

DOUBLE JEOPARDY (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Disclosure of information

Section 13 Disclosure of information

66. This section inserts sections 140A to 140F into Part 6 of the 2010 Act. These sections deal with the disclosure of information to persons subject to applications under sections 2, 3, 4, 11 or 12 of this Act.
67. The new sections are based upon the provisions in Part 6 of the 2010 Act that establish a statutory disclosure regime. The amendments are focused upon the obligation of the Crown to give a person accused of a crime fair notice of the case. This means not only disclosing the information which is likely to form part of the evidence to be led by the prosecutor but also that information which would materially weaken or undermine the prosecutor's case or materially strengthen the accused's case.
68. The new sections are focused upon applications to the High Court for a new trial under this Act. These are the applications made under sections 2, 3, 4, 11 and 12 of this Act. New section 140A is an interpretation section and defines these applications as "2011 Act proceedings" for the purposes of Part 6 of the 2010 Act. The section also describes the person subject to an application as a "respondent". This is because for some proceedings (e.g. under sections 3 and 4 of this Act) the subject of the application has been acquitted. The equivalent terminology used elsewhere in Part 6 of the 2010 Act ("accused") would not always be appropriate.
69. New sections 140A to 140F therefore focus upon "2011 Act proceedings" as applications to the High Court for a new trial. They are not concerned with disclosure at any new trial that subsequently occurred as a result of a successful application. Those trials would be regulated by Part 6 of the 2010 Act in the same way as any other trial.
70. New section 140B sets out the prosecutor's duty to disclose information in 2011 Act proceedings. Subsection (2) of section 140B confirms that the prosecutor has a duty to review all the information that may be relevant to the case for or against the respondent of which the prosecutor is aware. Having done so the prosecutor must disclose to the respondent any information described in subsection (3).
71. Subsection (3) of section 140B sets out the rules which determine whether the information must be disclosed by the prosecutor. If subsection (3) applies to any of that information then the prosecutor must, subject to the provisions concerning the non disclosure of sensitive information, disclose all such information to the respondent. If subsection (3) does not apply to any of that information, then the prosecutor need not disclose that information to the respondent. The information and the associated duty on the prosecutor can be summarised under 4 headings: to disclose in relation to first proceedings that which was not previously disclosed; to disclose that which was not considered necessary at first proceedings to disclose but which is now thought necessary; to disclose additional information that has come to light since the first

*These notes relate to the Double Jeopardy (Scotland) Act
2011 (asp 16) which received Royal Assent on 27 April 2011*

proceedings; and finally to disclose particular information that relates to the 2011 Act proceedings. This is particularly important in double jeopardy situations, for example where the application is, under section 4, based upon the discovery of new evidence. It is important that the respondent has sight of that new evidence at the application stage.

72. New section 140C ensures that the prosecutor has a continuing duty to disclose information throughout 2011 Act proceedings.
73. New section 140D provides that the prosecutor must respond to further requests for disclosure of information made by the respondent in 2011 Act proceedings. This section enables a respondent to apply to the prosecutor to seek the disclosure of information which has not already been disclosed in terms of section 140B(2). Subsection (2) requires the respondent to set out the nature of the information that the respondent wishes the prosecutor to disclose and the reasons why he or she considers that disclosure by the prosecutor is necessary. Subsection (3) places a duty on the prosecutor, as soon as practicable after receiving the further disclosure request, to review any information which he or she is aware of that relates to the request and disclose to the respondent any information which meets the tests set out in subsection (3) of section 140B and that has not previously been disclosed.
74. New section 140E allows the respondent to apply to the court to rule on a disputed issue on whether particular information should be disclosed. Subsection (2) allows a respondent to contest a prosecutor's decision not to disclose an item of information in response to a request for further disclosure in terms of section 140D. The basis upon which the respondent would do so would be that the prosecutor had failed to disclose information that satisfies the prosecutor's duty to disclose in 2011 Act proceedings. Subsection (3) provides the content of the respondent's written application to the court. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the appointment of a hearing and the disposals available to the court. By subsection (9) it is provided that except where it is impracticable to do so the application should be assigned to the judge or judges who are to hear the proceedings under this Act.
75. New section 140F allows the respondent to apply to the court to review an earlier ruling in terms of section 140E where secondary information subsequently becomes available. Such an application can be made if the respondent becomes aware of further information following the ruling and considers that had this further information been available to the court at the earlier hearing, the court would have made a ruling to disclose the requested information. Subsection (3) provides the content of the respondent's written application to the court. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the appointment of a hearing and the disposals available to the court. By subsection (8) it is provided that except where it is impracticable to do so the application should be assigned to the judge or judges who considered the application for the ruling which is now to be reviewed.