh evidence with a view to overturning a wrongful conviction.\(^{14}\) The Committee should consider whether, bearing in mind Article 8(2), the balance has been correctly struck.

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\(^{11}\) Section 3(4)(a). The same point applies to section 8(6) in respect of the plea in bar of trial provisions for murder.

\(^{12}\) Section 4(6)(a). The same point applied to section 8(5) in respect of the plea in bar of trial provisions for murder.

\(^{13}\) For an example of an unreliable (if credible) confession, see R v Miell [2007] EWCA Crim 3130; [2007] WLR(D) 346

\(^{14}\) Fraser v HMA 2008 HCJAC 26
Article 8: Victims and Witnesses

The Commission is concerned that there may be an assumption that victims and witnesses will always want an acquitted person to be re-prosecuted in any circumstances in which the exceptions apply. The Commission is unaware whether there has been any research done to ascertain the views of victims and witnesses.

A second prosecution for a crime is not only an interference with the Article 8 rights of the acquitted person, but it also constitutes an interference with the Article 8 rights of victims and witnesses. Witnesses can be compelled to testify, even if they do not support a second prosecution. The Committee may wish to bear in mind that, like acquitted persons, some victims and witnesses may have managed to put the case behind them and move on with their lives. Accordingly, the Committee should ensure that the interference with the private and family lives of victims and witnesses is justified under Article 8(2) as necessary in a democratic society. Regard should be had, in this respect, to the type and gravity of offences to which the exceptions will apply; to whether exceptions should be retrospective; and to whether there should be a time limit for applications under any of the exceptions.

5. Article 3: Protection against inhuman or degrading treatment or punishment

One of the key features of the rule against double jeopardy is the protection from the anxiety and humiliation that repeated trials would undoubtedly cause accused persons. It is essential that safeguards are in place to ensure that people are protected against inhuman or degrading treatment in terms of Article 3 of ECHR. A failure to properly justify the exceptions to the rule in terms of Article 8(2) may mean that in extreme circumstances a second prosecution risks breaching Article 3. This would be particularly so in relation to vulnerable acquitted persons.

6. Article 6: The right to a fair hearing

In the Commission’s view, Article 6 will be engaged (at the latest) when an application is intimated to the acquitted person. At the point when Article 6 is engaged, the acquitted person is guaranteed a number of protections.

Article 6(2) of ECHR provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The Bill concerns persons who have been acquitted and who are entitled to the ongoing presumption of innocence throughout the application process and in any subsequent trial. The Commission is concerned that the way in which the Bill is drafted may not properly reflect the importance of the presumption of innocence. For example, consideration should perhaps be given to whether the test for allowing an application based on an admission ought to be satisfied beyond reasonable doubt, as opposed to on the balance of probabilities.15

15 Section 3(4)(a)
Under Article 6(3) the acquitted person would be entitled to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusations against him; to have adequate time and facilities for the preparation of his defence; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

While section 5(1) of the Bill provides that the acquitted person is to be sent a copy of the application, and section 5(2) provides that they are entitled to appear or be represented at any hearing of the application, the Bill is silent in relation to the disclosure of evidence or the ability to challenge that evidence during the application process. In order to make the rights under Article 6 effective, there will have to be proper disclosure in relation to the information being relied upon in support of the application. For example, in the Commission’s view, if an application is made based on an alleged admission to a third party, the acquitted person should be entitled to have disclosed to him, at a minimum, any statement by that third party, any previous convictions of the third party, and any other material which might undermine the prosecution’s opposition to it. The absence of a statutory regime for such disclosure has resulted, in the past, in the Crown being found by the Judicial Committee of the Privy Council and to the Supreme Court to have breached Article 6 through failures to disclose material information pre-trial.16 The Committee may wish to consider inserting specific provisions governing disclosure to guard against similar failures in relation to the application process.

The Scottish Human Rights Commission
1 December 2010

Justice Committee

Double Jeopardy (Scotland) Bill

Written submission from the Society of Solicitor Advocates

The Society of Solicitor Advocates (“the SSA”) was formed to provide support for solicitor advocates following their introduction into our higher courts in 1993. Membership of the SSA is open to all solicitor advocates in Scotland, those who have gained rights of audience in the High Court and the Court of Session.

There are around 280 solicitor advocates practising in Scotland, with more than half being members of the SSA.

The SSA seeks to provide opportunities for members to share their experiences and update themselves on developments which affect their field of practice. It is heavily involved in the provision of training for solicitor advocates.

In addition the Society seeks to represent the interests of all solicitor advocates in Scotland who have been granted or who aspire to gain rights of audience in the Supreme Courts in Scotland.

Double Jeopardy (Scotland) Bill

We agree that the common law protection against double jeopardy should be placed on a statutory basis and, to that extent, welcome this Bill. It is however clear that, despite the intentions behind it, the Bill removes this protection in an uncertain number of cases of unknown gravity.

We oppose the removal of the protection in any cases.

Our system does not guarantee the “right” outcome in all cases. Very often the “right” outcome cannot be known or identified with sufficient clarity. Our police and prosecuting authorities are not yet able to identify, charge and prosecute only the guilty. Not all guilty people are convicted but, perhaps more significantly, not all innocent people are acquitted. Either of these situations involves a miscarriage of justice. For good reason our system has placed greater emphasis on those miscarriages of justice which have seen the innocent wrongly convicted. It is sometimes said that it is “better that ten guilty persons escape than that one innocent suffer”. Although originating in England in the 18th century this statement should be the basis of any just system, at least until we are better at identifying each group with appropriate certainty.

It is wrong, however, to proceed on the basis that an acquittal is in some way, in and of itself, a miscarriage of justice. An acquittal may not only be the right outcome in a particular trial, it may also be the “right” outcome in a wider sense. Acquittal can follow because a jury is convinced of innocence but just as frequently because they are not
satisfied of guilt beyond a reasonable doubt. Those acquittals are just as valid and must remain a part of our system.

For centuries the certainty of acquittal has been a key right afforded to accused people in this country. It should not be removed without greater evidence than has been mustered for this Bill.

The police and Crown have significant power when it comes to a suspect or accused person. In particular the timing of any prosecution is a matter over which the Crown have great control, albeit subject to a degree of judicial supervision. The Crown can never be forced to proceed with a prosecution, or to do so at a particular time, other than where specific statutory time-limits apply. Even in relation to cases where specific time-limits apply, the Crown is to a significant extent in control of the starting-point for their operation.

As Lord Cameron said in 1976 in the case of Boyle v HMA:

“In Scotland the master of the instance in all prosecutions for the public interest is the Lord Advocate. It is for him to decide when and against whom to launch prosecution and upon what charges. It is for him to decide in which Court they shall be prosecuted and upon what charges. It is for him to decide what pleas of guilt he will accept and it is for him to decide when to withdraw or abandon proceedings. Not only so, even when a verdict of guilt has been returned and recorded it still lies with the Lord Advocate whether to move the Court to pronounce sentence, and without that motion no sentence can be pronounced or imposed.”

At present the Crown will not bring a prosecution unless there is a sufficiency of evidence and they consider that it is in the public interest to do so. Sometimes this decision cannot be made at an early stage. This can mean cases being kept under consideration for a considerable time without a final decision on proceedings, in case further evidence comes to light which justifies them. The Crown strives, as it should, to prosecute all cases with its best evidence and at as early a stage as possible, albeit at a time substantially of its own choosing. Despite this, prosecutions are often brought many years after the alleged offences, on occasion because the corroborating evidence comes to light only later. This approach involves some uncertainty for a suspect but is less problematic than what is proposed. Any uncertainty in the current situation precedes a trial and verdict. What is proposed involves no certainty at all, even after a trial where all available evidence has been led and a jury has not been convinced to convict.

The law must be certain. Much public confidence in the law comes from the certainty it offers. No accused person should have to consider the prospect of repeated libels, as would be possible in certain cases under the Bill.
Tainted acquittals

In general this is a less controversial area as no one is suggesting that such acquittals should be secured without consequence. The existing law allows such acquittals to be investigated and prosecuted, with penalties available of up to life imprisonment. The need for change is not convincing in these circumstances.

“Confessions”

This is a more difficult area. It is not suggested that this will be a common occurrence. The absence of any examples in Scotland supports this suggestion. It is more than likely that any “confessions” will be hotly disputed, with evidence of their making coming from sources close to an acquitted accused. Such “confessions” would require to be treated with a great deal of caution, as our courts are only too familiar with evidence of questionable credibility and reliability, sometimes given in furtherance of a grudge between different members of the same criminal fraternity or in the hope of some other advantage to the “witness”. Unlike scientific evidence there is greater scope for abuse and manipulation in such evidence.

If the Bill is to proceed, as a further safeguard in such cases, where the alleged confession is said to have been made before acquittal, sections 3(4)(b) and 8(6)(b) should include a requirement that there be a reasonable explanation for the admission not being made known by the witness before the acquittal. While that might be something considered by the High Court in such cases it is not a requirement in the Bill as is stands and it should be expressly required, as it is in certain other types of appeal.

New evidence

Paragraph 8 of the Policy Memorandum says:

“On the other hand, technological, medical and scientific advances may be considered to justify a new evidence exception.”

It is important to be careful not to elevate scientific advances beyond their limits. Even DNA evidence, which is the example most frequently used, cannot tell us whether someone is guilty. It can clear an innocent person but it provides only probabilities about guilt, not certainty. There is rarely such a thing as evidence which provides conclusive proof of guilt.

The range of offences in schedule 1 is too widely drawn, and includes charges dealt with on summary complaint in some instances.

It is also wrong to allow any further extension of these offences to be made by Order of Ministers. The matter is controversial enough at present, with a detailed consultation and full Parliamentary scrutiny.
Retrospectivity

This involves issues of principle as well as practicality. The Bill proposes the removal in affected cases of a safeguard which has existed for centuries. People, including those who have been accused of serious crimes and acquitted, are entitled to certainty in their lives. If the law is changing for the future the Government can ensure that there is suitable publicity given to the change. Those acquitted in the future can be suitably warned. For example, a sheriff or judge might warn an acquitted accused of the possibility of a further trial. Those who have been acquitted before now are entitled to have organised their lives without the need to consider the possibility of having once more to face trial. It is wrong that they should now have to do so.

Despite the case acting as a trigger for the proposed changes, it is also wrong that the murders of Helen Scott and Christine Eadie (“the Worlds End case”) have been mentioned in this context, in a way which suggests that this case will be affected by the Bill. We do not have access to the evidence and cannot know, but neither do certain politicians and others who have spoken of the case in a way which will raise hopes and even expectations on the part of the families of the dead girls. That is unnecessary and cruel, as well as appearing opportunistic. Such hard cases demand honesty, perhaps especially if what must be said is unwelcome.

Prejudicial publicity

It might be thought that the Bill goes as far as it can in this matter, but consideration of existing problems with recent high-profile cases suggests that this is an area which has not been fully explored. There have been concerns expressed this year about the possible influence of the internet on the minds of jurors. Such possible influence must be all the greater in the sort of cases which are likely to be affected by the Bill. By the time a second or third trial is being considered much of the prejudicial publicity may well have been seen by future jurors, especially if our tabloids continue to take up cases with campaigns suggesting specific verdicts. Although there exists the possibility of a plea in bar of trial, this is an academic protection only at the moment. The whole area will undoubtedly be reconsidered in future cases.

Changes to admissibility

This is a dangerous area. The cases in question are those which will give rise to publicity and even campaigns for change. No law should be changed to target specific individuals for retrial and conviction where they have gone through a fair trial process and been acquitted on the basis of the law as it stood at the time. Such changes are likely to prove susceptible to challenge in court.

Specific sections of the Bill

Aspects of the Bill suggest that a second prosecution may follow on summary complaint. Given what has been said about the serious charges which were intended to
be covered this looks odd. The Bill makes possible a second prosecution for shoplifting if there is a subsequent admission. This cannot be right. The cases affected should be more tightly defined.

Crown evidence

I refer to the evidence given on 16 November 2010 when COPFS were before the Committee:

“As time goes on, it might be seen as being less and less in the public interest to bring somebody to justice. In the interim, perhaps no subsequent charges had been brought and they might have gone on to live their life to the full. In those circumstances—depending on the original charge—the balance of interests might not lie with prosecuting again.

“I do not really know how a time limit would be applied and I do not know what time limit one would choose. There would always be a plea of oppression against the Crown in bringing proceedings a long time after the incident had occurred. You would expect that the Crown would not necessarily bring proceedings in those circumstances, given the facts and circumstances of the case. A court would have the overall ability to say that it was not in the public interest to bring proceedings because the individual had gone on and lived his life.” (Col 3785)

We regret to say that we do not recognise this as a safeguard which is currently available to meet the circumstances suggested. We would not wish the Committee to consider the Bill on the basis of a misunderstanding of how the Court might be able to mitigate matters. A plea of oppression is available but it will succeed only where the accused is able to demonstrate actual prejudice – that is, that he can no longer receive a fair trial. The passage of time on its own will not suffice to succeed in such a plea.

John Scott
Criminal Vice President
Society of Solicitor Advocates
1 December 2010
Justice Committee

Double Jeopardy (Scotland) Bill

Written submission from Victim Support Scotland

Introduction

Victim Support Scotland is the largest agency providing support and information services to victims of crime in Scotland. In 2009-2010 our court based Witness Services and community based Victim Service supported around 165,000 people affected by crime. With the interest of victims and witness at heart, we are very pleased to be offered the chance to comment on this important consultation. This response is based on the consultation response we gave earlier this year to the Scottish Government’s consultation regarding the policy considerations surrounding Double Jeopardy.

Double Jeopardy (Scotland) Bill

Victim Support Scotland supports the introduction of the Double Jeopardy (Scotland) Bill. We agree that the rule against double jeopardy should remain, but that an exception should be introduced. Where the acquitted person admits to committing the offence, where compelling new evidence emerges to indicate that a person previously acquitted may have committed the offence, or when a trial had been tainted in any substantial way, the new rule for exceptions to double jeopardy should apply. We agree with the suggested conditions under which the court may set aside the acquittal in regard to new evidence.

Although many victims of crime would like to see an offender caught and sentenced, it may not necessarily be in the victim’s interest to hold a new trial. To be forced to give new evidence statements and go through the whole trial process again may be very traumatic for the victim, who in some cases would prefer to put the event behind them. Before a new trial is initiated, we would therefore like to introduce a public interest test which takes into account not only the interests of justice but also the interest of the victim.

“Fairness for both the victim and the accused is at the heart of any good justice system”.¹ It is very difficult to pinpoint exactly what is “fair” and what offences should be covered by the new exception. Every victim reacts differently to crime, so a case that is considered minor for criminal justice agencies may have a profound impact on the victim. We agree that the offences listed in schedule 1 should be covered by the new evidence exception. In addition, further discussions are needed to decide whether or not other offences should be included, such as for instance crimes against the state; terrorism etc. that may arguably have a larger societal impact. We therefore agree with section 4(7), giving Scottish Ministers the power to modify the list of offences by order.

One area that was mentioned in the Scottish Government’s consultation but omitted in the Double Jeopardy (Scotland) Bill is the aim to prevent any adverse publicity and media attention in the run up to a new trial. We would like this caveat to remain applicable as we believe that there should be no publicity of any details of a case before the trial. This includes descriptions of the crime or publication of pictures of the victim or victim’s family. We would welcome the opportunity to participate in developing guidance on how this can be developed in practice. 30 November 2010.

1 December 2010
Justice Committee

2nd Meeting, 2011 (Session 3), Tuesday 18 January 2011

Letter from Keir Starmer QC, Director of Public Prosecutions at the Crown Prosecution Service, to the Convener

Double Jeopardy (Scotland) Bill

I write in response to your letter of 23 December [please see the annexe] in relation to the operation of the double jeopardy provisions in England and Wales, particularly following the recent conviction of Mark Weston.

To date, we have made ten applications to the Court of Appeal to quash acquittals. In four of the eight cases that have been decided, the Court has granted our application and ordered a retrial. Two of the cases that have been referred to the Court have yet to be decided.

You have asked specifically about the case against Mark Weston.

Mrs Vikki Thompson was the victim of a savage attack whilst out walking her dog on 12 August 1995. She died of her injuries on 18 August 1995. Mark Weston was arrested and charged with her murder. He at all times denied having been the person who attacked her (or that he had been at the scene either at the time or she was attacked or immediately afterwards). Thus the issue at the trial was identity.

Following his trial, Mark Weston was acquitted by the jury on 3 December 1996.

The police treated Mrs Thompson’s murder as an unresolved crime. Ten years after her death, Thames Valley Police’s Major Crime Review Team decided to reinvestigate the case. All decisions in relation to the investigation of a crime (including whether it is appropriate to reinvestigate a specific offence) are for the police and the CPS does not have any responsibility for deciding which cases should be reinvestigated, nor when the reinvestigation should take place.

Once the police have decided that they wish to reinvestigate a case, however, the CPS will become involved. A reviewing lawyer will be allocated to the case; s/he will advise the police on any evidential matters that arise and will have responsibility for dealing with the case throughout the application and trial process. In the case against Mark Weston, the CPS reviewing lawyer (who had also been the reviewing lawyer in the first trial) was involved with the case from an early stage.

Once the decision had been made to reinvestigate Mrs Thompson’s murder, Thames Valley Police conducted a complete review of the initial investigation. A number of exhibits had been preserved, including a pair of boots belonging to Mark Weston which had been seized when he was arrested in 1995. They were sent to the forensic laboratory for further examination. When they were re-examined, small blood marks were detected on the boots. DNA examination confirmed that the blood matched that of Mrs Thompson, with a match probability of 1:1 billion.
These spots of blood had not been found when the boots were examined during the initial investigation. It was common ground between all the scientists that small blood spots on dark, uneven surfaces such as boots can be difficult to find, even by competent scientists doing their best. Though scientific techniques have not advanced significantly in the intervening period, the methods and procedures of examination have changed somewhat, for example, the use of better, stronger lighting, and the fact that each scientist’s work is now double-checked by another scientist.

It was of significance that in the (unchallenged) opinion of the forensic scientist that the blood had been wet when it was deposited on the boots, given that the issue at the trial had been the identity of Mrs Thompson’s attacker, and that on the defence put forward by Mark Weston there was no reasonable explanation as to how her wet blood could have come to be on his boots. Thanks to careful record keeping by the police and the laboratory, the Court was able to exclude the possibility that the boots had been accidentally contaminated with Mrs Thompson’s blood either during the initial examination which had taken place immediately following the murder or at any later stage.

My Principal Legal Advisor, Alison Levitt QC, represented the Prosecution in the Court of Appeal. The Court found the new evidence to be highly probative of guilt, quashed the acquittal and ordered that Mr Weston should be retried.

As you are aware, the trial took place at Reading Crown Court at the end of last year. The jury convicted Mr Weston on 13 December 2010 and he was sentenced to life imprisonment, with a minimum term of 13 years to serve before he is eligible to be considered for parole.

I attach a copy of the judgment of the Court of Appeal, which you may find of interest.

I hope that this assists you and your committee. As I have already said, my Principal Legal Advisor appeared in this case as counsel. Since then she has also appeared in a further case, that of Barry George Whittle and she may conduct others this year. As you will appreciate, she now has considerable experience of how the legislation works in practice (including questions such as publicity, and the mechanics of getting the acquitted person before the Court) as she considers the majority of applications which are sent to me for my consent. Plainly this includes the cases where I decline to give my consent as well as those where it is given. She would be pleased to help in any way she can if you would like to know anything further.

Keir Starmer QC
Director of Public Prosecutions
The Crown Prosecution Service
12 January 2011
Annexe

Letter from the Convener to Keir Starmer QC

The Scottish Parliament’s Justice Committee is currently considering the Double Jeopardy (Scotland) Bill which will codify in statute a general rule against double jeopardy. However, the Bill proposes a number of exceptions to this principle, including where the original trial was “tainted”, where an acquitted person subsequently confesses to the offence, or where new evidence of guilt emerges.

The Bill will also allow for the retrospective application of the general new evidence exception. During the Committee’s evidence sessions on the Bill, it heard from the police and prosecutors on the practicalities of identifying which cases should be reinvestigated and the implications for storage of evidence.

The Committee’s consideration of the legislation has coincided with the conviction of Mark Weston at Reading Crown Court for the murder of Vikki Thompson in 1995. The Committee is aware that Mr Weston was originally acquitted of Mrs Thompson’s murder but that new forensic evidence, including bloodstains on Mr Weston’s boots, had recently come to light which allowed for a second trial. While the Committee has been able to gain some details on the case from the media, it is interested in finding out more information on the background to the new trial, principally how the new evidence came to light after so many years.

I am therefore writing to ask if it would be possible for the Committee to receive a short summary of the circumstances which led to the second prosecution. Any information you can provide would be most helpful in providing an actual example of what happens before a second trial can be brought.

The Committee is required to report on the general principles of the Bill by the end of January next year so if you were able to provide us with some information relating to the case, I would be most grateful in receiving it by Monday 17 January 2011.

Bill Aitken MSP
Convener, Justice Committee
23 December 2010
Double Jeopardy (Scotland) Bill – Response from Cabinet Secretary

Background

1. Section 4(7) of the Double Jeopardy (Scotland) Bill sets out a power for Scottish Ministers to make an order to modify the list of offences in schedule 1. The Committee asked whether exercise of this power should be subject to a consultation requirement.

2. Members will recall that the Cabinet Secretary for Justice, Kenny MacAskill promised to write to the Committee following his evidence session with the Justice Committee on the Bill, before coming to a view on this matter.

Cabinet Secretary Response

3. The response indicates that the Scottish Government is content that the affirmative procedure, recommended by the Scottish law Commission in its 2009 report on Double Jeopardy, should provide an appropriate safeguard for situations where it is proposed to add or remove offences from the list.

4. However, he also indicates that he will consider any recommendations in the Justice Committee’s stage 1 report. Their stage 1 report is likely to be published towards the end of January.

5. The Subordinate Legislation Committee will give further consideration to the delegated powers contained in the Bill after Stage 2.

Recommendation

6. Members are invited to note the Cabinet Secretary’s response on this matter and to reconsider this matter after Stage 2.

Irene Fleming
Clerk to the Committee
SUBORDINATE LEGISLATION COMMITTEE

1st Meeting, 2011 (Session 3)

Tuesday 18 January 2011

Correspondence from the Scottish Government dated 23 December 2010

DOUBLE JEOPARDY (SCOTLAND) BILL

I am writing to follow up my response on 6 December to queries raised by the Committee after its 30 November meeting on the Double Jeopardy (Scotland) Bill. These points were raised in relation to section 4(7) of the Bill, which sets out a power for Scottish Ministers to make an order to modify the list of offences in schedule 1.

The Committee questioned whether exercise of the power so as to add or remove offences should be subject to a consultation requirement. I was asked about the issue on 21 December during my Stage 1 evidence on the Bill at the Justice Committee.

As I indicated to the Justice Committee, I think that if consultation is to be required ahead of any changes to the list, then that should be decided by the Government and Parliament at that time and we should not bind them into a formal statutory process. I also indicated that if there was a strict legal requirement to consult, this could invite legal challenges about the consultation process in any trials resulting from the change, even if the amendment adding an offence was merely consequential or removed an offence which had been repealed.

I accept that an amendment to the list might mark a change of policy, but it may not be controversial and could for example be consequential to other reforms such as the creation of a new serious offence. In the second case, statutory consultation might be unnecessary and cause a delay.

I sought to persuade the Justice Committee that the right balance is struck in the Bill by requiring the use of affirmative procedure to ensure that the Parliament of the day would require to consider and positively approve any changes.

The proposed power and form of procedure was recommended by the Scottish Law Commission in its 2009 Report on Double Jeopardy (SCOT LAW Com No 218, recommendation 30) and affirmative procedure should provide an appropriate safeguard for situations where it is proposed to add or remove offences from the list. However, as I indicated to the Justice Committee, I will of course carefully consider any recommendations made in its Stage 1 Report on any issues in relation to the Bill.

I hope that this response is helpful to the Committee. I am copying this letter to the Convener of the Justice Committee.

KENNY MACASKILL
CABINET SECRETARY FOR JUSTICE
Note: (DT) signifies a decision taken at Decision Time.

Double Jeopardy (Scotland) Bill: The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-7819—That the Parliament agrees to the general principles of the Double Jeopardy (Scotland) Bill.

After debate, the motion was agreed to ((DT) by division: For 114, Against 2, Abstentions 0).
The need for reform has been widely recognised, and I am heartened by the level of support that the proposals have received. Careful work by the Scottish Law Commission was followed by a debate in the chamber last March. Thereafter, a Government consultation exercise took place last summer and a thorough stage 1 report was provided by the Justice Committee just last week. I record my thanks to all those who took part in that process in whatever capacity, and I am grateful to the committee for its detailed and careful consideration of the bill. I am conscious of the committee’s full schedule this session and the effort that was required to prepare and publish its comprehensive report so swiftly.

During stage 1 scrutiny there were, understandably, differences of opinion on some aspects of the reform. I now turn to the parts of the bill that have attracted the most comment. The bill will allow a new trial when an acquittal has been tarnished. It seems clear to me that people should not be able to evade justice because of threats or bribery, and I am pleased that the committee endorses that provision. At the heart of this reform is the idea of allowing a second trial when new evidence emerges that casts doubt on an acquittal. There appears to be a consensus in favour of that concept and its application to historical cases. Some have argued that applying the change retrospectively will be unlikely to have a practical effect, because the passage of time might have diminished the evidence that is available. I accept that that will be true in some cases, but not necessarily all.

Robert Brown (Glasgow) (LD): One of the practical problems with retrospectivity that the committee came up against and raised in its report was the potential destruction of productions at the conclusion of the original trial. Can the minister enlighten us on the implications of that?

Kenny MacAskill: The committee raised a valid point, which relates, in many cases, to the attitude and actions of the police and the Crown Office and Procurator Fiscal Service. The Crown gave a full explanation of how it deals with such matters. On many occasions, productions are kept routinely, but it is a judgment call for the Crown. If Mr Brown or any other member wants me to go back to either the Lord Advocate or the Solicitor General for Scotland on particular issues, I will be happy to do so. However, it seems that the Crown Office has a procedure for dealing with productions, not all of which from every case in Scotland can be held, otherwise the service would be bursting at the seams. Nevertheless, in appropriate circumstances, productions will be retained for a relevant period, and that is a judgment call for the Crown. If members have any information or issues that they want to clarify, the law officers and I would be happy to speak to them.

As recently as December, the conviction of Mark Weston in an English retrial for the murder of Vikki Thompson underlined the value of retrospectivity. The bill will allow for retrial based on two broad categories of evidence. The first of those is admissions by the accused. The second is generally referred to as new evidence, and includes evidence that is obtained through advances in DNA technology. There are differences in the nature of the two categories, and the bill treats them differently in relation to the tests that are applied.

Substantial requirements will apply to admissions, but I accept the Justice Committee’s conclusion that there is sense in bringing the treatment of admissions and new evidence closer together. I therefore propose to lodge amendments to reflect that. The effect of that change will be that an admission will have to strengthen the case against the accused substantially in order to justify a retrial. It will also mean that the court will have to be satisfied that it
is highly likely that a reasonable jury would have convicted had the admission been available before.

I propose, however, to keep some points of distinction between admissions and new evidence, because I believe that persons who admit their guilt lose the right to absolute certainty that they can never be brought back to trial. 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. The exception for other forms of new evidence will be available only for more serious crimes. Both exceptions are targeted at serious offences, and that is where the Crown Office will focus its attention.

Stewart Stevenson (Banff and Buchan) (SNP): Does the cabinet secretary share my substantial distaste—which is widespread in society—at criminals who, having been found not guilty, subsequently exploit that verdict, confess to having committed crimes and make significant sums of money from certain disreputable parts of the media?

Kenny MacAskill: Absolutely. That is a matter that Paul Martin, who is not in the chamber, has frequently raised and something that we have consulted on and have worked on with Governments, both current and past, south of the border. All fair-minded people think that there is something reprehensible about what Stewart Stevenson describes. Whether through a tabloid or through a book, people should not be able to make financial gain at the expense of others.

There is an important point of principle in making it at least possible to pursue persons who boast of having evaded justice, whatever the crime. The committee considered carefully the question of which offences should be covered by the exception for other types of new evidence. In that sort of situation, the question mark over guilt would arise not from a confession but from an external factor such as DNA material or a new witness. There seems to be a consensus that a new trial in such circumstances should be possible only for the most serious offences. That will provide certainty in the law and keep the focus on serious crime.

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. I also want to hear members’ views on the issue.

The Government is genuinely open to ensuring that, when new information or evidence comes to light regarding those who have perpetrated the most serious offences, we are capable of dealing with it. The European convention on human rights sets parameters and for natural justice there is some requirement for certainty, but I am sure that, if we work together in the chamber, in committee and in Government, we will reach a solution that will provide what is required.

Section 11 of the bill deals with the situation when an accused has been prosecuted for assault or some other offence involving physical injury, but the victim later dies as a result. At present, the common law allows a further prosecution for causing the death, regardless of whether the accused was convicted or acquitted of the original assault. In order to ensure that the law is consistently and equitably applied, the Government wishes to enshrine that in statute. It is right that such an important and fundamental principle is recognised and retained in our legislation and in our system. I welcome the committee’s general support for that provision. The committee appears to accept that the bill takes the right approach in dealing with the accused who was convicted of the original assault, for which I thank it. I also thank the committee for its pragmatism in recognising the practical reality that demands that more resources are allocated to a murder investigation compared with an apparently simple assault.

Discussion of the provision has focused mainly on whether an accused can be tried for murder after being acquitted of the original assault. I believe that the common law in Scotland is correct in allowing the accused to be tried for causing the victim’s death. Such occasions are rare, but they do occur, therefore it is important that they are covered by the law and that victims and their families are protected.

Robert Brown: The issue seems to centre on the test before we allow a prosecution for murder following an acquittal. Does the cabinet secretary accept that, if the principle of double jeopardy is to have meaning, we must have a test before allowing a further prosecution, and that it has to be of the nature of the new-evidence test, if not precisely the same?

Kenny MacAskill: Yes. Mr Brown is correct. That point was flagged up by the committee and I
will do my best to answer it. He is correct that a high standard and a high bar must be set.

The bill provides that when the accused has been acquitted of assault, the court should apply an interests of justice test. The committee has asked the Government to consider whether in that situation some other additional test should be required before a retrial is allowed for causing the death. The committee has suggested that some form of new-evidence test is required.

I am happy to consider the issue ahead of stage 2, but I must stress that it would not be a double jeopardy situation. The second trial in that situation would not be a retrial. The accused would never before have been tried for causing the death of the victim, whether the charge was murder or culpable homicide. He would have been dealt with previously on a lower charge. We would be dealing with a different offence, whereas the double jeopardy exceptions are designed to hear the same offence again. In the scenario, it would not be a straightforward matter of the Crown rehearsing the same evidence. The court would be considering a different offence, which by its very nature would require additional facts and would require the court to consider questions of fact and law that were not considered in the assault trial.

There will always be additional evidence in such cases. The very fact that a death occurred will require the Crown to produce further evidence. Medical and forensic evidence will be required to link the death of the victim to the actions of the accused. The previous trial would not and could not have considered that.

The bill provides that when there has been an acquittal for assault, the court will have to consider whether it would be in the interests of justice to proceed with the new trial. That requirement, which is new and does not feature in the common law, will offer additional protection to the accused. The Crown will need to consider carefully the evidence that is available to it and the court will need to decide whether it is in the interests of justice to proceed.

The committee is right to point out that we should tread very carefully and with great caution in such circumstances. I believe that the interests of justice test that is contained in the bill will ensure that accused persons are treated fairly, but I am happy to consider the point further, either individually with members—be it Mr Brown or anybody else—or directly in discussion with the committee.

I express once more my thanks to the committee and to all those who contributed to the process of bringing the bill to Parliament.

I hope that the exceptions to double jeopardy that are set out in the bill are seldom used. As was narrated in evidence, it is anticipated that only a handful of such cases will arise over many years, but they will be cases of great significance, both for the individuals concerned and, especially, for the whole justice system. We are, after all, focusing on cases where it appears that justice was not done, which cannot be right.

As I said, such cases thankfully are rare, but each one involves suffering by victims and their families and can affect faith in our justice system. We need to get an element of closure whenever we can, and we need to ensure that we bring to trial perpetrators of serious and heinous offences. Allowing a second trial in exceptional cases will lessen suffering and promote public confidence. I am confident that the bill will achieve that aim, and I await with interest the views of members.

I move,

That the Parliament agrees to the general principles of the Double Jeopardy (Scotland) Bill.

09:30

Bill Aitken (Glasgow) (Con): The bill had its genesis in the Scottish Law Commission’s report on double jeopardy, which was published in December 2009. The report concluded that reform was needed in order to clarify and modernise the existing law surrounding double jeopardy. The bill is largely based on that report and seeks to achieve such reform.

The Justice Committee met on four separate occasions to consider the bill and to take oral evidence from witnesses, including the Scottish Law Commission; the Crown Office; the Faculty of Advocates; human rights representatives; the Lord Justice Clerk, Lord Gill; and the Scottish Government.

I thank all those who gave evidence to the committee and congratulate them on the quality of that evidence. I also thank the clerking team for all their work, and in particular Andy Proudfoot, who did a great deal of work on the stage 1 report prior to leaving us temporarily on paternity leave. It was a good piece of work all round.

Section 1 of the bill places the general rule against double jeopardy on a statutory footing. The double jeopardy rule plays a fundamental role in our justice system. The general principle protects the acquitted from the threat of further prosecution for the same offence and from prosecution for a fresh charge based on the same actions. However, as Patrick Layden QC pointed out, there are also “various unclear areas” surrounding the principle. Evidence received by the committee showed wide support for placing the principle on a statutory basis. The committee recognises that and agrees that, in the interests of
clarity and affirming its position in law, the rule should be set out in statute.

Under section 2, an acquitted person could face further prosecution if prosecutors can prove that certain offences against the administration of justice were committed and tainted the acquittal. It is clear that there has been public anxiety about that, which Mr Stevenson has articulated. However, the evidence that the committee received on section 2 was mixed. On one hand, the Crown Office felt that the proposals struck an appropriate balance and the Lord Justice Clerk assured the committee that the judges were satisfied with the safeguards in section 2 to deal with tainted acquittals. On the other hand, a number of witnesses raised concerns. For example, the Law Society of Scotland and the Scottish Human Rights Commission questioned whether the proposals should apply to all offences, rather than only more serious offences considered on indictment. They also questioned the possibility of a second prosecution being raised in instances when the acquitted person had no involvement in the tainting of the first trial. The cabinet secretary contested both those concerns, fairly robustly, on the basis that,

“However serious the charge, people should not benefit from attempts to pervert the course of justice and criminal trials.”—[Official Report, Justice Committee, 21 December 2010; c 3993.]

He has repeated that view this morning.

Taking everything into consideration, the committee supports the provisions outlined in section 2 and believes that, in the interests of protecting the integrity of our justice system, they should apply regardless of whether or not the acquitted person was personally involved in the tainting. The committee is also satisfied with the tests that will have to be met and the protection that the balance of probabilities test, in particular, will provide. The committee would like to highlight that the existing law on perverting or attempting to pervert the course of justice will remain an available option. A retrial will therefore not necessarily have to be sought in every instance.

Section 3 makes an exception to the double jeopardy rule by making it possible to reprosecute someone based on admissions that are made or become known after acquittal. There has also been public concern about that, to which the cabinet secretary referred. During evidence taking, concerns were expressed about the extent of offences to which the section will be applicable and the potential for repeated prosecution. Despite those concerns, the committee is satisfied that appropriate checks are in place to ensure that the measure will be used only relatively rarely and only when there is sufficient merit in doing so. It was also questioned whether the tests in section 3(4) are rigorous enough. However, taking all the evidence into consideration, the committee concludes that the provision is workable as it stands.

The committee agrees with Lord Gill that in the preliminary stages it is the judge’s responsibility to assess the credibility of admissions, and reliability—beyond the need for corroboration—is left for the jury to decide later, during the trial. The Scottish Law Commission questioned whether section 3 was necessary at all, given that it could, in theory, fall under the general new-evidence exception in section 4. The committee recognises that point and invites further discussion on whether, in the interests of streamlining, it might be better to incorporate the two exceptions. That should be discussed and dealt with at later stages in the proceedings. However, we also note the cabinet secretary’s response to the Subordinate Legislation Committee, which highlighted that the new-evidence exception will be limited to a specific range of offences, whereas the admissions exception will cover all offences. The committee, therefore, welcomes the Scottish Government giving further consideration to the matter.

Section 4 permits persons to be reprosecuted if new evidence comes to light. Again, the committee received mixed evidence on the issue. Witnesses from the Crown Office supported the general new-evidence exception and felt that it struck a “proportionate balance” between the rights of the accused and the rights of victims. Other witnesses either had reservations or, in the case of the Law Society of Scotland, supported the principle but questioned whether aspects of the current test would go far enough. However, after taking those various viewpoints into consideration, the committee concluded that the inclusion of a general new-evidence exception should be supported and that the tests in the bill are appropriate.

The range of offences that are to be covered by the new-evidence exception also sparked a variety of views. The committee firmly agrees with the Scottish Government that the exception should be made applicable only to a limited number of very serious offences. The committee also recognises the concern of respondents such as the Law Society over why some offences are included while other offences of commensurate seriousness are not. The committee therefore questions whether there could ever be a single, fixed list that would adequately and appropriately lay out the scope of the exception. The committee is, therefore, open-minded about exploring the possibility of replacing the list in schedule 1 with an alternative mechanism for restricting exceptions to only the most serious of offences, which is the unanimous intention of all concerned.
My view, for example, is that there could be a restriction whereby only offences that were originally indicted in the High Court would come under this particular category. Again, however, that matter can be discussed in the weeks ahead.

Sections 5 and 6 contain commonsense provisions, and the committee is content with them.

Section 7 provides for a broader principle, in addition to the double jeopardy rule, against the unreasonable splitting of cases. The committee is content with the provisions that are included in the section, particularly in light of the Crown's assurances that it restates current practice.

Sections 8 to 10 set out further provisions about pleas in bar of trial. Although section 8 attracted little attention from witnesses, Patrick Layden raised concerns over section 9, which deals with cases in which the prosecution's argument against the plea in bar of trial is that the original trial was a nullity and therefore not valid. Mr Layden stated that that is

"simply unnecessary, overcomplicates the legislation and should be removed."—[Official Report, Justice Committee, 16 November 2010; c 3767.]

In light of that, the committee asks the Scottish Government to explain more fully, either today or later, why section 9 is necessary in addition to sections 7(4) and 12.

Section 10 applies where the accused was originally tried in a jurisdiction outwith the United Kingdom and sets out the factors that the court is to consider in deciding whether it is in the interests of justice for a retrial to proceed. The section attracted some comment. The Faculty of Advocates did not object to the proposal but questioned how it would work in practice. It stated:

"one of the difficulties will be in establishing the standards that have been applied in the context of a foreign prosecution."—[Official Report, Justice Committee, 7 December 2010; c 3917.]

At the same time, however, measures must be in place for instances in which a previous trial occurred in a jurisdiction that does not uphold our standards of justice. The committee is satisfied with the level of discretion that the section affords courts in deciding whether or not a retrial should proceed in such instances.

Stewart Stevenson: Does the member share my concern about second prosecutions taking place in a different jurisdiction from the original, in respect of something that we cannot deal with here but which, nonetheless, is an issue: a circumstance in which, following an acquittal in a Scottish court, someone is taken to another country where there is no test of the evidence at that point—for example, the United States—and prosecuted there?

Bill Aitken: That is an interesting point, and I concede that the issue could be fraught with difficulty in certain circumstances. We have to rely on the judicial processes that are carried out further of these shores being adequate and affording the appropriate protections for accused persons. Stewart Stevenson's point is not without merit.

Section 11 allows a person who is convicted or acquitted of assault to be tried for homicide if their victim later dies from their injuries. There are problems with that, as the provision applies regardless of whether or not the person was acquitted or convicted of assault. Evidence received by the committee was deeply divided over the issue. The committee notes the concern that was expressed by the Faculty of Advocates and the Law Society in that regard and feels somewhat sympathetic towards the view that an acquitted person should not face the threat of retrial in the absence of incriminating evidence in the first trial.

However, homicide is a distinct offence under Scots law and the proposal maintains the current common-law approach towards retrial under those circumstances. Not only does that capture the seriousness of the offence but, as the Crown Office stated during evidence, murder inquiries are usually much more extensive than assault inquiries and witnesses are

"more likely to come forward in a murder investigation than in an investigation of an assault, even of assault to severe injury."—[Official Report, Justice Committee, 16 November 2010; c 3784.]

That is logical and understandable. In light of that, the committee wishes to support the proposal and invites the Government to consider whether adding a new-evidence requirement might be appropriate.

Section 12 deals with the nullity of proceedings on previous indictment or complaint. No objections were received, so the committee is content with the provision and the balance that it achieves between the interests of the prosecution and the accused.

In contrast, section 13, which deals with the retrospective application of the legislation, proved to be highly contentious. Indeed, a host of issues was raised during the evidence-taking process. Concerns were raised about compliance with the ECHR. However, having heard the evidence on that matter, the committee is content that the provision is ECHR-compliant.

Most objections were based on the argument that including a retrospective aspect would deprive acquitted persons of the certainty that they would not be tried again for the same offence. That is a powerful argument. However, the committee also
believes that it is important that justice is given the opportunity to prevail.

It is anticipated that, due to current rules covering the retention of physical evidence, the use of the legislation retrospectively will occur only very rarely, which perhaps addresses the point that Mr Brown raised. The committee does not believe that the physical difficulty of storing evidence is a ground for discarding the retrospective aspect of the legislation. Therefore, the committee is inclined to agree with the Crown Office and others that, should compelling evidence come to light, the bill should apply

“regardless of whether the original trial was held before or after the new reforms.”—[Official Report, Justice Committee, 16 November 2010; c 3783.]

This has been a fairly consensual debate. The committee’s inquiry was thorough. We have flagged up a number of issues that need to be addressed, and I am confident that they will be.

There is a need for the provisions in statute. They are a necessary adjunct to Scots law, and the committee is content that the bill should proceed today.

09:45

Richard Baker (North East Scotland) (Lab): 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. We believe that the Scottish Government has broadly taken the right approach on this important issue and we look forward to supporting the general principles of the bill at decision time.

In our debate on the issue last year, we made it clear why the proposed change in the law is right. We all know that there are people in this country—victims of crime and their families—who believe that they have not received justice for very great wrongs that have been committed against them and their loved ones, and that there will be compelling evidence that they have indeed been denied justice thus far.

We know that the change in the law will apply to only a small number of cases, as Bill Aitken confirmed in his speech as convener of the Justice Committee, but that does not diminish its importance. There can be no more sickening sight than that of a killer walking from a Scottish court free from punishment for the crime and even, as the cabinet secretary said, bragging that they have done so. We have to accept that people who are guilty of serious crimes have evaded justice in Scotland. If we can properly rectify such injustices, we should do so.

Once again, we must thank the Justice Committee for its considered and informed scrutiny of the bill. As always, and as the convener summed up in his speech, the committee has drilled down into those areas of the bill where there will be a need for further consideration—for example, in determining the range of offences that the reform should cover. I welcome the fact that the cabinet secretary has said that he is willing to give further thought to those issues. However, what comes through in the committee report is the great deal of consensus that exists around the bill as introduced.

We made it clear in our ambitions for the legislation that it should be proportionate, that it should not result in an accused person being tried repeatedly for the same offence, and that there should be clear parameters for the situations in which it should apply. We believe that those things have been achieved in the bill through the provisions on trials that have been tainted or deemed null, the provisions on new evidence, and the fact that it will require special reasons not to accept pleas in bar of trial.

Of course, the Parliament must take care in considering the reform of a principle that has been part of Scots law for generations but, in considering the legislation thoroughly and diligently, the committee found that the general approach that is taken in the bill is indeed robust in achieving the changes for which the Parliament expressed its support almost a year ago.

A key debate following the publication of the Scottish Law Commission’s report on double jeopardy was on the issue of retrospective application and we are pleased that the bill will have retrospective effect. That is right because prosecutors now have access to new technologies and techniques, such as DNA evidence, that can show proof of criminality even in cases that are many years old. In the previous debate, a number of us mentioned the collapse of the trial for the World’s End murders, and there can be no doubt that the change in the law is important for the families of Helen Scott and Christine Eadie and for other families who face similarly tragic circumstances.

While the Justice Committee was scrutinising the bill, as the cabinet secretary said, Mark Weston was convicted at Reading Crown Court for the murder of Vikki Thompson in 1995. Indeed, the committee asks in its report whether that conviction could have been secured under the provisions in the bill. I am aware that there are differences between the approach to new evidence in the bill and the exceptions to double jeopardy that have been introduced in English law,
but I hope that it can be shown that it will be possible to secure a conviction in similar circumstances under the bill. I hope that the cabinet secretary will be able to do that, as it is important that that can be shown.

The example of the changes that were made to the law in England and Wales in 2003 can give us confidence that the changes should work well here. In England and Wales, the opportunity now exists to seek prosecutions if there is clear evidence that justice has not been served, but it has evidently not created a situation in which accused persons are routinely retried for the same offence. At the time of our previous debate on the matter, of the six applications for retrial that had been determined in England and Wales, three had failed, and Mark Weston is the first person to face a second murder trial in England following the discovery of new forensic evidence. The provision has been used sparingly, but it has obviously been hugely important to the family of Vikki Thompson, as that case has now been concluded.

We look forward to debating the bill further at stage 2, but I stress that, at this point, we see no reason to demur from the approach that the Scottish Government is taking. We are always ready to challenge Government policy when we believe that it does not serve the victims of crime—indeed, we had just such a debate on sentencing policy this week. If, however, the Government brings forward proposals that we believe do serve the interests of victims, we will support them, and we firmly believe that the bill does just that. It is not only an important matter of justice for the victims of crime and their families who will be affected by the change in the law, but it will also be an improvement to our justice system.

We agreed with the Scottish Government’s response to the Scottish Law Commission and the consultation process that ministers engaged in was robust. The clear consensus that has been achieved at committee shows that the Parliament supports the bill and I am sure that it will support the general principles at decision time tonight. I am also pleased that we will be able to pass the bill in the current parliamentary session.

We hope that the legislation will be required in only a small number of cases, but there are individuals and families in Scotland who have sought it in the hope that the great injustices that they have had to endure can finally be rectified in our courts. The bill at least offers that opportunity and I hope that it will see a number of past wrongs righted. I also believe that it will safeguard the interests of justice in the future, and that is why we will support it.

09:52

John Lamont (Roxburgh and Berwickshire) (Con): When my colleague and party leader Annabel Goldie opened a debate on double jeopardy in February 2007, she expressed hope that common ground might be found to take this important issue forward. Unfortunately, the then Scottish Executive was not quite ready to engage properly on the issue. I am pleased that we are now at a stage where there is sufficient common ground to allow the matter to be progressed.

It is important to acknowledge at the outset the work of the Scottish Law Commission in producing the report that underpins what we are considering today. Although the bill is not a carbon copy of the report, it is a product of the commissioners’ hard work, expertise and knowledge, and we are in their debt for their efforts. The Justice Committee’s report adds further weight to the debate and we should also acknowledge the work that Bill Aitken and his colleagues have done on the bill.

Members will be aware that, although there has been an established principle for hundreds of years that an individual once tried and convicted or acquitted of an offence should not be subject to another prosecution for the same offence, the rule against double jeopardy has not been enshrined in statute before. We believe that the rule against double jeopardy is an important principle in the operation of our justice system and that it should be codified in statute. The finality of criminal verdicts allows individuals who are involved in a trial to get on with their lives in the knowledge that the matter has been resolved. It also provides a more general benefit in that public confidence in the court system is retained. The rule against double jeopardy also limits the reach of the state over individuals’ lives and protects individuals from the stress of repeat trials. Indeed, the rule is considered so important in the protection of liberty that it is written into the constitutions of many countries including the United States, Japan, Pakistan and South Africa. It is for those reasons that we agree that there should be a general rule against double jeopardy.

As with every good principle, there should be a few significant exceptions, which are outlined in the Scottish Law Commission’s report. It seems to me common sense that, if there is compelling new evidence of guilt that was not available at the time of the original trial, the Crown should be able to bring forward a new trial. Given the seriousness of such a step, however, it is right that that should happen only in exceptional circumstances and for the most serious of crimes. It is worth noting that provisions already exist in law for an individual acquitted of an offence to be retried for contempt of court or even perjury if it is clear that their acquittal was based on false evidence.
There is disagreement over certain exceptions, including the use of evidence that emerges after the trial, the list of offences for which a retrial could be brought and the new law’s retrospective nature. I am sure that the Justice Committee will examine those details in more detail at stage 2, but there is a clear direction of travel in favour of the bill’s general principles, which I believe reflect the interests of not just the accused, but the justice system and wider society.

The Conservatives are particularly pleased to be able to vote for the bill at decision time, as it brings forward a commitment that the Scottish Conservatives set out in their 2007 election manifesto. Indeed, we were the only party to call for these changes at that election although, to its credit, the SNP Government was quick to invite the Scottish Law Commission to review the double jeopardy law in November 2007.

There are many examples over the centuries of other countries borrowing or copying the better attributes of our legal system. However, in the area that we are debating today, we seem to be following the example of changes that have already been made in other countries. As Richard Baker has already pointed out, in England, the Macpherson report on the investigation into the tragic murder of Stephen Lawrence in 1993 contained a damning assessment of the role of racism in the Metropolitan Police. However, in that report, Sir William Macpherson also recommended:

“That consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented.”

In 2001, the Law Commission in England and Wales recommended that, in murder cases only, the Court of Appeal should have the power to quash an acquittal if reliable and compelling new evidence of guilt emerged and if a retrial would be in the interests of justice; moreover, in 2003, the Criminal Justice Bill, which reformed the law on double jeopardy, was passed at Westminster. Of course, that is not to say that we should blindly mirror developments in the legal system of England and Wales, but there is an imperative to consider such a change to the law in Scotland, given the nature of the issue and changes in evidence and how it is gathered. I also suggest that victims in Scotland would find it unacceptable that they might be denied the entitlement to justice afforded to those in England and Wales.

We believe that, although the principle of not being subject to double jeopardy is right and should continue, it should be reformed and restated in Scots law to allow exceptions where new evidence emerges in the form of an admission of guilt or in other new and compelling forms. Clearly, in allowing exceptions to the principle we will have to ensure that there are certain safeguards, but we are satisfied that the bill strikes the right balance between ensuring that we have a fair and effective justice system and protecting the rights of victims and individuals accused of crime.

I am pleased that the Government introduced the bill. The Scottish Conservatives will support it at decision time.

09:58

Robert Brown (Glasgow) (LD): Like many justice bills that the Parliament has previously considered, the Double Jeopardy (Scotland) Bill is important legislation enshrining in statute the old Scots law principle that—to use the old word for an accused person—a panel who has tholeed their assize and been acquitted cannot be tried again or put into double jeopardy on the same matter. The decision of the court or jury is final and, as the cabinet secretary pointed out, finality is an important—indeed, central—principle in our law.

The reason for the rule against double jeopardy is straightforward. Professor Paul Roberts of Nottingham University school of law put it thus:

“nobody could be safe and secure in their liberty, person, possessions or reputation if they were constantly at peril of being prosecuted by the state, condemned as a criminal, and subjected to penal sanctions. The government is allowed one attempt at bringing offenders to justice, but acquittals are final. What’s done is done, and we all move on.”

Some might say that such a rule is very necessary in other countries where democracy and the rule of law are less well entrenched; in Scotland, however, we have the protection of robustly independent courts, an independent Lord Advocate and procurators fiscal prosecuting in the public interest and an independent legal profession. I think it right to warn the Parliament to be ever vigilant in the defence of liberty, due process and the rule of law—and, indeed, the proper use of language. When politicians and journalists talk about “banging up criminals” rather than “prosecuting persons accused of crime”—who, after all, are under the presumption of innocence—we need to be on our guard against abuse of process. I am happy to say that there was no dispute in the Justice Committee about the importance of the general rule against double jeopardy; our consideration centred on the detail of the necessary exceptions to it.

The first exception is where the acquittal is tainted by someone, whether or not the accused, trying to bribe or threaten witnesses or the jury. It is easy to agree that a prosecution undermined in such a way is no real trial at all. In many cases, it might be possible to prosecute perpetrators of such offences against the proper course of justice.
but, in any event, it is quite proper that, if such a move taints the trial and if it is in the interests of justice to start again, that should be allowed—and, as the bill provides, allowed for all crimes. It does not matter whether the taint came from the original accused, someone associated with him or someone else to whom no connection could be established. It would be an unreasonable burden on the prosecution to require it to prove a link with the accused as well as a travesty of justice for the victims if a tainted prosecution was allowed to stand. Fortunately, tainted prosecutions, certainly through jury or judge tampering, are fairly rare in Scotland—and long may that continue to be the case.

However, a more common occurrence is the discovery of new evidence that was not and could not with reasonable diligence have been made available at the original trial. There might be advances in forensic science—indeed, the development of DNA testing is a clear example; a body might be discovered, yielding new evidence; or a new witness might turn up. John Lamont was right to mention in that context the Stephen Lawrence case, of which we are all aware.

Such things might or might not make guilt clearer. Even DNA is not conclusive; it all depends on where and how it was found and any implications that might be drawn. As a result, it is right that more stringent tests be met before a new trial is permitted and I felt that there was some force in certain witnesses’ view that the fact that new evidence substantially strengthens the case might not go far enough. I hope that the cabinet secretary will continue to examine that particular aspect.

There is fairly broad agreement that the new evidence rule as a basis for a new trial should be limited to serious crimes, but I do not think that the cabinet secretary’s approach of listing crimes works very well; in particular, I cannot see how one can satisfactorily define sexual assaults by separating out serious ones from more minor ones. I urge the cabinet secretary to follow the committee’s suggestion and make the dividing line between serious and other crimes somewhat more clear. Even DNA is not conclusive; it all depends on the nature and severity of the offence, whether or not the case was prosecuted on indictment. I am less clear, though, as to whether the case in question should be on indictment in only the High Court or on indictment more generally; that requires to be bottomed out.

Section 3 also proposes a specific exception to the double jeopardy rule if an admission by the accused subsequently comes to light.

Stewart Stevenson: The member suggests that retrials should be permitted only for prosecutions on indictment. Does he acknowledge, however, that had the additional evidence been available, what was tried as a summary case might well have been tried on indictment and that, as a result, excluding summary cases from being revisited might put us in an uncomfortable position?

Robert Brown: I take Mr Stevenson’s point but, to be quite frank, I think that such a situation would be pretty unusual. The question whether the prosecution was on indictment would probably depend on the nature and severity of the offence, rather than the adequacy of the evidence and I think that, in practical terms, we can probably disregard the member’s suggestion.

I was not persuaded by the Scottish Law Commission’s reasoning that a new admission by the accused was qualitatively different from other forms of new evidence and believe that its new view on the matter is correct. In any case, its original view emerged at a time when it was uncertain whether there should be a more general new-evidence exception and, as Patrick Layden QC said, “there is little logic in leaving admissions out of the ordinary new-evidence exception.”[Official Report, Justice Committee, 16 November 2010; c 3766.]

I welcome the minister’s comments on this matter, but I ask him to follow the committee’s suggestion and look more closely at the issue. Admissions are a notoriously unreliable area of evidence and many high-publicity murders bring forth a veritable army of people claiming for various deluded reasons to have carried out the killing.

Although some might think that I take a different view, I strongly support retrospectivity. It would be a scandal if someone who had been acquitted of a heinous murder or rape through lack of sufficient evidence could not be prosecuted again in a clear case where, say, DNA evidence materialised later that demonstrated compelling evidence of guilt. There would be a public outcry if, in such situations, a serious criminal could not be prosecuted and put behind bars. The central point is that we are not creating a new crime. A new offence, rightly, should not be retrospective. Instead, we are for good and exceptional reasons allowing a second prosecution of a crime that was always a crime. The difference between the substantive law and the procedural law seems to me to be valid.

With regard to prosecuting for murder or culpable homicide someone who was acquitted of an assault that the victim later died of, it has been argued—with some truth—that such a charge would be more thoroughly investigated and prosecuted. However, I do not think that that takes us all the way. It seems to me that there is clearly merit in the views of those who have said that, if that were to be allowed, there should at the very least be substantial new evidence that was not reasonably available before. I do not accept the cabinet secretary’s position that that is not an example of the double jeopardy rule in practice.
The principles are exactly the same. I accept the existing law position, but we need to get the principle right, and it seems to me that there should be prosecution in those circumstances only when there has been an acquittal and new evidence has come forward.

There are ongoing issues of detail to be resolved, but it is clear that the bill’s basic principles are valid. As other members have done, I ask members to support the bill’s principles at stage 1.

10:05

Nigel Don (North East Scotland) (SNP): My first thought is that we seem to have been at this debate for quite a while. It has gone on for a long time, but that is probably a good thing, because we are talking about changing the law as it has been for centuries. The bill is not a political whim or a policy idea that somebody thought would be a good one. We are reflecting on what has happened for generations and we must ensure that we get things right. After all, we are unlikely to change the law again soon.

I want to go through the issues and reflect on the Law Society of Scotland’s comments, as it is clear that it is still not, for reasons that I respect, in the same place as us. It seems to me that the Law Society’s comments should be addressed, as it has considerable connection with the legal process day by day and week by week.

I will start with tainted acquittals. The Law Society commented that the principle should apply only in solemn cases and only where the accused had played some part in the tainting of the trial. I understand where it is coming from, but I agree with the committee and comments that members have made so far. That is simply not the right approach. I think that the principle remains that if a trial is not a fair test—it should be a fair test—there should be the ability to have it again. It has nothing to do with whether the accused had any part in what happened. If the accused got off as a consequence of jury nobbling or evidence tampering, it seems to be in the interests of justice to be able to have the trial again. It seems to me that the principle is that if a trial is not a fair test, there will have been no justice at all, and that it is in the interests of justice that it should be possible to have it again. It may, of course, be appropriate not to have the trial again but to try somebody for perjury, for example, but that would be up to the Crown. That said, it seems to me that the principle is quite clear. If the original trial was not fair, it should be possible to have it again.

The Law Society of Scotland is concerned about admissions and, again, I think that I understand where it is coming from. Lord Gill, however, gave a lucid explanation that I remember well. His point was that at the opening stage of the appeal before the judges, it is for them to decide whether the admission and the evidence for that admission can fairly be put to a jury. They are to apply those tests. The jury is to decide how reliable something is only if it gets to the jury. Again, it is quite clear that that should cover all offences. I think that the Government made that point. There is really no distinction to be made. If somebody owns up, or is said to have owned up to an offence, there is no earthly reason why the matter should not be brought back to the court to consider whether that is right.

Robert Brown: Does the member accept that, leaving aside boasting, there really is no distinction of principle, in respect of the merits of the issue, between a particle of evidence that relates to an admission and a particle of evidence that relates to something else? What is the principal difference between the two situations?

Nigel Don: The principal difference goes back to the idea of acquittal. The layman’s view is that if somebody walks away from the court and says, “I did it,” or that part of the evidence that proved that they did something was tampered with, they will have told the world that the test was unfair. To use a cricket analogy, they tampered with the ball, and that is not fair. If the guilty party tampered with evidence, they have taken away the right to say that they got away with it.

In contrast, we need to be very careful about new evidence. The idea and importance of the rule against double jeopardy first emerged in that context. We need to be absolutely clear that we are looking for new-evidence exceptions only in the most serious cases and that we do not expect anybody to come back to court for relatively minor offences just because the evidence has improved. The public want the murderer and the rapist and possibly the armed robber and the major fraudster to be able to be brought back to trial. Those are matters of considerable public significance and we should be able, with new evidence, to break the historic rule in such cases. That is why I am, I confess, in the same position as those who have spoken so far: I am not sure that there should be a list. In fact, I am now quite sure that there should not be a list. We should couch things in terms of the level at which a crime was originally prosecuted. I am not with Robert Brown on the issue of general indictment. Of those who have spoken so far, I am with Bill Aitken. Only High Court cases should be involved, because those are the cases in which the public will be interested. I can see the principle that Stewart Stevenson has already enunciated, that a case might originally appear on a summary cause, but it seems to me that that would be the exception to the exception and we do not have to worry about it. It seems to
me that we should be dealing with serious offences by anybody's standards, that they will at the very least have been indicted and, I suspect, have been indicted in the High Court. That is where we should put the line.

Mike Pringle (Edinburgh South) (LD): Nigel Don talks about cases on indictment only in the High Court, but surely one of the bill's principles is to give some satisfaction to people who have been affected by crime. Surely the principle is the same for people have been affected by crime, whether the case has been dealt with under indictment in the High Court or in the sheriff court. It is about getting justice for people who have had injustice committed against them.

Nigel Don: Indeed, but this is not just about justice; if it were, there would be no limits. We would say that the moment there was new evidence anybody should be able to go back to court. However, we have accepted over the centuries that that is a bad principle, because it basically means that the state could retry until it got the conviction that it wanted. We recognise that that is not where we want to be, as a matter of human rights and good political principle. That is the principle that history has given us and we are trying to find exceptions while accepting that principle. Therefore, not all cases should be involved, although I understand the logic.

The Law Society of Scotland was concerned about the problem of eventual death and I am sticking with that approach. Other members have mentioned the issue. It seems clear to me that if something ain't broke, don't fix it. That is where the law has finished up and there is no reason to change it. As the cabinet secretary outlined, it is a completely different event: a person will be charged with a different offence under different circumstances that will have generated a different investigation. That has not caused us a problem any more than has the concern about the problem of eventual death.

Nigel Don: It is an unhappy circumstance.

Colleagues have said everything that there is to say about retrospection. The trial of Mark Weston for the murder of Vikki Thompson makes the point far more eloquently than any of us could. It would be crazy not to make things retrospective. I understand the concerns that exist, but the practicalities are before us. It is a matter of public confidence; it is about the public knowing that the prosecution can go back for new evidence in the most serious cases, or for other issues in the most difficult or worrying cases. We owe it to the public to ensure that that principle is enshrined in the law so that the courts know what they are doing.

Bill Butler (Glasgow Anniesland) (Lab): I support the motion in the name of the cabinet secretary that urges members to support the general principles of the bill.

As deputy convener of the Justice Committee, I place on the record my thanks to those who gave evidence to the committee, the Scottish Parliament information centre for its invaluable assistance, and the committee's clerking team for its sterling support.

The bill, which is based on the Scottish Law Commission's report on double jeopardy, published in 2009, seeks to enshrine in statute the established principle that a person should not normally be prosecuted for a second time for the same offence or on a new charge arising from the same actions.

The SLC defined the rule against double jeopardy as

"prohibiting a repetition of criminal proceedings against anyone who has been previously tried for a particular offence, whether he was convicted or acquitted in those earlier proceedings."

The commission noted that, although it has been clear in Scots law for centuries that no one could be tried twice for the same offence, the law lacked clarity and

"the precise boundaries of the present protection against double jeopardy in Scots law are unclear."

That is an unhappy circumstance.

Witnesses were overwhelmingly in favour of enshrining in law the rule against double jeopardy. The Lord Justice Clerk, Lord Gill, said that the judges of the High Court of Justiciary were

"unanimously of the view that the double jeopardy rule is of considerable constitutional significance and that, subject to certain exceptions ... it should be retained."—[Official Report, Justice Committee, 14 December 2010, c 3959.]

Given the weight of evidence, it is unsurprising that the committee—correctly—recognised the central

"importance of the double jeopardy rule, in providing certainty about the finality of criminal proceedings and in protecting accused persons against repeated prosecution"; and the need to clarify and entrench the rule by placing it on a statutory footing.

As members have said, the bill proposes several exceptions to the principle, which include exceptions when the original trial was tainted by an offence against the course of justice, when new evidence that an acquitted person confessed to the offence emerges and when other new evidence of guilt emerges. In the main, those exceptions are rational and acceptable. As the cabinet secretary has said,
"It is no threat to our justice system to reappraise historic principles such as double jeopardy", for there must be a balance between the rights of the accused and the ability of the Crown to prosecute in the public interest.

Quite so.

I will touch on some exceptions to the general principle that the Justice Committee considered. Section 2 of the bill proposes that an acquitted person could face further prosecution if prosecutors could prove that the acquittal had been tainted by certain offences against the course of justice. Section 2 mirrors the SLC’s recommendation of an exception when an acquittal has allegedly been subverted or perverted by someone bribing or threatening witnesses, jurors or, in extreme cases, the judge.

The SLC concluded that retrials should be permitted if the prosecution could convince three High Court judges, on the balance of probabilities, that an offence against the administration of justice had been committed in relation to the original trial; that that had resulted in a tainted acquittal; and that a further prosecution was in the interests of justice.

I believe—as did the committee—that the evidence that was presented to members in favour of that approach was persuasive. I acknowledge that the proposals gave rise to several concerns, most notably from the Law Society of Scotland and the Scottish Human Rights Commission. Nevertheless—and given the balance of probabilities test—the committee was correct to judge that the provisions provide an appropriate level of protection in this particular context.

Like my committee colleagues, I concluded that the general new-evidence exception in section 4 was appropriate and rational. I was comforted by the Lord Justice Clerk’s confidence that judges could apply the tests in section 4. Lord Gill noted that that "is an approach that can be applied, as it is routinely applied in new-evidence appeals in the court of appeal."—[Official Report, Justice Committee, 14 December 2010; c 3965.]

I, too, was struck by the case to which members have referred of Mark Weston a t Reading Crown court for the murder of Vikki Thompson in 1995, which came to the committee’s notice during its consideration of the bill. His conviction, which was made possible following the discovery of new forensic evidence, was allowable only because a new-evidence exception had been introduced in English law. That exception was entirely reasonable and such a rational approach should be followed in Scotland.

The putative legislation strikes the correct balance between the rights of the accused and the public interest. In the most serious cases, we must do all that we as a legislature can to prevent someone from literally getting away with murder. Scottish Labour will support the motion at decision time.

10:20

Dave Thompson (Highlands and Islands) (SNP): The Double Jeopardy (Scotland) Bill is based on the Scottish Law Commission’s “Report on Double Jeopardy”. The bill aims to codify in statute a long-held Scottish law principle that a person should not normally be prosecuted a second time for the same offence. The wide agreement that such codification is desirable was reflected in the evidence taken by the committee, which did not hesitate to recognise the fundamental importance of the double jeopardy rule and therefore fully supported putting it on a statutory footing.

However, one subject of discussion on which witnesses’ views differed was whether the law should be retrospective. The SLC did not support retrospection and claimed that it would have little practical effect, as much evidence is not kept after a trial. That argument has merit, but it does not provide sufficient reason not to apply the law retrospectively. Even if retrospection applied to only a small number of cases—I think that the number would be tiny—a public outcry would arise if evidence of an offence came to light but the Crown could not pursue the offender because the law was not retrospective. The conviction of Mark Weston in England for the murder of Vikki Thompson highlights that issue.

It was put to the committee that people who enjoyed certainty after being acquitted before the bill came into force would have their judgments converted into provisional judgments. I suppose that that is true, but that is no different from the position of those who will be tried and acquitted in the future, when all judgments to which the bill will apply will, in essence, be provisional. The argument is not strong enough to convince me that the bill should not be retrospective.

New evidence generated much discussion. The SLC found that to be the most difficult issue that it faced and made no recommendation on whether a new-evidence exception should be created. The Crown Office felt that the new-evidence exception in the bill struck a proportionate balance between the rights of the accused and the rights of victims. It also felt that the tests that would require to be passed were very high and would provide sufficient safeguards.
Those tests are in section 4(6), which says that the High Court can set aside an acquittal only if, first,

"the case against the accused is strengthened substantially by the new evidence";

secondly,

"the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence";

thirdly,

"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 of ... the original offence";

and fourthly,

"it is in the interests of justice to do so."

Those are not easy hurdles to overcome and they are sufficiently robust to protect the accused effectively.

Unlike the exceptions for tainted acquittals and admissions, the new-evidence exception is tightly drawn, with the intention of restricting it to certain offences. The SLC recommended that, if a new-evidence exception was created, it should be restricted to murder and rape, although ministers should have the power by affirmative order to add other serious offences.

The bill goes further than that and adds culpable homicide, genocide, crimes against humanity, war crimes and a broader range of sexual offences. What the list of offences should include is not agreed. The problem with such a list is that, once it is created, all sorts of groups will exert pressure for new offences to be added to it. In our deliberations, the committee agreed that the general new-evidence exception should apply to only a limited number of very serious offences but questioned whether a list was the best way in which to achieve that.

As has been said, the committee suggested that consideration should be given to replacing schedule 1 and dealing with the matter in another way. The suggestion is that the new-evidence exception would affect only offences that were originally prosecuted on indictment or tried in the High Court. The advantage of restricting the measure to High Court-only offences is that that restricts application of the new-evidence exception to cases that the Crown felt merited a sentence of more than five years. It has been suggested that such a proposal may encourage the Crown to put more cases to the High Court on the basis that that will make such cases eligible for the new-evidence exception in future. I doubt that that will be the case. The option of High Court-only cases is well worth considering. I await the Government response with interest.

The bill will enshrine in statute a long-held Scottish legal principle that an accused can be tried only once on the same set of evidence, but it allows, rightly, for exceptions. The number of cases that will be caught by the provision will be tiny, as evidence elsewhere shows clearly. I hope that the Parliament can and will support the general principles of the bill this evening.

10:26

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I welcome the opportunity to speak in this stage 1 debate. I begin by outlining my support for the general principles of the bill, which the cabinet secretary has introduced. Of course, I also want to emphasise the importance of protecting the rights of all our constituents. The last time that I spoke on the issue in the chamber, in addition to stating my support for change, I welcomed the ensuing consultation period. Having listened carefully to the evidence, along with my fellow members of the Justice Committee, I remain steadfast in my belief that this reform is needed.

As we have witnessed, cases south of the border show that persons who were previously acquitted of a crime have been brought back to trial in light of new evidence. The evidence that the Society of Solicitor Advocates provided to the committee affirmed that DNA evidence—or whatever other form of incriminating evidence that comes forward—does not prove that someone is guilty. We must all wholly accept that point of view. It said that, if such evidence comes forward, it should trigger only a retrial, not prove someone’s guilt. It is the responsibility of the prosecution to prove guilt and it is for the jury to reach a decision. Furthermore, I agree with the analysis of those who are experienced in trauma and loss, who recognise that with the constant developments in forensics it is time for amendments to be made to the double jeopardy rule to reflect those improvements.

I understand—but disagree with—the concerns of some lawyers, judges and human rights experts who worry that the changes will infringe on the liberties and rights of the accused. Professor Paul Roberts stated that

"nobody would be safe and secure in their liberty, person, possessions or reputation if they were constantly at peril of being prosecuted by the state".

I want to make it clear: I do not support any act that intrudes on the civil liberties of people in my constituency and across Scotland. I am sure that there is 100 per cent agreement on that around the chamber. I also do not believe that the overall principle of changing the double jeopardy rule will
lead to such encroachment. If incriminating evidence arises that puts in doubt the innocence of an acquitted party, we should encourage this change in the law, with the full intention of providing justice to victims and their families.

There has been and is little protest about the proposals to alter our legal system to allow for a new trial if an acquitted individual expresses his or her guilt. Previously, I have highlighted the historic case in England of Billy Dunlop, who murdered 22-year-old Julie Hogg in 1989 and who twice faced trial in 1991. On both occasions, the jury failed to reach a verdict and the killer was never brought to justice. The killer was subsequently imprisoned for another crime and boasted to prison officers that he was guilty of the murder of Julie Hogg.

As a consequence of the 2003 changes to the legal system in England and Wales, Billy Dunlop was charged and convicted of the murder in 2006, following his confession in 1999. He thought that he had got away with murder—indeed, for 17 years he did—but changes in the law that applied retrospectively meant that he came before the court and got his just deserts. However, if the case had happened in Scotland, that vicious murderer would still be free to walk the streets and the family of the victim would still have no sense of justice or closure.

Our criminal justice system is unquestionably unique, and etched in it is much of the history of Scotland. As legislators, our job from time to time is to amend the system and fix fundamental wrongs that should not happen in modern-day Scotland. I agree that care must be taken and the Government must ensure that the rights of all citizens—victims and accused alike—are protected. However, change is needed. I hope that all members recognise that.

Bill Aitken, the convener of the Justice Committee, highlighted very adequately the recommendations and conclusions of the committee following the evidence sessions that we heard and submissions that we received. We have some concerns. I am pleased that the cabinet secretary listened to the committee and that he indicated in his speech this morning his willingness to work with us to discuss and address the issues that we highlighted. I look forward to working with the cabinet secretary and my colleagues on the Justice Committee to ensure that we get this matter right. The rights of victims and the rights of those who are accused need to be protected, but justice should be seen to be done in all cases in Scotland.

10:31

Ian McKee (Lothians) (SNP): For me, the double jeopardy debate is one of the most difficult issues that we face in Parliament. Unlike many other issues, there is no party split but the arguments for and against legislation to allow prosecution for an offence of which a person has previously been found not guilty are both compelling.

The benefits of refusing to allow further prosecution are strong. In 2009, the lead commissioner for the Scottish Law Commission, Patrick Layden QC, neatly summed up the reason:

“Essentially, it prevents the state from running the criminal prosecution system on a ‘Heads we win; tails, let’s play again until you lose’ basis”.

Allowing not even for the possibility of further prosecution gives closure to people who have been acquitted at a fair trial. People who are truly innocent might otherwise feel the sword of Damocles hanging over their heads for the rest of their lives. However, although most would concur with the 1842 observation of Lord Justice Rolfe—in a case in the English courts of a compensation claim that resulted from faulty maintenance of a stagecoach—that hard cases make bad law, there is something grossly offensive in the spectacle of a person who has been found innocent of a serious crime subsequently boasting that he or she has got away with it. Massive advances in the forensic sciences mean that evidence that could not have been available at the time of the trial can now prove conclusively that the person who was found innocent is, in fact, guilty of the crime. We need to take account of that. What is needed is a fair balance between the two poles of the argument. That is what has been achieved in the bill that is before us today.

Let us look at the main issues. It is important that double jeopardy legislation applies only to the most serious offences. It should not apply to those who could have been tried at the time for another alleged offence had the prosecution chosen to do so; nor should it apply if the so-called new evidence would have been available to the prosecution at the time of the original trial, had reasonable diligence been shown. That could be a defence against the reopening of the World's End case.

The bill covers those situations. In particular, the bill affects only those who have previously been acquitted of one of the serious offences that are listed in schedule 1, and after High Court approval of a retrial. A person cannot be tried again for an offence that is listed in schedule 1, unless that offence was listed in schedule 1 at the time of the first trial. I have not had the benefit of being a member of the Justice Committee and hearing all the evidence, but I have heard enough in today's debate to feel that we should look again at schedule 1 and consider whether listing offences in a schedule is the best way of proceeding.
Another rare but important use of the proposed legislation is in cases of tainted acquittal, perhaps when there has been proven interference with a jury or even a judge. Even in those cases, the acquittal may not be set aside unless the court is satisfied that the previously acquitted person or someone else has been convicted of an offence against the course of justice in connection with the trial, or that the balance of probability leads to the same conclusion. Of course, the court must also consider that the interference could have had an effect on the outcome of the proceedings.

An associated issue that has caused particular unease in some quarters is whether double jeopardy legislation should be retrospective. In general, I am against retrospective legislation. It seems unfair even to attempt to convict someone of a crime that was not a crime when an incident took place. That opens legislative bodies to the charge of being vindictive or even attempting to settle old political scores. However, as Robert Brown stated, the situation here differs to an important degree. When a person was tried in the past for one of the serious offences that are listed in schedule 1, those were offences at the time—it is simply a case of the person having been found innocent. If advances in science or whatever now provide strong evidence to the contrary, I see no reason why the person should not be charged again. If someone goes around boasting of having committed a murder or a rape, for example, thinking that they are immune from prosecution, it is not in the interests of the law or society that they should be protected.

A similar argument applies to new evidence, which must be substantial. As has been said, difficulties may arise because material evidence can deteriorate or be contaminated over the years, which may mean that a second prosecution is unlikely to be successful. However, that will not always be the case. If the evidence is watertight, I cannot see how it is in the interests of justice or anyone other than the perpetrator of the serious crime that a retrial should not take place.

We have before us a bill that is the culmination of years of reflection by all concerned with this difficult issue. I have studied the checks and balances that the bill contains and consider them to be proportionate and appropriate. I therefore support the bill and commend it to the chamber.

10:37

Stewart Stevenson (Banff and Buchan) (SNP): I welcomed the Cabinet Secretary for Justice’s referral of this issue to the Scottish Law Commission in 2007. That was an important step in taking forward a matter that we have debated and engaged with in this place for some time.

Of course, the principle of ne bis in idem or, in French, autrefois convict has been in Scots law for some 800 years. It is worth thinking of the kind of world that existed at that time. The English had been conquered by the Normans, but Scotland had yet to face down the substantial challenge that Edward I would bring 100-plus years later. That was a very different world, with a very different approach to legal matters. The fact that the principle has endured over such a lengthy period should put us substantially on notice that it is not a matter to be treated trivially, but one of the utmost seriousness. It has been at the centre point of Scots law—and the law of many other countries—for a very long time.

For me—and, I suspect, for other members—one of the most chilling speeches that has been made to the Parliament was the speech by the Lord Advocate on the World’s End murder case. It was a lengthy speech that left the chamber as quiet as I have ever heard it. There was no fidgeting—there was a stillness among us as we heard the Lord Advocate lay out matters before us in a judicial manner to which we are not used. Those who listened to that statement—some members found it sufficiently disturbing not to stay for the whole of it—will understand the issue that is before us.

Cathie Craigie was absolutely right to focus on issues relating to the victims of crime; I think that she was the first speaker in the debate to do so. The point is not simply to identify someone’s crimes and to ensure that an appropriate punishment is put in place, but to serve the interests of those who have been affected by crime. When considering whether, after 800 years, we should look at the matter again, there are very substantial issues that we must consider.

Having served on two justice committees of the Parliament and having spoken on the subject previously, I see today’s debate as a welcome opportunity to revisit it. Of course, revisitation is the whole point of the bill. It could be argued that it is somewhat strange that trials can be restarted for a variety of reasons up to the point of decision but that cases cannot be revisited thereafter, as decisions are absolute and inviolate. We have now moved beyond the point of accepting that. Equally, we have accepted that it is no small thing to do so. The English example shows us that the criminal justice system and the interests of justice do not collapse when such a measure is introduced. That can give us substantial confidence that it is worth our while proceeding in this way.

Clearly, there are other ways in which the ends of justice can be served. We have observed with varying degrees of interest and engagement the use following a civil trial of the law of perjury for one of the former tenants of these premises. Let
us not forget that people are found not guilty—they are not found innocent at any stage, although the presumption is that they are innocent. If someone has been prosecuted and has not been found guilty, there are other ways, one of which is the law of perjury, of serving the ends of justice. Of course, that is not an easy matter with which to deal.

What tests are we putting in place? Are they sufficient and adequate? The hearing that must precede any reprosecution is a very important part of the changes that we are contemplating. For example, all of us recognise that not all confessions are sincerely made. I suspect that there will be instances of people who are clearly engaged in criminality and may already have substantial criminal records embellishing a tale to the point of confessing to crimes that they may or may not have committed, because they are publishing a book or have the opportunity to be paid large sums of money by one of the tabloid newspapers. For that reason—and many others—the hearing process is important, as it will allow us to test whether a reprosecution should be contemplated in the interests of justice. It is equally important that the person who may be subject to a new prosecution has the right to appear and to be represented in it. Those are important provisions in the bill.

We have had some exchanges on the scope of reprosecution; I suspect that we will continue to have such exchanges as the bill proceeds through Parliament. Should it be limited to original prosecutions on indictment, or should it be extended to summary prosecutions? Perfectly properly, Robert Brown said that it was pretty unlikely that evidence would come forward following a summary trial that would have caused the case to be taken on indictment in the first instance, but we cannot exclude that possibility. If we are thinking of the victims, we need to think very carefully about where we strike the balance.

There are some things that are not in the bill that could not, sensibly, be in it, but which it is worth having a think about. For example, should we be able to reprosecute people who have died? That might seem a slightly amusing idea, but the reality is that holding a court case to prosecute someone who is dead—which can be done in other jurisdictions—does, in certain instances, serve the interests of justice and of the victims. However, that is an extremely difficult thing to contemplate and the size of the bill, which at present is relatively modest, would be substantially greater if we were to do so. I mention that just to point out that we should not imagine that we are solving every issue that surrounds double jeopardy.

Robert Brown: I am not quite clear what Mr Stevenson has in mind, but I wonder whether he is thinking of the Megrahi case and the situation whereby the reported death of Mr Megrahi, in due course, would have interrupted the re-review of proceedings. Does he think that that would have given rise to an issue whereby the victims would have been deprived of the opportunity to test the issues before the appeal court, following on from a decision by the Scottish Criminal Cases Review Commission?

Stewart Stevenson: The member cites a perfectly reasonable example; there would, of course, be others.

There are other ways in which the issue can be dealt with, besides having a retrial in a criminal court, but it is clear that victims often do not regard such alternatives as being equivalent to prosecution in a criminal court. Prosecuting someone after they have died is not dealt with in the bill, and I would not wish the Presiding Officer to draw me up too tightly for speaking on a matter that is not strictly before us.

Turning to things that are in the bill, an issue that has been raised relates to acquittals when there has been interference with the jury. Section 2(5) says:

“But the acquittal is not to be set aside if, in the course of the trial, the interference (being interference with a juror and not with the trial judge) became known to the trial judge, who then allowed the trial to proceed to its conclusion.”

Superficially, that looks okay, but the reality is that the effects of that interference might have been greater than the trial judge was aware of at the time at which they allowed the trial to proceed to its conclusion. Those who will take the bill forward might wish to look at that again, if that part of the bill is to be retained. If one juror was nobbled, they may have contaminated other jurors or put other jurors in a state of fear and alarm before they were removed from the trial. The judge may not have been in sufficient possession of the facts to have realised that that had happened. As almost everything that a judge decides can be reviewed elsewhere, to exclude a review of a judicial decision to allow a trial to continue after a juror has been nobbled may be an exclusion too far.

I am conscious that we have a certain amount of time so, if I am permitted, I will proceed to deal with the committee’s report. Paragraph 33 mentions the concerns of the SHRC and the Law Society about what the standard of proof should be. They thought that beyond reasonable doubt should be the standard of proof at the hearing but, of course, that would not necessarily have been the case in the original prosecution. It is important to bear in mind that the procurator fiscal could
have considered a lower test—the existence of a reasonable prospect of a conviction.

Paragraph 48 mentions that the SHRC, and John Scott talked about the range of serious offences. As the bill proceeds, it will be important to test that we can combine the trial of new charges with the retrial of old charges in a way that will serve the interests of justice, and I hope that the members concerned will do that.

The committee considered at great length the retrospective application of the bill, which, instinctively—like others—I am not comfortable with. However, in this particular case, I think that it would leave a huge gap in our ability to deliver justice for many people if we were not to have the opportunity to revisit trials that took place in the past.

Earlier, I intervened on Bill Aitken on the subject of extradition, and I think that there remains a substantial issue there. People may be extradited to other jurisdictions in the European Union and to the United States in a variety of circumstances, without there being any necessity to show that there is a case to answer—that is a matter for the jurisdiction to which the extradition takes place. In a case in which someone who has already been found not guilty in a Scottish court is extradited, there is an enduring potential for injustice but, of course, responsibility for the law in respect of extradition lies elsewhere and it is not at our hand to change it.

Section 10(3) relates to article 54 of the Schengen convention, which touches on some of that. I had been aware of the Schengen convention only to the extent that the UK is outside the common travel area that it created, much to travellers’ inconvenience. I will go away and read it to discover what other delights it contains.

I congratulate the Government and all who have pressed for such provisions on the introduction of an excellent bill that will serve the interests of justice and of victims, and which will be a source of great fascination to those of us who are interested in the minutiae of legal legislation.

The Deputy Presiding Officer (Alasdair Morgan): We move to the winding-up speeches.

10:52

Mike Pringle (Edinburgh South) (LD): Double jeopardy is a procedural defence that forbids a defendant’s being tried again on the same or similar charges following a legitimate acquittal or conviction. The rule against double jeopardy is a fundamental principle of Scots law that provides essential protection by preventing the state from repeatedly prosecuting an individual for the same act. Stewart Stevenson gave us a bit of a history lesson, which shows that we are now in a different place.

Interestingly, double jeopardy has even interested Hollywood. The film “Double Jeopardy”, which starred Tommy Lee Jones and was made in 1999, was about a wife who is framed for her husband’s murder and who suspects that he is still alive. As she has already been tried for the crime, she says that she cannot be re prosecuted if she finds and kills him.

All members of the Council of Europe, which includes nearly all European countries and every member of the European Union, have signed the European convention on human rights, which protects against double jeopardy. Article 4 of the optional seventh protocol to the convention says:

“No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”

However, member states may implement legislation that allows the case to be reopened in the event that new evidence is found or if there was a fundamental defect in the previous proceedings. The optional protocol has been ratified by all the European states except Belgium, Germany, Spain, the Netherlands and the United Kingdom. In those member states, national rules governing double jeopardy may or may not comply with the provision that I cited. I note that Bill Aitken said that the committee looked at that issue and was satisfied that the bill is ECHR compliant.

Double jeopardy is an extremely complex and often sensitive issue, so we welcome the bill and the clarification that it provides in setting out in statute the rule against double jeopardy as part of a fair and modern criminal justice system. We support the setting-out of exceptions to the rule against double jeopardy, for example when the original trial was tainted by jury tampering or when the acquitted individual has since confessed to the crime.

In its submission, the Law Society outlined its view that there should continue to be a general rule against double jeopardy. However, it said:

“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 … and … It should be possible to retry an acquitted person who subsequently admits to having committed the offence.”

The issue of admission should be dealt with in law. The cabinet secretary referred to that in his speech and said that he will lodge amendments to strengthen and clarify the bill on that matter.

In addition, we support an exception in limited and very serious cases in which important new
evidence emerges. That exception should of course apply only when the evidence was not and could not have been—with the exercise of reasonable diligence—available at the original trial. Advances in science such as those relating to DNA provide perhaps the best example of how that could happen. As Robert Brown, Ian McKee and others have said, various considerable advances have been made in scientific evidence. Members have referred to the English case of Mark Weston, who was cleared in 1996 of the murder of Vikki Thompson near her home in the Cotswolds. He was retried after the double jeopardy rule was removed in 2005 and was subsequently found guilty because small patterns of blood were discovered on his boots. That, and other DNA evidence that was not available at the original trial, led to his conviction. That surely must be right.

The decision on whether there should be a retrial must be made by the High Court when, having examined any new evidence, it deems that a retrial is in the interests of justice. Nigel Don suggested that only cases that were taken on indictment in the High Court should be brought back for retrial. I make it clear that my colleague Robert Brown did not say that only cases that were taken on indictment should be brought back; instead, he said that the Justice Committee needs to bottom out that issue.

The Procurator Fiscal Service decides whether cases are taken on indictment or are to be summary cases and whether they go to the High Court or sheriff court. At a particular time, a procurator fiscal might decide that, because the sheriff court is inundated and there is a bit of free space in the High Court, they will push one or two cases to the High Court. Would it be right if only cases from the High Court could be re-examined? I suggest not. Stewart Stevenson made the good point that the bill is about the interests of justice and of victims, and that victims need closure. I therefore suggest that the issue is another one that the Justice Committee needs to bottom out.

Nigel Don: If I misunderstood Robert Brown earlier, I apologise for doing so.

Mike Pringle: I accept that.

Legal people in the High Court will look at the evidence and consider whether a case should be brought back. The High Court might decide that a case that was originally taken as a summary case should now be taken on indictment and not in the sheriff court but in the High Court. There are many permutations. I suspect that the Justice Committee will spend some time on that issue at stage 2.

The debate on whether a new-evidence exception should be applied retrospectively is complex. However, our view is that it would be arbitrary and probably unsatisfactory if acquittals that occurred before a certain date were final while those occurring after it could be looked at again in the event of new evidence emerging. The Law Society of Scotland remains of the view that it would not be in the interests of justice to allow any exception to the principle of double jeopardy to be retrospective but, as I said, I am not convinced of that and I think that most members of the Justice Committee and other members who have spoken in the debate take that view, too.

I am not a member of the committee, but I am aware that it received evidence on that aspect of the bill and examined it in considerable detail. I suspect that it will examine it again. The committee’s stage 1 report states that it 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."

It therefore

"supports the retrospective application of the Bill, whilst recognising some of the practical difficulties which may limit the ability of the police to obtain new evidence in relation to cases which have already been decided."

I congratulate the committee on all its hard work up to this point. I suspect that it has a lot of hard work still to do at stage 2, and I am sure that it will do that work. I will be happy to support the bill at decision time this evening.

11:00

Bill Aitken: Although several matters are unreconciled at this stage, I am pretty certain that we are all moving in the same direction and that there can be a satisfactory outcome. It is important that we reassert what we are trying to do in the bill. We have had several interesting speeches—one was particularly interesting—and a lot of common sense has been spoken, but let me try to clarify what we are trying to do. I believe that none of us would seek to achieve a situation in which the rights of the individual were under threat and people could face a catalogue of prosecutions if the Crown initially failed to sustain a conviction.

The first protection that is in place is that a case will go to the High Court only when the Crown feels that it is in the public interest to do so. We have received assurances on that from the Crown in evidence to the committee and from the cabinet secretary this morning. The unanimous view of the Parliament is that only very serious cases should be pursued for the second time. We might have to work to identify the type of case, if indeed we take that route. Such cases would be pursued only when doing so was essential to the public interest.
Very few prosecutions have occurred under the legislation that was introduced in England, and I anticipate that a similar situation would pertain in Scotland.

So the first protection is that the Crown would pursue a case only in extreme circumstances. The matter would then require to be determined by the Scottish court of criminal appeal, with three judges sitting. It would inevitably set a high bar, which is entirely appropriate. The new evidence would have to be evidence that was not available at the time of the original trial and could not reasonably have been expected to be available. That is a further protection. To refer to a point that Richard Baker raised and Stewart Stevenson subsequently made, I have difficulty in seeing how the World’s End case—Sinclair v Her Majesty’s Advocate—could be re prosecuted under those terms. However, that is an argument for another day.

Stewart Stevenson: It would be useful if I said that I actually agree with the member. I just think that when members were confronted with the sort of detailed material that is presented to the courts, as people who are, thankfully, not normally in a court, that was a substantial wake-up call to us about the real world. Thankfully, most of our community, including members, are relatively isolated from that.

Bill Aitken: We have that protection in respect of new evidence. I am confident that the High Court would set a fairly high bar.

I turn to admissions. As Robert Brown correctly said, when a high-profile murder or other serious crime occurs, every deluded individual and his auntie seems to phone up the press claiming responsibility for it. The protection would be that the High Court would have to be persuaded that the admission contained a degree of special knowledge—that would be persuasive. That would perhaps do away with the difficulty of bar-room bragging by some of our more imaginative citizens.

Robert Brown: I take that point. I was interested in the point that my colleague Mike Pringle made when he quoted the ECHR rules, which refer to tainted prosecutions and new evidence, but not to admissions. Does Mr Aitken have a view on whether that affects the argument and whether we should incorporate the admissions issue into the new-evidence issue, as we have discussed in the Justice Committee?

Bill Aitken: That is one of the unresolved matters. I will consider it fully before it returns to the committee, but I am initially of the view that there is an argument for merging the two issues. That is how I see it at present, but I will take appropriate advice.

In any event, the question of tainted acquittals presents a degree of difficulty. To some extent, we are inhibited in our knowledge of what goes on by the operation of the Contempt of Court Act 1981. We might have to consider how we get round that. In essence, we are not allowed to know what happens in a jury-room—sometimes that might be just as well, in the context of matters that are not related to the business that is before us today. We must consider the operation of existing legislation in that regard.

The list of offences, and what is and is not on it, remains a current issue. I heard what Mike Pringle said on the subject and there is merit in his argument, but my view is that the list should be restricted to cases indicted in the High Court, which is consistent with the application of the approach to only the most serious crimes.

The main issue is the interests of justice. Forensic science has improved immeasurably over the years, not just DNA analysis but fingerprint analysis and other aspects. Things can be done today that could not have been done even five or 10 years ago. In the interests of justice, we must use every tool that is available to us and I see nothing wrong with using DNA samples that were taken at the time of the crime but which could not be used because the science of the day was inadequate. There might be difficulties to do with storage, but we can work round such difficulties, because we are talking about the principle of justice.

The Parliament will do nothing that would prejudice anyone’s right to a fair trial. However, we must consider victims and, in the case of murders, victims’ relatives. What we are seeking to do is morally entirely justifiable and legally sensible. I am sure that when we have sorted out the various issues that have been raised in the debate, the Parliament will be presented at stage 3 with a bill that will make a significant impact on the law of Scotland.

11:07

James Kelly (Glasgow Rutherglen) (Lab): I welcome the opportunity to close the debate on behalf of the Labour Party. I thank the Justice Committee clerks and everyone who gave evidence to the committee and contributed to its detailed report.

There is no doubt that the issue is serious, so it is right that the committee gave it serious and detailed consideration. There is much agreement on the matter, but we owe it to the Parliament and to the public to show that we are considering the issues appropriately. As Stewart Stevenson said, double jeopardy is an 800-year-old principle. The Scottish Law Commission took the issue forward
in its report, having given it appropriate consideration, as John Lamont said. It is correct that the principle of double jeopardy be codified in law. As Lord Gill said, it is a matter of considerable constitutional significance that in 2011 we begin the process of establishing in statute a principle that has been around for 800 years.

Much of the debate has centred on the exceptions to the double jeopardy rule and why they should be made. As many members said, it is right that we consider the experience of victims and their families. There can be no worse experience than the tragic loss of a loved one in a violent incident, and the inability to see justice done must eat away at families every day.

We must ensure that only the right cases are taken forward. The delivery of justice must be paramount. We can look to examples in England and Wales. Many members mentioned the Mark Weston case, which shows that justice can be achieved by introducing exceptions to the double jeopardy principle and lends a strong moral case for what the bill is trying to achieve. We can also learn from what has happened internationally.

Bill Aitken talked about how DNA analysis and other scientific techniques have greatly improved, which lends tremendous weight to the argument for giving further consideration to cases in which a person was cleared but there is new evidence.

Also on the subject of modern technology, we live in the information age and people are much more aware of cases in which there has potentially been a miscarriage of justice. It is not just about people who might have been wrongly cleared; DNA evidence can be used to clear the names of people who have been wrongly convicted. The public’s greater awareness of such cases lends greater weight to the need to consider the bill and take it forward.

Important legal principles of consistency and certainty are at the heart of the bill. The committee was right to support the approach in section 2, on tainted acquittals, which deals with situations in which a result was achieved by perverting the course of justice. As the committee’s convener, Bill Aitken, said in his opening speech, the Scottish Human Rights Commission and the Law Society of Scotland questioned the application of the provision to all offences, but I agree with the Crown Office and Procurator Fiscal Service that the bill strikes the right balance. It is right that we revisit trials in which witnesses were intimidated or jury members were unduly influenced, so that justice is done.

Section 3 is on admissions made or becoming known after acquittal and the committee had to consider whether the provision should apply to pre-acquittal and post-acquittal admissions. Some witnesses thought that it should apply only to post-acquittal admissions. However, Victim Support Scotland gave powerful evidence on the matter and the Association of Chief Police Officers in Scotland said that section 3 will help to deliver public confidence in the Justice Committee—I meant the justice system; I assure Bill Aitken that we always have confidence in the Justice Committee. ACPOS made a valid point.

Members talked about the standard of proof and welcome the cabinet secretary’s acknowledgement that the bar might be raised and the approaches in sections 3 and 4 made more consistent. That might help to address the fears about section 3 that were expressed in evidence.

The new-evidence exception in section 4 is in the public interest. New techniques such as DNA analysis will supply new evidence.

There has been much discussion this morning of the list of offences to which the new-evidence exception should apply. The Scottish Law Commission stated in its report that the provision should apply only to murder and rape. The Government was right to extend the list of crimes in the bill to cover more serious offences such as war crimes and certain sexual offences.

There has been a certain amount of debate this morning about whether a list is appropriate, or whether the provision should apply simply to cases that have been tried on indictment or in the High Court. There has been a lot of support for that argument, but I see some attraction in having a list of offences. A list is quite transparent, so the public can see the offences to which the retrial provision would potentially apply.

Introducing an alternative system would potentially open the way for the provision to apply to other cases, and the public might think that it would not apply in certain cases. As members have said, the provision should apply only to serious cases.

Mike Pringle: Will the member take an intervention?

James Kelly: I will take an intervention in just a minute.

An alternative approach in that regard might have unintended consequences and open the issue up. I have a relatively open mind on the issue, but I do not dismiss the idea of having a list.

Mike Pringle: On that point, who will draw up the list? Will it be a group of people, the High Court or the Justice Committee?

James Kelly: The Government has introduced a list in the bill. If the Parliament and the Justice Committee do not consider the list to be appropriate, we must amend the bill at stage 2.
Ultimately, we are dealing with a very serious matter, and the list—or any alternative—must be lodged in statute.

Section 11 deals with the eventual death of an injured person and there has been discussion about whether there should be a retrial in such cases. The cabinet secretary dealt with that point well. If someone subsequently dies, the circumstances change and the police will view the investigation differently. They will potentially put more resources into it and bring forward more evidence, and the prosecutors will look for more evidence to bring the case back to trial. Logically, the changed circumstances and the additional evidence that is on display would make it appropriate for a retrial to take place.

The Scottish Law Commission disagreed with the Government on retrospectivity, but I support the Government on that issue. If the provision is introduced, it should be applied retrospectively. One needs only to look at the application of the law in England and Wales in that regard—in the case of Mario Celaire, for example. He murdered Cassandra McDermott in 2001 and was found not guilty in 2002, but the case was subsequently retried in 2009. I am sure that Ms McDermott’s family are glad that the provision on exceptions to the double jeopardy rule was applied in England and Wales. That is a strong example that supports the case for applying the provision retrospectively.

I think I have a bit of time left; I do not want to eat into the minister’s time.

The Deputy Presiding Officer: The member is under no compulsion to carry on talking if he does not wish to.

James Kelly: I will touch briefly on some of the contributions from members during the debate.

There was an exchange between Robert Brown and the cabinet secretary on the storage of evidence that might be needed for a retrial. As the cabinet secretary said, the relevant services will have to make an appropriate call with regard to the storage of evidence. If the bill is passed, it will create a different situation and we will have to consider storing more additional evidence than has been stored in the past. However, it is right to be pragmatic in such matters. We do not want a lot of evidence to be stored unnecessarily from cases that would not be deemed to be appropriate for a retrial.

Robert Brown made a valid point about how the public will view retrospectivity. They would see it as a scandal and an outrage if someone was perceived to be potentially liable to be retried for a crime but the case could not be taken forward.

Nigel Don made a thoughtful contribution, as ever. It was helpful of him to take Parliament through some of the Law Society’s criticisms, and he rebutted those very competently. Although there is general agreement in Parliament this morning, we heard criticisms of certain aspects of the bill in the Justice Committee, and it is helpful for those to be aired in the chamber.

Stewart Stevenson’s contribution was interesting as ever, and full of depth. We got a bit of history, and a bit of French at one point. On a serious note, he recalled the Lord Advocate’s statement on the collapse of the World’s End trial. I take Bill Aitken’s point about that matter but, as Stewart Stevenson said, the statement was a poignant moment for Parliament, and it has given some focus to our deliberations this morning. Stewart Stevenson was correct to link that issue with Cathie Craigie’s contribution, in which she emphasised the importance of victims.

I am happy to support the general principles of the bill at stage 1. It is in the interests of justice, public confidence and the consistent application of the law.

11:22

The Minister for Community Safety (Fergus Ewing): We welcome the debate. There is plainly a broad consensus today, which continues the consensus reached on the previous occasions on which we have debated this very important matter.

As Nigel Don said, it is right that we take time to debate double jeopardy and that we debate and consider it in great detail and at length. It is essential that we pass an effective bill that achieves the objectives that we all share. That is our predominant duty—as a Government especially, but also as members of the Parliament—in reforming the law of double jeopardy, which I think a vast majority of the public wishes us to do.

The law of double jeopardy is a vital safeguard, and it is right that the cabinet secretary and the Justice Committee convener began by setting that out. We are not scrapping the principle that has served Scotland so well for centuries, and which was well described by Robert Brown—drawing, no doubt, on his extensive legal experience.

The principle is important for three reasons. First, it allows finality in criminal proceedings. People who have been acquitted in a court will have gone through the fire and the ordeal of a trial—with all the pressure that is put on any individual who finds himself in the dock, especially in a case in which a very serious crime has been libelled against him. That individual and his family will have faced that pressure—it is an experience that, as far as I am aware, none of us here has undergone. It is essential that an individual who has been acquitted—against whom the state has
not made the charge—is then able to get on with his life. If that were not the case, individuals who were acquitted might live in constant fear of a retrial. It is the existence of the law of double jeopardy that marks out what we all regard as a civilised legal system for people whom we would otherwise view in a different light entirely. It offers a necessary finality.

Secondly, the law of double jeopardy limits the power of the state and the ways in which it can pursue citizens through the criminal courts. Thirdly, it also provides protection from the anxiety and humiliation that repeated trials would undoubtedly cause accused persons.

It is agreed across all parties, and it has been acknowledged among all the members who have taken part in the debate, that there should, however, be changes to the current system. Those changes have been considered extremely carefully and thoroughly, first by the Scottish Law Commission and then by the Parliament.

I will deal first with the issue of tainted acquittals. On trials that have been tainted, it is essential, as a matter of principle, that people should not benefit from attempts to pervert the course of justice. Many speakers commented on that.

There are myriad ways in which trials can be tainted. Jurors and witnesses can be bribed. Witnesses can be threatened—for example, so that they do not identify an accused person as the person alleged to have carried out the crime. A witness can be threatened with violence either against members of his family or against himself. That is a real scenario; it does not exist purely in the pages of John Grisham novels. It is quite easy to recognise that, in some sections of society, witnesses may be and have been placed under such pressure.

It has emerged during the debate that all members agree that if the trial is tainted, there should be an opportunity for a retrial, whether the crime of which the accused person was originally acquitted is of the most serious sort or less serious. Where there is taint, there is injustice, and there must be an opportunity to put it right. That principle was expounded by Dave Thompson, and he was absolutely correct in what he said. There has not been a fair first trial in such cases, and it is therefore right that there should be an opportunity for a further trial so that a false acquittal can be set aside. Any offence against justice is a serious matter.

In his closing speech, Bill Aitken touched on the possible effect of merging elements of the new-evidence test and of the admissions exception. Both admissions and other types of new evidence can create a compelling case for a new trial. However, it is important to stress that for an admission to justify a new trial the bill as drafted requires that it must be “credible”. That answers Bill Aitken’s point about instances when a number of individuals—and, I think he said, their auntie—come forward, for reasons best known to themselves, to claim that they carried out the crime. Indeed, financial reasons could be involved, as Stewart Stevenson said.

The admission must be credible, it must be new and it must be corroborated by other evidence. It must also be in the interests of justice to have a new trial. Those are all substantial requirements—it is important to stress that. We will amend the bill so that an admission will have substantially to strengthen the case against the accused in order for it to justify a retrial, and it must also be highly likely that a reasonable jury would have convicted had the admission been available.

Robert Brown: I ask the minister to consider Mike Pringle’s point about the wording of the ECHR arrangements regarding double jeopardy—which I have not recently read, and had actually forgotten about. Does the fact that the ECHR provisions at least appear to cover the two categories of tainted evidence and new evidence give the Scottish Government pause for thought as to whether that should be the framework under the bill, so that the admissions bit would be tied in as a sub-particle of the provisions on new evidence?

Fergus Ewing: If Robert Brown does not mind, I decline his invitation to respond to his question with a definitive answer—for good reason. I will not respond now with specific and definitive answers on how we will frame amendments.

However, I can say, and it is correct for me to do so, that we will reflect carefully on each contribution that members have made in the debate, and we will then lodge our stage 2 amendments. We have already determined, as the cabinet secretary announced, the purpose of the amendments that we seek to make and to which I have alluded. However, although my contribution will probably not turn out to be short, it will not be definitive on how we will seek to amend the bill. We have to get it right, and it would be foolish of me to make commitments or give undertakings on the hoof. I have not done that for four years, and I am certainly not going to start today.

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. I hope that we can all support that position.

If I understood him correctly, I think that in his closing speech Bill Aitken proposed that we merge section 3, on admissions, with section 4, on new
evidence. I will make a few points about that. There are some points of difference between admissions and new evidence.

First, the section on new evidence is limited to a specific range of offences, but as I have just set out, the admissions exception should be capable of covering any offence. That is a difference between two of the reasons that justify the departure from the general principle of double jeopardy.

Secondly, the section on new evidence allows a person to be reprosecuted only once for the offence, whereas it should be possible for an application to be made under the admissions exception regardless of whether there has already been a retrial. In other words, if an individual is acquitted after a retrial, but then boasts of having got away with it, that should not be acceptable. Although I suspect that the number of such cases will be very small indeed, the example illustrates the difference between the two categories.

The new-evidence provisions cover murder, rape, culpable homicide and serious sexual offences. The difficult issue on which many of the speeches focused is how we tackle which offences should permit a departure from the general principle. Do we list those offences? Do we try to define when the general principle can be disapplied by providing a different test—one that is based on whether the case was originally tried in the High Court or whether the crime would normally be dealt with on indictment rather than by way of summary procedure? These are difficult areas and the questions are finely balanced, so we will consider the matter further.

We accept that it is difficult appropriately to define the scope of the exception by using a list alone. However, because most offences can be tried on indictment or in the High Court, an approach based on that test would make the range of offences that could be reprosecuted following new evidence much wider than the list in the bill. One option would be to restrict retrials in such cases to those that were initially prosecuted under solemn procedure or in the High Court, but to retain the list. I say that as a general response to that whole area, which was probably the area that was most widely covered by members in today’s debate.

**Bill Aitken:** Does the minister agree that summary cases could be dealt with in another way? Rather than seek a retrial, we could charge the accused—or anyone else involved—simply with attempting to pervert or perverting the course of justice. That would probably be tidier than going through the procedure again.

**Fergus Ewing:** We will certainly consider that approach before we lodge stage 2 amendments. I am sure that we will wish to involve the committee in discussions prior to the stage 2 proceedings so that we can get such matters settled as well as we can.

The bill contains the power, using the affirmative procedure, to add or remove offences from the list, so Parliament will have full scope to consider any such changes. It will be for the Government and Parliament to consider what would be appropriate in each case when change is proposed.

There is an important issue around the new-evidence test. Many speakers in the debate referred to DNA evidence as the most likely source of new evidence that leads to a retrial. Indeed, although I do not plan to mention individual cases, members referred to the one case in England in which a retrial led to a conviction on the basis of new evidence.

What should our new-evidence test be? It is important to say that the Scottish Law Commission devised our test after a thorough analysis of the law. The test looks at the effect of the evidence on the case as a whole. It is a high-level test, but it is not the English test. The commission looked at the test that is used in England and Wales, which requires new evidence to be compelling in its own right. It concluded that, in practice, the English courts had found that test to be unworkable because it does not permit a retrial when the new evidence is unremarkable by itself but, in combination with the existing evidence, puts the case in a compelling light. It is important to accept that the SLC’s judgment on that is correct. It concluded that in practice the English courts looked at the effect of new evidence in strengthening the original case. That is much more in line with the provisions in our bill. However, a brief perusal of a submission from the Director of Public Prosecutions in England reminded me that, during the five years in which the law has been in force south of the border, there have been only 10 applications to the High Court for retrial; I am advised that four of them led to a conviction. That is an important reminder for us.

As Mr Pringle and other members said, relatively few cases will end up in retrials. That is an important point because many people have legitimate concerns about what we are seeking to do. The Green MSPs are opposed to the bill, although they are not here to state their position today, which is a shame. Nonetheless, I mention that for the record.

**The Presiding Officer (Alex Fergusson):** I must ask you to close, minister. I did not think that I would have to say that in this debate.

**Fergus Ewing:** I was just getting into my stride, Presiding Officer.
The Presiding Officer: Please be fairly quick because we are encroaching on the next item of business.

Fergus Ewing: Certainly.

I thank all those who contributed to the debate. It is essential that we should be able to bring people to justice when new evidence emerges. We are trying to perfect the removal of an injustice that has existed for perhaps too long, and I am grateful that we have the support of the parties that have been represented in the debate.
Decision Time

17:01

The Presiding Officer (Alex Fergusson): The first question is, that motion S3M-7819, in the name of Kenny MacAskill, on the Double Jeopardy (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glassgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glassgowl) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffee, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glassgowl) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fusgrus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Fergusson, Patricia (Glassgowl Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glassgowl Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glassgowl Rutherforden) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glassgowl) (SNP)
Lamont, Johann (Glassgowl Pollok) (Lab)
Lamont, John (Roxburgh and Berwickehire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)

Against
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glassgowl Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glassgowl) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeill, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glassgowl Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Mulligan, Mary (Linlithgow) (Lab)
Munro, John (Farquhar) (Ross, Skye and Inverness West) (LD)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pervis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinnen, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glassgowl) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Willett, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 114, Against 2, Abstentions 0.

Motion agreed to,

That the Parliament agrees to the general principles of the Double Jeopardy (Scotland) Bill.
Justice Committee

Double Jeopardy (Scotland) Bill

Letter from the Cabinet Secretary for Justice

I would like to express once more my thanks to the Committee for its Report on the above Bill, its willingness to speed up the Stage 1 process and for the general consensus that has emerged on this important reform.

The attached paper responds to some of the Committee’s points made in its Stage 1 Report and also to a number of issues raised at the Stage 1 Debate on 3 February where I thought that it might be helpful to offer comment.

I have also taken the opportunity to outline the main thrust of the amendments proposed by the Government for the Stage 2 session on 1 March.

I hope that the attached paper is of assistance to the Committee.

Kenny MacAskill MSP
Cabinet Secretary for Justice
25 February 2011
Double Jeopardy (Scotland) Bill

1. This paper responds to aspects of the Justice Committee’s Stage 1 Report on the Double Jeopardy (Scotland) Bill, published on 26 January 2011. It focuses on specific parts of the Report where the Committee requested further consideration by Scottish Ministers. It also refers to comments made by MSPs at the Stage 1 Debate for the Bill on 3 February and, where appropriate, outlines the Government’s thinking on Stage 2 amendments to the Bill.

Section 3: Admission made or becoming known after acquittal

The test to be used in assessing admissions

2. Paragraph 56 of the Justice Committee’s Report, invited the Government to consider “amalgamating, either wholly or substantially, the admissions exception in section 3 within the proposals on new evidence in section 4 of the Bill.” As announced at the Stage 1 Debate, the Government accepts that there is scope to bring the tests to be applied in the admissions and new evidence exceptions closer together. Amendments have therefore been laid to apply aspects of the new evidence test to admissions.

Special knowledge admissions

3. At the Stage 1 Debate, the Convenor raised the subject of special knowledge admissions (at Column 32939). This focused upon the suggestion that where the High Court assessed an admission containing a degree of special knowledge, this would afford a protection against a false admission being used to justify a double jeopardy retrial. Although this could certainly be the case in some circumstances, it is worth stressing that the exception does not focus solely upon special knowledge admissions.

4. The Government’s view is that although special knowledge admissions are of course likely to be of a very high probative value, it is appropriate for other types of admission to justify a new trial, provided that the tests set out in the Bill are satisfied. The court in deciding an application under the Bill should be well placed to consider the credibility of any admission in question and the amendment adopting aspects of the new evidence test should guarantee that any new trial based on an admission will be thoroughly justified.

Article 4 of Protocol 7 to the European Convention on Human Rights

5. At the Stage 1 Debate, Robert Brown MSP (at Column 32946) asked whether the Bill should follow the format of the text of Article 4 of Protocol 7 to the European Convention on Human Rights (ECHR) in framing the exception for new evidence. He observed that there is no specific mention of admissions as a separate category of new evidence in the Convention. The text of the Article is as follows:

Article 4
Right not to be tried or punished twice
1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

6. This Article has not yet been signed or ratified by the UK. However, even if it were to be ratified, the Government’s view is that there is no requirement for the Bill’s treatment of exceptions to double jeopardy to exactly mirror the provisions of this Article. The Bill treats admissions as a distinct category of new evidence but the assessment required by the Bill must still be on the basis of whether “there is evidence of new or newly discovered facts” such as evidence that a person has admitted to the crime. It is submitted that this comes within both the letter and the spirit of this Article.

Section 4 and schedule 1: New evidence

The Mark Weston case

7. At paragraph 70 of its Report, the Committee questioned “whether, in the Scottish Government’s opinion, the conviction of Mark Weston for the murder of Vikki Thompson, had it taken place in Scotland, could have been secured under the provisions in the Bill”.

8. Whilst Keir Starmer QC, Director of Public Prosecutions at the Crown Prosecution Service did not offer a detailed assessment of the evidence in his letter to the Committee, he did however highlight two key factors in the Weston case, namely retrospectivity and the discovery of new evidence. Although the Scottish Government is not able to comment on an individual case, the Bill makes provision for both those factors. As a more general comment, it is hoped that the following observations on the similarities and differences between the Bill and the provisions of the Criminal Justice Act 2003 (the “2003 Act”) assist the Committee’s consideration.

9. The principal difference is of course that section 78 of the 2003 Act requires “new and compelling evidence”, whereas the Bill focuses on the impact of the new evidence on the case. An additional difference (noted by the SLC in paragraph 5.9 of its Report on Double Jeopardy) is that under the 2003 Act:

“there is no requirement that the evidence should not have been available, or available with the exercise of reasonable diligence, at the original trial…whether or not it would have been so adduced had it not been for the failure of the prosecution to act with due diligence is merely a factor to be taken into account”.

3
10. This is in marked contrast to section 4 of the Bill, which provides that evidence cannot be considered “new” if it could have been made available with the exercise of reasonable diligence at the original trial.

11. Part of the justification for introducing a new evidence exception is to enable a person to be tried again where evidence which may have physically existed at the time of the original trial has acquired new value as evidence as a result of technological advances or new technical ways of analysing physical evidence. It was acknowledged by the SLC in their Report (paras 4.25 to 4.32) that if productions were to be preserved “it would be possible, when some new technology was developed, to test those productions in light of the new knowledge” and this could allow applications to be brought under this exception. As a part of its overall assessment, it would always be for the court to assess during its consideration of any double jeopardy application whether the practices of the past met the standard of “reasonable diligence”. Scottish courts would need to apply that test to any forensic examination conducted at the time of the original trial.

The offences to be covered by the new evidence exception

12. At paragraph 82 of its Report, the Committee suggested removal of the list of offences in schedule 1 of the Bill and that instead, the new evidence exception should be restricted to cases tried on indictment or at the High Court.

13. The Government considers that a straightforward restriction to indicted cases without combination with a list of offences would be too broad, because of the very wide range of crimes that can potentially be tried on indictment. The Government has concluded that a restriction to solemn cases without the retention of a list would be highly undesirable.

14. However, the Government accepts the arguments in favour of applying a restriction to all cases originally tried at the High Court as an alternative to retaining a list and has lodged amendments to achieve that change.

15. This limitation will mean that where a case has been tried in the lower courts, it will not be subject to the exception. However the scope of offences covered will be widened beyond the list featured in the Bill at Introduction. It will include offences such as attempts, drugs crime and conspiracy.

16. Whilst any acquittal by the High Court would potentially be subject to the new evidence exception, no other acquittal in any other forum (being the vast majority of cases) would be affected. The Government is confident that use of the new evidence section will remain focused on the rarest and most serious of cases and therefore does not anticipate that the removal of the list of offences will substantively affect the impact assessment set out in the Bill’s Financial Memorandum.
Section 11: Eventual death of injured person

17. Paragraph 113 of the Committee’s Report commented on the situation where a person has been acquitted of causing injury, but the victim dies of the injuries received:

“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).”

18. The Government remains convinced that the type of situation covered by section 11 cannot be considered to be an example of double jeopardy. That assessment was shared by the Scottish Law Commission (para. 2.39 of the Report). The reason for this is that there has never been a previous trial for the causing of death in this situation and murder is not an aggravated form of assault but a different crime. Therefore, a further prosecution would not be prohibited under the rule against double jeopardy in section 1.

19. It is accepted that a parallel could be drawn with double jeopardy in certain circumstances. For example, a second trial could be considered unfair where the case is focused on the identity of the assailant and no evidence emerges after the death to throw light on that question. The interests of justice test within the Bill was designed in contemplation of this type of situation. That test is an innovation upon the existing common law, which simply permits a new trial.

20. However, in other cases further investigation following the victim’s death could mean that the second trial would be likely to hear a much fuller account of the case than the first and there are realistic grounds to conclude that the first trial did not provide an adequate exploration of the circumstances that resulted in a death.

21. The tabled amendment requiring the leave of the High Court to justify a new trial in this situation has a clear benefit in avoiding proceedings being commenced unnecessarily. It was also the approach recommended by the judges of the High Court in their submission to the Committee.

1.
Extradition and double jeopardy

22. At the Stage 1 Debate Stewart Stevenson MSP raised the issue of whether there was potential for injustice in extradition cases, where a person who has already been found not guilty in a Scottish court is extradited. It is perhaps worth noting in this context that sections 12 and 80 of the Extradition Act 2003 provide specific protection where it is thought that an extradition would lead to a double jeopardy situation.
Crown office policy on trying cases on indictment

23. Mike Pringle MSP queried at the Stage 1 Debate whether a Procurator Fiscal “might decide that, because the sheriff court is inundated and there is a bit of free space in the High Court, they will push one or two cases to the High Court”. The Crown Office and Procurator Fiscal Service have requested that this letter highlight that this position would not occur. Decisions as to forum are made in accordance with Crown Office guidelines and in the public interest.
Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 4  Schedule 1
Sections 5 to 15  Schedule 2
Section 16  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Robert Brown

32 In section 1, page 1, line 15, leave out <, 3>

Section 2

Kenny MacAskill

1 In section 2, page 2, line 10, leave out second <or>

Section 3

Kenny MacAskill

2 In section 3, page 3, line 25, leave out <or>

Kenny MacAskill

3 In section 3, page 4, leave out lines 4 and 5

Kenny MacAskill

4 In section 3, page 4, leave out line 10 and insert—

<(  ) that the case against the person is strengthened substantially by the admission,
(  ) that, on the admission and the evidence which was led at the trial in respect of the original offence, it is highly likely that a reasonable jury properly instructed would have convicted the person of—

(i) the original offence, or
(ii) a relevant offence, and>
Robert Brown
33 Leave out section 3

Section 4

Kenny MacAskill
20 In section 4, page 4, line 13, leave out from <whether> to <complaint”)> in line 14 and insert <after trial in the High Court on indictment (the “original indictment”)

Kenny MacAskill
5 In section 4, page 4, line 17, leave out <or>

Kenny MacAskill
21 In section 4, page 4, line 21, leave out <or complaint>

Kenny MacAskill
22 In section 4, page 4, line 24, leave out <or complaint>

Kenny MacAskill
23 In section 4, page 4, leave out line 27

Kenny MacAskill
24 In section 4, page 4, line 32, after <prosecution> insert <in the High Court>

Kenny MacAskill
25 In section 4, page 4, leave out line 33

Robert Brown
34 In section 4, page 4, line 33, at end insert—

<(3A) For the purposes of subsection (3)(b), new evidence includes a person’s admission to having committed the original offence or a relevant offence, made—
 (a) after the acquittal, or
 (b) before the acquittal but becoming known after the acquittal.>

Kenny MacAskill
26 In section 4, page 4, line 37, leave out <in relation to any particular case> and insert <to set aside the acquittal of an original offence>

Kenny MacAskill
27 In section 4, page 4, line 38, at end insert—
But an application may not be made to set aside the acquittal of an original offence if the person was charged with, and prosecuted anew for, that offence by virtue of this section.

Kenny MacAskill
6 In section 4, page 5, line 1, leave out <accused> and insert <person>

Kenny MacAskill
7 In section 4, page 5, line 7, leave out from <(had> to <charged)> in line 8

Robert Brown
35 In section 4, page 5, line 9, at end insert—

<(6A) But where the new evidence is of the type mentioned in subsection (3A), the court must also be satisfied—

(a) on the balance of probabilities, that the person credibly admitted having committed the original offence or a relevant offence,

(b) that evidence is available sufficient to corroborate the admission.>

Kenny MacAskill
28 In section 4, page 5, line 10, leave out subsections (7) and (8)

Schedule 1

Kenny MacAskill
29 Leave out schedule 1

Section 5

Robert Brown
36 In section 5, page 5, line 19, leave out <, 3(3)(b)>

Section 6

Robert Brown
37 In section 6, page 5, line 32, leave out <, 3>

Robert Brown
38 In section 6, page 6, line 6, leave out <, 3>

Kenny MacAskill
8 In section 6, page 6, line 6, leave out <, as the case may be,>
Robert Brown

39 In section 6, page 6, line 8, leave out <, 3>

Kenny MacAskill

9 In section 6, page 6, line 8, leave out <, as the case may be,>

Kenny MacAskill

10 In section 6, page 6, line 18, at end insert—

<(8A) In proceedings in a new prosecution it is competent for either party to lead evidence which it was competent for that party to lead in the proceedings on the original indictment or complaint (the “earlier proceedings”).

(8B) But the prosecutor must identify in the indictment or complaint in the new prosecution any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (8A) which would not have been competent but for that subsection.>

Kenny MacAskill

11 In section 6, page 6, line 19, leave out <brought by virtue of section 2, 3 or 4>

Robert Brown

40 In section 6, page 6, line 19, leave out <, 3>

Section 7

Robert Brown

41 In section 7, page 6, line 27, leave out <, 3>

Section 8

Kenny MacAskill

12 In section 8, page 7, leave out lines 33 and 34

Kenny MacAskill

13 In section 8, page 7, leave out line 39 and insert—

<(  ) that the case against the person is strengthened substantially by the admission,

(  ) that, on the admission 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 of murder, and>

Section 9

Kenny MacAskill

14 In section 9, page 8, line 17, after first <sheriff> insert <, or
( ) a justice of the peace>

Kenny MacAskill

15 In section 9, page 8, line 17, after second <sheriff> insert <or justice of the peace>

Section 11

Kenny MacAskill

16 In section 11, page 9, line 20, at end insert <, and

(c) in a case where A was acquitted, the condition mentioned in subsection (2A) is satisfied.>

Kenny MacAskill

17 In section 11, page 9, line 24, at end insert—

<(2A) The condition referred to in subsection (1)(c) is that, on the application of the prosecutor and after hearing parties, the High Court is satisfied that it is in the interests of justice to proceed as mentioned in subsection (2).>

Section 14

Kenny MacAskill

30 Leave out section 14

Schedule 2

Kenny MacAskill

18 In schedule 2, page 12, line 15, after <evidence)> insert <, 11(2A) (eventual death of injured person)>

Kenny MacAskill

19 In schedule 2, page 12, line 32, leave out paragraph 7

Section 16

Kenny MacAskill

31 In section 16, page 10, line 34, after <order> insert <made by statutory instrument>
Double Jeopardy (Scotland) Bill

Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

Admissions to be treated as type of new evidence
32, 33, 34, 35, 36, 37, 38, 39, 40, 41

Notes on amendments in this group
Amendment 40 is pre-empted by amendment 11 in the group “Minor and technical changes”

Minor and technical changes
1, 2, 5, 6, 7, 8, 9, 11

Admissions: tests for granting authority for new prosecutions
3, 4, 12, 13

New evidence: tests for granting authority for new prosecutions
20, 21, 22, 23, 24, 25, 28, 29, 30, 31

New evidence: limit on number of applications
26, 27

New prosecutions: leading of evidence
10

Plea in bar of trial: summary cases
14, 15

Eventual death of injured person
16, 17, 18, 19
PRESENT:
Robert Brown                  Bill Butler (Deputy Convener)
Cathie Craigie               Nigel Don
James Kelly                  John Lamont
Dave Thompson                Maureen Watt (Committee Substitute)

Apologies were received from Stewart Maxwell.

**Double Jeopardy (Scotland) Bill:** The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 1, 2, 3, 4, 20, 5, 21, 22, 23, 24, 25, 26, 27, 6, 7, 28, 29, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 30, 18, 19 and 31.

Amendment 32 was disagreed to (by division: For 1, Against 7, Abstentions 0).

Amendment 40 was pre-empted.

The following amendments were not moved: 33, 34, 35, 36, 37, 38, 39 and 41.

Sections 1, 5, 7, 10, 12, 13, 15 and the long title were agreed to without amendment.

Sections 2, 3, 4, 6, 8, 9, 11, schedule 2 and section 16 were agreed to as amended.

The Committee completed Stage 2 consideration of the Bill.
That is the background to what I am proposing. I am not necessarily against the cabinet secretary's move to make High Court cases the cut-off for new evidence. Perhaps the exception could be a bit wider for admissions evidence and take in cases on indictment more generally but, broadly, the rule and test should be the same and new evidence should include admissions because it is the same sort of evidence. I do not see the justification for dealing with it in two different sections and for having two different types of starting-off criteria, as is proposed.

I move amendment 32.

The Convener: Before I invite other members to speak, I note that I should have drawn members' attention to the pre-emption information on the groupings. I do so now.

Nigel Don: Now that I have heard Robert Brown and have a clearer idea of where he is going on the issue, and knowing where the cabinet secretary is proposing to go on it, I think that the idea that we separate admissions from new evidence is entirely appropriate. If I am right in thinking that we will agree that the new-evidence exception should be only for those cases that are heard in the High Court on indictment, I do not believe that the admissions exception should have such a narrow focus.

If the new-evidence exception were going to apply to much wider range of cases, the idea of having admissions in the same packet might have made sense. However, if we are narrowing the new-evidence section, as the cabinet secretary will propose and which I will certainly support—I said as much at stage 1—then separating out the admissions exception and allowing it to have a wider locus is entirely appropriate. I understand why Robert Brown lodged his amendments but, in light of the cabinet secretary's proposals, his approach may now be entirely inappropriate.

James Kelly: I broadly agree with Nigel Don. It comes down to the central issue of seeing that justice is done. If an admission is made either pre or post-acquittal by someone who is found not guilty, the victim will feel that they have been badly done by. Our drive should be to ensure that justice is done for victims. I therefore believe that the bill's provisions and the cabinet secretary's proposed amendments in this regard are correct.

Kenny MacAskill: As members have said, the amendments in this group relate to the new-evidence test and the admissions exception. Mr Brown is right that good arguments have been proposed south of the border in this area. However, I think that the bill is right in treating admissions as a distinct form of new evidence. An admission is evidence that flows entirely from the actions of the acquitted person. The Scottish Law...
Commission in its report made a persuasive case that, by making the conscious decision to admit the crime, the acquitted person is in effect waiving their right not to be tried again. That argument simply does not arise with other forms of new evidence.

The court will have to consider the circumstances of individual cases, but there can be no disputing that it is undesirable, disrespectful and offensive to have an acquitted person openly brag about their guilt. Permitting that to happen without censure risks bringing our justice system into disrepute. That is why it is important to allow an admission to justify a new trial for any type of offence under the bill.

Amendment 33 would remove section 3, which would mean that an admission could justify a retrial only where the case was prosecuted originally in the High Court. Because I do not think that admissions should be limited in that way, I believe that section 3 should be retained. Although I fully accept that it would be rarely used in less serious cases, I feel that it is important to the public's perception of justice that an admission should be capable of permitting a new trial in any case, whatever the crime. That would send a strong signal that bragging about one's guilt will not be tolerated in our society, regardless of the nature of the offence in question.

The second effect of amendment 33 would be to limit the use of an admission so that only one double jeopardy retrial would ever be possible on the basis of an admission. That is of course broadly as it should be. There is no suggestion that acquitted persons should ever be subjected to repeated double jeopardy trials. That is why section 4, on new evidence, is limited to one use only, even if further new evidence were to come to light. The reason why section 3 on admissions is not limited to one use is to defeat the prospect of a person acquitted at both the original trial and a double jeopardy trial publicly bragging of having twice evaded justice. The effect of amendment 33 would be to allow such bragging to occur with no risk of retrial for the offence. Once again, such a situation will be unlikely, but it is still desirable, as a matter of public policy, to close the door on such bragging and allow the potential for action to be taken.

Amendment 4, which we will debate later, will apply the rigorous tests in section 4 to admissions. The High Court will subject any application under the bill to a stringent review and will always have to be confident that any new trial would be in the interests of justice. That provision should safeguard against any acquitted person being prejudiced by the differences between section 3 and section 4 that I have outlined.

I therefore invite Mr Brown not to pursue amendment 33. I also suggest that his other substantive amendments—amendments 34 and 35—are simply not needed. Those amendments would insert specific reference to admissions into section 4 and would apply two additional tests to admissions: one on sufficiency of evidence and one on credibility. I do not think that amendment 34 is required, because if section 3 were to be removed, section 4 as currently worded can already cover admissions. No amendment is required to achieve that aim.

On amendment 35, I can see why Mr Brown would wish to insert provisions on the quality of any admission, but I do not think that it is necessary, because the other tests in section 4 would already capture the provisions on credibility and sufficiency that amendment 35 seeks to insert. The two tests being applied will ensure that, to justify a retrial, any admission will have to strengthen substantially the case against the accused and it will have to be highly likely that a reasonable jury would have convicted had the admission been available before. I do not think that it would be possible for any court to conclude that an admission that satisfied both those tests would somehow fail to be credible or provide sufficiency of evidence. The elements that amendment 35 would add would not assist either the court or the defence; indeed, there is a risk that their addition in relation to admissions alone might have an unintended impact by suggesting to the High Court that a somehow different standard should be applied for other types of new evidence.

I therefore invite Mr Brown not to press his amendments.

Robert Brown: I have listened carefully to the arguments, because this is an important issue. If I may say so, I thought that the cabinet secretary overegged the pudding greatly with regard to the possibility of repeat trials. It seems to me that there are good reasons why there should not be repeat trials in relation to this or other matters. The idea of there being a second retrial after an initial double jeopardy retrial seems positively ridiculous.

Two issues arise out of this, and perhaps I concentrated too much on one of them. The first is whether the tests that apply to new evidence and admissions evidence should be the same. The second is whether the type of offences covered by the two areas should be the same. Because the cabinet secretary was making changes by removing schedule 1 and putting in the High Court as the cut-off point, I left over the issue whether we should widen or narrow the type of offences in admissions cases, which could be looked at later. I invite the committee to concentrate on whether there are substantial differences between new evidence in general terms and new evidence in
admissions that make it necessary to apply different tests to them—leaving aside the issue of what sort of cases they should apply to.

As I have said before, admissions are notoriously unreliable. The committee and the Parliament have already had to deal with the question of the use of admissions evidence following the Cadder judgment, which is obviously a broader issue. Every significant publicised murder can lead to a large number of people coming forward to confess to the crime, which they did not commit. There are therefore definite limitations to the extent to which this sort of evidence can be used.

I stand by the position that, as the cabinet secretary said, admissions are a distinct form of new evidence and should be treated in that way in the bill. I invite the committee to agree to amendment 32 and to leave aside the question whether a wider category of offence should be covered, because there is a subsequent debate to be had on that matter.

Given the probable line-up of votes on this issue, I will take a test vote on amendment 32 and will not press other amendments in the event that amendment 32 is defeated.

The Convener: The question is, that amendment 32 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)

Against
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Lamont, John ( Roxburgh and Berwickshire) (Con)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 32 disagreed to.

Section 1 agreed to.

Section 2—Tainted acquittals

11:45

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 2, 5 to 9 and 11.

Kenny MacAskill: This group of amendments makes some minor changes to the bill to remove text that is considered to be unnecessary. Amendments 1, 2 and 5 will ensure that there is sufficient flexibility in relation to the charges to be heard at any new trial. Amendment 6 acknowledges that the subject of an application under section 4 is not at that point an accused person in the usual sense, their having been acquitted in the earlier trial. Amendments 7 to 9 and 11 are intended to improve and simplify wording in the bill.

I move amendment 1.

Amendment 1 agreed to.

Section 2, as amended, agreed to.

Section 3—Admission made or becoming known after acquittal

Amendment 2 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 3, in the name of the minister, is grouped with amendments 4, 12 and 13.

Kenny MacAskill: Amendments 3 and 4 respond to the committee’s stage 1 report. They 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. We have already considered the appropriate way to assess admissions in double jeopardy cases, and I do not propose to revisit those arguments.

Amendment 4 applies the essential elements of the new-evidence test to admissions and, with amendment 3, removes the parts of the existing test for admissions that become unnecessary as a result of amendment 4, that is, the references to credibility and sufficiency, which were discussed in relation to Robert Brown’s amendment 35. As indicated, those elements are no longer necessary because of the adoption of the more rigorous tests of section 4.

Amendments 12 and 13 carry forward the change of tests to admissions considered under section 8, which deals with situations in which murder was not charged at the original trial but evidence later emerges that the acquitted person admitted to committing murder.

I move amendment 3.

Amendment 3 agreed to.

Amendment 4 moved—[Kenny MacAskill]—and agreed to.

Amendment 33 not moved.

Section 3, as amended, agreed to.
Section 4—New evidence

The Convener: Amendment 20, in the name of the minister, is grouped with amendments 21 to 25 and 28 to 31.

Kenny MacAskill: The amendments alter the range of criminal cases that will be covered by the new-evidence exception to double jeopardy. Members will recall that the Scottish Law Commission originally recommended that the new-evidence exception should be restricted to murder and rape. The bill as introduced went further than that by listing specific offences, such as culpable homicide and serious sexual crimes.

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. Compelling arguments and examples can be and have been made and provided in relation to a range of serious criminal conduct. 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. Amendment 20 therefore adopts that change, with amendments 23 and 29 removing the restriction to the list of offences and the schedule that contains the list.

It is true that applying a High Court-based restriction has potential to widen the application of the new-evidence exception. For example, the bill will now encompass crimes such as attempted murder and serious drugs offences. However, it seems right for compelling new evidence sometimes to justify including such cases, where they have been tried in our highest criminal court. Each case will have to be carefully assessed on its own facts and circumstances, in terms of whether the new evidence makes the argument for a retrial compelling and whether it is appropriate to invoke the exceptions to double jeopardy in that instance. That will be a demanding decision for the Lord Advocate and the High Court to assess in each and every case that is considered under the legislation. I am confident that they will rigorously assess the public interest and the interests of justice in reaching their decisions.

I move amendment 20.

Robert Brown: I welcome the cabinet secretary’s proposals, as they are a more elegant and satisfactory solution than the existing one, which involves all the usual difficulties with having a list. The measures will keep intact the unusualness of an exception to the general double jeopardy rule. I am glad to support the cabinet secretary’s recommendations.

Nigel Don: I echo Robert Brown’s comments. The proposals will cover cases such as attempted murder. I do not see why an attempted murder should be treated differently from a murder just because it did not happen to succeed. What is the difference in the crime? The proposals also recognise that the issue is one of public perception. It is about the public outcry when the law cannot cope. The bill should be about only the most serious offences, and the proposals are an elegant way of getting to the most serious offences, regardless of what they happen to be.

Amendment 20 agreed to.

Amendments 5 and 21 to 25 moved—[Kenny MacAskill]—and agreed to.

Amendment 34 not moved.

The Convener: Amendment 26, in the name of the minister, is grouped with amendment 27.

Kenny MacAskill: Amendments 26 and 27 uphold the general principle that the Lord Advocate may only ever make one new-evidence application in relation to any one offence, but they elaborate on the situation in which the indictment at the original trial contained several distinct offences. Should new evidence be relevant to only one or some of the offences from the original trial, the amendments will allow the Lord Advocate to focus the application on those particular offences. If, at a later date, further new evidence emerges in relation to the remaining charges, they could in theory be subject to a further application under the bill. That is important when the indictment contains a number of serious matters and is not focused on a single serious offence.

I move amendment 26.

Amendment 26 agreed to.

Amendments 27, 6 and 7 moved—[Kenny MacAskill]—and agreed to.

Amendment 35 not moved.

Amendment 28 moved—[Kenny MacAskill]—and agreed to.

Section 4, as amended, agreed to.

Schedule 1—New evidence: relevant offences

Amendment 29 moved—[Kenny MacAskill]—and agreed to.
Section 5—Applications under sections 2, 3 and 4
Amendment 36 not moved.
Section 5 agreed to.

Section 6—Further provision about prosecutions by virtue of sections 2, 3 and 4
Amendments 37 and 38 not moved.
Amendment 8 moved—[Kenny MacAskill]—and agreed to.
Amendment 39 not moved.
Amendment 9 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 10, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 10 ensures that either party in a new trial authorised under one of the exceptions to double jeopardy can lead evidence that could have been employed at the first trial, subject to it still being admissible under the rules of evidence as they apply at the time of the second trial. It will ensure that evidence can be led about other related charges from the original trial. That will allow a full range of evidence to be deployed at the second trial, enabling the court to consider all aspects of the case.

Amendment 10 ensures that any prosecution evidence that it is competent for the Crown to lead only because of this provision must be drawn to the attention of the accused, to ensure that the accused has fair notice that the evidence will be led.

I should also inform the committee that the Government is considering the disclosure regime that is applicable to double jeopardy issues under the bill, and will write if it is thought that consequential amendments are needed at stage 3.

I move amendment 10.

Amendment 10 agreed to.

The Convener: I point out that if amendment 11 is agreed to, I cannot call amendment 40 for pre-emption reasons.

Amendment 11 moved—[Kenny MacAskill]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Plea in bar of trial that accused has been tried before
Amendment 41 not moved.
Section 7 agreed to.

Section 8—Plea in bar of trial for murder: new evidence and admissions
Amendments 12 and 13 moved—[Kenny MacAskill]—and agreed to.

Section 8, as amended, agreed to.

Section 9—Plea in bar of trial: nullity of previous trial

The Convener: Amendment 14, in the name of the minister, is grouped with amendment 15.

Kenny MacAskill: Section 9 applies where the prosecutor argues that a trial should continue because a previous decision on the same or substantially the same issue was null and void. The committee in its stage 1 report queried the need for section 9, but amendments 14 and 15 illustrate the need for its retention.

The section ensures that where a question of nullity arises at the sheriff court, it will be referred to the High Court for consideration. That is a special procedure for this unusual situation, which does not appear in the more general section that covers pleas in bar of trial. Amendments 14 and 15 extend that provision to cases that are first heard in a justice of the peace court. I stress that section 9 is restricted to very rare cases in which the prosecutor was unaware of the nullity when beginning proceedings. The application procedure in section 12 should be used where the prosecutor was already aware of any nullity.

I move amendment 14.

Robert Brown: I have one small query for the cabinet secretary. Amendment 14 refers to justices of the peace as well as sheriffs, and it crossed my mind to wonder whether stipendiary magistrates will be covered by the expression “a justice of the peace”, or indeed by the expression “sheriff”.

Kenny MacAskill: They will be, yes.

Amendment 14 agreed to.

Amendment 15 moved—[Kenny MacAskill]—and agreed to.

Section 9, as amended, agreed to.

Section 10 agreed to.

Section 11—Eventual death of injured person

12:00

The Convener: Amendment 16, in the name of the minister, is grouped with amendments 17 to 19.

Kenny MacAskill: Amendments 16 and 17 provide that where a person is acquitted of an
offence involving the physical injury of another person, and the injured person subsequently dies, apparently from their injury, the prosecutor will require to apply to the High Court for authority to prosecute for the death. In considering the application, the High Court will have to be satisfied that the prosecution would be in the interests of justice.

The Government carefully considered the committee’s suggestion that we consider whether some form of new-evidence test should be applied to such a case. Although the situation concerns a related topic, it is not a double jeopardy situation—I stress that point, having looked again at the matter. I appreciate that the concerns that were expressed were well intentioned, but I consider that the approach in amendments 16 and 17 will provide the right safeguards for the accused. The Lord Justice Clerk indicated to the committee that an application procedure would be appropriate. Amendments 16 and 17 will ensure that High Court scrutiny will be applied at a preliminary stage. The bill will ensure that a higher test for the prosecutor and the courts will apply than is currently provided for by the common law where the person was acquitted at the earlier trial.

Amendment 18 provides that the application procedure that amendments 16 and 17 create will be subject to the terms of the Contempt of Court Act 1981, which makes it a contempt of court to publish any material that would create “a substantial risk of prejudice” to the proceedings.

Amendment 19 will remove the interests-of-justice test in schedule 2, which requires that the court must be satisfied at a preliminary hearing in any second trial that it is in the interests of justice to proceed to trial. The provision will no longer be required, as a result of amendments 16 and 17.

I move amendment 16.

Nigel Don: The proposed approach will shift the balance appropriately in what is a rather strange situation that does not occur often. The amendments probably get the balance about right.

Amendment 16 agreed to.

Amendment 17 moved—[Kenny MacAskill]—and agreed to.

Section 11, as amended, agreed to.

Sections 12 and 13 agreed to.

Section 14—Subordinate legislation

Amendment 30 moved—[Kenny MacAskill]—and agreed to.

Section 15 agreed to.
Double Jeopardy (Scotland) Bill
[AS AMENDED AT STAGE 2]

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Double Jeopardy (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision as to the circumstances in which a person convicted or acquitted of an offence may be prosecuted anew; and for connected purposes.

Double jeopardy

1 Rule against double jeopardy

(1) It is not competent to charge a person who, whether on indictment or complaint (the “original indictment or complaint”), has been convicted or acquitted of an offence (the “original offence”) with—
   (a) the original offence,
   (b) any other offence of which it would have been competent to convict the person on the original indictment or complaint, or
   (c) an offence which—
       (i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and
       (ii) is an aggravated way of committing the original offence.

(2) Subsection (1) is subject to sections 2, 3 and 4 and is without prejudice to sections 107E(3) (prosecutor’s appeal against acquittal: authorisation of new prosecution), 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) and 185 (authorisation of new prosecution) of the 1995 Act.

(3) In this Act, references to a person being “convicted” of an offence are references to—
   (a) the person being found guilty of the offence,
   (b) the prosecutor accepting the person’s plea of guilty to the offence, or
   (c) the court making an order under section 246(3) of the 1995 Act discharging the person absolutely in relation to the offence,

and related expressions are to be construed accordingly.

(4) For the purposes of subsection (3)—
   (a) section 247(1) (conviction of person placed on probation or absolutely discharged deemed not to be a conviction) of the 1995 Act does not apply, and
(b) it is immaterial whether or not sentence is passed.

Exceptions to rule against double jeopardy

2 Tainted acquittals

(1) A person who, whether on indictment or complaint (the “original indictment or complaint”), has been acquitted of an offence (the “original offence”) may, provided that the condition mentioned in subsection (2) is satisfied, be charged with, and prosecuted anew for—

(a) the original offence,

(b) any other offence of which it would have been competent to convict the person on the original indictment or complaint,

(c) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the original offence.

(2) The condition is that the High Court has, on the application of the Lord Advocate—

(a) set aside the acquittal, and

(b) granted authority to bring a new prosecution.

(3) The court may not set aside the acquittal unless it—

(a) is satisfied that the acquitted person or some other person has (or the acquitted person and some other person have) been convicted of an offence against the course of justice in connection with the proceedings on the original indictment or complaint, or

(b) concludes on a balance of probabilities that the acquitted person or some other person has (or the acquitted person and some other person have) committed such an offence against the course of justice.

(4) Where the offence against the course of justice consisted of or included interference with a juror or with the trial judge, the court must set aside the acquittal if it—

(a) is unable to conclude that the interference had no effect on the outcome of the proceedings on the original indictment or complaint, and

(b) is satisfied that it is in the interests of justice to do so.

(5) But the acquittal is not to be set aside if, in the course of the trial, the interference (being interference with a juror and not with the trial judge) became known to the trial judge, who then allowed the trial to proceed to its conclusion.

(6) Where the offence against the course of justice is not one mentioned in subsection (4), the acquittal may be set aside only if the court is satisfied—

(a) on a balance of probabilities as to the matters mentioned in subsection (7), and

(b) that it is in the interests of justice to do so.

(7) The matters referred to in subsection (6)(a) are—

(a) that the offence led to—
(i) the withholding of evidence which, had it been given, would have been capable of being regarded as credible and reliable by a reasonable jury, or
(ii) the giving of false evidence which was capable of being so regarded, and
(b) that the withholding, or as the case may be the giving, of the evidence was likely to have had a material effect on the outcome of the proceedings on the original indictment or complaint.

(8) In this section, “offence against the course of justice” means an offence of perverting, or of attempting to pervert, the course of justice (by whatever means and however the offence is described) and—

(a) includes—

(i) an offence under section 45(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (aiding, abetting, counselling, procuring or suborning the commission of an offence under section 44 of that Act),
(ii) subornation of perjury, and
(iii) bribery,
(b) does not include—

(i) perjury, or
(ii) an offence under section 44(1) of that Act (statement on oath which is false or which the person making it does not believe to be true).

3 Admission made or becoming known after acquittal

(1) A person who, whether on indictment or complaint (the “original indictment or complaint”), has been acquitted of an offence (the “original offence”) may, if the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence,
(b) an offence mentioned in subsection (2) (a “relevant offence”).

(2) A relevant offence is—

(a) an offence (other than the original offence) of which it would have been competent to convict the person on the original indictment or complaint, or
(b) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and
(ii) is an aggravated way of committing the original offence.

(3) The conditions are that—

(a) after the acquittal—

(i) the person admits to committing the original offence or a relevant offence, or
(ii) such an admission made by that person before the acquittal becomes known, and

(b) the High Court, on the application of the Lord Advocate, has—
(4) The court may set aside the acquittal only if satisfied—

(b) in the case of an admission such as is mentioned in subsection (3)(a)(ii), that the admission was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of the acquittal in respect of the original offence,

(ca) that the case against the person is strengthened substantially by the admission,

(cb) that, on the admission and the evidence which was led at the trial in respect of the original offence, it is highly likely that a reasonable jury properly instructed would have convicted the person of—

(i) the original offence, or

(ii) a relevant offence, and

(d) that it is in the interests of justice to do so.

4 New evidence

(1) A person who, after trial in the High Court on indictment (the “original indictment”), has been acquitted of an offence (the “original offence”) may, if the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence,

(b) an offence mentioned in subsection (2) (a “relevant offence”).

(2) A relevant offence is—

(a) an offence (other than the original offence) of which it would have been competent to convict the person on the original indictment, or

(b) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment, and

(ii) is an aggravated way of committing the original offence.

(3) The conditions are that—

(b) there is new evidence that the person committed the original offence or a relevant offence, and

(c) the High Court, on the application of the Lord Advocate, has—

(i) set aside the acquittal, and

(ii) granted authority to bring a new prosecution in the High Court.

(4) For the purposes of subsection (3)(b), evidence which was not admissible at the trial in respect of the original offence but which is admissible at the time the court considers the application under subsection (3)(c) is not new evidence.

(5) Only one application may be made under subsection (3)(c) to set aside the acquittal of an original offence.

(5A) But an application may not be made to set aside the acquittal of an original offence if the person was charged with, and prosecuted anew for, that offence by virtue of this section.
The court may set aside the acquittal only if satisfied that—

(a) the case against the person is strengthened substantially by the new evidence,

(b) the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence,

(c) on the new evidence and the evidence which was led at that trial, it is highly likely that a reasonable jury properly instructed would have convicted the person of—

(i) the original offence, or

(ii) a relevant offence, and

(d) it is in the interests of justice to do so.

Exceptions to rule against double jeopardy: common provisions

Applications under sections 2, 3 and 4

(1) On making an application under section 2(2), 3(3)(b) or 4(3)(c), the Lord Advocate is to send a copy of the application to the acquitted person.

(2) The acquitted person is entitled to appear or to be represented at any hearing of the application.

(3) For the purposes of hearing and determining the application, three of the Lords Commissioners of Justiciary are a quorum of the High Court (the application being determined by majority vote of those sitting).

(4) The court may appoint counsel to act as amicus curiae at the hearing in question.

(5) The decision of the court on the application is final.

(6) Subsection (3) is without prejudice to any power of those sitting to remit the application to a differently constituted sitting of the court (as for example to the whole court sitting together).

Further provision about prosecutions by virtue of sections 2, 3 and 4

(1) This section applies to a new prosecution brought by virtue of section 2, 3 or 4.

(2) The new prosecution may be brought despite the fact that any time limit for the commencement of proceedings in such a prosecution, other than the time limit mentioned in subsection (3), has elapsed.

(3) Proceedings in the new prosecution are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.

(4) For the purposes of subsection (3), proceedings are deemed to be commenced—

(a) in a case where a warrant to apprehend the accused person is granted—

(i) on the date on which it is executed, or

(ii) if it is executed without unreasonable delay, on the date on which it was granted, and

(b) in any other case, on the date on which the accused person is cited.

(5) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought, the decision under section 2, 3 or 4 setting aside the acquittal has the effect, for all purposes, of an acquittal.
(6) On granting authority under section 2, 3 or 4 to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

(7) The provisions of the 1995 Act mentioned in subsection (8) below apply to an accused person who is detained under subsection (6) as they apply to an accused person detained by virtue of being committed until liberated in due course of law.

(8) Those provisions are—
(a) in solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9) (prevention of delay in solemn proceedings), and
(b) in summary proceedings, section 147 (prevention of delay in summary proceedings).

(8A) In proceedings in a new prosecution it is competent for either party to lead evidence which it was competent for that party to lead in the proceedings on the original indictment or complaint (the “earlier proceedings”).

(8B) But the prosecutor must identify in the indictment or complaint in the new prosecution any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (8A) which would not have been competent but for that subsection.

(9) Where, in a new prosecution, the accused is convicted of an offence, no sentence may be passed in relation to the offence which could not have been passed under the earlier proceedings.

7 Plea in bar of trial

(1) This section applies where a person is charged with an offence—
(a) whether on indictment or complaint,
(b) other than by virtue of—
(i) section 2, 3, 4, 11 or 12, or
(ii) section 107E(3) (prosecutor’s appeal against acquittal: authorisation of new prosecution), 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) or 185 (authorisation of new prosecution) of the 1995 Act.

(2) The person may aver, as a plea in bar of trial, that the offence arises out of the same, or largely the same, acts or omissions as have already given rise to the person being tried for, and convicted or acquitted of, an offence.

(3) The court must sustain the plea if satisfied on a balance of probabilities as to the truth of the person’s averment.

(4) But the court may repel the plea despite being so satisfied if it—
(a) is persuaded by the prosecutor that there is some special reason why the case should proceed to trial, and
(b) determines that it is in the interests of justice to do so.

(5) Subsection (4) is subject to sections 8, 9 and 10.
Plea in bar of trial for murder: new evidence and admissions

(1) This section applies where—

(a) a person is charged with murder,
(b) the person avers, as a plea in bar of trial under section 7(2), that the charge arises out of the same, or largely the same, acts or omissions as have already given rise to the person, whether on indictment or complaint (the “original indictment or complaint”), being tried for, and convicted or acquitted of, an offence other than murder, and
(c) the prosecutor asserts, as a special reason why the case should proceed to trial, one of the matters mentioned in subsection (2).

(2) Those matters are that, since the trial on the original indictment or complaint (the “original trial”)—

(a) there is new evidence that the person committed the murder charged,
(b) the person has admitted to committing the murder charged,
(c) such an admission made before the conviction or acquittal at the original trial has become known.

(3) For the purposes of subsection (2)(a), evidence which was not admissible at the original trial but which is admissible at the time the court considers the plea is not new evidence.

(4) For the purposes of determining whether to sustain or repel the plea, three of the Lords Commissioners of Justiciary are a quorum of the High Court (the plea being determined by majority vote of those sitting).

(5) Where the special reason relates to the matter mentioned in subsection (2)(a), the court may repel the plea only if satisfied that—

(a) the case against the person is strengthened substantially by the new evidence,
(b) the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the original trial,
(c) on the new evidence and the evidence which was led at that trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the murder had it been charged, and
(d) it is in the interests of justice to do so.

(6) Where the special reason relates to the matter mentioned in subsection (2)(b) or (c), the court may repel the plea only if satisfied—

(b) in the case of an admission such as is mentioned in subsection (2)(c), that the admission was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of the conviction or acquittal at the original trial,

(ca) that the case against the person is strengthened substantially by the admission,
(cb) that, on the admission 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 of murder, and
(d) that it is in the interests of justice to do so.
(7) Section 5 (other than subsections (1) and (3)) applies to a case to which this section applies as it applies to an application under section 4(3)(c), with the modifications that—

(a) the reference in subsection (2) of that section to the acquitted person is to be read as a reference to the person charged, and

(b) the reference in subsection (6) of that section to subsection (3) is to be read as a reference to subsection (4) of this section.

9 Plea in bar of trial: nullity of previous trial

(1) This section applies where—

(a) a person avers, as a plea in bar of trial under section 7(2), that the charge arises out of the same, or largely the same, acts or omissions as have already given rise to the person, whether on indictment or complaint (the “original indictment or complaint”), being tried for, and convicted or acquitted of, an offence, and

(b) the prosecutor asserts, as a special reason why the case should proceed to trial, that the trial on the original indictment or complaint (the “original trial”) was a nullity.

(2) Where the proceedings are before—

(a) the sheriff, or

(b) a justice of the peace,

the sheriff or justice of the peace must remit the case to the High Court.

(3) Where the proceedings are—

(a) before the High Court, or

(b) are remitted to that court under subsection (2),

the court must determine whether to sustain or repel the plea.

(4) The High Court may repel the plea only if satisfied that—

(a) the original trial was a nullity,

(b) the existence of that trial was not known to the prosecutor before the commencement of the proceedings in which the plea is made, and

(c) it is in the interests of justice to do so.

10 Plea in bar of trial: previous foreign proceedings

(1) This section applies where the previous trial averred under section 7(2) took place outwith the United Kingdom.

(2) In determining under section 7(4)(b) whether it is in the interests of justice for the case to proceed to trial, the court is in particular to have regard to—

(a) whether the purpose of bringing the person to trial in the foreign country appears to have been to assist the person to evade justice,

(b) whether the proceedings in the foreign country appear to have been conducted—

(i) independently and impartially, and

(ii) in a manner consistent with dealing justly with the person,
(c) whether such sentence (or other disposal) as was or might have been imposed in the foreign country for the offence of the kind of which the person has been convicted or acquitted is commensurate with any that might be imposed for an offence of that kind in Scotland, and

(d) the extent to which the acts or omissions can be considered to have occurred in, respectively—
   (i) Scotland,
   (ii) the foreign country.

(3) But the court may not repel the plea if permitting the case to proceed to trial would be inconsistent with the obligations of the United Kingdom under Article 54 of the Schengen Convention.

(4) In subsection (3), the “Schengen Convention” means the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985.

11 Eventual death of injured person

(1) This section applies where—
   (a) a person (“A”) is, whether on indictment or complaint, convicted or acquitted of an offence (the “original offence”) involving the physical injury of another person (“B”),
   (b) after the conviction or acquittal, B dies, apparently from the injury, and
   (c) in a case where A was acquitted, the condition mentioned in subsection (2A) is satisfied.

(2) It is competent to charge A with—
   (a) the murder of B,
   (b) the culpable homicide of B, or
   (c) any other offence of causing B’s death.

(2A) The condition referred to in subsection (1)(c) is that, on the application of the prosecutor and after hearing parties, the High Court is satisfied that it is in the interests of justice to proceed as mentioned in subsection (2).

(3) Subsection (4) applies where—
   (a) A was convicted of the original offence, and
   (b) A is subsequently convicted of an offence mentioned in subsection (2).

(4) The court may—
   (a) on the motion of A made immediately on A’s being convicted, and
   (b) after hearing the parties on that motion, quash A’s conviction of the original offence where satisfied that it is appropriate to do so.

(5) A party may appeal to the High Court against the grant or refusal of a motion under subsection (4).
Where A was convicted of the original offence and is subsequently acquitted of an offence mentioned in subsection (2), A may appeal against the conviction under section 106(1)(a) or, as the case may be, section 175(2)(a) of the 1995 Act.

An appeal may be brought by virtue of subsection (6) despite the fact that A, before the acquittal mentioned in that subsection—

(a) had appealed, or
(b) had been refused leave to appeal,

against the conviction or against any other matter mentioned in section 106(1) or 175(2) of the 1995 Act in relation to the original offence.

Sections 121 and 193 of the 1995 Act do not apply in relation to an appeal under subsection (6).

Nullity of proceedings on previous indictment or complaint

This section applies where—

(a) a person has, whether on indictment or complaint, been charged with, and acquitted or convicted of, an offence, and
(b) the condition mentioned in subsection (3) is satisfied.

The person may be charged with, and prosecuted anew for, the offence.

The condition referred to in subsection (1)(b) is that, on the application of the prosecutor and after hearing parties, the High Court is satisfied that—

(a) the proceedings on the indictment or complaint were a nullity, and
(b) it is in the interests of justice to proceed as mentioned in subsection (2).

General

Retrospective application of Act

For the purposes of sections 1 to 4 and 7 to 12, it is immaterial whether the conviction or, as the case may be, acquittal referred to in each of those sections was before or after the coming into force of this Act.

Consequential amendments

Schedule 2, which makes amendments of enactments consequential on the provisions of this Act, has effect.

Short title, interpretation and commencement

The short title of this Act is the Double Jeopardy (Scotland) Act 2011.

In this Act, the “1995 Act” means the Criminal Procedure (Scotland) Act 1995 (c.46).

This Act, except this section, comes into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.
SCHEDULE 2
(introduced by section 15)

CONSEQUENTIAL AMENDMENTS

Contempt of Court Act 1981

1 Schedule 1 to the Contempt of Court Act 1981 (c.49) (times when proceedings are active for the purposes of section 2 of that Act) is amended as follows.

2 After paragraph 1 (meaning of “criminal proceedings” and “appellate proceedings”), insert—
   “1ZA Proceedings under the Double Jeopardy (Scotland) Act 2011 (asp 00) are criminal proceedings for the purposes of this Schedule.”.

3 In paragraph 4 (initial steps of criminal proceedings), after sub-paragraph (e) insert—
   “(f) the making of an application under section 2(2) (tainted acquittals), 3(3)(b) (admission made or becoming known after acquittal), 4(3)(c) (new evidence), 11(2A) (eventual death of injured person) or 12(3) (nullity of previous proceedings) of the Double Jeopardy (Scotland) Act 2011 (asp 00).”.

4 In paragraph 5 (conclusion of criminal proceedings), after sub-paragraph (c) insert—
   “(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f)—
   (i) by refusal of the application;
   (ii) if the application is granted and within the period of 2 months mentioned in section 6(3) of the Double Jeopardy (Scotland) Act 2011 (asp 00) a new prosecution is brought, by acquittal or, as the case may be, by sentence in the new prosecution.”.

5 In paragraph 7 (discontinuance of proceedings), after sub-paragraph (c) insert—
   “(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f) and the application is granted, if no new prosecution is brought within the period of 2 months mentioned in section 6(3) of the Double Jeopardy (Scotland) Act 2011 (asp 00).”.

Criminal Procedure (Scotland) Act 1995

6 The Criminal Procedure (Scotland) Act 1995 (c.46) is amended as follows.

8 In section 94 (transcripts of record and documentary productions), after subsection (2A) insert—
   “(2AA) Subsection (2A) applies to a person mentioned in subsection (2AB) as it applies to a person convicted at the trial, with the modification that the reference to the transcript in subsection (2A) is to be construed as a reference to the transcript of the record made of proceedings at the trial resulting in the acquittal mentioned in subsection (2AB)(b).

(2AB) The person mentioned in subsection (2AA) is a person who—
   (a) is convicted of the offence mentioned in subsection (1) of section 11 of the Double Jeopardy (Scotland) Act 2011 (asp 00);
(b) is subsequently acquitted of an offence mentioned in subsection (2) of that section; and
(c) desires to appeal, under subsection (6) of that section, against the conviction of the offence mentioned in paragraph (a).”.

In section 107 (leave to appeal), after subsection (2) insert—
“(2A) In respect of an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00), the “report under section 113” in subsection (2)(c) means—
(a) the report of the judge who presided at the trial resulting in the appellant’s acquittal for an offence mentioned in section 11(2) of that Act;
(b) where an appeal against conviction was taken before that acquittal, the report of the judge who presided at the trial resulting in the conviction in respect of which leave to appeal is sought prepared at that time; and
(c) any other report of that judge furnished under section 113.”.

In section 109 (intimation of intention to appeal), after subsection (1) insert—
“(1A) Where a person desires to appeal under section 106(1)(a) of this Act by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00), subsection (1) applies with the following modifications—
(a) for the words “two weeks of the final determination of the proceedings” substitute “two weeks of the date on which the person is acquitted of an offence mentioned in section 11(2) of the Double Jeopardy (Scotland) Act 2011 (asp 00)”; and
(b) the reference to identifying the proceedings is to be construed as a reference to identifying—
(i) the proceedings which resulted in the conviction desired to be appealed; and
(ii) the proceedings which resulted in the person’s acquittal as mentioned in section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00).

(1B) Subsections (5) to (9) of section 106 of this Act do not apply where the modifications specified in subsection (1A) apply.”.

In section 110 (note of appeal), after subsection (3) insert—
“(3A) In respect of a written note of appeal relating to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00)—
(a) subsection (1) applies as if the reference to the judge who presided at the trial were a reference to—
(i) the judge who presided at the trial resulting in the conviction to which the written note of appeal relates; and
(ii) the judge who presided at the trial for an offence mentioned in section 11(2) of that Act resulting in the convicted person’s acquittal; and
(b) subsection (3)(a) applies as if the reference to the proceedings were a reference to—

(i) the proceedings which resulted in the conviction to which the written note of appeal relates; and

(ii) the proceedings which resulted in the convicted person’s acquittal.”.

12 In section 113 (judge’s report)—

(a) in subsection (1), at the beginning, insert “Subject to subsections (1A) to (1D),”;

(b) after subsection (1) insert—

“(1A) Subsections (1B) to (1D) apply where the copy note of appeal mentioned in subsection (1) relates to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00).

(1B) The reference in subsection (1) to the judge who presided at the trial is to be construed as a reference to—

(a) the judge who presided at the trial for an offence mentioned in section 11(2) of that Act resulting in the appellant’s acquittal; and

(b) where subsection (1C) applies, the judge who presided at the trial resulting in the conviction to which the copy note of appeal relates.

(1C) This subsection applies—

(a) where, in connection with the appeal, the High Court calls for the report to be furnished by the judge mentioned in subsection (1B)(b); and

(b) it is reasonably practicable for the judge to furnish the report.

(1D) For the purposes of subsections (1) to (1C), it is irrelevant whether or not the judge mentioned in subsection (1B)(b) had previously furnished a report under subsection (1).

(c) in subsection (3), for “subsection (1)” substitute “subsections (1) to (1D)”.

13 In section 118 (disposal of appeals), after subsection (1) insert—

“(1A) Where an appeal against conviction is by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00), paragraph (c) of subsection (1) does not apply.”.

14 After section 176 insert—

“176A Application of section 176 in relation to certain appeals

(1) Section 176 applies in relation to an appeal under section 175(2)(a) by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00) with the following modifications.

(2) In subsection (1)(a), for the words “one week of the final determination of the proceedings” substitute “one week of the date on which the appellant is acquitted of an offence mentioned in section 11(2) of the Double Jeopardy (Scotland) Act 2011 (asp 00)”.

(3) In subsection (2), the reference to the proceedings is to be construed as a reference to the proceedings resulting in the appellant’s acquittal as mentioned in section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00).
(4) In subsection (5), the reference to the inferior court is to be construed as a reference to the court which acquitted the appellant of an offence under section 11(2) of the Double Jeopardy (Scotland) Act 2011 (asp 00).”.

In section 178 (stated case: preparation of draft), after subsection (1) insert—

“(1A) Where an application for a stated case under section 176 of this Act relates to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00)—

(a) the reference in subsection (1) to the final determination of proceedings is to be construed as a reference to the date on which the appellant is acquitted of an offence mentioned in section 11(2) of that Act; and

(b) the reference in subsection (1)(b) to the judge who presided at the trial is to be construed as a reference to the judge who presided at the trial resulting in the conviction in respect of which the application for a stated case is made.”.

In section 179 (stated case: adjustment and signature), after subsection (10) insert—

“(11) In relation to a draft stated case under section 178 of this Act relating to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00)—

(a) the reference in subsection (1) to the court is to be construed as a reference to the court by which the appellant was convicted; and

(b) the references in this section to the judge are to be construed as references to the judge who presided at the trial resulting in that conviction.”.

In section 183 (stated case: disposal of appeal), after subsection (1) insert—

“(1A) Where an appeal against conviction is by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00), paragraphs (a) and (d) of subsection (1) do not apply.”.
Double Jeopardy (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision as to the circumstances in which a person convicted or acquitted of an offence may be prosecuted anew; and for connected purposes.

Introduced by: Kenny MacAskill
On: 7 October 2010
Bill type: Executive Bill
DOUBLE JEOPARDY (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS
1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised
Explanatory Notes are published to accompany the Double Jeopardy (Scotland) Bill (introduced
in the Scottish Parliament on 7 October 2010) as amended at Stage 2. Text has been added or
deleted as necessary to reflect amendments made to the Bill at Stage 2 and these changes are
indicated by sidelining in the right margin.

INTRODUCTION
2. These Explanatory Notes have been prepared by the Scottish Government in order to
assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and
have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to
be, a comprehensive description of the Bill. So where a section or schedule, or a part of a
section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL
4. Scottish criminal law prohibits a person being placed in jeopardy of criminal prosecution
twice for the same offence. This is commonly referred to as the rule against “double jeopardy”.
This rule provides an important protection for individuals from being subjected to criminal
prosecution twice for the same offence. This Bill builds upon the work of the Scottish Law
Commission (SLC) in its December 2009 Report on Double Jeopardy. It contains a number of
measures to reform and restate the rule against double jeopardy and also sets out certain
exceptions to the rule.

1 Scot Law Com No. 218
COMMENTARY ON SECTIONS

Double jeopardy

Section 1  Rule against double jeopardy

5. This section places onto a statutory footing the general rule against double jeopardy i.e. that a person should not be prosecuted on more than one occasion for the same offence.

6. Subsection (1) restates the rule against double jeopardy. It provides that where someone has been convicted or acquitted of an offence, it is not possible to charge the person again with the same offence or any other offence of which it would have been competent to convict on the original indictment or complaint. Subsection (1)(c) further provides that it is also not competent to charge the person again with an offence which arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint and is an aggravated way of committing the original offence. The section does not prevent a person from being tried for murder or culpable homicide where the victim dies after that person’s conviction or acquittal of assault, since murder and culpable homicide are not aggravated ways of committing assault but separate crimes; such prosecutions are regulated by section 11. Similarly, it does not prohibit the charging of a person for murder who has previously been tried for culpable homicide arising out of the same act or omission, provided that murder was not charged at the earlier trial (however, such a charge could result in a plea in bar of trial under section 7).

7. Subsection (2) makes it clear that section 1 does not bar a further prosecution where this is authorised under sections 2, 3 or 4 of the Bill, or under existing provisions whereby a new prosecution is authorised by the High Court following appeal (those provisions are set out in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”)).

8. Subsections (3) and (4) define “conviction” and provide that the rule applies to a conviction even if sentence has not been passed. This definition settles the question of whether a sentence must be passed before the rule against double jeopardy may operate, making it clear that double jeopardy protection will apply in any case where a verdict has been delivered or a guilty plea accepted, regardless of whether sentence has been passed.

9. The reference to section 246 of the 1995 Act in subsection (3) expands the definition of conviction to include a special scenario in summary cases. This is where a person has been charged and, although the court was satisfied that the accused committed the offence, it opted in the circumstances to discharge the person without proceeding to conviction. The reference in subsection (4) to section 247(1) of the 1995 Act ensures that a conviction where the offender was placed on probation or discharged absolutely will count as a “conviction” for the purposes of the rule against double jeopardy.

10. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to or after the coming into force of this section.
Exceptions to rule against double jeopardy

11. Sections 2, 3 and 4 provide that a further prosecution can take place under certain limited exceptions to the rule against double jeopardy set out in section 1.

Section 2  Tainted acquittals

12. This section provides that where a person has been acquitted of an offence either on indictment (solemn proceedings) or complaint (summary proceedings), the acquitted person can be tried again if the High Court is satisfied that the acquitted person or some other person has committed an offence against the course of justice in connection with the original proceedings (whether or not anyone has been convicted of such an offence). Section 13 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section.

13. Subsection (1) provides that the person can be prosecuted anew for the original offence, any other offence of which it would have been competent to convict the person on the original indictment or complaint or for a new offence which arises out of, or largely out of, the same acts or omissions and is an aggravated way of committing the original offence. This is subject to subsection (2).

14. Subsection (2) provides that the Lord Advocate is required to apply to the High Court to have the acquittal set aside and to seek authority to prosecute anew. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.

15. Subsection (3) provides that the court cannot set aside the acquittal unless it is satisfied that the acquitted person or some other person has either been convicted of or has committed an offence against the course of justice in connection with the original proceedings. This subsection needs to be read with subsections (4) to (7).

16. Subsection (4) provides that where the offence against the course of justice is in respect of interference with a juror or the trial judge, the High Court must set aside the acquittal if satisfied that the interference had an effect on the outcome of the original proceedings and that the setting aside of the acquittal would be in the interests of justice. However, subsection (5) provides that where the interference related only to a juror and this was known to the trial judge who allowed the trial to continue then the acquittal is not to be set aside (the trial judge having had an opportunity to consider at the time whether or not it was safe to continue with the trial).

17. Subsections (6) and (7) make provision for where the offence against the course of justice is not in respect of interference with a juror or trial judge. They allow the acquittal to be set aside only if the High Court is satisfied on the balance of probabilities that the offence led to the withholding of evidence or the giving of false evidence which a jury would have been able to regard as being credible and reliable and which was likely to have had a material effect on the outcome of the proceedings. If satisfied as to this and that it is in the interests of justice to do so, the court may set aside the acquittal.
18. Subsection (8) defines an “offence against the course of justice” for the purposes of section 2. It excludes the crime of perjury and its statutory equivalent, an offence under section 44(1) of the 1995 Act. This is because the assessment of whether a witness is guilty of perjury is a part of the normal trial process in a way that external interference is not (see paragraph 3.10 of the SLC’s Report).

Section 3 Admission made or becoming known after acquittal

19. This section provides an exception to the rule against double jeopardy in section 1. It allows a further prosecution to take place where it becomes apparent following an acquittal that the accused has admitted to committing the offence. This applies to both summary and solemn proceedings. Section 13 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section. Section 3 goes beyond the SLC’s Report by including admissions made prior to the date of the acquittal, but which were unknown (and could not with the exercise of reasonable diligence have been known) to the investigating and prosecuting authorities. So, subsection (3)(a), in conjunction with subsections (3)(b) and (4), permits an application for a retrial in such circumstances.

20. Subsections (1) and (2) provide that a fresh prosecution may take place where the admission relates to the original offence; any other offence of which it would have been competent to convict the person on the original indictment or complaint; or an offence which arises out of, or largely out of, the same acts or omissions and is an aggravated way of committing the original offence.

21. Subsection (3)(b) provides that the Lord Advocate needs to apply to the High Court if the prosecution wants to set aside the acquittal and bring a fresh prosecution. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.

22. Subsection (4) provides for the test that has to be satisfied before the High Court can set aside the acquittal.

Section 4 New evidence

23. This section provides an exception to the rule against double jeopardy in section 1, potentially allowing a fresh prosecution where new evidence is discovered. Section 13 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section. Section 3 is the relevant provision where the new evidence in question takes the form of an admission.

24. Subsection (1) provides, among other things, that a subsequent prosecution may be permitted only if both the original offence was, and the one to be charged is to be, tried at the High Court on indictment.

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2 Recommendation 25
25. The new evidence may relate either to the commission of the original offence; any other offence of which it would have been competent to convict the person on the original indictment; or an offence which arises out of, or largely out of, the same acts or omissions and which is an aggravated way of committing the original offence. As in the case of the other exceptions to the double jeopardy rule, the Lord Advocate needs to apply to the High Court to have the acquittal set aside and to seek authority to reprousecte. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.

26. Subsection (4) provides that “new evidence” does not include evidence which was inadmissible at the original trial even if it would be admissible at the time of the subsequent trial. Such previously inadmissible evidence could still be used at the subsequent trial if the relevant changes to admissibility had taken place since the original trial (as the rules that apply at the time of the subsequent trial will govern what evidence is admissible). But it could not, of itself, form the basis of the “new evidence” for the purposes of authorising that subsequent prosecution.

27. Subsection (5) provides that only one new evidence application can be made under section 4 in relation to any one individual offence. Alongside subsection (5A), it means that where new evidence emerges that is relevant to only one (or some) of the offence(s) considered at the original trial the prosecutor will be able to make a new evidence application limited to the relevant offence(s) from the original trial. This would mean that if different new evidence subsequently arose for the remaining offence(s) from the original trial a new evidence application could be made under the Bill in relation to that offence(s). Only one such application could be made.

28. Subsection (6) provides for the test that must be satisfied before the High Court can set aside the acquittal and grant authority to bring a fresh prosecution. The application may be granted only if:

- the case against the person is strengthened substantially by the new evidence;
- the new evidence is evidence which was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence; and
- that 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 of the offence.

29. The court may not grant the application where it considers that to do so would be contrary to the interests of justice.
Exceptions to rule against double jeopardy: common provisions

Section 5 Applications under sections 2, 3 and 4

30. This section contains provisions common to applications made by the Lord Advocate under sections 2(2), 3(3)(b) and 4(3)(c) to the High Court. It provides, for example, that the accused is entitled to be present and be represented at any hearing on an application to prosecute anew (subsection (2)). Subsection (3) provides that any application must be considered by a quorum of at least three High Court judges, with decisions made by a majority.

31. Subsection (4) provides that the court may appoint counsel to act as amicus curae at the hearing. This is particularly important in the case of applications under section 2 involving tainted acquittals where the offence against the course of justice was allegedly committed not by the accused but by a third party. In such a case, there could potentially be no-one in a position to oppose the Lord Advocate’s application.

Section 6 Further provision about prosecutions by virtue of sections 2, 3 and 4

32. This section contains technical provisions which apply to new prosecutions brought by virtue of sections 2, 3 and 4. Subsection (2) provides that any fresh prosecution is not prevented by virtue of time bars applicable to the original prosecution elapsing. Where authority to prosecute has been granted, however, the new prosecution must commence within 2 months of the grant of that authority (subsections (3) and (5)).

33. Subsections (6), (7) and (8) provide that the accused may be detained in custody or granted bail in relation to the fresh prosecution. However, the general time limits usually applicable to criminal prosecutions would then apply.

34. Subsection (8A) allows either party in a new trial authorised under section 2, 3 or 4 to lead any evidence that it was competent to lead at the original trial. This will enable the court to hear all previously led evidence relevant to the innocence or guilt of the accused.

35. Subsection (8B) places a requirement on the prosecutor to identify evidence that he or she intends to lead under subsection (8A). This ensures that “fair notice” is given to the accused of the prosecution case.

36. Subsection (9) provides that where a fresh prosecution takes place, the maximum sentence is limited to that which could have been imposed at the time the offence to which it relates was committed.

Plea in bar of trial

37. Sections 7 to 10 deal with a broader range of situations than that covered by the rule in section 1 against double jeopardy. These sections will prevent multiple trials for the same act, in particular, where the new offence charged is not the original offence (or an aggravated way of committing it).
Section 7 Plea in bar of trial that accused has been tried before

38. This section allows a person to aver as a plea in bar of trial that the offence he or she faces on the indictment or complaint arises out of the same or largely the same acts or omissions upon which he or she has already been tried. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to or after the coming into force of this section.

39. Subsection (1) provides that a plea in bar of trial will not be available in relation to the exceptions to double jeopardy detailed in this Bill (sections 2, 3 and 4) or to the special cases detailed in sections 11 and 12. The references to provisions of the 1995 Act ensure that a plea in bar of trial will not be available where the High Court has already granted authority for a retrial following a successful appeal.

40. Subsection (2) provides a broad basis for a person seeking to plead that the trial should be barred because of a previous trial for largely the same acts or omissions. It is broader than the rule against double jeopardy in section 1, which focuses on the offences charged at the previous trial, therefore not necessarily prohibiting a trial for other offences which were not charged at the previous trial, but which arose out of the same or substantially the same acts or omissions.

41. Subsection (3) provides that the court must sustain the plea in bar of trial if it is satisfied on the balance of probabilities that the crime charged relates to the same acts or omissions, or substantially the same acts or omissions, as a crime of which he or she has already been convicted or acquitted. However even if satisfied that there is a bar against a second trial, the court may permit a new prosecution if persuaded by the prosecutor that there is some “special reason” as to why the case should be prosecuted and that it would be in the interests of justice to do so (subsections (4) and (5)).

42. This provision is designed to permit further proceedings for essentially the same criminal act that resulted in an earlier conviction or acquittal where there is “special reason”. 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.3 Two further examples of special reason are contained within sections 8 and 9.

Section 8 Plea in bar of trial for murder: new evidence and admissions

43. Section 8 contains provision which applies where a plea in bar of trial under section 7 is taken in a prosecution for murder in circumstances where murder was not charged at the previous trial and the prosecution argue, as a special reason to permit the case to proceed, that, since the original trial, the person has admitted to committing the murder (or such an admission made before the conviction or acquittal at the original trial has subsequently come to light) or new evidence has emerged. The process to be followed and the tests to be applied are modelled

3 For further detail, see paragraphs 2.31 to 2.35 of the SLC’s Report
on those set out in sections 3 and 4. The court may not permit a retrial where it considers that to do so would be contrary to the interests of justice.

44. Section 8 is necessary because section 1, which sets out the general rule against double jeopardy, and sections 2, 3 and 4, which set out the exceptions to it, do not expressly deal with this scenario. Those provisions are premised on the basis of the new prosecution being either for the original offence; for any other offence of which it would have been competent to convict the person on the original indictment or complaint; or an offence which arises out of the same or largely the same acts or omissions as gave rise to the original indictment or complaint and is an aggravated version of that offence. Those provisions do not apply where the original trial was for, say, culpable homicide or assault and a second trial is proposed for murder. Section 8 deals with such cases. It builds on section 7 which is also relevant as it permits the previous trial to be cited in a plea in bar of trial, on the basis that the new prosecution will arise from the same or largely the same acts or omissions that already led to the original trial. Section 7 puts the onus onto the prosecution to explain what “special reason” justifies the new trial. Section 8 deals expressly with the situation of an accused being charged with murder where the original trial was for a lesser offence. It sets out two possible special reasons (new evidence and admissions) that may justify a new trial and the factors that the court must consider in determining whether to sustain or repel the plea in bar of trial.

45. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to or after the coming into force of this section.

46. Subsection (2) lists the special reasons averred by the prosecutor to repel the plea in bar of trial and to which this section applies. Those reasons are that there is new evidence that the person committed the murder or an admission that the person committed the murder (including an admission made before the conviction or acquittal at the original trial which only subsequently comes to light).

47. Subsection (3) provides that “new evidence” does not include evidence which was inadmissible at the original trial even if it would be admissible at the time of the subsequent trial.

48. Subsection (4) provides that the plea must be considered by three judges of the High Court, whose decision on the matter is final.

49. In relation to the new evidence special reason, subsection (5) sets out the test to be satisfied before a plea can be repelled. This is essentially the same test as is contained in section 4(5).

50. Where the special reason relates to an admission, subsection (6) provides the test that the court must apply in deciding if it is satisfied that a plea in bar of trial should be repelled. This test is essentially the same test as is contained in section 3(4). This includes an assessment of whether an admission made before the acquittal or conviction at the original trial was not, and could not with the exercise of reasonable diligence have been known to the prosecutor at the time of the original trial. It also provides that the court can only repel the plea in bar of trial if to do so is in the interests of justice.
51. Subsection (7) applies the provision of section 5(2) and (4) to (6) to this section so that, among other things, the High Court may appoint an amicus curiae and that the court’s decision on the plea in bar of trial is final.

Section 9 Plea in bar of trial: nullity of previous trial

52. This section applies where a plea in bar of trial is taken in terms of section 7(2) and the prosecutor avers as a special reason to repel the plea that the original trial was a nullity and therefore cannot be regarded as either a valid acquittal or conviction. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to or after the coming into force of the section.

53. Subsections (2) and (3) provide that the matter must be considered by the High Court.

54. Subsection (4) sets out the test that must be satisfied before the High Court can repel the plea in bar. This is essentially the same test as the Court would have applied had an application been made to it under section 12 before proceedings were raised.

Section 10 Plea in bar of trial: previous foreign proceedings

55. This section applies where a plea in bar of trial is taken under section 7(2) where the accused was originally tried in a jurisdiction outwith the United Kingdom.

56. The general rule is that, for the purpose of the plea in bar, it does not matter whether the original trial took place in Scotland or elsewhere. However, if the person was originally tried outwith the United Kingdom, section 10 means that the court may disregard a conviction or acquittal where it determines that there is a sufficient special reason and it would be in the interests of justice to do so. Subsection (2) provides particular factors for the court to consider in determining whether it is in the interests of justice to permit a trial to proceed.

57. Subsections (3) and (4) provide that the court is prevented from disregarding a non-UK verdict where trying the accused would be inconsistent with the UK's obligations under Article 54 of the Schengen Convention; that is, where a charge relating to the same acts has been finally determined in another State to which Article 54 of that Convention applies (that is, an EU Member State, Iceland or Norway).

Other subsequent prosecutions

Section 11 Eventual death of injured person

58. This section provides that where a person is convicted or acquitted of an offence involving the physical injury of another (such as an assault) and that victim subsequently dies as a result of the injury, it is possible to charge the person with their murder, culpable homicide or any other offence of causing the death of the victim. Section 13 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to the coming into force of this section.
59. Subsections (1)(c) and (2A) apply where the previous trial ended in an acquittal of an offence involving physical injury. They require the prosecutor to apply to the High Court for authority to prosecute for causing death. The High Court must consider whether a new prosecution would be in the interests of justice.

60. Subsections (3) and (4) provide a mechanism to deal with the scenario of person “A” being convicted of the offence at the original trial and also the offence at the subsequent trial. They enable the court, on a motion of A, to quash the original conviction, if considered appropriate. Subsection (5) provides a right of appeal against such a decision.

61. Subsection (6) applies where A was convicted of the offence at the original trial but then acquitted of the offence at the subsequent trial. In such a case, A may appeal against the conviction, notwithstanding any previous appeal or refusal of leave to appeal (subsections (7) and (8)).

62. The Bill makes various technical amendments to the 1995 Act to make provision for prosecutions under section 11. In particular, provision is made for appeals against the earlier conviction. Paragraphs 6 to 17 of schedule 2 set out a number of amendments to the 1995 Act to take into account the unusual circumstances of this section, for example, the amendments in paragraph 11 clarify that the judge who should write the note of appeal for a case coming under section 10(6) should be the judge at the original trial.

Section 12 Nullity of proceedings on previous indictment or complaint

63. This section applies where the prosecutor is of the view that a previous trial was a fundamental nullity and wants to raise a fresh prosecution. In such circumstances, the prosecutor needs to make an application to the High Court for authority to prosecute anew.

64. Subsection (3) sets out the test the High Court needs to consider before granting authority to prosecute.

General

Section 13 Retrospective application of Act

65. This section provides that the double jeopardy rule, the exceptions to it, the provisions on plea in bar of trial, section 11 on prosecutions after the death of the victim and section 12 on prosecutions where previous proceedings were a nullity have retrospective effect in that convictions or acquittals occurring prior to the commencement of the Bill are subject to the Bill.

Section 15 Consequential amendments

66. This section gives effect to consequential amendments contained within schedule 2 to the Bill.
Section 16  Short title, interpretation and commencement

67. This section provides for the short title of the Bill and allows the Scottish Ministers to appoint when the provisions of the Bill should come into force by order.

Schedule

Schedule 2  Consequential amendments

68. Paragraphs 1 to 5 amend the Contempt of Court Act 1981 to protect double jeopardy proceedings from pre-trial publicity. This protects any subsequent trial from prejudicial publicity arising during the application stage seeking authority to bring a new prosecution.

69. Paragraphs 6 to 17 amend the 1995 Act. These amendments make provision for prosecutions under section 11 (where the victim of, say, an assault dies after acquittal or conviction of a person for that offence). They make provision for appeals against conviction at the first trial.
DOUBLE JEOPARDY (SCOTLAND) BILL

REVISED DELEGATED POWERS MEMORANDUM

Purpose

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Double Jeopardy (Scotland) Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed power. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Double Jeopardy (Scotland) Bill as amended at Stage 2 is divided into 15 sections and 1 schedule. The Bill is largely based upon the work of the Scottish Law Commission (SLC), contained within its 2009 Report on Double Jeopardy.

3. Section 1 of the Bill will restate and reform the law which prevents a person being tried twice for the same offence.

4. There is no general proposal to remove the rule against double jeopardy. However, sections 2, 3 and 4 of the Bill will create certain strictly limited exceptions where a new trial will in future be possible. The only delegated power in the Bill is contained in section 16, which provides for the Bill to be commenced by order.

1 SCOT LAW COM No 218 http://www.scotlawcom.gov.uk/publications/
DELEGATED POWER

Section 16(3) – Short title, interpretation and commencement

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: no procedure

Provision

5. Section 16(3) provides for the sections of the enacted Bill (other than section 16) to come into force on such a day as the Scottish Ministers appoint by order.

Rationale for subordinate legislation

6. This is a standard commencement by order power. As usual with commencement orders, no provision is made for laying the order in Parliament, as the power is to commence provisions which the Parliament has already scrutinised.

Choice of procedure

7. Whilst the order will not be subject to Parliamentary procedure as such, the Subordinate Legislation Committee will, in terms of its remit, have the opportunity to consider the order.
Justice Committee

Double Jeopardy (Scotland) Bill – Stage 3

Letter from the Cabinet Secretary for Justice

I indicated at the Stage 2 session on the above Bill on 1 March that I intended to move amendments on disclosure to the defence at Stage 3. Although these amendments are technical in character, they are relatively substantial in size and it seems appropriate to write in advance. The first annex to this letter provides a summary of the intended disclosure regime.

The amendments will ensure that disclosure in applications to the High Court made under the Bill will be regulated by the disclosure scheme contained within the provisions of the Criminal Justice and Licensing (Scotland) Act 2010. The amendments ensure that disclosure will occur in a consistent manner to other criminal proceedings without reliance upon the common law. The amendments are focused upon disclosure in applications to the High Court for a new trial: disclosure at any subsequent trial authorised under the Bill will occur under the 2010 Act regime.

The amendments also involve an order-making power in case transitional provision is needed in commencing the disclosure regime. This power will be confined to the disclosure provisions. If any order were to involve textual amendment to primary legislation, it would be subject to the affirmative procedure.

I appreciate that this is a late stage to introduce a delegated power provision, but the provision is intended as simply a precaution to ensure the smooth operation of the disclosure regime.

Other amendments

At the Stage 2 session, the Committee agreed to amend section 9 of the Bill to add reference to justices of the peace. During the debate, I gave an assurance to Robert Brown that this would cover stipendiary magistrates. However, on reflection I think that there would be merit in making the wording of the section consistent with the provisions of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (which established justice of the peace courts). I therefore propose to make 2 minor amendments to section 9 to change the references to “a justice of the peace” to “a justice of the peace court”. This reflects the principle that it is the justice of the peace court that has jurisdiction and powers, rather than the justice of the peace (or stipendiary magistrate) as such.

Impact Assessment

I also attach a copy of the Business and Regulatory Impact Assessment for the Bill.

I hope that this information is helpful. I am writing in similar terms to the Convenor of the Subordinate Legislation Committee.
Double Jeopardy (Scotland) Bill - disclosure amendments

1. Sections 116 to 167 of the Criminal Justice and Licensing (Scotland) Act 2010 (the “2010 Act”) make provision in relation to the disclosure of evidence in criminal proceedings. The provisions build upon the long established practice of the Scottish legal system that the Crown has an obligation to give the accused notice of the case against him, i.e. to tell him what charges he faces and what evidence the Crown intends to bring to prove the charges. The provisions are due to come into force on 6th June 2011 (under the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 8, Transitional and Savings Provisions) Order 2011).

2. The Double Jeopardy (Scotland) Bill will mean that in certain circumstances the prosecutor will be able to apply to the High Court for permission to bring new proceedings. For example, section 4 of the Bill permits an application to the High Court seeking a new trial of an acquitted person on the basis that new evidence has emerged that suggests that there are compelling grounds for a second trial. The High Court will hear representations from both parties in considering that application and it is important that there is an adequate regime for information to be disclosed to the subject of the application. If the High Court is content, it may authorise a new prosecution on the basis of the application. That new prosecution also needs to be subject to a disclosure regime.

3. In practical terms, it is thought that a combination of the 2010 Act, the prosecutor’s general duty to disclose relevant information and the existing common law would adequately cover the application proceedings envisaged under the Bill. There is no risk that the Bill as it stands would lead to an accused person being deprived of essential information. However, it is desirable that disclosure in all criminal proceedings is dealt with in a consistent manner and the disclosure regime under the Bill ties into the regime to be established by the 2010 Act. This should promote consistency and clarity in the law and provide persons subject to the Bill with a clear process for the obtaining of information. Three amendments to the Double Jeopardy Bill are therefore envisaged for Stage 3. They will cover three distinct situations:

- a new section will be inserted into the Bill to ensure that there is an adequate disclosure regime for applications made under the Bill. This section will insert 6 new sections (140A to 140F) into the 2010 Act. These follow closely the disclosure provisions of the 2010 Act. They are designed to ensure that appropriate disclosure is made to the subject of the application;
- additions will be made to the schedule to the Bill to modify the general provisions of the 2010 Act on disclosure (sections 116 and 141 to 167) so that they apply appropriately to application proceedings under the Bill; and
- a new section will create an order-making power in case transitional provision is needed in commencing the disclosure regime set out in the new section and in the amended schedule.
Further detail on the provision conferring power to make subordinate legislation to be inserted at stage 3

Proposed new section ("Transitional Provision etc.")
Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative or negative (depending upon content)

Provision

The proposed section provides for Scottish Ministers to make provision by order as considered appropriate to assist the coming into force of the provisions on disclosure of information to the defence in application proceedings before the High Court made under the Bill.

Choice of procedure

The power will be subject to negative procedure, unless textual amendment to primary legislation was involved, in which case it would be subject to the affirmative procedure.

Rationale for subordinate legislation

Other amendments being made at Stage 3 will, if agreed, insert detailed provision into the Criminal Justice and Licensing (Scotland) Act 2010 (the "2010 Act") on disclosure of evidence in application proceedings made under the Double Jeopardy Bill. The order making power is thought necessary in order to bring those provisions into force in a coherent manner, consistent with the disclosure provisions in the 2010 Act. Due to the retrospective effect of the Bill, it is possible that, in a case where an application is made under the Bill, the original trial and any related appeals will not have been subject to the disclosure regime in the 2010 Act. As it stands, Part 6 of the 2010 Act assumes that the disclosure regime set out in that Part will have applied. Transitional provision may therefore need to be made to ensure that the new provisions on disclosure in applications under the Bill operate correctly in such cases. The new power is modelled on similar provision in section 205 of the 2010 Act. The power is confined to the disclosure provisions of the Bill.
Title of Proposal
Double Jeopardy (Scotland) Bill

Purpose and intended effect

- **Objectives**

To help ensure public confidence in the legal system is maintained by modernising the rule against double jeopardy. The Bill upholds the general rule against multiple trials for the same criminal act, but creates limited exceptions predominantly focused on whether significant new evidence brings an acquittal into doubt. These exceptions are intended to be used rarely and only in relation to very serious cases.

- **Background**

Scottish criminal law prohibits a person being placed in jeopardy of criminal prosecution twice for the same offence. This is commonly referred to as the rule against "double jeopardy". This rule provides an important protection for individuals from being subjected to criminal prosecution twice for the same offence. The Bill builds upon the work of the Scottish Law Commission (SLC) in its December 2009 Report on Double Jeopardy. It contains a number of measures to reform and restate the rule against double jeopardy and also sets out certain exceptions to the rule. The Bill was introduced in Parliament on 7 October 2010:


It is not expected that the reform will have a large impact in terms of case numbers. It is estimated only 1 trial every 5 years will proceed on the basis of the exceptions to double jeopardy for new evidence and admissions established by the Bill.

- **Rationale for Government intervention**

There is no alternative approach that can achieve the objective. Without the introduction of the Bill it would not be competent to have a second trial after an acquittal. The Bill is not an essential reform, but is designed to have an impact in very serious cases where the lack of an opportunity to have a second trial damages public confidence in the justice system. The Bill, if passed, helps contribute to the Government’s ‘Safer & Stronger’ strategic objective by helping to reduce crime and improving confidence in the legal system.

Consultation

- **Within Government**
The Scottish Court Service, Crown Office & Procurator Fiscal Service, the Association of Chief Police Officers in Scotland, and the Scottish Legal Aid Board were consulted about the general proposals of the Bill. They each contributed (providing assessments and data) to the Financial Memorandum presented with the Bill.

- Public Consultation

A Government consultation exercise based upon the SLC’s proposals ran March – June 2010


A consultation report will be published in spring 2011.

- Business

No consultation specifically focused on business was carried out. It is estimated these reforms will contribute to there being 1 new court case every 5 years. The impact is therefore largely upon the police, prosecutors and the courts.

Any possible impact on the private sector would be as a result of new proceedings under the Bill involving the services of criminal defence solicitors and advocates. Neither of the appropriate professional bodies (the Law Society of Scotland and the Faculty of Advocates) raised any concerns on the expected impact on criminal defence lawyers in either responding to the Government’s consultation or in giving evidence (orally and in writing) to the Justice Committee at Stage 1 evidence for the Bill.

Options

**Option 1** – No reform to the law. This would not be problematic from a procedural point of view but might dent public confidence in the justice system if a particular case arose where there was a clear and convincing case that an acquittal at the first trial would not have been reached had the new evidence been available.

**Option 2** – Reform the double jeopardy law to allow for a second trial under certain circumstances outlined in the Bill. Instances of a second trial are expected to be highly unusual, estimated at 1 every 5 years.

- Sectors and groups affected

The main impact of the reforms are expected to be upon the public sector, in particular police forces (conducting an additional investigation following the emergence of new evidence), the Crown Office & Prosecution Service (conducting the prosecution of any second trial), the Scottish Court Service (facilitating the second trial) and the Scottish Legal Aid Board (providing legal aid to the accused). There will be minimum private sector impact, likely only for the defence agents and counsel acting for the accused (given the low number of expected cases this impact is
considered to be negligible).

- **Benefits**

**Option 1** – No reform to the law means there will be no cost to the Government other than that already incurred during the creation of the Bill and the consultation process.

**Option 2** – Reform the double jeopardy law to allow for a second trial under certain circumstances outlined in the Bill. These will likely be high profile cases and this will promote public confidence in the Justice System.

- **Costs**

**Option 1** – No monetary cost.

**Option 2** – Based on an estimated 1 double jeopardy trial every five years (this includes police investigative work in cases that are not ultimately retried) it is estimated a total annual cost of £12,240 to the Scottish Court Service, £24,680 to the Crown Office Procurator Fiscal Service, £316,800 to the Police, £14,000 to the Scottish Legal Aid Board. The annual cost of the Option is therefore expected to be £367,720 per annum. (a further breakdown and explanation of costs can be found in the Financial Memorandum for the Double Jeopardy (Scotland) Bill at [http://www.scottish.parliament.uk/s3/bills/59-DoubleJeopardy/b59s3-introd-en.pdf](http://www.scottish.parliament.uk/s3/bills/59-DoubleJeopardy/b59s3-introd-en.pdf)). These costs will be met from existing resources, in the same way as any other crime.

### Scottish Firms Impact Test

No Impact Test was carried out. It is estimated these reforms will result in there being 1 new court case every 5 years. That would generate additional work (and revenue) for any law firm and the 2 advocates representing the accused in such a case. There would therefore be a limited impact: 409 firms are registered for receipt of criminal legal aid with the Law Society of Scotland and the Faculty of Advocates identify 95 advocates as having a “particular interest” in criminal trial law (this is non-exclusive: other advocates outwith of that 95 appearing could appear in a criminal case).

The impact on Scottish Firms is therefore considered to be negligible on the basis that it would like to result in one additional case every 5 years for one defence firm (out of 409) and two advocates (out of 95).

- **Competition Assessment**

No impact on the competitiveness of any business is expected. An accused person facing a retrial is highly likely to have already had legal representation (a solicitor and 1 or 2 advocates) in place at the first trial. It seems reasonably likely that they will request the same legal representation at any second trial under the Bill (as the first trial ended in acquittal, the accused might be expected to decide to revert to the same representation if it is available). However, it is difficult to see how this “repeat business” in such limited and rare circumstances could meaningfully impact upon competition between law firms and advocates.
• Test run of business forms

No business forms have been created.

Legal Aid Impact Test

The total legal aid cost for a double jeopardy case is estimated at £70,000. This is composed of the cost of 2 application hearings and one trial (£10,000 + £10,000 + £50,000). On the basis of one double jeopardy case progressing every 5 years, this gives an average annual cost to SLAB of £14,000. This will be met from existing budgets.

This was discussed with the Scottish Legal Aid Board, who contributed to the Financial Memorandum accompanying the Bill.

Enforcement, sanctions and monitoring

The legislation will be enforced and monitored by a combination of the Crown and Courts.

The reforms will grant the Crown power to apply to the High Court for a second trial under certain circumstances. The High Court will grant/refuse these applications. The Crown and the Government will monitor the numbers of applications and trials under the Bill, which are expected to be low.

Implementation and delivery plan

The reforms will be implemented by enactment of the Double Jeopardy (Scotland) Bill. The Bill was introduced to Parliament on 7 October 2010 and is due to pass through Stage 3 on 22 March 2011. Following the provisions coming into force the Crown will decide whether the new rights of application to the High Court for a second trial should be employed in relation to any specific criminal case.

• Post-implementation review

The use of the reform will be kept under review by the Scottish Government and the Crown Office. This will be formally reviewed between the organisations after 5 years to ensure the estimated use of the new reforms (1 trial in every 5 years) is accurate.

Summary and recommendation

• Summary costs and benefits table

<table>
<thead>
<tr>
<th>Option</th>
<th>Costs</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>None</td>
<td>Poor public perception of justice system in failing to deal with cases where compelling new evidence has become available or where there has been a post trial confession.</td>
</tr>
<tr>
<td>Option 2</td>
<td>£350,920 p.a.</td>
<td>Promotes public confidence in the Justice System. Allows retrial for serious crimes where compelling new evidence of guilt emerges to suggest that an acquittal at a previous trial was mistaken.</td>
</tr>
</tbody>
</table>

Option 2 is recommended. The Scottish Government considers that the proposed measures commanded a broad consensus of support, and that they represent a proportionate and pragmatic package, which should promote public confidence in the justice system.

**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: [Signature]

Date: 16th March 2011

Kenny MacAskill MSP, Cabinet Secretary for Justice
Double Jeopardy (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 16 Schedule 2
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 4

Kenny MacAskill

2 In section 4, page 4, line 16, leave out <after trial in the High Court on indictment> and insert <on indictment in the High Court>

Section 9

Kenny MacAskill

3 In section 9, page 8, line 19, after <peace> insert <court>

Kenny MacAskill

4 In section 9, page 8, line 20, after <peace> insert <court>

After section 12

Kenny MacAskill

1 After section, 12 insert—

Disclosure of information

(1) Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) (disclosure of information) is amended as follows.

(2) After section 140 (review of ruling under section 139) insert—

“Disclosure in relation to 2011 Act proceedings

140A Sections 140B to 140F: interpretation

In sections 140B to 140F—

“2011 Act” means the Double Jeopardy (Scotland) Act 2011 (asp 00),

“2011 Act proceedings” means—
(a) an application under section 2(2), section 3(3)(b) or section 4(3)(c) of the 2011 Act to set aside a person’s acquittal and grant authority for a new prosecution,

(b) an application under subsection (2A) of section 11 of that Act to charge a person as mentioned in subsection (2) of that section,

(c) an application under subsection (3) of section 12 of that Act to charge, and prosecute anew, a person as mentioned in subsection (2) of that section,

“respondent” means the person to whom the 2011 Act proceedings relate.

140B Duty to disclose on institution of 2011 Act proceedings

(1) This section applies where 2011 Act proceedings are instituted in relation to a respondent.

(2) As soon as practicable after the relevant act the prosecutor must—

(a) review all information of which the prosecutor is aware that relates to the 2011 Act proceedings, and

(b) disclose to the respondent any information that falls within subsection (3).

(3) Information falls within this subsection if it is—

(a) information that the prosecutor was required by virtue of section 121(2)(b), 123(2)(b), 133(2)(b), 134(2)(b), 136(2), 137(2) or 138(2) to disclose in, or in relation to, the first proceedings but did not disclose,

(b) information to which, during the first proceedings, the prosecutor considered paragraph (a) or (b) of section 121(3) or subsection (3) of section 133 did not apply but to which the prosecutor now considers one or both of those paragraphs or that subsection would apply,

(c) information of which the prosecutor has become aware since the disposal of the first proceedings that, had the prosecutor been aware of it during or after those proceedings, the prosecutor would have been required to disclose by virtue of section 121(2)(b), 123(2)(b), 133(2)(b), 134(2)(b), 136(2), 137(2) or 138(2), or

(d) information of which the prosecutor has become aware since the disposal of the first proceedings, other than information that falls within paragraph (c), which—

(i) would materially weaken or undermine the evidence that is likely to be led or relied on by the prosecutor in the 2011 Act proceedings involving the respondent,

(ii) would materially strengthen the respondent’s case, or

(iii) is likely to form part of the evidence to be led or relied on by the prosecutor in the 2011 Act proceedings involving the respondent.

(4) The prosecutor need not disclose under subsection (2)(b) anything that the prosecutor has already disclosed to the respondent.

(5) In this section—
“appellate proceedings” has the meaning given by section 132,
“first proceedings”, in relation to 2011 Act proceedings, means the
proceedings (including any appellate proceedings or other appeal) in or
as a result of which the respondent was convicted or acquitted,
“relevant act” means the making of the application under section 2(2),
3(3)(b), 4(3)(c), 11(2A) or 12(3) of the 2011 Act.

140C Continuing duty of prosecutor

(1) This section applies where—
(a) the prosecutor has complied with section 140B(2) in relation to a
respondent, and
(b) during the relevant period, the prosecutor becomes aware of information
which relates to the 2011 Act proceedings and falls within section
140B(3).

(2) The prosecutor must disclose to the respondent any information that falls
within section 140B(3).

(3) The prosecutor need not disclose under subsection (2) anything that the
prosecutor has already disclosed to the respondent.

(4) Nothing in this section requires the prosecutor to carry out a review of
information of which the prosecutor is aware.

(5) In subsection (1), “relevant period” means the period—
(a) beginning with the prosecutor’s compliance with section 140B(2), and
(b) ending with the relevant conclusion.

(6) In subsection (5), “relevant conclusion” means the disposal or abandonment of
the 2011 Act proceedings.

140D Application to prosecutor for further disclosure

(1) This section applies where—
(a) the prosecutor has complied with section 140B(2) in relation to a
respondent, and
(b) the respondent lodges a further disclosure request—
(i) during the preliminary period, or
(ii) if the court on cause shown allows it, after the preliminary period
but before the relevant conclusion.

(2) A further disclosure request must set out—
(a) the nature of the information that the respondent wishes the prosecutor to
disclose, and
(b) the reasons why the respondent considers that disclosure by the
prosecutor of any such information is necessary.

(3) As soon as practicable after receiving a copy of the further disclosure request
the prosecutor must—
(a) review any information of which the prosecutor is aware that relates to the request, and
(b) disclose to the respondent any of that information that falls within section 140B(3).

(4) The prosecutor need not disclose under subsection (3)(b) anything that the prosecutor has already disclosed to the respondent.

(5) In this section—

“preliminary period”, in relation to the 2011 Act proceedings concerned, means the period beginning with the relevant act and ending with the beginning of the hearing of the 2011 Act proceedings,

“relevant act” has the meaning given by section 140B(5),

“relevant conclusion” has the meaning given by section 140C(6).

Court rulings on disclosure: 2011 Act proceedings

140E Application by respondent for ruling on disclosure

(1) This section applies where the respondent—

(a) has made a further disclosure request under section 140D, and
(b) considers that the prosecutor has failed, in responding to the request, to disclose to the respondent an item of information falling within section 140B(3) (the “information in question”).

(2) The respondent may apply to the court for a ruling on whether the information in question falls within section 140B(3).

(3) An application under subsection (2) is to be made in writing and must set out—

(a) a description of the information in question, and
(b) the respondent’s grounds for considering that the information in question falls within section 140B(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or
(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 140B(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the respondent an opportunity to be heard before determining the application.

(7) On determining the application, the court must make a ruling on whether the information in question, or any part of the information in question, falls within section 140B(3).

(8) In this section and in section 140F, “the court” means the High Court.
Except where it is impracticable to do so, the application is to be assigned to the judge or judges who are to hear the 2011 Act proceedings.

140F  Review of ruling under section 140E

(1)  This section applies where—

   (a)  a court has made a ruling under section 140E that an item of information (the “information in question”) does not fall within section 140B(3), and
   
   (b)  during the relevant period—

       (i)  the respondent becomes aware of information (“secondary information”) that was unavailable to the court at the time it made its ruling, and

       (ii)  the respondent considers that, had the secondary information been available to the court at that time, it would have made a ruling that the information in question does fall within section 140B(3).

(2)  The respondent may apply to the court which made the ruling for a review of the ruling.

(3)  An application under subsection (2) is to be made in writing and must set out—

   (a)  a description of the information in question and the secondary information, and

   (b)  the respondent’s grounds for considering that the information in question falls within section 140B(3).

(4)  On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5)  However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

   (a)  comply with subsection (3), or

   (b)  otherwise disclose any reasonable grounds for considering that the information in question falls within section 140B(3).

(6)  At a hearing appointed under subsection (4), the court must give the prosecutor and the respondent an opportunity to be heard before determining the application.

(7)  On determining the application, the court may—

   (a)  affirm the ruling being reviewed, or

   (b)  recall that ruling and make a ruling that the information in question, or any part of the information in question, falls within section 140B(3).

(8)  Except where it is impracticable to do so, the application is to be assigned to the judge or judges who dealt with the application for the ruling that is being reviewed.

(9)  Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, “relevant period”, in relation to a respondent, means the period—
(a) beginning with the making of the ruling being reviewed, and
(b) ending with the relevant conclusion.

(11) In subsection (10), “relevant conclusion” has the meaning given by section 140C(6).”.

After section 13

Kenny MacAskill

5  After section 13, insert—

<Transitional provision etc.

(1) The Scottish Ministers may by order made by statutory instrument make such provision as they consider necessary or expedient for transitional, transitory or saving purposes in connection with the coming into force of section (Disclosure of information) or paragraphs 18 to 35 of schedule 2.

(2) An order under subsection (1) may modify any enactment (including this Act).

(3) A statutory instrument containing an order under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) But no order under subsection (1) which contains provisions which add to, replace or omit any part of the text of an Act may be made unless a draft of the statutory instrument containing it has been laid before and approved by resolution of the Scottish Parliament.>

Schedule 2

Kenny MacAskill

6  In schedule 2, page 14, line 27, at end insert—

<Criminal Justice and Licensing (Scotland) Act 2010

18  Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) is amended as follows.

19  In section 116 (meaning of “information”)—

(a) after subsection (2) insert—

“(2A) In this Part, “information”, in relation to 2011 Act proceedings, includes material of any kind given to or obtained by the prosecutor in connection with those proceedings or the first proceedings.”,

(b) after subsection (3) insert—

“(3A) In subsection (2A)—

“2011 Act proceedings” has the meaning given by section 140A, “first proceedings” has the meaning given by section 140B(5).”.

20  In section 141 (application for section 145 order)—

(a) in subsection (1), for “or (3)” substitute “, (3) or (3A)”,

(b) after subsection (3) insert—
“(3A) The conditions are that—
(a) by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b) the prosecutor is required to disclose an item of information to a respondent,
(b) the information is not likely to form part of the evidence to be led or relied on by the prosecutor in the proceedings, and
(c) the prosecutor considers that subsection (4) applies.”

In section 142 (application for non-notification order or exclusion order)—
(a) in subsection (2), after “concluded)” insert “or to 2011 Act proceedings”;
(b) in subsection (8)—
(i) for the definition of “accused” substitute—
““accused” includes—
(a) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, the appellant or other person to whom the prosecutor is required to disclose the item of information, and
(b) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3A) of that section being met, the respondent,”
(ii) after the definition of “appellant” insert—
““respondent” has the meaning given by section 140A.”.

In section 143 (application for non-notification order and exclusion order), in subsection (11), for the words from “include” to the end substitute “include—
(a) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial, and
(b) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3A) of that section being met, references to the respondent receiving a fair hearing in the 2011 Act proceedings.”.

In section 145 (application for section 145 order: determination)—
(a) in subsection (2)(c)—
(i) omit “or” immediately following sub-paragraph (i), and
(ii) after sub-paragraph (ii) insert “or
(iii) where the application for the section 145 order is made by virtue of section 141(3A), whether the conditions in subsection (4A) apply,”,
(b) in subsection (2)(d), for “or, as the case may be, (4)” substitute “, (4) or, as the case may be, (4A)”,
(c) after subsection (4), insert—
“(4A) The conditions are—"
(a) that by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b) the prosecutor is required to disclose an item of information to a respondent,
(b) the information is not likely to form part of the evidence to be led or relied on by the prosecutor in the proceedings,
(c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
(d) that withholding the item of information is not inconsistent with the respondent’s receiving a fair hearing in the 2011 Act proceedings to which the item relates, and
(e) that the public interest would be protected only if a section 145 order were to be made.”,
(d) in subsection (5)(a), for “or, as the case may be, paragraph (c) of subsection (4)” substitute “, paragraph (c) of subsection (4) or, as the case may be, paragraph (c) of subsection (4A)”,
(e) in subsection (6) for “or, as the case may be, (4)” substitute “, (4) or, as the case may be, (4A)”.

24 In section 146 (order preventing or restricting disclosure: application by Secretary of State)—
(a) in subsection (1), for “or (4)” substitute “, (4) or (4A)”,
(b) after subsection (4) insert—
“(4A) The condition is that the prosecutor proposes to disclose to a respondent information which the prosecutor is required to disclose by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b).”,
(c) in subsection (6)—
(i) in paragraph (c), for “or (3)” substitute “, (3) or (4A)”,
(ii) omit “or” immediately following paragraph (d)(i),
(iii) after paragraph (d)(ii) insert “or

(iii) where the application for the section 146 order is made by virtue of subsection (4A), whether the conditions in subsection (8A) apply.”, and

(iv) in paragraph (e), for “or, as the case may be, (8)” substitute “, (8) or, as the case may be, (8A)”,
(d) after subsection (8) insert—
“(8A) The conditions are—
(a) that by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b) the prosecutor is required to disclose an item of information to a respondent,
(b) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
(c) that withholding the item of information is not inconsistent with the respondent’s receiving a fair hearing in the 2011 Act proceedings to which the item relates, and
(d) that the public interest would be protected only if a section 146 order of the type mentioned in subsection (10) were to be made.”,

(e) in subsection (9)(a), for “or, as the case may be, paragraph (b) of subsection (8)” substitute “, paragraph (b) of subsection (8) or, as the case may be, paragraph (b) of subsection (8A)”;

(f) in subsection (10), for “or, as the case may be, (8)” substitute “, (8) or, as the case may be (8A)”;

(g) in subsection (13)—

(i) for the definition of “accused” substitute—

““accused” includes—

(a) where subsection (3) or (4) applies, the appellant or other person to whom the prosecutor is required to disclose the item of information, and

(b) where subsection (4A) applies, the respondent,”;

(ii) after the definition of “appellant” insert—

““respondent” has the meaning given by section 140A.”;

(h) in subsection (14), for the words from “include” to the end substitute “include—

(a) where subsection (3) or (other than in relation to an accused) (4) applies, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial, and

(b) where subsection (4A) applies, references to the respondent receiving a fair hearing in the 2011 Act proceedings.”.

25 In section 147 (application for ancillary orders: Secretary of State), in subsection (2), after “concluded)” insert “or to 2011 Act proceedings”,

26 In section 150 (special counsel), in subsection (10)—

(a) for the definition of “accused” substitute—

““accused” includes—

(a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and

(b) respondent,”;

(b) after the definition of “non-notification case” insert—

““respondent” has the meaning given by section 140A.”.

27 In section 152 (role of special counsel), after subsection (5) insert—

“(5A) In subsection (1), the reference to the accused receiving a fair trial includes reference to the respondent receiving a fair hearing in the 2011 Act proceedings.”.

28 In section 153 (appeals), in subsection (10)—

(a) for the definition of “accused” substitute—

““accused” includes—
(a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and
(b) respondent.”,

(b) after the definition of “appellant” insert—

“‘respondent’ has the meaning given by section 140A.”.

In section 155 (review of section 145 order)—

(a) in subsection (6), after “145(3)” insert “or (4A),”,
(b) in subsection (8)—

(i) for the definition of “accused” substitute—

“‘accused’ includes—

(a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and
(b) respondent.”,

(ii) after the definition of “relevant period” insert—

“‘respondent’ has the meaning given by section 140A,.”,

(c) in subsection (9)—

(i) omit “or” immediately following paragraph (g),
(ii) after paragraph (h) insert “, or

(i) the 2011 Act proceedings are disposed of or abandoned.”,

(d) after subsection (10) insert—

“(11) In its application to proceedings involving a respondent, subsection (9) is to be read as if paragraphs (a) to (h) were omitted.”.

In section 156 (review of section 146 order)—

(a) in subsection (8)—

(i) for the definition of “accused” substitute—

“‘accused’ includes—

(a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and
(b) respondent.”,

(ii) after the definition of “relevant period” insert—

“‘respondent’ has the meaning given by section 140A,.”,

(b) in subsection (9)—

(i) omit “or” immediately following paragraph (g),
(ii) after paragraph (h) insert “, or

(i) the 2011 Act proceedings are disposed of or abandoned.”,

(c) after subsection (10) insert—

“(11) In its application to proceedings involving a respondent, subsection (9) is to be read as if paragraphs (a) to (h) were omitted.”.
31 In section 158 (applications and reviews: general provisions)—
   (a) in subsection (4), after paragraph (b) insert—
       “(c) if the 2011 Act proceedings to which the application or review relates are
       continuing, to the same judge or judges as have been (or are to be)
       assigned to those proceedings.”,
   (b) in subsection (5), for “or, as the case may be, other person” substitute “, other
       person or, as the case may be, respondent”,
   (c) for subsection (6) substitute—
       “(6) In this section—
           “appellant” and “appellate proceedings have the meanings given by
           section 132,
           “respondent” has the meaning given by section 140A.”.
32 In section 160 (means of disclosure), in subsection (9)—
   (a) for the definition of “accused” substitute—
       ““accused” includes—
       (a) appellant or, in any case relating to section 136(2), 137(2) or
           138(2), other person to whom the section concerned applies, and
       (b) respondent,”,
   (b) after the definition of “appellant” insert—
       ““respondent” has the meaning given by section 140A.”.
33 In section 162 (confidentiality of disclosed information), for subsection (8) substitute—
   “(8) In this section—
       “accused” includes—
       (a) where information is disclosed by virtue of section 133(2)(b),
           134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2), the appellant or, as
           the case may be, person to whom the prosecutor is required to
           disclose the information, and
       (b) where information is disclosed by virtue of section 140B(2)(b),
           140C(2) or 140D(3)(b), the respondent,
       “respondent” has the meaning given by section 140A.”.
34 In section 166 (abolition of common law rules about disclosure)—
   (a) in subsection (3)—
       (i) for “and 139” substitute “, 139 and 140E”,
       (ii) for “or appellant” substitute “, appellant or respondent”,
   (b) in subsection (4)—
       (i) for “or the appellant” substitute “, the appellant or the respondent”,
       (ii) for “or 139” substitute “, 139 or 140E”,
       (iii) omit “or” immediately following paragraph (a),
       (iv) after paragraph (b) insert “, or
(c) information does not fall within section 140B(3).”;
(d) in subsection (6)—
   (i) after “accused” insert “or the respondent”,
   (ii) for “or 139” substitute “, 139 or 140E”,
(e) in subsection (7)—
   (i) for “or, as the case may be, the appellant” substitute “, the appellant or, as the case may be, the respondent”,
   (ii) for “or 139” substitute “, 139 or 140E”,
(f) for subsection (8) substitute—
   “(8) In this section—
   “appellant” has the meaning given by section 132,
   “respondent” has the meaning given by section 140A.”.

In section 167 (interpretation of Part 6)—
(a) in subsection (3)—
   (i) for “or the appellant or other person” substitute “, the appellant or other person or the respondent”,
   (ii) for “or, as the case may be, the appellant or other person” substitute “, the appellant or other person or, as the case may be, the respondent”,
   (iii) in paragraph (e), after “145(4)(a)” insert “, (4A)(a)”,
   (iv) in paragraph (f), after “(8)(c)” insert “, (8A)(c)”,
(b) after subsection (5) insert—
   “(6) References in the following sections to the respondent include references to a solicitor or advocate acting on behalf of the respondent—
   (a) section 140B(2)(b) and (4),
   (b) section 140C(1)(a), (2) and (3),
   (c) section 140D(1), (2), (3)(b) and (4).”.
Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated at Stage 3, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

**Group 1: Minor and technical drafting changes**
2, 3, 4

**Group 2: Disclosure of information**
1, 5, 6

Debate to end no later than 25 minutes after proceedings begin
Double Jeopardy (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 2, 3, 4, 1, 5 and 6.

Double Jeopardy (Scotland) Bill: The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-8156—That the Parliament agrees that the Double Jeopardy (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
Double Jeopardy (Scotland) Bill: Stage 3

10:23

The Deputy Presiding Officer (Alasdair Morgan): The next item of business is stage 3 proceedings on the Double Jeopardy (Scotland) Bill. In dealing with amendments, members should have in front of them the papers that are available to them at the back of the chamber.

Section 4—New evidence

The Deputy Presiding Officer: The first group of amendments is on minor and technical drafting changes. Amendment 2, in the name of the minister, is grouped with amendments 3 and 4.

The Cabinet Secretary for Justice (Kenny MacAskill): Section 4 will permit the retrial of an acquitted person when that person was originally prosecuted in the High Court and new evidence strongly suggests that the case should be retried. Amendment 2 is a minor technical change that is designed to make it clear that that exception covers acquittals secured not only at the original trial, but on appeal.

Amendments 3 and 4 are minor technical amendments inspired by a question that was raised by Robert Brown at stage 2, when he queried whether the reference in section 9 to “justice of the peace” covered stipendiary magistrates. After reflecting on his point, we think that there is a potential gap and that it would be worth making a small modification. The amendment adopts the language used in the Criminal Proceedings etc (Reform) (Scotland) Act 2007, which refers to “justice of the peace courts” rather than to individual justices of the peace. The change makes it completely clear that stipendiary magistrates are covered by the provision. I am grateful to Mr Brown.

I move amendment 2.

Amendment 2 agreed to.

Section 9—Plea in bar of trial: nullity of previous trial

Amendments 3 and 4 moved—[Kenny MacAskill]—and agreed to.

After section 12

The Deputy Presiding Officer: The second group of amendments concerns disclosure of information. Amendment 1, in the name of the minister, is grouped with amendments 5 and 6.

Kenny MacAskill: Amendment 1 ensures that the statutory rules of disclosure of evidence apply to all double jeopardy matters.

When this Parliament passed the Criminal Justice and Licensing (Scotland) Act 2010, it agreed that the common-law system of disclosure of evidence in criminal proceedings should be placed on a statutory footing. Part 6 of the 2010 act is due to be commenced in June this year.

There will be three stages in a double jeopardy case. The first stage is the original trial and any appeal that follows it. The second stage is the application to the High Court for authority to prosecute again. The third stage, assuming that the High Court consents, is the subsequent trial. The provisions of part 6 of the 2010 act will apply to any trial in a double jeopardy case. No amendments are required to ensure that those rules apply to any such trial, but amendment 1 seeks to ensure that the scheme will also apply to the application procedure.

Amendment 1 is not fundamental to the bill. Disclosure at the application stage would take place under the common law if the amendment is not agreed to. However, we believe that, where possible, it is right to ensure that disclosure in any criminal proceedings is governed by the same framework. The application process is a new procedure and it is important to ensure that fairness to the accused is preserved. Disclosure of evidence is key to ensuring that fairness.

Amendment 1 is lengthy and detailed, but let me be clear about what it does. It does not change the way in which disclosure of evidence is made under the 2010 act; it simply ensures that the principles and procedures in the 2010 act apply in the same way to double jeopardy applications. Despite its length, the amendment does nothing more than that.

Amendment 1 introduces six new sections into part 6 of the 2010 act. New section 140A is an interpretation section. New section 140B introduces a prosecutor’s duty to disclose information that was not previously provided in earlier proceedings. That is particularly important in double jeopardy situations in which, for example, the application is based on the discovery of new evidence. It is important that the accused has sight of that new evidence at the application stage. New section 140C ensures that the prosecutor has a continuing duty to disclose information throughout the application stage. New section 140D provides that the prosecutor must respond to further requests for disclosure of information that are made by the respondent during the application stage. New section 140E allows the respondent to apply to the court to rule on a disputed issue of whether particular information should be disclosed. Finally, if new
information becomes available, new section 140F provides further opportunities for the respondent to apply to the court for a review of any previous ruling on disclosure.

Those new sections mirror what part 6 of the 2010 act already provides for in other criminal proceedings. They ensure that disclosure in double jeopardy applications is carried out in a consistent way. The absence of disclosure provisions was discussed in the stage 1 evidence sessions before the Justice Committee. At stage 2, I advised the committee that I would lodge amendments on disclosure. Though confident that the statutory scheme applied to the trial stages in double jeopardy cases, we considered that, in light of the evidence sessions, some amendment to the recently enacted 2010 act would be required to ensure that the statutory scheme also applied to the application stage.

As members can see from this group of amendments, applying disclosure to double jeopardy is a technical and complex matter. The amendments have to fit in accordance with the provisions that are already contained in part 6 of the 2010 act. Furthermore, key principles of the bill were still being debated at stage 2, and the shape of the bill could have changed. For example, issues such as the merging of sections 3 and 4, the introduction of an application stage to section 11 and the type of offences that the new evidence section should cover were all being considered. All those changes could have required a rewrite of any disclosure amendments that were made at stage 2. Accordingly, the Government considered that it would be more appropriate to resolve those matters first, before inserting disclosure amendments at this stage.

Given the detail of part 6 of the 2010 act and the fact that we have introduced a new procedure in the bill, it is not possible to translate disclosure into a single-line amendment. It is important that we follow as closely as possible the disclosure process that is already enacted and do not create a new and unintended approach.

10:30

When discussing the bill, members of all parties have recognised that in allowing exceptions to the double jeopardy rule, fairness to the accused must be preserved. Amendment 1 provides an additional safeguard to ensure that that aim is met.

Amendment 5 provides a power to make transitional provisions for the bill, so that the Scottish ministers can ensure a smooth transition from the common-law rules on disclosure that may have applied in a trial some time ago to the new disclosure regime under the 2010 act that will apply where a double jeopardy application is made. The power is restricted to making transitional provision that is necessary or expedient in consequence of the disclosure provisions in the bill only; it cannot be used in relation to any other aspect of the bill.

Amendment 6 makes a series of consequential amendments to the 2010 act, which follow from amendment 1. For example, it ensures that the question of disclosing sensitive information that is relevant to a double jeopardy application can be considered by the court, which provides a safeguard for the fair treatment of the respondent’s position. The consequential amendments are necessary to ensure that the statutory disclosure scheme applies consistently throughout part 6 of the 2010 act to double jeopardy applications in the same way that it does to other criminal proceedings.

I move amendment 1.

James Kelly (Glasgow Rutherglen) (Lab): I support the Government amendments.

Disclosure is an important aspect of legal proceedings, and it is a fundamental right of the accused and their legal team that they have sight of the evidence against them.

The cabinet secretary was correct to lodge the amendments in order to make the disclosure regime in relation to double jeopardy consistent with other aspects of the criminal law. We would not want a situation in which the common law applied to what will be a very few—indeed, exceptional—serious cases.

Although it is quite unusual for an order-making power to be introduced at stage 3, I recognise that it is a precaution and that it will ensure that the appropriate transitional arrangements can be made in relation to disclosure.

Bill Aitken (Glasgow) (Con): I agree with James Kelly, although perhaps for different reasons. As is generally known, I am a great supporter of the common law, which I believe has served Scotland well over the centuries. However, James Kelly is right to support these amendments today, and we will support them too.

The cabinet secretary has had to lodge lengthy, convoluted and complex amendments, but when one looks at them, one sees that the issue is fairly simple. We are tied into the provisions in the 2010 act, and the issue of disclosure has quite appropriately caused tremendous excitement—to say the least—in Scottish legal circles in recent years.

The fact is that we have to operate under a code of disclosure. Many of us spent a great deal of time on providing input to the code, and it was agreed largely unanimously. Although what is being done today may seem on the face of it
unnecessarily complex, it is necessary; otherwise there would be an inconsistency in the approach that is taken in two major pieces of legislation, which would be unfortunate to say the least.

Amendment 1 agreed to.

After section 13
Amendment 5 moved—[Kenny MacAskill]—and agreed to.

Schedule 2—Consequential amendments
Amendment 6 moved—[Kenny MacAskill]—and agreed to.

The Deputy Presiding Officer: That ends consideration of amendments.

Double Jeopardy (Scotland) Bill

The Deputy Presiding Officer (Alasdair Morgan): The next item of business is a debate on motion S3M-8156, in the name of Kenny MacAskill, on the Double Jeopardy (Scotland) Bill.

10:34

The Cabinet Secretary for Justice (Kenny MacAskill): I am pleased that, at the end of the parliamentary session, we will complete what is an important reform. The Double Jeopardy (Scotland) Bill, the final piece of legislation that the Parliament will consider in the current session, can be traced back to a debate at the end of the previous session. On 22 February 2007, the Scottish National Party, together with the Conservatives, made the case for reform of double jeopardy. In a thought-provoking debate, a number of weighty points were made and there was general agreement that the issue necessitated careful study. The parties comprising the then Administration argued against making a commitment to reform, but I am pleased that they have now joined us in a widespread consensus that change is needed. I welcome the support for the bill in the Justice Committee and today in the chamber.

Later that year, as the Cabinet Secretary for Justice, I asked the Scottish Law Commission to consider possible reforms in four complex areas of criminal procedure. That was a substantial piece of work. Each issue that was referred to the commission covered difficult technical questions of law and required the balancing of the many and often competing concerns of fairness to victims, fairness to the accused and fairness to society. The proposed reforms prompted searching questions about the type of criminal justice system that we want for Scotland. Such a substantial review could never have been undertaken lightly, and it was not. It required an enormous amount of careful fact finding, consultation and analysis.

The Scottish Law Commission responded to my challenge with its customary diligence. The Government and Parliament have seized and built on the commission's work and have made great progress in a remarkably short period. On Monday, the first part of the project—the reform establishing a Crown right of appeal—will become law. I think that all members welcome that, as the current situation is anachronism. The measure will allow prosecutors to challenge decisions by judges to end a trial before the case can go to a jury. It will permit contested decisions that there is no case to answer to be challenged—an innovation that I am sure all members welcome. Again, I record my appreciation for the unanimity
that the Parliament showed when that measure was passed.

We now have before us the fruits of the second part of the reference, in the form of the Double Jeopardy (Scotland) Bill. The commission is conducting a consultation on the rest of the project, to consider the use of evidence of similar conduct and the admissibility of evidence on previous convictions. That will be a matter for a future Parliament to consider. It is one of three proposals that the Lord Advocate raised some time ago, on the Crown right of appeal, double jeopardy and evidence of similar fact. When we conclude the bill, we will have delivered two out of those three proposals.

The commission’s current work is an even more complex task. In essence, it focuses on the extent to which the accused’s past conduct should be brought to the attention of the jury. The use of evidence of similar fact involves the difficult balance of considering the value of certain information as evidence, but weighing up whether its usage would be unfairly prejudicial. We expect the commission’s final report on that to be published by the end of the year. I have no doubt that the Parliament in the next session, whatever the Administration is, will wish to assess that report. On behalf of my Administration, I confirm that we have a desire to implement the recommendations in that report.

In reforming double jeopardy, we have built on the commission’s work through a public consultation and by considering the Justice Committee’s thorough evidence taking and analysis. We have taken on board most of the commission’s recommendations, but we have gone further by including a general exception for new evidence; by applying the exception to a wider range of serious cases; and by extending it to historical crimes. I am convinced that those changes are right as a matter of public policy and I am grateful that members have supported them. They were discussed and debated in the Justice Committee. I understand where the commission came from, but I believe that the position that has been adopted is correct and takes on board wider views in our society.

The bill achieves a careful balance, as it must. It weighs up the rights of the accused and the broader rights of victims in communities. It upholds and enshrines the ancient principle of double jeopardy and restates it comprehensively and in modern terms. That is appropriate because it is only in a few exceptions that cases will arise. As much as I agree with what was said earlier about the importance and benefit of our common law, it is important that from time to time we enshrine certain things in statute. It is appropriate that we enshrine in statute the accused’s right, in the normal course of events, not to face a subsequent trial.

The legislation provides for some strictly limited exceptions in which there is a clear and compelling case for a new trial. In short, it will—as it should—permit a trial tainted by threats or corruption to be re-run. It will allow a new trial when evidence, such as an admission or DNA material, emerges, demanding a new look at the case—the public expect no less. It will also clarify the rules that apply when a victim dies after a trial for assault.

I am pleased that the reforms in the bill have near-unanimous support. The Justice Committee has made a significant and thorough contribution to the development of the bill. My amendments at stage 2 responded positively to many points aired at stage 1. The scrutiny and the resulting amendments have improved the bill.

As Mr Kelly and Mr Aitken commented, many amendments are lengthy but relatively simple. Unfortunately, we require to state the changes at length.

Together, we have raised the test for assessing admissions; we have restricted new evidence retrials to cases previously decided by the High Court; and, today, we have improved the disclosure regime that applies to the bill.

I look forward to hearing members’ views on the bill and thank them for the manner in which they have worked with us in committee and elsewhere.

I move,

That the Parliament agrees that the Double Jeopardy (Scotland) Bill be passed.

10:41

Richard Baker (North East Scotland) (Lab): As we enter the final hours before the dissolution of Parliament, I have no doubt that justice issues will be some of the most hotly debated in the weeks ahead. It is an area in which there are significant disagreements between parties. Where we cannot agree, we should be clear about that and debate the issues fully.

It is good that on the last day of this session of Parliament, our final justice debate—indeed, our final debate—should be an opportunity to reflect on an important area of agreement, which is the decision to reform our outdated laws on double jeopardy. Considering that we are talking about a change to 800 years of Scots law, I admit to having some reservations about the fact that the debate is only a short one. However, I concede that the stage 2 consideration of the bill was notable for its high degree of consensus, to which the cabinet secretary referred. The Labour Party, too, was keen that the law should be changed.
before the end of this parliamentary session. We believe that victims and families who have not seen justice served should not face further uncertainty or wait longer for a change in the law. We welcome our being able to pass this law today.

The change that is represented by the bill maintains the correct balance between the rights of an accused and those of a victim of crime. The bill reconfirms the principle of double jeopardy in statute, while ensuring that in future there can be new proceedings against the accused in exceptional cases in which there are clear reasons for believing that justice was not done in the original trial.

Exceptional cases and cases involving serious crimes are the right parameters. On that basis, we supported the approach of the Scottish Government at stage 2 that the changes should be restricted to High Court decisions. Notwithstanding the concerns that were expressed by Robert Brown at stage 2 about the issue of admissions, we appreciate that the Government’s intention is extremely clear: that in this area, too, the application of the new provisions should be with regard to serious cases.

We should not expect a high number of cases to be affected by the bill, but those that are affected will be serious. We all know that there are people in this country who, with good reason, believe that they have not received justice for great wrongs committed against them and their loved ones. People who are guilty of serious crimes have evaded justice in Scotland. If we can properly rectify injustices in which killers have walked free from court or people who are guilty of serious offences have bragged of their culpability after acquittal, we should do so. That is why we were persuaded of the case for the legislation to have retrospective effect. Prosecutors now have access to new technologies such as DNA evidence that can show proof of criminality even in cases that are many years old. That offers hope in cases where victims and families are still waiting to see justice done for the crimes committed against them and where the Crown has the appropriate evidence to seek new proceedings. I am sure that in cases where the Crown believes that it is appropriate to do so, it will work diligently with the families and the victims involved.

The experience of the reforms that were made to the law in England and Wales in 2003 can give us confidence that the changes that we propose are as proportionate as they are important. The reforms to the law on double jeopardy in England and Wales have not created a situation in which accused persons are routinely retried for the same offence. Although those laws were reformed in 2003, it was not until last year that Mark Weston became the first person to face a second murder trial in England, following the discovery of new forensic evidence. He was convicted of the murder of Vikki Thompson in 1995. The provisions have been used sparingly, but where they have been used, serious injustices have been rectified and they have doubtless been of huge importance to all those affected.

This is our last justice debate in this session of Parliament. None of us can be certain of our return in the next session, although I notice that the cabinet secretary is standing on a list as well as for a constituency, which I would say is a sensible precaution on his part. However, we know that Bill Aitken is leaving us. We owe Bill a great debt of gratitude for his contribution to this Parliament, particularly as convener of the Justice Committee, and I wish him very well for the future.

Not through his own doing but because of the spectacular unpopularity of the Deputy Prime Minister, we might not be joined by Robert Brown in the next session. Robert and I have not always seen eye to eye, but we should all recognise his hugely important and informed contribution to our consideration of justice policy in this Parliament. I for one—I am sure that I speak for our whole group—would very much like to thank him for that and to wish him well should he not be here next session. [Applause.]

Of course, Deputy Presiding Officer, in the next session we shall also miss you and your now-famous catchphrase, “The member’s time is up. Please turn off their microphone.” I am moving speedily to a conclusion.

The Deputy Presiding Officer: I was just going to say that you can carry on, Mr Baker.

Richard Baker: Oh, really? Such largesse, Deputy Presiding Officer—you are obviously demob happy. We wish you well. I for one very much valued your convenership of the Enterprise and Culture Committee in the previous session of Parliament—it was a very important contribution, as was your contribution in the chamber.

I am pleased to join Bill Aitken, Robert Brown and ministers in supporting the bill. In the next session we want to see more support for victims, so I am pleased that we can conclude this session by passing a bill that makes an important but correct change to Scots law, which is very much in the interests of getting justice for victims of crime in our country.

10:48

John Lamont (Roxburgh and Berwickshire) (Con): Like others, I am very pleased to speak in this stage 3 debate on the Double Jeopardy (Scotland) Bill. It has taken us some time to get to this point, but I am pleased that at decision time—
the last decision time of this session—we will vote to enact one of the Scottish Conservatives’ key manifesto pledges from 2007.

It is important that we record our gratitude to the Scottish Law Commission and the Justice Committee for their hard work in bringing us to where we are today on this subject. The Scottish Government also deserves credit for taking the first step in 2007 by inviting the Scottish Law Commission to review the law in this area.

There have been some disagreements during the passage of the bill, but the process has generally been marked by consensus and mature debate from all sides in the chamber.

At this point, I pay tribute to my colleague Bill Aitken; as Richard Baker pointed out, Bill will be standing down from Parliament and will be making his final contribution to Parliament later this morning. Bill Aitken has been a loyal servant to the people of the city of Glasgow for many decades and, more recently, he has been a formidable convener of the Justice Committee. On a personal level, I will certainly miss his advice and constant support and I am sure that everybody wishes him well for his retirement. [Applause.]

At stage 1, several members detailed the history of the double jeopardy principle. They highlighted the fact that it is not a technical term in Scots law but a principle or rule that has never been formally codified. The principle is good, as the finality of criminal verdicts allows the individuals who are involved in a trial to get on with their lives in the knowledge that the matter has been resolved. It also provides the more general benefit of retaining public confidence in the court system. The double jeopardy rule limits the state’s reach over individuals’ lives and protects individuals from the stress of repeat trials.

However, as I said in the stage 1 debate, every good principle ought to have exceptions. Many people consider it to be common sense that, when compelling new evidence of guilt arises that was not available at the time of the original trial, the Crown should be able to bring a new trial. However, as such a step is serious, it is right that it should occur only in exceptional circumstances and for the most serious crimes; otherwise, we risk eroding the integrity of our courts and public confidence in the wider justice system.

The principles in the bill reflect the interests of not just the accused but the justice system and wider society. As we have seen, it is important for decisions of courts to be upheld and seen to be conclusive. However, it is clear that exceptional circumstances could arise, and our justice system must be capable of dealing with such exceptions.

We believe that the principle of double jeopardy is right and should continue. However, it should be reformed and restated in Scots law to allow exceptions when new evidence in the form of an admission of guilt or other new and compelling evidence emerges. When we allow exceptions to the principle, we must put safeguards in place. We are satisfied that the bill strikes the right balance between ensuring that we have a fair and effective justice system and protecting the rights of victims and of individuals who are accused of crime. I am pleased that the Government introduced the bill, which the Scottish Conservatives will support at decision time.

10:51
Robert Brown (Glasgow) (LD): I am glad to open for the Liberal Democrats in the last justice debate, the last stage 3 debate and the last substantive debate of the parliamentary session. As with many justice debates, the bill raises substantial issues around the interface between personal liberty, public safety and public confidence in the law. The rule against double jeopardy is an important part of that debate.

It is right that, in general, the state should have one go at prosecuting a person who is accused of crime. We thank Patrick Layden QC, the Scottish Law Commission’s lead commissioner on the double jeopardy project, and his colleagues for their work. He put the position well when he said:

“The rule against double jeopardy has protected the citizens of Scotland against repeated prosecutions for hundreds of years. Essentially, it prevents the state from running the criminal prosecution system on a ‘Heads we win; tails, let’s play again until you lose’ basis.”

Against that background, the commission rightly recommended that the rule should be kept and should be put in legislation.

Repeated prosecutions until the state thinks that it has got the result right are oppressive. In Scots law, if a person has thole their assize, they cannot be prosecuted again. “Thoiling the assize” is the phrase in this context, as against “nobile officium” in the previous debate, about whose pronunciation we have had interesting discussions.

It is right that the rare cases in which a jury or a magistrate is nobbled and in which proceedings have been tainted because they have been undermined by illegality should be regarded as null and able to be started again. No great exercise of legal reasoning is needed to support that proposition. What has perhaps been more difficult to deal with is new evidence or admissions—perhaps even bragging—by the accused. In the case of a serious and appalling crime, there would—rightly—be public outrage if major new evidence, such as a new witness, the discovery of a body or compelling DNA evidence,
I disagreed with the wide approach to new evidence and particularly to admissions evidence. The cabinet secretary was right to restrict the new-evidence exception to cases that were taken on indictment in the High Court, but it would have been desirable to deal with admissions in the same way, as I suggested at stage 2. However, the bill lays down considerable safeguards to give the High Court significant reasons for determining whether a case should proceed in appropriate instances. It is important to narrate those reasons, which are that

"the case against the person is strengthened substantially by the new evidence";

that

"the new evidence was not available, and could not with the exercise of reasonable diligence have been made available" at the original trial; that

"it is highly likely that a reasonable jury properly instructed would have convicted the person";

and that

"it is in the interests of justice to" proceed.

Those are fairly stringent tests by anybody's account; they give us the confidence that the new legislation will operate in exceptional and unusual circumstances, which will nevertheless allow prosecutions in the significant cases that I have spoken about.

The final issue of controversy is perhaps that of retrospectivity. I am personally satisfied that creating a new procedure is a different matter from creating a new offence. It would be scandalous if new evidence that emerged in the week before the bill came into effect could not be made use of in this regard.

I thank Justice Committee members, committee clerks, ministers and the Scottish Law Commission for their work on the bill. It has been a great pleasure to serve on the Justice Committee, which—dare I say it—is one of the highest-quality committees of the Parliament. As others have said, that owes a lot to Bill Aitken's convenership of the committee over the last period. As I have mentioned previously, Bill is a colleague whose career has gone in tandem with mine in terms of our council and Parliament commitments. Bill Aitken will be greatly missed; I am sorry that the new session of the Parliament will not have the benefit of his advice and support. As others have said, that may be my fate, too. If so, it will happen in a slightly less voluntary way. Support from the clerks and Scottish Parliament information centre researchers, and members' intelligent and sensitive input have all been important aspects of the consideration of the bill.

Finally, I thank the ministers. Like their predecessors in the previous Government, members of the ministerial team have taken their responsibilities seriously; they have applied their minds to the detail of this important matter. Obviously, we did not always agree, but in large measure we did. I am grateful to the ministers for their liberal and reasonable approach. I wish them all success in the next session of Parliament.

Against that background, I have great pleasure in indicating Liberal Democrat support for the principles and detailed provisions of the Double Jeopardy (Scotland) Bill.

10:57

Stewart Maxwell (West of Scotland) (SNP): I thank in particular the Justice Committee clerks for their assistance, advice and support on the bill and over the past four years. I have been a committee member for the past two years of this session of the Parliament. The clerks made a great team; they served the Justice Committee very well.

I am absolutely delighted to be taking part in this final justice debate in this session of the Parliament. As other members have said, this is the final debate of the parliamentary session. The debate is an important one, dealing as it does with an ancient tenet of Scots law. I am slightly disappointed—I had hoped to be the first member to mention throed assize, but Robert Brown got in first. There you go. I will stick to double jeopardy, given that he used that other phrase.

Before I turn to the meat of the issue, I join other members in commenting on Bill Aitken's convenership of the Justice Committee. Bill Aitken has been a top-class servant of the Parliament over the past 12 years and a top-class servant of the Justice Committee over the past four years. We wish him well in his retirement. I will miss in particular our jousting on BBC Radio Scotland of a morning or evening. Bill and I suffer from the same problem of living relatively close to the BBC headquarters—indeed, it may be no problem, but a useful thing. Our proximity to the BBC meant that our parties often called upon us to be available to put forward our respective points of view. I wish Bill very well in whatever he chooses to do in future.

One thing that has been slightly overlooked in the debate on the bill is that, although the provisions will allow trials to take place for a second time, we are putting a very important rule and safeguard of Scots law—double jeopardy—on a statutory footing for the first time. It is critically important that we all understand that. Double
jeopardy does, of course, give a solid line of defence to those who have been tried and acquitted. As other members have said, there are some underlying fundamental reasons why we have had to make this change in the law.

I have not always agreed with Paul McBride QC, but he got it right when he said:

“If one thinks of rape cases involving children, rape cases involving adults, horrific murder cases, and new evidence of a compelling nature comes to light that wasn’t available at the trial that demonstrates beyond any question the person is guilty, is it right as a society to say that persons should go free?

For me, that sums up why we are here today to make this change. It cannot be right that society knows that a person is guilty but allows that person to go free. For that reason, it is absolutely correct that we make the change.

However, we must be exceptionally careful when making such a change. Many have argued that it may be a step too far. Given that there is consensus across the chamber for the change, we must accompany it with rigorous safeguards to ensure that people are rightly protected. Those safeguards are in place in the bill at stage 3. As Professor Christopher Gane said to the Justice Committee in evidence, people should not be found “guilty by attrition”—a phrase that sums up some of the risks in making such changes. However, I am sure that that will not happen in this case.

The strength of our committee system emerged strongly during consideration of the bill. In the bill as introduced, the offences to which it applied were listed in schedule 1. The Justice Committee disagreed with that approach and thought that there were better, more logical ways of deciding which cases should be dealt with. I am glad that the Government agreed with that recommendation and that the cases to which the bill will apply are now defined as cases that were originally tried in the High Court. That is a much more logical way of treating the issue.

The argument about retrospectivity always seemed slightly odd to me. Is the legislation retrospective? If new evidence comes forward today, tomorrow, next month or next year, surely it is new evidence, even if it relates to old cases. In my view, it would be unjust to ignore that evidence and, effectively, to say that because a case took place a number of years ago—or, as some members have said, literally a week before the legislation came into effect—the legislation should not apply. I have never accepted that argument. The argument about retrospective application was a slight red herring in our discussions, but it led to a detailed debate about the issue, in which we came to the right conclusion.

My concluding remarks concern not the technical aspects of the bill but the reasons why we should be here today. There are five such reasons. First, other members have spoken about the scientific and technical advances that have been made, which may allow DNA or other compelling evidence to come forward. Secondly, there is a moral principle, which we often take for granted, to what we do. It is undeniable that justice should be brought to bear on those who are guilty of serious crimes.

The third reason is public perception and confidence. Surely our justice system comes close to being undermined if public confidence is lost because people walk free, although we have the evidence to prove that they are clearly guilty, or, as members such as Richard Baker have said, because people boast about their previous crimes and having got away with them. The bill is an important measure to address that issue.

The fourth reason is consistency. It is and has always been right that people should have a right of appeal against a sentence, if new evidence comes to light. It seems fair and consistent that, if new evidence comes to light on the other side, we should be able to deal with that issue, too.

The final reason that I want to mention is the most important one of all. The bill provides justice for victims and victims’ families. Irrespective of all the debates that we have had, that is the fundamental reason why this is the right change to make to Scots law. It gives me great pleasure to support the bill today. The bill will make an important change. It will seldom be used, but when it is, it will be very important to the families, to the victims and for the credibility of our legal system.

11:04

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Presiding Officer, thank you for allowing me the privilege of speaking in the last debate in this session. I thank the people of Cumbernauld and Kilsyth for sending me here as their representative in the Parliament. I hope that, with their good will, it will not be the last time that I speak in this great Scottish Parliament.

As other members have done this morning, I place on record my thanks to the clerks to and fellow members of the Justice Committee. Like other members, I have found it a very enjoyable committee to be on. Party politics have been left at the door—in most cases—and we have put the interests of justice at the heart of everything that we have done.

I also thank the ministerial team, their civil servants and all the individuals and organisations that engaged with the committee and the Parliament in providing written and oral evidence
and in co-operating with us as we scrutinised the bill. It has arrived here, in the very last hours of the parliamentary session, as a very important piece of legislation.

There is broad consensus on the proposals. Without question, the time is right and change is due. That view is supported by the vast majority of Scots. Throughout the process, I have emphasised the need for reform and I have indicated many problems with the current system—problems that go beyond the World’s End killings that we have discussed so often throughout the process.

My view, and that which is taken by many colleagues, is that the double jeopardy rule is deeply unfair to victims of crime. In previous debates, I have given the example of Billy Dunlop. His was a shocking example of years of justice not being seen to be done, and his case clearly illustrates why we need the new legislation—it is why opinions have hardened and changed over recent years, in my opinion. I make no apologies for mentioning Dunlop again today. He murdered 22-year-old Julie Hogg in 1989, and he faced trial twice. On both occasions, the jury failed to reach a verdict and the killer was never brought to justice. As a result of the changes in 2003 to the legal system in England and Wales, Dunlop was charged and convicted for the murder in 2006—and that after confessing his guilt to the authorities back in 1999.

Changing the system in England and Wales allowed for Dunlop to be punished for the crime that he had committed. For years, however, the authorities knew that he was the killer but were working with their hands tied behind their backs. I ask colleagues to imagine being a family member of a murder victim in those circumstances. As well as having to endure the endless grief of such a cruel and horrendous loss, families know that the killer cannot be prosecuted because of the outdated double jeopardy law. People must have been asking why the law was not standing up for the victims of crime. The status quo here in Scotland is simply wrong, and it is right that new legislation has reached the chamber—legislation that will stand up for victims and their families in my constituency of Cumbernauld and Kilsyth and throughout Scotland.

Times have changed, and our justice system must change to take account of that. The prosecution is able to establish evidence using modern techniques, and our justice system must be allowed to adapt to that. I hope that members throughout the chamber will support the bill today, and I urge them to do so. The changes that it will bring will not impinge on the civil liberties of the people of Scotland; they will help victims and families to see justice done.

Before I sit down, I, too, wish to pay tribute to some of our colleagues who are leaving us today. Bill Butler, as the convener of the Justice Committee for all but three or four meetings—

Richard Baker: Bill Aitken.

Cathie Craigie: What did I say?

Members: Bill Butler.

Cathie Craigie: Oh, goodness. That’s Bill Butler got a promotion, although maybe he does not want it.

As convener, Bill Aitken has always dealt fairly with the committee's proceedings. He is a good parliamentarian, and we have all been able to look up to him. I am sure that Bill will find plenty to do with his time outside the Parliament, probably supporting that north Glasgow football team, Partick Thistle; then again, he might want to come through and visit here more often than he watches the football. I wish him well in whatever he chooses to do.

I pay tribute to Robert Brown. I do not know whether he will be back in the next session of the Parliament. During our time in the Parliament, he and I always seemed to end up on the same committees. I do not know whether he has interests or hobbies outside the Parliament, but I imagine him spending his free time brushing up on the law and learning even more about even more things.

I also pay tribute to you, Deputy Presiding Officer, as you step down from your parliamentary duties. Like Bill Aitken, I am sure that you will be out cheering on your local football team, in the east end of Glasgow—I think it is the Shettleston Juniors that you support. I wish you all the very best.

I am grateful for the opportunity to pay tribute to some great parliamentarians who have certainly made a contribution to the Scottish Parliament and to the lives of the people of Scotland.

11:10

Nigel Don (North East Scotland) (SNP): I am in my characteristic position as the final back-bench speaker—a sort of tail gunner—so I must repeat one or two things, although that is not something that I do lightly.

I thank my colleagues on the Justice Committee for their hard work during the past four years. It has been a hard-working, largely consensual and always respectful committee. I was a newcomer to the Parliament four years ago and it has been a joy to work on a committee that regarded its business as important and did not get stuck into the somewhat unconstructive party politics that are perhaps more common in other committees.
It would be wrong not to thank Bill Aitken for his exemplary convenership of the committee during the past four years. I agree with members’ remarks about Robert Brown. Robert Brown seems to think that it is unlikely that he will come back; I find it rather presumptuous of the rest of us to think that we are coming back—an interesting straw poll is going on in the Parliament, but let us not worry about that.

I also thank SPICe and the clerks, who did a fabulous job. I agree with members’ comments about the ministers, who have been seriously constructive on all our work—I do not say that just because I am a Scottish National Party back bencher. It has been a pleasure to work with them. We should also pay tribute to the civil servants, because although we have two hard-working ministers I do not think that they do everything that we see, so they probably have a pretty good team behind them, to whom I am grateful.

Stewart Maxwell talked about the principles of the bill and why it is important. I am grateful to him and I have no desire to repeat what he said. The bill that I hope we will pass this afternoon is steeped in principle. The principles are two-fold. First, the law against double jeopardy is ancient and correct and has now been codified, which I am sure was the right thing to do. Secondly, we have established that provision for exceptions should be clearly set down in statute. At the very least, we have made the law of the land clear.

I will run through a few points and establish the principles behind them. First, in relation to cases in which a person has been found not guilty of assault but the victim subsequently dies, we have set down the old principle that a second trial can take place because there is a new offence. It seems to me that that is right, although I note in passing that there is little evidence that the principle is much used. However, there is also little evidence that it is a bad thing, so we have stuck with it.

The second general principle is that it should be clearly set down that the new-evidence exception applies only in serious cases. I reiterate my thanks to ministers for adopting the policy that I concluded a long time ago should be adopted, that is, that the approach should be restricted to High Court cases.

I do not disagree with Stewart Maxwell often. I very much agree with what he said about the principles, but my view of retrospectivity is completely different from his. The ancient principle was that once a court had found someone not guilty their status before the law had changed. By passing the law we are changing the status of people who have been found not guilty on a High Court charge to one that allows for their recall, when previously they could not have been recalled. That is entirely the right thing to do because, as others have said, if new and compelling evidence comes to light—and the ways in which evidence can be garnered have now changed, of course—it is important that we are able to prosecute the acquitted person. We have changed the principle of retrospectivity, but it is the right thing to do.

Other members mentioned admissions. Such cases would come back to the court only if there was clear and compelling evidence and a new trial was in the interests of justice. I do not expect that there will be many such cases, but it would be a mistake to leave them out. Equally, we have dealt with tainted trials.

Members can see that I brought along the large file of papers on the bill. I did not do that to make any particular point, as colleagues are well aware of the size of file that we finish up with on such issues. Subject to some rather long amendments, which were almost as long as the bill, we have finished up with a short codification of the general principles on double jeopardy. We have got it about right. I am grateful and look forward to the opportunity to pass the bill later today.

11:16

Mike Pringle (Edinburgh South) (LD): As my colleague Robert Brown has already indicated, the Liberal Democrats will support the Government’s Double Jeopardy (Scotland) Bill. We are glad to do so.

I associate myself with the comments that others made about Bill Aitken, who was a fine convener of the Justice Committee. I am not sure what he will do when he moves on, but he will clearly have a lot more time to do the things that he wants to do in his private life and to consider other things. I congratulate him on the great job that he did on the Justice Committee.

I also thank Robert Brown, who is one of the best Liberal Democrats in the Parliament. He will be sorely missed by our group if he is not re-elected. I thank him for all the help that he has given me over the past four years in the justice portfolio. As a lawyer, he comes with a slightly different perspective from mine, but his comments and help over the past four years have been welcome.

I also congratulate the rest of the Justice Committee, which has—along with the minister—guided the bill through its various stages and scrutinised it extremely closely. Today is the result of that scrutiny. Between them, the committee and the minister have produced an extremely solid bill.

I also congratulate the committee clerks on the excellent job that they have done, not only during
the bill’s progress but over the past four years. We all know that, without our committee clerks, we would struggle seriously, particularly when trying to produce stage 1 reports.

The ministerial team that has guided justice issues over the past four years has also done a good job. Liberal Democrats have perhaps not always agreed with the ministers and perhaps do not agree with them on one or two matters, but justice is without doubt one of the biggest portfolios and to tackle it for four years is a huge job. I wonder whether, when the ministers are re-elected—I am confident that they both will be—they will look for a different portfolio.

Double jeopardy is a procedural defence that forbids the defendant being tried again on the same or similar charges following a legitimate acquittal or conviction. The rule against double jeopardy is a fundamental principle of Scots law that provides essential protection by preventing the state from procedurally prosecuting an individual twice for the same act.

Double jeopardy has always been extremely complex and often sensitive, so we welcome the bill and the clarification that it provides by setting out in statute the rule against it as part of a modern criminal justice system. Perhaps, when the rule was introduced, the criminal justice system was not quite so modern, but we now have a modern system.

We support the setting out of exceptions to the rule against double jeopardy—for example, when the original trial was tainted by jury tampering or when the acquitted individual has since confessed to the crime.

Perhaps the biggest debate on the bill has been whether a new-evidence exception should be applied retrospectively. That was the most complex issue that the Justice Committee had to deal with. Stewart Maxwell, in his final speech in this session, made a very good case for why that is the right way to go. Our view is that it would be arbitrary and unsatisfactory if acquittals that occurred before a certain date were final while those that occurred after it could be looked at again in the event of new evidence emerging. As my colleague Robert Brown said, in this day and age, given the advances in science in relation to dead bodies, it is only sensible that if solid new evidence, particularly DNA evidence, is found for an existing case, even if the case is old—it could be a considerable number of years old—the case should be brought back in front of the court so that justice is served.

Stewart Maxwell again put his finger on the main issue: victims. Victims will find the bill to be the best way forward. In the cases that we are discussing, a victim would surely want to be satisfied that the perpetrator of the crime, even if it was some years ago, might finally be brought to justice. That would give the victim or victims, or the relations of the victims—perhaps children or grandchildren—closure. I agree with Richard Baker on the point about victims. Retrospectivity is an important aspect of the bill and it is the right way forward for victims.

There has been very little change to the bill between stage 2 and now. The Government lodged a considerable number of stage 2 amendments, which were all agreed by the committee. The Liberal Democrats also welcome the amendments that the cabinet secretary lodged for today. As James Kelly and others said, that is perhaps quite unusual at stage 3, but Kenny MacAskill, the cabinet secretary, realised that the amendments were necessary to finalise the bill and make it a really good, solid piece of legislation.

I am pleased that the Liberal Democrats are firmly behind the bill and will support it at the final decision time of this session.

11:22

Bill Aitken (Glasgow) (Con): It is appropriate that the final debate in this session should deal with an important legal principle. The principle of the rule against double jeopardy has been enshrined in Scots law down the centuries. It would be oppressive if we lived in a society in which the Crown or the prosecution service had carte blanche to prosecute time after time. No one in the Parliament would support that, but it is understandable that there have been objections from legal purists and scholars that what we are doing is perhaps not appropriate. Much as I respect them, I dismiss those objections. How could we, as politicians, explain to the public that people who walk free can remain free after they have admitted committing serious crimes or if their acquittals are found to have been tainted as a result of jury nobbling or coercion? We could not explain that away and it is therefore perfectly correct that the Government and the Parliament seek to change the law.

It is important that we relate what we are doing today to our contemporary circumstances. We are seeking to underline the fact that new evidence can now be brought forward that could only have been dreamed about 20 or even 10 years ago. Forensic science has improved and DNA technology now enables prosecutors and the police to deal with matters that could not have been considered some years ago.

We also seek to remedy the problem of tainted acquittals, many of which result from serious and organised crime. Members had better believe that
those who engage in such crime are serious and organised—they will coerce and threaten jurors and we cannot have that.

At the same time, we have built into the bill the appropriate protections to ensure fairness. The Government has accepted the view that I put forward, which was shared by others, that the general new-evidence exception should be restricted to cases dealt with in the High Court. That will deal with homicides, serious sexual assaults and other offences for which a high-tariff sentence could be expected. The public have the right to expect that such cases will be prosecuted.

There is also a provision whereby a decision to allow a reprosecution can be made only after the Lord Advocate has applied to the Scottish court of criminal appeal and a bench of three judges has decided that that is the appropriate route to take. That is surely a protection in itself. I do not imagine that there will be a rush of such cases. If the experience in England is replicated, not only will there not be a plethora of such cases, there will be very few of them indeed, and that is as it should be.

On more minor matters, the Crown has the option of prosecuting on a charge of attempting to pervert the course of justice, and that is the way forward.

Some members have said some very kind words about me during the debate, and I appreciate that very much indeed. Perhaps uncharacteristically, I propose to say some kind words myself. [Laughter] First, I thank my staff: the Conservative researcher Erin Boyle; Gillian McPherson, who has done a huge amount of work on the legislation that the Justice Committee has considered over the past two years; and, in particular, my parliamentary secretary, Sandra Robinson, who has not only put up with me for the best part of 12 years but done so cheerfully, efficiently and effectively.

I turn to my political colleagues. Some cynic once said that in politics you do not make many friends, but you certainly increase the number and quality of your enemies. I have not found that to be so. I thank the Presiding Officer for his friendship over the years—for more years than either of us would like to remember. Robert Brown said that our political careers have run in tandem but, of course, he tried to puncture my bike way back in 1976, when he fought to prevent me from being elected in the council by-election, my success in which led on to my work as an MSP.

I have old friends and I have newer friends. When I came to the Parliament, I met Cathie Craigie on the Social Inclusion, Housing and Voluntary Sector Committee. I admired her common sense then and I still admire it. Later on, I got to know others, such as Stewart Maxwell, Mike Pringle, James Kelly and Richard Baker, with whom I have no doubt that I will continue to fight like cat and dog on the various media channels. I thank Margo MacDonald for her friendship over the years—Margo is an incomparable individual—and I thank my group colleagues, particularly John Lamont, who have been tremendously supportive over the past four years.

It has been a privilege to serve in the Parliament, which is a quite different and much better place than it was 12 years ago. It is a matter for regret that some members are unlikely to come back, particularly in the case of Robert Brown, whose outstanding contribution the Parliament will miss a great deal, but to all my colleagues I express my best wishes for the future and thank them for their fellowship and friendship over the past 12 years. [Applause.]

11:28

James Kelly (Glasgow Rutherglen) (Lab): I welcome the opportunity to close the stage 3 debate on the Double Jeopardy (Scotland) Bill on behalf of the Labour Party.

It is difficult to follow such a strong speech from Bill Aitken. It is a measure of his class as a parliamentarian that, in his final speech to the Parliament, he was so dignified and made so many strong points about the bill that we are discussing and about his attitude to his colleagues. Today marks the end for him of 35 years of public service. I pay tribute to him for that public service as a councillor in Glasgow, as a Glasgow MSP and as convener of the Justice Committee. He has always been a very fair person, although we have had our disagreements. As the Justice Committee convener, he was always very supportive of other committee members and we saw that in his contribution today. I have a great regard for that. It is also right that his Conservative party colleagues have turned out in such numbers for his final contribution, which was fitting indeed.

I echo the comments that have been made about Robert Brown. If he does not return after the election, it will be a loss to the Parliament and the Liberal Democrats. He has a great deal of experience in justice matters and the constitution. He was a minister for education and he can speak in the Parliament on a breadth of issues. His contribution has been significant during the past 12 years and I wish him all the best for the future.

I also briefly mention Alasdair Morgan who, as Deputy Presiding Officer, chaired the beginning of the debate and who is standing down. It is significant that I have managed to reach the end of
four years in the Parliament and he has never once switched off my microphone.

I pay tribute to Trish Godman, Deputy Presiding Officer, for the way in which she has handled proceedings. She has always been fair and dignified, but perhaps her choice of outfit today shows her true colours. I wish her all the very best as she heads off to the paradise of her retirement.

It is right that this session should close on a debate on the Double Jeopardy (Scotland) Bill, about which there is consensus across the parties. We are passing a serious piece of legislation by, as Stewart Maxwell pointed out, putting the 800-year-old principle of double jeopardy into statute. It is right to build on the work of the Scottish Law Commission and, as Lord Gill said, this is a matter of considerable constitutional significance.

It is also correct that there should be exceptions to the double jeopardy rule and the principal reason for that is that victims and their families must get justice. For someone who has been the victim of a crime or who has lost a family member, there must be no feeling worse than that of not seeing justice done, or seeing someone acquitted when there seems to be evidence against them that could lead to a conviction but which is not allowed by the current law of the land. The main driver for the change must be justice and there is a strong moral argument in favour of that.

We have reached this point in 2011 because tremendous advances in science and DNA technology mean that a lot more information can be made available to retry cases than was the case 20 or 30 years ago. The bill’s principles will also allow the law to be applied consistently and with certainty.

There has been some disquiet in legal circles about the bill’s principles, but the Parliament has considered those issues carefully through all the stages. In its final form, the bill takes the correct position.

On tainted acquittals, it is correct that if someone has acted inappropriately to pervert the course of justice, the case should be brought back to court. The Crown Office and Procurator Fiscal Service got the right balance in its input into the legislation on tainted acquittals.

On admissions, there was some debate in the committee evidence sessions about whether it is right to include admissions when the new information is received pre or post acquittals. The weight of the evidence, including from Victim Support Scotland and the Association of Chief Police Officers in Scotland, supported taking the new evidence regardless of whether it was pre or post acquittal, and for me that is absolutely correct. It gets the balance right.

There has been some discussion about the general new-evidence exception and whether it is correct to apply it. Ultimately, as with so much of this debate, when new evidence comes forward we need to consider the impact on the victims and their family. It is correct to introduce the new-evidence exception.

On the offences to be covered, the Government’s original approach was to draw up a list. I had some sympathy with that approach, but it was discussed at length in the committee at stage 1 and the committee put forward an alternative. That has been fine-tuned by the Government, so that the cases to which the exceptions apply will be those that have been tried at the High Court.

On reflection, I think that is the correct approach, as it captures the correct number of offences and gives the right amount of flexibility to bring appropriate cases forward.

There was quite a bit of discussion at committee about whether another case should be brought when a person is assaulted, someone is acquitted of the assault and the victim subsequently dies. Some concerns were expressed about that but, again, I agree with the approach in the bill.

Appropriate safeguards have been built in to apply before a new investigation could be started. Such an investigation would clearly bring different aspects of evidence, and prosecutors would have to look closely at them to decide whether to bring forward a case.

Retrospectivity is one of the key principles of the bill. It is correct that the new evidence exception should be applied retrospectively. Obviously, the advance in DNA technology means that a lot more data can be acquired and brought forward as evidence than previously. We need only to consider cases such as the Dunlop case that Cathie Craigie has quoted in this and previous debates and which lends great weight to the argument that it is correct to apply exceptions retrospectively.

As there appears to be some time, I will highlight some of the contributions that have been made during the debate.

The cabinet secretary looked back to the debate on double jeopardy that took place just before the 2007 election. He was right to highlight that there were a lot of important contributions in that debate and that, in many ways, it set the scene for the bill.

I was not a member of the Parliament at the time, but I have read the Official Report of that earlier debate and it is interesting to see how the issue has developed through to this closing debate of 2011.

Robert Brown, Stewart Maxwell and Nigel Don have all spoken about the importance of the Justice Committee and the contributions that it has
made. Nigel Don was right to bring out his file—although it might be said that it is one of the lighter files that we have had over the session. Nigel Don is a great supporter of the Justice Committee. He is always telling us how hard we work to examine things diligently. With his display of the folder, he was showing the large amount of work that produced this much smaller bill. That is not in any way a criticism of the bill—legislation worded correctly and succinctly is much easier for legislators and lawmakers to interpret. The Justice Committee, along with civil servants and the ministerial team, has made a tremendous contribution to that.

Cathie Craigie spoke about how opinion has progressed through the years. That is correct. When there is potential for a miscarriage of justice, the internet and 24-hour news mean that there is now a lot more publicity about it, so the concerns of victims are highlighted greatly. That is part of the reason that we have got to the situation that we are in today in passing the bill.

Like others, I pay tribute not just to the Justice Committee, but to the clerking team, which has given us great back-up and support. That has helped tremendously in enabling the committee to look expertly not only at the bill, but at the other aspects of legislation that have been dealt with in the Parliament.

This has been an important debate with which to close the session. There have been serious issues to consider and Scottish Labour firmly supports the passing of the Double Jeopardy (Scotland) Bill at stage 3. It is in the interests of justice, it will instil public confidence and it will ensure the consistent application of the law. With that in mind, we will support the bill at decision time.

11:41

Kenny MacAskill: This has been a remarkably consensual debate, as it should have been for two reasons: first, because it has dealt with the final bill that the Parliament will pass in the current parliamentary session; and secondly, because the Parliament has, in the main, united around the subject.

A great many thanks have been given, and I echo each and every one. As I mentioned in my opening speech, the bill started back in 2007. The issue was raised and commented on by John Lamont and Bill Aitken on behalf of the Conservative party, and we have been happy to work with the Conservatives throughout the bill process. Indeed, John Scott, who is not in the chamber, raised the issue before the bill process commenced.

We recognise that we have come into politics to make Scotland a safer place, and nobody from any political party believes that the bill stands to make Scotland a less safe place or that we would have put forward proposals that would undermine our judiciary, our legal system or the rights of victims. We may disagree on some solutions—indeed, there will be hectic debates on the constitution, the economy and justice matters—but the debate has shown the Parliament at its best and has highlighted the genuine respect with which we can come together to make Scotland a safer place.

There have been disagreements, and not simply between members of the Parliament. For example, the Parliament disagreed with the Scottish Law Commission, which I believe was appropriate. That is not to undermine the Law Commission, which undertook a tremendous piece of work—I echo what other members have said about our great debt of gratitude to Patrick Layden and all those who work with the Law Commission. Nevertheless, we were correct in taking on board the view of many and the broader views of Parliament that retrospectivity, for example, had to be addressed. I echo Stewart Maxwell’s comments on that.

I pay tribute not simply to all those who have contributed to today’s debate, but to all those who have worked towards the passing of the bill. I echo the remarks that have been made about Bill Aitken. He has been thorough and has often been challenging, as I would have expected, but equally he has shown good grace and, more often than not, good humour.

The election will decide Robert Brown’s fate, but I pay tribute to his service. He has been diligent both as a minister and as an Opposition spokesperson. The Government has often had the opportunity to work with him when we have shared his views; where we have disagreed, it has been on points of principle. I wish him well, whatever the outcome of the election may be.

As I said, the bill started its long journey back in 2007, when much public interest was raised by the Lord Advocate’s statement in the chamber following the collapse of the World’s End case. Changes have already been made by this Parliament. The Lord Advocate raised three issues that arose as a consequence of that case. The first issue was the Crown’s right of appeal, which the chamber has addressed. It was wrong that the Crown was fettered in a way that meant that matters could go unchallenged and justice could not be done, at times. The Parliament was right to rise to that challenge. The second issue was double jeopardy, which I hope that we will address at decision time today. A matter remains outstanding around the issue of evidence of similar fact or bad character. That will be canvassed in the electoral debates and is being
investigated by the Law Commission as we speak. I have no doubt that it will come back to this chamber to be decided on at a later stage. However, I think that that represents progress.

As has been mentioned, the provision that we are dealing with today will be used in only an extremely small number of cases. Richard Baker mentioned the situation south of the border, where the numbers are still capable of being counted on two hands. The provision is not to be used lightly; it is to be used sparingly. As John Lamont and others mentioned, it involves a principle that goes back over centuries in our common law and of which we are all proud. However, as James Kelly and others mentioned, it is important that we make changes to reflect scientific changes and the changes in the media. If scientific changes show that there has been a manifest injustice, that has to be acted on. Equally, if people are found to be bragging in the modern media or it comes to light that they have subverted processes, action must be taken.

All of us in this chamber meet youngsters and others to discuss issues. I am frequently asked what is the hardest part of my job, and I have to say that the hardest part of my job is meeting victims, and the hardest part of that part of my job is meeting victims who have received no justice. The buck stops with me, it stopped with my predecessors and it will stop with my successor, if there is to be one. It will be for them to decide. Doubtless, they will have to do exactly what I have done. However, the fact of the matter is that it is difficult to explain to someone that no action will be taken in a case in which there has been a manifest injustice, even though clear evidence has come to light.

Justice must not only be done, it must be seen to be done. There will be instances where justice will not be done because of a lack of evidence, because witnesses cannot be found or simply because evidence cannot be gathered. However, where evidence is available, we cannot stand on ceremony. Clearly, we must ensure that the law balances the interests of the accused.

The provisions will be used sparingly, but they are complex. As Mr Aitken and others mentioned, they could involve cases going back many years, and there could be issues around whether the evidence has been protected and preserved. At stage 1, Mr Brown asked how we can preserve evidence so that we can ensure that the accused has a fair chance. As I said, we are talking not about ensuring that someone is convicted, but about ensuring that there is an opportunity for a retrial; it will be for a judge and a jury to decide whether the evidence is sufficient to justify a conviction. The issue is about delivering justice. That is what we seek to do.

I welcome the spirit in which the issues have been discussed. The issues are complex, particularly those around retrospectivity, which James Kelly and others mentioned. However, as Bill Aitken said, when we drill down, the issues become relatively simple.

It is not sufficient simply to rest on the common law. Given that we have brought in disclosure in other legislation, it is important to ensure that it applies in relation to double jeopardy, even if only in a limited number of cases. As we all know, the issue of disclosure will be revisited by the Justice Committee and perhaps even by this chamber. It is a matter that causes me some angst and concern, especially when I see the amount of paperwork that hard-working police officers who carry out diligent inquiries into serious offences have to produce and the amount of bureaucracy that they have to deal with. I am not sure precisely what the solution is, because nobody—neither the police, nor the Crown nor anyone else—is seeking to make the process more difficult. However, at some stage, we have to have a review because, clearly, something is not correct.

As members across the chamber have said, no Lord Advocate or High Court judge is ever going to assess the need for a new prosecution lightly. A double jeopardy retrial is designed for cases involving manifest injustice, where evidence that comes to light after the initial trial calls the acquittal at that trial into serious doubt. That is not to prejudge the outcome of any new trial: there will be a trial, and the normal rules and requirements for evidence will stand. Rather, it is about providing the fair trial that should have been: the one that was denied to the victim and to society because the full range of evidence was simply not available at that time, as Mike Pringle mentioned.

The hardest job that any of us has to do is to meet a constituent or a citizen who has not been given justice for their family. To continue the existing law and close the door on all such cases would be to continue a situation that is simply incomprehensible and unacceptable to the public at large, and manifestly wrong.

Once again, I express my thanks to all those who have been involved in the process: the Scottish Law Commission; those who responded to the Government’s consultation; members of the Justice Committee and those who gave evidence to it; and those in the clerking and bill teams who have done extremely diligent work.

Together, we will deliver an important reform for the people of Scotland, which will promote confidence in our justice system and pursue persons who attempt to corrupt the trial process, brag about having escaped justice, undermine or suborn jurors or whatever else. As James Kelly and Bill Aitken mentioned, the tentacles of serious
organised crime are dangerous and must be tackled, and those involved cannot be allowed to get away with their guilt.

The reform will allow the fruits of new techniques and advances in science—which are spectacular—to be used to the utmost effect. It will allow justice to be done and to be seen to be done, and will deliver what victims want. That is the obligation on everyone who has the privilege of serving in this chamber.

I once again thank all those members who have been involved—in particular those who will not be returning—for their service, not only in relation to the bill but in relation to the chamber, their constituents and the country.
Double Jeopardy (Scotland) Bill
[AS PASSED]

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Double Jeopardy (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision as to the circumstances in which a person convicted or acquitted of an offence may be prosecuted anew; and for connected purposes.

Double jeopardy

1 Rule against double jeopardy

(1) It is not competent to charge a person who, whether on indictment or complaint (the “original indictment or complaint”), has been convicted or acquitted of an offence (the “original offence”) with—
   (a) the original offence,
   (b) any other offence of which it would have been competent to convict the person on the original indictment or complaint, or
   (c) an offence which—
      (i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and
      (ii) is an aggravated way of committing the original offence.

(2) Subsection (1) is subject to sections 2, 3 and 4 and is without prejudice to sections 107E(3) (prosecutor’s appeal against acquittal: authorisation of new prosecution), 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) and 185 (authorisation of new prosecution) of the 1995 Act.

(3) In this Act, references to a person being “convicted” of an offence are references to—
   (a) the person being found guilty of the offence,
   (b) the prosecutor accepting the person’s plea of guilty to the offence, or
   (c) the court making an order under section 246(3) of the 1995 Act discharging the person absolutely in relation to the offence,

and related expressions are to be construed accordingly.

(4) For the purposes of subsection (3)—
   (a) section 247(1) (conviction of person placed on probation or absolutely discharged deemed not to be a conviction) of the 1995 Act does not apply, and
(b) it is immaterial whether or not sentence is passed.

Exceptions to rule against double jeopardy

2 Tainted acquittals

(1) A person who, whether on indictment or complaint (the “original indictment or complaint”), has been acquitted of an offence (the “original offence”) may, provided that the condition mentioned in subsection (2) is satisfied, be charged with, and prosecuted anew for—

(a) the original offence,

(b) any other offence of which it would have been competent to convict the person on the original indictment or complaint,

(c) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the original offence.

(2) The condition is that the High Court has, on the application of the Lord Advocate—

(a) set aside the acquittal, and

(b) granted authority to bring a new prosecution.

(3) The court may not set aside the acquittal unless it—

(a) is satisfied that the acquitted person or some other person has (or the acquitted person and some other person have) been convicted of an offence against the course of justice in connection with the proceedings on the original indictment or complaint, or

(b) concludes on a balance of probabilities that the acquitted person or some other person has (or the acquitted person and some other person have) committed such an offence against the course of justice.

(4) Where the offence against the course of justice consisted of or included interference with a juror or with the trial judge, the court must set aside the acquittal if it—

(a) is unable to conclude that the interference had no effect on the outcome of the proceedings on the original indictment or complaint, and

(b) is satisfied that it is in the interests of justice to do so.

(5) But the acquittal is not to be set aside if, in the course of the trial, the interference (being interference with a juror and not with the trial judge) became known to the trial judge, who then allowed the trial to proceed to its conclusion.

(6) Where the offence against the course of justice is not one mentioned in subsection (4), the acquittal may be set aside only if the court is satisfied—

(a) on a balance of probabilities as to the matters mentioned in subsection (7), and

(b) that it is in the interests of justice to do so.

(7) The matters referred to in subsection (6)(a) are—

(a) that the offence led to—
(i) the withholding of evidence which, had it been given, would have been capable of being regarded as credible and reliable by a reasonable jury, or
(ii) the giving of false evidence which was capable of being so regarded, and
(b) that the withholding, or as the case may be the giving, of the evidence was likely to have had a material effect on the outcome of the proceedings on the original indictment or complaint.

(8) In this section, “offence against the course of justice” means an offence of perverting, or of attempting to pervert, the course of justice (by whatever means and however the offence is described) and—

(a) includes—

(i) an offence under section 45(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (aiding, abetting, counselling, procuring or suborning the commission of an offence under section 44 of that Act),
(ii) subornation of perjury, and
(iii) bribery,

(b) does not include—

(i) perjury, or
(ii) an offence under section 44(1) of that Act (statement on oath which is false or which the person making it does not believe to be true).

3

Admission made or becoming known after acquittal

(1) A person who, whether on indictment or complaint (the “original indictment or complaint”), has been acquitted of an offence (the “original offence”) may, if the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence,

(b) an offence mentioned in subsection (2) (a “relevant offence”).

(2) A relevant offence is—

(a) an offence (other than the original offence) of which it would have been competent to convict the person on the original indictment or complaint, or

(b) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the original offence.

(3) The conditions are that—

(a) after the acquittal—

(i) the person admits to committing the original offence or a relevant offence, or

(ii) such an admission made by that person before the acquittal becomes known, and

(b) the High Court, on the application of the Lord Advocate, has—
(i) set aside the acquittal, and
(ii) granted authority to bring a new prosecution.

(4) The court may set aside the acquittal only if satisfied—

(b) in the case of an admission such as is mentioned in subsection (3)(a)(ii), that the admission was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of the acquittal in respect of the original offence,

(c) that the case against the person is strengthened substantially by the admission,

(cb) that, on the admission and the evidence which was led at the trial in respect of the original offence, it is highly likely that a reasonable jury properly instructed would have convicted the person of—

(i) the original offence, or
(ii) a relevant offence, and

(d) that it is in the interests of justice to do so.

4 New evidence

(1) A person who, on indictment in the High Court (the “original indictment”), has been acquitted of an offence (the “original offence”) may, if the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—

(a) the original offence,

(b) an offence mentioned in subsection (2) (a “relevant offence”).

(2) A relevant offence is—

(a) an offence (other than the original offence) of which it would have been competent to convict the person on the original indictment, or

(b) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment, and

(ii) is an aggravated way of committing the original offence.

(3) The conditions are that—

(b) there is new evidence that the person committed the original offence or a relevant offence, and

(c) the High Court, on the application of the Lord Advocate, has—

(i) set aside the acquittal, and

(ii) granted authority to bring a new prosecution in the High Court.

(4) For the purposes of subsection (3)(b), evidence which was not admissible at the trial in respect of the original offence but which is admissible at the time the court considers the application under subsection (3)(c) is not new evidence.

(5) Only one application may be made under subsection (3)(c) to set aside the acquittal of an original offence.

(5A) But an application may not be made to set aside the acquittal of an original offence if the person was charged with, and prosecuted anew for, that offence by virtue of this section.
(6) The court may set aside the acquittal only if satisfied that—
   (a) the case against the person is strengthened substantially by the new evidence,
   (b) the new evidence was not available, and could not with the exercise of reasonable
diligence have been made available, at the trial in respect of the original offence,
   (c) on the new evidence and the evidence which was led at that trial, it is highly likely
that a reasonable jury properly instructed would have convicted the person of—
      (i) the original offence, or
      (ii) a relevant offence, and
   (d) it is in the interests of justice to do so.

Exceptions to rule against double jeopardy: common provisions

5 Applications under sections 2, 3 and 4

(1) On making an application under section 2(2), 3(3)(b) or 4(3)(c), the Lord Advocate is to
send a copy of the application to the acquitted person.

(2) The acquitted person is entitled to appear or to be represented at any hearing of the
application.

(3) For the purposes of hearing and determining the application, three of the Lords
Commissioners of Justiciary are a quorum of the High Court (the application being
determined by majority vote of those sitting).

(4) The court may appoint counsel to act as amicus curiae at the hearing in question.

(5) The decision of the court on the application is final.

(6) Subsection (3) is without prejudice to any power of those sitting to remit the application
to a differently constituted sitting of the court (as for example to the whole court sitting
together).

6 Further provision about prosecutions by virtue of sections 2, 3 and 4

(1) This section applies to a new prosecution brought by virtue of section 2, 3 or 4.

(2) The new prosecution may be brought despite the fact that any time limit for the
commencement of proceedings in such a prosecution, other than the time limit
mentioned in subsection (3), has elapsed.

(3) Proceedings in the new prosecution are to be commenced within 2 months after the date
on which authority to bring the prosecution was granted.

(4) For the purposes of subsection (3), proceedings are deemed to be commenced—
   (a) in a case where a warrant to apprehend the accused person is granted—
      (i) on the date on which it is executed, or
      (ii) if it is executed without unreasonable delay, on the date on which it was
           granted, and
   (b) in any other case, on the date on which the accused person is cited.

(5) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has
been brought, the decision under section 2, 3 or 4 setting aside the acquittal has the
effect, for all purposes, of an acquittal.
On granting authority under section 2, 3 or 4 to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.

The provisions of the 1995 Act mentioned in subsection (8) below apply to an accused person who is detained under subsection (6) as they apply to an accused person detained by virtue of being committed until liberated in due course of law.

Those provisions are—
(a) in solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9) (prevention of delay in solemn proceedings), and
(b) in summary proceedings, section 147 (prevention of delay in summary proceedings).

In proceedings in a new prosecution it is competent for either party to lead evidence which it was competent for that party to lead in the proceedings on the original indictment or complaint (the “earlier proceedings”).

But the prosecutor must identify in the indictment or complaint in the new prosecution any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (8A) which would not have been competent but for that subsection.

Where, in a new prosecution, the accused is convicted of an offence, no sentence may be passed in relation to the offence which could not have been passed under the earlier proceedings.

**Plea in bar of trial**

This section applies where a person is charged with an offence—
(a) whether on indictment or complaint,
(b) other than by virtue of—
(i) section 2, 3, 4, 11 or 12, or
(ii) section 107E(3) (prosecutor’s appeal against acquittal: authorisation of new prosecution), 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) or 185 (authorisation of new prosecution) of the 1995 Act.

The person may aver, as a plea in bar of trial, that the offence arises out of the same, or largely the same, acts or omissions as have already given rise to the person being tried for, and convicted or acquitted of, an offence.

The court must sustain the plea if satisfied on a balance of probabilities as to the truth of the person’s averment.

But the court may repel the plea despite being so satisfied if it—
(a) is persuaded by the prosecutor that there is some special reason why the case should proceed to trial, and
(b) determines that it is in the interests of justice to do so.

Subsection (4) is subject to sections 8, 9 and 10.
8 Plea in bar of trial for murder: new evidence and admissions

(1) This section applies where—

(a) a person is charged with murder,

(b) the person avers, as a plea in bar of trial under section 7(2), that the charge arises out of the same, or largely the same, acts or omissions as have already given rise to the person, whether on indictment or complaint (the “original indictment or complaint”), being tried for, and convicted or acquitted of, an offence other than murder, and

(c) the prosecutor asserts, as a special reason why the case should proceed to trial, one of the matters mentioned in subsection (2).

(2) Those matters are that, since the trial on the original indictment or complaint (the “original trial”)—

(a) there is new evidence that the person committed the murder charged,

(b) the person has admitted to committing the murder charged,

(c) such an admission made before the conviction or acquittal at the original trial has become known.

(3) For the purposes of subsection (2)(a), evidence which was not admissible at the original trial but which is admissible at the time the court considers the plea is not new evidence.

(4) For the purposes of determining whether to sustain or repel the plea, three of the Lords Commissioners of Justiciary are a quorum of the High Court (the plea being determined by majority vote of those sitting).

(5) Where the special reason relates to the matter mentioned in subsection (2)(a), the court may repel the plea only if satisfied that—

(a) the case against the person is strengthened substantially by the new evidence,

(b) the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the original trial,

(c) on the new evidence and the evidence which was led at that trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the murder had it been charged, and

(d) it is in the interests of justice to do so.

(6) Where the special reason relates to the matter mentioned in subsection (2)(b) or (c), the court may repel the plea only if satisfied—

(b) in the case of an admission such as is mentioned in subsection (2)(c), that the admission was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of the conviction or acquittal at the original trial,

(ca) that the case against the person is strengthened substantially by the admission,

(cb) that, on the admission 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 of murder, and

(d) that it is in the interests of justice to do so.
Section 5 (other than subsections (1) and (3)) applies to a case to which this section applies as it applies to an application under section 4(3)(c), with the modifications that—

(a) the reference in subsection (2) of that section to the acquitted person is to be read as a reference to the person charged, and

(b) the reference in subsection (6) of that section to subsection (3) is to be read as a reference to subsection (4) of this section.

Plea in bar of trial: nullity of previous trial

This section applies where—

(a) a person avers, as a plea in bar of trial under section 7(2), that the charge arises out of the same, or largely the same, acts or omissions as have already given rise to the person, whether on indictment or complaint (the “original indictment or complaint”), being tried for, and convicted or acquitted of, an offence, and

(b) the prosecutor asserts, as a special reason why the case should proceed to trial, that the trial on the original indictment or complaint (the “original trial”) was a nullity.

Where the proceedings are before—

(a) the sheriff, or

(b) a justice of the peace court,

the sheriff or justice of the peace court must remit the case to the High Court.

Where the proceedings are—

(a) before the High Court, or

(b) are remitted to that court under subsection (2),

the court must determine whether to sustain or repel the plea.

The High Court may repel the plea only if satisfied that—

(a) the original trial was a nullity,

(b) the existence of that trial was not known to the prosecutor before the commencement of the proceedings in which the plea is made, and

(c) it is in the interests of justice to do so.

Plea in bar of trial: previous foreign proceedings

This section applies where the previous trial averred under section 7(2) took place outwith the United Kingdom.

In determining under section 7(4)(b) whether it is in the interests of justice for the case to proceed to trial, the court is in particular to have regard to—

(a) whether the purpose of bringing the person to trial in the foreign country appears to have been to assist the person to evade justice,

(b) whether the proceedings in the foreign country appear to have been conducted—

(i) independently and impartially, and

(ii) in a manner consistent with dealing justly with the person,
(c) whether such sentence (or other disposal) as was or might have been imposed in the foreign country for the offence of the kind of which the person has been convicted or acquitted is commensurate with any that might be imposed for an offence of that kind in Scotland, and

(d) the extent to which the acts or omissions can be considered to have occurred in, respectively—

(i) Scotland,

(ii) the foreign country.

(3) But the court may not repel the plea if permitting the case to proceed to trial would be inconsistent with the obligations of the United Kingdom under Article 54 of the Schengen Convention.

(4) In subsection (3), the “Schengen Convention” means the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985.

11 Eventual death of injured person

(1) This section applies where—

(a) a person (“A”) is, whether on indictment or complaint, convicted or acquitted of an offence (the “original offence”) involving the physical injury of another person (“B”),

(b) after the conviction or acquittal, B dies, apparently from the injury, and

(c) in a case where A was acquitted, the condition mentioned in subsection (2A) is satisfied.

(2) It is competent to charge A with—

(a) the murder of B,

(b) the culpable homicide of B, or

(c) any other offence of causing B’s death.

(2A) The condition referred to in subsection (1)(c) is that, on the application of the prosecutor and after hearing parties, the High Court is satisfied that it is in the interests of justice to proceed as mentioned in subsection (2).

(3) Subsection (4) applies where—

(a) A was convicted of the original offence, and

(b) A is subsequently convicted of an offence mentioned in subsection (2).

(4) The court may—

(a) on the motion of A made immediately on A’s being convicted, and

(b) after hearing the parties on that motion,

quash A’s conviction of the original offence where satisfied that it is appropriate to do so.

(5) A party may appeal to the High Court against the grant or refusal of a motion under subsection (4).
(6) Where A was convicted of the original offence and is subsequently acquitted of an offence mentioned in subsection (2), A may appeal against the conviction under section 106(1)(a) or, as the case may be, section 175(2)(a) of the 1995 Act.

(7) An appeal may be brought by virtue of subsection (6) despite the fact that A, before the acquittal mentioned in that subsection—
(a) had appealed, or
(b) had been refused leave to appeal,
against the conviction or against any other matter mentioned in section 106(1) or 175(2) of the 1995 Act in relation to the original offence.

(8) Sections 121 and 193 of the 1995 Act do not apply in relation to an appeal under subsection (6).

12 Nullity of proceedings on previous indictment or complaint

(1) This section applies where—
(a) a person has, whether on indictment or complaint, been charged with, and acquitted or convicted of, an offence, and
(b) the condition mentioned in subsection (3) is satisfied.

(2) The person may be charged with, and prosecuted anew for, the offence.

(3) The condition referred to in subsection (1)(b) is that, on the application of the prosecutor and after hearing parties, the High Court is satisfied that—
(a) the proceedings on the indictment or complaint were a nullity, and
(b) it is in the interests of justice to proceed as mentioned in subsection (2).

Disclosure of information

12A Disclosure of information

(1) Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) (disclosure of information) is amended as follows.

(2) After section 140 (review of ruling under section 139) insert—
"Disclosure in relation to 2011 Act proceedings

140A Sections 140B to 140F: interpretation

In sections 140B to 140F—

"2011 Act" means the Double Jeopardy (Scotland) Act 2011 (asp 00),

"2011 Act proceedings" means—
(a) an application under section 2(2), section 3(3)(b) or section 4(3)(c) of the 2011 Act to set aside a person’s acquittal and grant authority for a new prosecution,
(b) an application under subsection (2A) of section 11 of that Act to charge a person as mentioned in subsection (2) of that section,
(c) an application under subsection (3) of section 12 of that Act to charge, and prosecute anew, a person as mentioned in subsection (2) of that section,
“respondent” means the person to whom the 2011 Act proceedings relate.

140B Duty to disclose on institution of 2011 Act proceedings

(1) This section applies where 2011 Act proceedings are instituted in relation to a respondent.

(2) As soon as practicable after the relevant act the prosecutor must—

(a) review all information of which the prosecutor is aware that relates to the 2011 Act proceedings, and

(b) disclose to the respondent any information that falls within subsection (3).

(3) Information falls within this subsection if it is—

(a) information that the prosecutor was required by virtue of section 121(2)(b), 123(2)(b), 133(2)(b), 134(2)(b), 136(2), 137(2) or 138(2) to disclose in, or in relation to, the first proceedings but did not disclose,

(b) information to which, during the first proceedings, the prosecutor considered paragraph (a) or (b) of section 121(3) or subsection (3) of section 133 did not apply but to which the prosecutor now considers one or both of those paragraphs or that subsection would apply,

(c) information of which the prosecutor has become aware since the disposal of the first proceedings that, had the prosecutor been aware of it during or after those proceedings, the prosecutor would have been required to disclose by virtue of section 121(2)(b), 123(2)(b), 133(2)(b), 134(2)(b), 136(2), 137(2) or 138(2), or

(d) information of which the prosecutor has become aware since the disposal of the first proceedings, other than information that falls within paragraph (c), which—

(i) would materially weaken or undermine the evidence that is likely to be led or relied on by the prosecutor in the 2011 Act proceedings involving the respondent,

(ii) would materially strengthen the respondent’s case, or

(iii) is likely to form part of the evidence to be led or relied on by the prosecutor in the 2011 Act proceedings involving the respondent.

(4) The prosecutor need not disclose under subsection (2)(b) anything that the prosecutor has already disclosed to the respondent.

(5) In this section—

“appellate proceedings” has the meaning given by section 132,

“first proceedings”, in relation to 2011 Act proceedings, means the proceedings (including any appellate proceedings or other appeal) in or as a result of which the respondent was convicted or acquitted,

“relevant act” means the making of the application under section 2(2), 3(3)(b), 4(3)(c), 11(2A) or 12(3) of the 2011 Act.
140C  Continuing duty of prosecutor

(1) This section applies where—
   (a) the prosecutor has complied with section 140B(2) in relation to a respondent, and
   (b) during the relevant period, the prosecutor becomes aware of information which relates to the 2011 Act proceedings and falls within section 140B(3).

(2) The prosecutor must disclose to the respondent any information that falls within section 140B(3).

(3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the respondent.

(4) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

(5) In subsection (1), “relevant period” means the period—
   (a) beginning with the prosecutor’s compliance with section 140B(2), and
   (b) ending with the relevant conclusion.

(6) In subsection (5), “relevant conclusion” means the disposal or abandonment of the 2011 Act proceedings.

140D  Application to prosecutor for further disclosure

(1) This section applies where—
   (a) the prosecutor has complied with section 140B(2) in relation to a respondent, and
   (b) the respondent lodges a further disclosure request—
      (i) during the preliminary period, or
      (ii) if the court on cause shown allows it, after the preliminary period but before the relevant conclusion.

(2) A further disclosure request must set out—
   (a) the nature of the information that the respondent wishes the prosecutor to disclose, and
   (b) the reasons why the respondent considers that disclosure by the prosecutor of any such information is necessary.

(3) As soon as practicable after receiving a copy of the further disclosure request the prosecutor must—
   (a) review any information of which the prosecutor is aware that relates to the request, and
   (b) disclose to the respondent any of that information that falls within section 140B(3).

(4) The prosecutor need not disclose under subsection (3)(b) anything that the prosecutor has already disclosed to the respondent.

(5) In this section—
“preliminary period”, in relation to the 2011 Act proceedings concerned, means the period beginning with the relevant act and ending with the beginning of the hearing of the 2011 Act proceedings,

“relevant act” has the meaning given by section 140B(5),

“relevant conclusion” has the meaning given by section 140C(6).

Court rulings on disclosure: 2011 Act proceedings

140E Application by respondent for ruling on disclosure

(1) This section applies where the respondent—

(a) has made a further disclosure request under section 140D, and

(b) considers that the prosecutor has failed, in responding to the request, to disclose to the respondent an item of information falling within section 140B(3) (the “information in question”).

(2) The respondent may apply to the court for a ruling on whether the information in question falls within section 140B(3).

(3) An application under subsection (2) is to be made in writing and must set out—

(a) a description of the information in question, and

(b) the respondent’s grounds for considering that the information in question falls within section 140B(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 140B(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the respondent an opportunity to be heard before determining the application.

(7) On determining the application, the court must make a ruling on whether the information in question, or any part of the information in question, falls within section 140B(3).

(8) In this section and in section 140F, “the court” means the High Court.

(9) Except where it is impracticable to do so, the application is to be assigned to the judge or judges who are to hear the 2011 Act proceedings.

140F Review of ruling under section 140E

(1) This section applies where—

(a) a court has made a ruling under section 140E that an item of information (the “information in question”) does not fall within section 140B(3), and

(b) during the relevant period—
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(i) the respondent becomes aware of information ("secondary information") that was unavailable to the court at the time it made its ruling, and

(ii) the respondent considers that, had the secondary information been available to the court at that time, it would have made a ruling that the information in question does fall within section 140B(3).

(2) The respondent may apply to the court which made the ruling for a review of the ruling.

(3) An application under subsection (2) is to be made in writing and must set out—

(a) a description of the information in question and the secondary information, and

(b) the respondent's grounds for considering that the information in question falls within section 140B(3).

(4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.

(5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—

(a) comply with subsection (3), or

(b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 140B(3).

(6) At a hearing appointed under subsection (4), the court must give the prosecutor and the respondent an opportunity to be heard before determining the application.

(7) On determining the application, the court may—

(a) affirm the ruling being reviewed, or

(b) recall that ruling and make a ruling that the information in question, or any part of the information in question, falls within section 140B(3).

(8) Except where it is impracticable to do so, the application is to be assigned to the judge or judges who dealt with the application for the ruling that is being reviewed.

(9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.

(10) In this section, "relevant period", in relation to a respondent, means the period—

(a) beginning with the making of the ruling being reviewed, and

(b) ending with the relevant conclusion.

(11) In subsection (10), "relevant conclusion" has the meaning given by section 140C(6)."
13 **General**

13A **Retrospective application of Act**

For the purposes of sections 1 to 4 and 7 to 12, it is immaterial whether the conviction or, as the case may be, acquittal referred to in each of those sections was before or after the coming into force of this Act.

13A **Transitional provision etc.**

(1) The Scottish Ministers may by order made by statutory instrument make such provision as they consider necessary or expedient for transitional, transitory or saving purposes in connection with the coming into force of section 12A or paragraphs 18 to 35 of schedule 2.

(2) An order under subsection (1) may modify any enactment (including this Act).

(3) A statutory instrument containing an order under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) But no order under subsection (1) which contains provisions which add to, replace or omit any part of the text of an Act may be made unless a draft of the statutory instrument containing it has been laid before and approved by resolution of the Scottish Parliament.

15 **Consequential amendments**

Schedule 2, which makes amendments of enactments consequential on the provisions of this Act, has effect.

16 **Short title, interpretation and commencement**

(1) The short title of this Act is the Double Jeopardy (Scotland) Act 2011.

(2) In this Act, the “1995 Act” means the Criminal Procedure (Scotland) Act 1995 (c.46).

(3) This Act, except this section, comes into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.
Schedule 2—Consequential amendments

Contempt of Court Act 1981

Schedule 1 to the Contempt of Court Act 1981 (c.49) (times when proceedings are active for the purposes of section 2 of that Act) is amended as follows.

1 After paragraph 1 (meaning of “criminal proceedings” and “appellate proceedings”), insert—

“1ZA Proceedings under the Double Jeopardy (Scotland) Act 2011 (asp 00) are criminal proceedings for the purposes of this Schedule.”.

2 In paragraph 4 (initial steps of criminal proceedings), after sub-paragraph (e) insert—

“(f) the making of an application under section 2(2) (tainted acquittals), 3(3)(b) (admission made or becoming known after acquittal), 4(3)(c) (new evidence), 11(2A) (eventual death of injured person) or 12(3) (nullity of previous proceedings) of the Double Jeopardy (Scotland) Act 2011 (asp 00).”.

3 In paragraph 5 (conclusion of criminal proceedings), after sub-paragraph (c) insert—

“(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f)—

(i) by refusal of the application;

(ii) if the application is granted and within the period of 2 months mentioned in section 6(3) of the Double Jeopardy (Scotland) Act 2011 (asp 00) a new prosecution is brought, by acquittal or, as the case may be, by sentence in the new prosecution.”.

4 In paragraph 7 (discontinuance of proceedings), after sub-paragraph (c) insert—

“(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f) and the application is granted, if no new prosecution is brought within the period of 2 months mentioned in section 6(3) of the Double Jeopardy (Scotland) Act 2011 (asp 00).”.

Criminal Procedure (Scotland) Act 1995

The Criminal Procedure (Scotland) Act 1995 (c.46) is amended as follows.

8 In section 94 (transcripts of record and documentary productions), after subsection (2A) insert—

“(2AA) Subsection (2A) applies to a person mentioned in subsection (2AB) as it applies to a person convicted at the trial, with the modification that the reference to the transcript in subsection (2A) is to be construed as a reference to the transcript of the record made of proceedings at the trial resulting in the acquittal mentioned in subsection (2AB)(b).

(2AB) The person mentioned in subsection (2AA) is a person who—

(a) is convicted of the offence mentioned in subsection (1) of section 11 of the Double Jeopardy (Scotland) Act 2011 (asp 00));
(b) is subsequently acquitted of an offence mentioned in subsection (2) of that section; and

c) desires to appeal, under subsection (6) of that section, against the conviction of the offence mentioned in paragraph (a).

In section 107 (leave to appeal), after subsection (2) insert—

“(2A) In respect of an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00), the “report under section 113” in subsection (2)(c) means—

(a) the report of the judge who presided at the trial resulting in the appellant’s acquittal for an offence mentioned in section 11(2) of that Act;

(b) where an appeal against conviction was taken before that acquittal, the report of the judge who presided at the trial resulting in the conviction in respect of which leave to appeal is sought prepared at that time; and

(c) any other report of that judge furnished under section 113.”.

In section 109 (intimation of intention to appeal), after subsection (1) insert—

“(1A) Where a person desires to appeal under section 106(1)(a) of this Act by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00), subsection (1) applies with the following modifications—

(a) for the words “two weeks of the final determination of the proceedings” substitute “two weeks of the date on which the person is acquitted of an offence mentioned in section 11(2) of the Double Jeopardy (Scotland) Act 2011 (asp 00)”; and

(b) the reference to identifying the proceedings is to be construed as a reference to identifying—

(i) the proceedings which resulted in the conviction desired to be appealed; and

(ii) the proceedings which resulted in the person’s acquittal as mentioned in section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00).

(1B) Subsections (5) to (9) of section 106 of this Act do not apply where the modifications specified in subsection (1A) apply.”.

In section 110 (note of appeal), after subsection (3) insert—

“(3A) In respect of a written note of appeal relating to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00)—

(a) subsection (1) applies as if the reference to the judge who presided at the trial were a reference to—

(i) the judge who presided at the trial resulting in the conviction to which the written note of appeal relates; and

(ii) the judge who presided at the trial for an offence mentioned in section 11(2) of that Act resulting in the convicted person’s acquittal; and
(b) subsection (3)(a) applies as if the reference to the proceedings were a reference to—

(i) the proceedings which resulted in the conviction to which the written note of appeal relates; and

(ii) the proceedings which resulted in the convicted person’s acquittal.”.

12 In section 113 (judge’s report)—

(a) in subsection (1), at the beginning, insert “Subject to subsections (1A) to (1D),”.

(b) after subsection (1) insert—

“(1A) Subsections (1B) to (1D) apply where the copy note of appeal mentioned in subsection (1) relates to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00).

(1B) The reference in subsection (1) to the judge who presided at the trial is to be construed as a reference to—

(a) the judge who presided at the trial for an offence mentioned in section 11(2) of that Act resulting in the appellant’s acquittal; and

(b) where subsection (1C) applies, the judge who presided at the trial resulting in the conviction to which the copy note of appeal relates.

(1C) This subsection applies—

(a) where, in connection with the appeal, the High Court calls for the report to be furnished by the judge mentioned in subsection (1B)(b); and

(b) it is reasonably practicable for the judge to furnish the report.

(1D) For the purposes of subsections (1) to (1C), it is irrelevant whether or not the judge mentioned in subsection (1B)(b) had previously furnished a report under subsection (1).”,

(c) in subsection (3), for “subsection (1)” substitute “subsections (1) to (1D)”.

13 In section 118 (disposal of appeals), after subsection (1) insert—

“(1A) Where an appeal against conviction is by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00), paragraph (c) of subsection (1) does not apply.”.

14 After section 176 insert—

“176A Application of section 176 in relation to certain appeals

(1) Section 176 applies in relation to an appeal under section 175(2)(a) by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00) with the following modifications.

(2) In subsection (1)(a), for the words “one week of the final determination of the proceedings” substitute “one week of the date on which the appellant is acquitted of an offence mentioned in section 11(2) of the Double Jeopardy (Scotland) Act 2011 (asp 00)”. 

(3) In subsection (2), the reference to the proceedings is to be construed as a reference to the proceedings resulting in the appellant’s acquittal as mentioned in section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00).
(4) In subsection (5), the reference to the inferior court is to be construed as a reference to the court which acquitted the appellant of an offence under section 11(2) of the Double Jeopardy (Scotland) Act 2011 (asp 00).”.

15 In section 178 (stated case: preparation of draft), after subsection (1) insert—

“(1A) Where an application for a stated case under section 176 of this Act relates to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00)—

(a) the reference in subsection (1) to the final determination of proceedings is to be construed as a reference to the date on which the appellant is acquitted of an offence mentioned in section 11(2) of that Act; and

(b) the reference in subsection (1)(b) to the judge who presided at the trial is to be construed as a reference to the judge who presided at the trial resulting in the conviction in respect of which the application for a stated case is made.”.

16 In section 179 (stated case: adjustment and signature), after subsection (10) insert—

“(11) In relation to a draft stated case under section 178 of this Act relating to an appeal by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00)—

(a) the reference in subsection (1) to the court is to be construed as a reference to the court by which the appellant was convicted; and

(b) the references in this section to the judge are to be construed as references to the judge who presided at the trial resulting in that conviction.”.

17 In section 183 (stated case: disposal of appeal), after subsection (1) insert—

“(1A) Where an appeal against conviction is by virtue of section 11(6) of the Double Jeopardy (Scotland) Act 2011 (asp 00), paragraphs (a) and (d) of subsection (1) do not apply.”.

Criminal Justice and Licensing (Scotland) Act 2010

18 Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) is amended as follows.

19 In section 116 (meaning of “information”)—

(a) after subsection (2) insert—

“(2A) In this Part, “information”, in relation to 2011 Act proceedings, includes material of any kind given to or obtained by the prosecutor in connection with those proceedings or the first proceedings.”,

(b) after subsection (3) insert—

“(3A) In subsection (2A)—

“2011 Act proceedings” has the meaning given by section 140A,

“first proceedings” has the meaning given by section 140B(5).”.

20 In section 141 (application for section 145 order)—

(a) in subsection (1), for “or (3)” substitute “, (3) or (3A)”,
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(b) after subsection (3) insert—

“(3A) The conditions are that—

(a) by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b) the prosecutor is required to disclose an item of information to a respondent,

(b) the information is not likely to form part of the evidence to be led or relied on by the prosecutor in the proceedings, and

(c) the prosecutor considers that subsection (4) applies.”

21 In section 142 (application for non-notification order or exclusion order)—

(a) in subsection (2), after “concluded)” insert “or to 2011 Act proceedings”,

(b) in subsection (8)—

(i) for the definition of “accused” substitute—

““accused” includes—

(a) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, the appellant or other person to whom the prosecutor is required to disclose the item of information, and

(b) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3A) of that section being met, the respondent,”

(ii) after the definition of “appellant” insert—

““respondent” has the meaning given by section 140A.”.

22 In section 143 (application for non-notification order and exclusion order), in subsection (11), for the words from “include” to the end substitute “include—

(a) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial, and

(b) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3A) of that section being met, references to the respondent receiving a fair hearing in the 2011 Act proceedings.”.

23 In section 145 (application for section 145 order: determination)—

(a) in subsection (2)(c)—

(i) omit “or” immediately following sub-paragraph (i), and

(ii) after sub-paragraph (ii) insert “or

(iii) where the application for the section 145 order is made by virtue of section 141(3A), whether the conditions in subsection (4A) apply,”,

(b) in subsection (2)(d), for “or, as the case may be, (4)” substitute “, (4) or, as the case may be, (4A)”,

(c) after subsection (4), insert—

“(4A) The conditions are—
(a) that by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b) the prosecutor is required to disclose an item of information to a respondent,

(b) the information is not likely to form part of the evidence to be led or relied on by the prosecutor in the proceedings,

(c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(d) that withholding the item of information is not inconsistent with the respondent’s receiving a fair hearing in the 2011 Act proceedings to which the item relates, and

(e) that the public interest would be protected only if a section 145 order were to be made.”,

(d) in subsection (5)(a), for “or, as the case may be, paragraph (c) of subsection (4)” substitute “, paragraph (c) of subsection (4) or, as the case may be, paragraph (c) of subsection (4A)”.

(c) in subsection (6) for “or, as the case may be, (4)” substitute “, (4) or, as the case may be, (4A)”.

24 In section 146 (order preventing or restricting disclosure: application by Secretary of State)—

(a) in subsection (1), for “or (4)” substitute “, (4) or (4A)”,

(b) after subsection (4) insert—

“(4A) The condition is that the prosecutor proposes to disclose to a respondent information which the prosecutor is required to disclose by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b).”,

(c) in subsection (6)—

(i) in paragraph (c), for “or (3)” substitute “, (3) or (4A)”,

(ii) omit “or” immediately following paragraph (d)(i),

(iii) after paragraph (d)(ii) insert “or

(iii) where the application for the section 146 order is made by virtue of subsection (4A), whether the conditions in subsection (8A) apply,”, and

(iv) in paragraph (e), for “or, as the case may be, (8)” substitute “, (8) or, as the case may be, (8A)”,

(d) after subsection (8) insert—

“(8A) The conditions are—

(a) that by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b) the prosecutor is required to disclose an item of information to a respondent,

(b) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

(c) that withholding the item of information is not inconsistent with the respondent’s receiving a fair hearing in the 2011 Act proceedings to which the item relates, and
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(d) that the public interest would be protected only if a section 146 order of the type mentioned in subsection (10) were to be made.”,

(e) in subsection (9)(a), for “or, as the case may be, paragraph (b) of subsection (8)” substitute “, paragraph (b) of subsection (8) or, as the case may be, paragraph (b) of subsection (8A)”,

(f) in subsection (10), for “or, as the case may be, (8)” substitute “, (8) or, as the case may be (8A)”,

(g) in subsection (13)—

(i) for the definition of “accused” substitute—

““accused” includes—

(a) where subsection (3) or (4) applies, the appellant or other person to whom the prosecutor is required to disclose the item of information, and

(b) where subsection (4A) applies, the respondent,”,

(ii) after the definition of “appellant” insert—

““respondent” has the meaning given by section 140A.”,

(h) in subsection (14), for the words from “include” to the end substitute “include—

(a) where subsection (3) or (other than in relation to an accused) (4) applies, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial, and

(b) where subsection (4A) applies, references to the respondent receiving a fair hearing in the 2011 Act proceedings.”.

In section 147 (application for ancillary orders: Secretary of State), in subsection (2), after “concluded)” insert “or to 2011 Act proceedings”,

In section 150 (special counsel), in subsection (10)—

(a) for the definition of “accused” substitute—

““accused” includes—

(a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and

(b) respondent,”,

(b) after the definition of “non-notification case” insert—

““respondent” has the meaning given by section 140A,.”.

In section 152 (role of special counsel), after subsection (5) insert—

“(5A) In subsection (1), the reference to the accused receiving a fair trial includes reference to the respondent receiving a fair hearing in the 2011 Act proceedings.”.

In section 153 (appeals), in subsection (10)—

(a) for the definition of “accused” substitute—

““accused” includes—
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(a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and

(b) respondent,”,

(b) after the definition of “appellant” insert—

“respondent” has the meaning given by section 140A.”.

29 In section 155 (review of section 145 order)—

(a) in subsection (6), after “145(3)” insert “or (4A)”;

(b) in subsection (8)—

(i) for the definition of “accused” substitute—

“accused” includes—

(a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and

(b) respondent,”;

(ii) after the definition of “relevant period” insert—

“respondent” has the meaning given by section 140A,”;

(c) in subsection (9)—

(i) omit “or” immediately following paragraph (g),

(ii) after paragraph (h) insert “, or

(i) the 2011 Act proceedings are disposed of or abandoned.”;

(d) after subsection (10) insert—

“(11) In its application to proceedings involving a respondent, subsection (9) is to be read as if paragraphs (a) to (h) were omitted.”.

30 In section 156 (review of section 146 order)—

(a) in subsection (8)—

(i) for the definition of “accused” substitute—

“accused” includes—

(a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and

(b) respondent,”;

(ii) after the definition of “relevant period” insert—

“respondent” has the meaning given by section 140A,”;

(b) in subsection (9)—

(i) omit “or” immediately following paragraph (g),

(ii) after paragraph (h) insert “, or

(i) the 2011 Act proceedings are disposed of or abandoned.”;

(c) after subsection (10) insert—
“(11) In its application to proceedings involving a respondent, subsection (9) is to be read as if paragraphs (a) to (h) were omitted.”.

31 In section 158 (applications and reviews: general provisions)—
   (a) in subsection (4), after paragraph (b) insert—
   “(c) if the 2011 Act proceedings to which the application or review relates are continuing, to the same judge or judges as have been (or are to be) assigned to those proceedings.”,
   (b) in subsection (5), for “or, as the case may be, other person” substitute “, other person or, as the case may be, respondent”,
   (c) for subsection (6) substitute—
   “(6) In this section—
   “appellant” and “appellate proceedings have the meanings given by section 132,
   “respondent” has the meaning given by section 140A.”.

32 In section 160 (means of disclosure), in subsection (9)—
   (a) for the definition of “accused” substitute—
   “‘accused’ includes—
   (a) appellant or, in any case relating to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and
   (b) respondent,”,
   (b) after the definition of “appellant” insert—
   “‘respondent” has the meaning given by section 140A.”.

33 In section 162 (confidentiality of disclosed information), for subsection (8) substitute—
   “(8) In this section—
   “accused” includes—
   (a) where information is disclosed by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2), the appellant or, as the case may be, person to whom the prosecutor is required to disclose the information, and
   (b) where information is disclosed by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b), the respondent,
   “respondent” has the meaning given by section 140A.”.

34 In section 166 (abolition of common law rules about disclosure)—
   (a) in subsection (3)—
   (i) for “and 139” substitute “, 139 and 140E”,
   (ii) for “or appellant” substitute “, appellant or respondent”,
   (b) in subsection (4)—
   (i) for “or the appellant” substitute “, the appellant or the respondent”,
   (ii) for “or 139” substitute “, 139 or 140E”,

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(iii) omit “or” immediately following paragraph (a),
(iv) after paragraph (b) insert “, or
   (c) information does not fall within section 140B(3).”,
(c) in subsection (5), for “or, as the case may be, the appellant,” substitute “, the
   appellant or, as the case may be, the respondent”,
(d) in subsection (6)—
   (i) after “accused” insert “or the respondent”,
   (ii) for “or 139” substitute “, 139 or 140E”,
(e) in subsection (7)—
   (i) for “or, as the case may be, the appellant” substitute “, the appellant or, as
       the case may be, the respondent”,
   (ii) for “or 139” substitute “, 139 or 140E”,
(f) for subsection (8) substitute—
   “(8) In this section—
   “appellant” has the meaning given by section 132,
   “respondent” has the meaning given by section 140A.”.
In section 167 (interpretation of Part 6)—
(a) in subsection (3)—
   (i) for “or the appellant or other person” substitute “, the appellant or other
       person or the respondent”,
   (ii) for “or, as the case may be, the appellant or other person” substitute “, the
       appellant or other person or, as the case may be, the respondent”,
   (iii) in paragraph (e), after “145(4)(a)” insert “, (4A)(a)”,
   (iv) in paragraph (f), after “(8)(c)” insert “, (8A)(c)”,
(b) after subsection (5) insert—
   “(6) References in the following sections to the respondent include references to a
       solicitor or advocate acting on behalf of the respondent—
       (a) section 140B(2)(b) and (4),
       (b) section 140C(1)(a), (2) and (3),
       (c) section 140D(1), (2), (3)(b) and (4).”.

Double Jeopardy (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision as to the circumstances in which a person convicted or acquitted of an offence may be prosecuted anew; and for connected purposes.

Introduced by: Kenny MacAskill
On: 7 October 2010
Bill type: Executive Bill