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.
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).

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1 Scot Law Com No. 218
These documents relate to the Double Jeopardy (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 7 October 2010

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 fresh 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 to 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 re prosecute. 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 on 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\(^4\).

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.

\(^4\) 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)).

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**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\(^5\). 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 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\(^9\). 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 £31,10610).

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.

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10 SPS, Annual Report 2009-10
These documents relate to the Double Jeopardy (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 7 October 2010

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.”

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


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