DOUBLE JEOPARDY (SCOTLAND) BILL

POLICY MEMORANDUM

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](http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0222-02.htm#Col32373)
“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

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\(^9\), 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
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.10

16. The consultation paper11 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
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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 afflicted by prejudicial publicity. However, the consultation paper\(^\text{13}\) 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\(^\text{14}\).

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\(^\text{15}\). 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.
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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.
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\(^\text{16}\). 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\(^\text{17}\). 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.

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18 See Scottish Government consultation paper on double jeopardy, paras. 2.7-2.9
This document relates to the Double Jeopardy (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 7 October 2010

DOUBLE JEOPARDY (SCOTLAND) BILL

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