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 concluded 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)
Order 2008\(^6\). 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**

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<tr>
<th>Power conferred on:</th>
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**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.

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\(^6\)2008 No. 1769 (N.I.2) [http://www.legislation.gov.uk/nisi/2008/1769/contents](http://www.legislation.gov.uk/nisi/2008/1769/contents), section 81 and paragraphs 30 and 31 of schedule 1
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