This document relates to the Double Jeopardy (Scotland) Bill as amended at Stage 2 (SP Bill 59A)

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 Report² 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.

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 repsecure. 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. 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.