

# **DOUBLE JEOPARDY (SCOTLAND) ACT 2011**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### *Double jeopardy*

#### *Section 1 Rule against double jeopardy*

5. This section places onto a statutory footing the general rule against double jeopardy i.e. that a person should not be prosecuted on more than one occasion for the same offence.
6. Subsection (1) restates the rule against double jeopardy. It provides that, where someone has been convicted or acquitted of an offence, it is not possible to charge the person again with the same offence or any other offence of which it would have been competent to convict on the original indictment or complaint. Subsection (1)(c) further provides that it is also not competent to charge the person again with an offence which arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint and is an aggravated way of committing the original offence. The section does not prevent a person from being tried for murder or culpable homicide where the victim dies after that person's conviction or acquittal of assault, since murder and culpable homicide are not aggravated ways of committing assault but separate crimes; such prosecutions are regulated by section 11. Similarly, it does not prohibit the charging of a person for murder who has previously been tried for culpable homicide arising out of the same act or omission, provided that murder was not charged at the earlier trial (however, such a charge could result in a plea in bar of trial under section 7(2)).
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 Act, or under existing provisions whereby a new prosecution is authorised by the High Court following appeal (those provisions are set out in the 1995 Act)
8. Subsections (3) and (4) define what is meant by conviction of an offence 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(3) of the 1995 Act 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 14](#) 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 14 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 [Criminal Law \(Consolidation\) \(Scotland\) Act 1995 \(c.39\)](#). This is because the assessment of whether a witness is guilty of perjury is a part of the normal trial process in a way that external interference is not (see paragraph 3.10 of the SLC’s Report).

### ***Section 3 Admission made or becoming known after acquittal***

19. This section provides an exception to the rule against double jeopardy in section 1. It allows a further prosecution to take place where it becomes apparent following an acquittal that the acquitted person has admitted to committing the offence. This applies to both summary and solemn proceedings. Section 14 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 recommendation in the SLC's Report<sup>1</sup> 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)(ii), in conjunction with subsections (3)(b) and (4), permits an application for a retrial in such circumstances.

20. Subsections (1) and (2) provide that a fresh prosecution may take place where the admission relates to the original offence; any other offence of which it would have been competent to convict the person on the original indictment or complaint; or an offence which arises out of, or largely out of, the same acts or omissions and is an aggravated way of committing the original offence.
21. Subsection (3)(b) provides that the Lord Advocate needs to apply to the High Court if the prosecution wants to set aside the acquittal and bring a fresh prosecution. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.
22. Subsection (4) provides for the test that has to be satisfied before the High Court can set aside the acquittal. The application may be granted only if:
  - any admission made before the previous acquittal was not known and could not with the exercise of reasonable diligence have become known to the prosecutor at the time of that acquittal;
  - the case against the person is strengthened substantially by the admission; and
  - that on the admission 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.
23. Finally, the court may only grant the application where it considers that to do so would be in the interests of justice.

#### ***Section 4 New evidence***

24. 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 14 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section. Section 3 is the relevant provision where the new evidence in question takes the form of an admission.
25. Subsection (1) provides, among other things, for the exception outlined in section 4 to apply only to persons who have been originally prosecuted and acquitted in the High Court. The section does not therefore apply the exception to persons prosecuted in a Sheriff or Justice of the Peace Court. Subsection (1) goes on to permit a new prosecution for the original offence or a "relevant offence" (as described in subsection (2)), as long as the conditions set out in subsection (3) are satisfied.
26. Subsection (3) sets out the requirement for there to be new evidence that the person subject to the application committed the offence in question. This new evidence may relate either to the commission of the original offence; any other offence of which it would have been competent to convict the person on the original indictment; or an offence which arises out of, or largely out of, the same acts or omissions and which is an aggravated way of committing the original offence. As in the case of the other exceptions to the double jeopardy rule, the Lord Advocate needs to apply to the High Court to have the acquittal set aside and to seek authority to 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.

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<sup>1</sup> Recommendation 25

27. 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.
28. Subsection (5) provides that only one new evidence application can be made under section 4 in relation to any one individual offence. Alongside subsection (6), it means that where new evidence emerges that is relevant to only one (or some of the) offence(s) considered at the original trial, the prosecutor will be able to make a new evidence application limited to the relevant offence(s) from the original trial. This would mean that if different new evidence subsequently arose for the remaining offence(s) from the original trial a new evidence application could be made under the Act in relation to that offence(s). Only one such application could be made.
29. Subsection (7) provides for the test that must be satisfied before the High Court can set aside the acquittal. The application may be granted only if:
- the case against the person is strengthened substantially by the new evidence;
  - the new evidence is evidence which was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence; and
  - that on the new evidence and the evidence which was led at the original trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the offence.
30. Finally, the court may only grant the application where it considers that to do so would be in the interests of justice.

### ***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)(b) to the High Court. It provides, for example, that the acquitted person 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 curiae* at the hearing. This may be 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 acquitted person but by a third party. In such a case, there could potentially be no-one in a position to contradict 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. Some of these provisions are modelled upon section 119 (provision where High Court authorises new prosecution) of the 1995 Act. 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)).

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2011 (asp 16) which received Royal Assent on 27 April 2011*

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 anew.
35. Subsection (9) allows the court to hear evidence relating to other charges in the original indictment or complaint which have already been disposed of at the original trial. The wording of subsections (9) and (10) has been modelled on section 119(6) and (7) of the 1995 Act which apply to retrial proceedings which have been allowed following the quashing of a conviction on appeal. This provision in the 1995 Act was introduced to address difficulties which had arisen in previous cases to ensure that the court is not prevented from hearing all relevant evidence at a retrial where the accused had been acquitted or convicted of a different but related charge at the original trial.
36. Subsection (10) places a requirement on the prosecutor to identify evidence that he or she intends to lead under subsection (9). This ensures that fair notice is given to the accused of the prosecution case.
37. Subsection (11) 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***

38. 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***

39. 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 14 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.
40. Subsection (1)(b) provides that a plea in bar of trial will not be available in relation to the exceptions to double jeopardy detailed in this Act (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.
41. 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.
42. 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, unless the prosecutor can persuade the court that there is some “special reason” as to why the case should be prosecuted and the court is satisfied it would be in the interests of justice to do so (subsections (4) and (5)).
43. 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 might 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 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.<sup>2</sup> 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***

44. **Section 8** contains provision which applies where a plea in bar of trial under section 7(2) 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.
45. **Section 8** is necessary because section 1, which sets out the general rule against double jeopardy, and sections 2, 3 and 4, which set out the exceptions to it, do not expressly deal with this scenario. Those provisions are premised on the basis of the new prosecution being either for the original offence; for any other offence of which it would have been competent to convict the person on the original indictment or complaint; or an offence which arises out of the same or largely the same acts or omissions as gave rise to the original indictment or complaint and is an aggravated version of that offence. Those provisions do not apply where the original trial was for, say, culpable homicide or assault and a second trial is proposed for murder. Section 8 deals with such cases. It builds on section 7 which is also relevant as it permits the previous trial to be cited in a plea in bar of trial, on the basis that the new prosecution will arise from the same or largely the same acts or omissions that already led to the original trial. Section 7 puts the onus onto the prosecution to explain what “special reason” justifies the new trial. Section 8 deals expressly with the situation of an accused being charged with murder where the original trial was for a lesser offence. It sets out two possible special reasons (new evidence and admissions) that may justify a new trial and the factors that the court must consider in determining whether to sustain or repel the plea in bar of trial.
46. **Section 14** 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.
47. 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).
48. 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.
49. Subsection (4) provides that the plea must be considered by three judges of the High Court, whose decision on the matter is final.
50. 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(7).
51. Where the special reason relates to an admission, subsection (6) provides the test that the court must apply in deciding if it is satisfied that a plea in bar of trial should be repelled.

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<sup>2</sup> For further detail, see paragraphs 2.31 to 2.35 of the SLC’s Report

This test is essentially the same test as is contained in section 3(4). This includes an assessment of whether an admission made before the acquittal or conviction at the original trial was not, and could not with the exercise of reasonable diligence have been known to the prosecutor at the time of the original trial. It also provides that the court can only repel the plea in bar of trial if to do so is in the interests of justice.

52. Subsection (7) applies subsections (2), (4), (5) and (6) of section 5 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***

53. 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 14 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.
54. Subsections (2) and (3) provide that the matter must be considered by the High Court.
55. 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. The Court must also be satisfied that the existence of the original trial was not known to the prosecutor before these proceedings were raised. This could arise, for example, where the original trial took place abroad.

### ***Section 10 Plea in bar of trial: previous foreign proceedings***

56. 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.
57. 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.
58. 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.

### ***Other subsequent prosecutions***

#### ***Section 11 Eventual death of injured person***

59. 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 14 ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to the coming into force of this section.
60. Subsections (1)(c) and (3) apply where the previous trial ended in an acquittal of an offence involving physical injury. They require the prosecutor to apply to the High Court for authority to prosecute for causing death. The High Court must consider whether a new prosecution would be in the interests of justice.

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61. Subsections (4) and (5) 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 (6) provides a right of appeal against such a decision.
62. Subsection (7) 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 (8) and (9)).
63. The Act 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 16 of the schedule 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 at the original trial may be required to write a report in response to the grounds of appeal for a case coming under section 11(7).

***Section 12 Nullity of proceedings on previous indictment or complaint***

64. 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.
65. Subsection (3) sets out the test the High Court needs to consider before granting authority to prosecute.

***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



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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 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.

## **General**

### **Section 14 Retrospective application of Act**

76. 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 Act are subject to the Act.

### **Section 15 Transitional provision etc.**

77. **Section 15** gives the Scottish Ministers power to make transitional arrangements in commencing the Act to ensure the smooth transition of the applicability of the new disclosure duties within the double jeopardy application proceedings to “old” trials that took place before Part 6 of the 2010 Act was in force. Under subsection (1), the power is restricted to the making of transitional arrangements only in relation to the disclosure provisions within the Act (section 13 and paragraphs 17 to 34 of the schedule).
78. Subsections (3) and (4) provide that the power will operate under the negative procedure, unless it is to be used to amend primary legislation, in which case affirmative procedure will be required.

### **Section 16 Consequential amendments**

79. This section gives effect to consequential amendments contained within the schedule to the Act.

### **Section 17 Short title, interpretation and commencement**

80. This section provides for the short title of the Act and allows the Scottish Ministers to appoint when the provisions of the Act should come into force by order.

## **Schedule**

### **Schedule Consequential amendments**

81. **Paragraphs 1 to 5** amend the **Contempt of Court Act 1981 (c.49)** to protect double jeopardy proceedings from pre-trial publicity. This protects any subsequent trial from prejudicial publicity arising during the application stage where the prosecutor is seeking authority to bring a new prosecution.
82. **Paragraphs 6 to 16** 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.
83. Paragraphs 17 to 34 of the schedule provide various consequential amendments to Part 6 of the 2010 Act in relation to disclosure. The amendments apply the duties, remedies and necessary applications contained therein, including the provisions applicable to hearings on the non disclosure of sensitive information, to applications made under the Double Jeopardy (Scotland) Act 2011. Many of the amendments contain references to terms and sections inserted into Part 6 of the 2010 Act by section 13 of this Act. In particular, they create references to the terms “2011 Act proceedings” and “respondent” defined in new section 140A of the 2010 Act, being inserted by section 13 of this Act.