

## **EXECUTIVE NOTE**

### **THE DOUBLE JEOPARDY (SCOTLAND) ACT 2011 (COMMENCEMENT AND TRANSITIONAL PROVISIONS) ORDER 2011**

#### **SSI 2011/365 (C. 34)**

1. The above instrument was made in exercise of the powers conferred by sections 15(1) and 17(3) of the Double Jeopardy (Scotland) Act 2011 (the “2011 Act”). The instrument is subject to the negative procedure. Section 17(3) provides for the commencement of the 2011 Act (excluding section 17, which came into force upon Royal Assent on 27 April 2011). Section 15(1) permits Scottish Ministers to make such provision as they consider necessary or expedient for transitional, transitory or saving purposes in connection with the coming into force of section 13 or paragraphs 17 to 34 of the schedule (these provisions concern disclosure of information to the respondent in application proceedings under the 2011 Act).
2. In accordance with section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, the Scottish Ministers consider it desirable to exercise together and by the same instrument the power conferred by section 15(1) of the 2011 Act (which is subject to the negative procedure) and the power conferred by section 17(3) of the 2011 Act (to which section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies).

#### **POLICY OBJECTIVES**

3. The 2011 Act will reform and restate the rule against double jeopardy. This principle prohibits a person being placed in jeopardy of criminal prosecution twice for the same offence. The Act also sets out certain exceptions to the rule and makes a number of related and consequential reforms.

#### **Commencement**

4. This Order provides for complete commencement of the 2011 Act. From 28 November 2011, there will be a statutory rule that where a person has been convicted or acquitted of an offence, it will not be possible to charge the person again with the same offence or any other offence of which it would have been competent to convict previously. Commencement will also make available a number of application procedures, permitting the Crown to apply to the High Court to seek permission for a new prosecution in certain strictly limited circumstances. For example, under section 4 the Lord Advocate will be able to apply to the High Court to have an acquittal set aside and to seek authority to re-prosecute on the basis that new evidence has emerged which is sufficient to justify a new trial. Sections 2, 3, 11 and 12 provide for other application procedures.

#### **Disclosure**

5. During a prosecution, the Crown is obliged to give accused persons fair notice of the case. This means not only the information which is likely to form part of the evidence to be led by the prosecutor but also information which would materially weaken or undermine the prosecutor’s case. This principle of “disclosure” of information is regulated under Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 (the “2010 Act”), which came into force on 6 June 2011. The disclosure regime in Part 6 of the 2010 Act will apply to

application proceedings under sections 2, 3, 4, 11 or 12 of the 2011 Act and also to any new trial authorised following a successful application.

### **Transitional Provision - cases initially tried under the common law rules of disclosure**

6. An application to the High Court to seek authority to bring a new prosecution could be made under the 2011 Act in relation to a case where the first proceedings commenced before 6 June 2011. Article 4 of this Order makes transitional provision for disclosure of information during any such application proceedings, to acknowledge the fact that the first proceedings were conducted under a different disclosure regime. Effectively, it will treat information that was not disclosed under the previous (common law) regime as information that was not disclosed under the 2010 Act's disclosure regime. This will have the practical result of placing a duty on the prosecutor to disclose: (i) material which was not disclosed in the first proceedings and should have been if the 2010 Act disclosure regime had applied; (ii) material which was not considered necessary at first proceedings to disclose but which is now thought necessary; (iii) any relevant additional information that has come to light since the first proceedings; and (iv) any particular information relating to the application proceedings.

### **Transitional Provision - cases initially tried under the common law rules of disclosure**

7. Sections 140B(4), 140C(3) and 140D(4) of the 2010 Act provide that the prosecutor need not disclose any material that has previously been disclosed to the person subject to application proceedings under the 2011 Act. This means that where material was disclosed during the first proceedings, the prosecutor need not re-disclose the same material during a subsequent application for a new prosecution. If there is a dispute on a matter of re-disclosure, section 140E of the 2010 Act allows the respondent to apply to the court to rule on whether particular information should be disclosed.

8. Article 5 makes a further transitional provision in relation to sections 140B(4), 140C(3) and 140D(4). It provides that where the first proceedings concluded prior to 28 November 2011, these subsections will only apply so far as not disclosing the information again would be consistent with the respondent receiving a fair hearing. Therefore, in such cases the prosecutor in making an application under the 2011 Act will have to assess what previously disclosed material should be provided again.

## **CONSULTATION**

9. There was no statutory requirement to consult on this Order. Additional consultation was not considered to be necessary, as the 2011 Act was subject to Parliamentary scrutiny, and followed a Government consultation exercise and a Report by the Scottish Law Commission. The Crown Office and Procurator Fiscal Service was fully involved in preparation of the transitional provisions in relation to disclosure, as that organisation will bear the responsibility for ongoing day-to-day implementation of the disclosure regime.

## **IMPACT ASSESSMENTS**

10. An Equality Impact Assessment and a Business and Regulatory Impact Assessment were prepared to assist the Justice Committee in its consideration of the Double Jeopardy (Scotland) Bill during its passage through Parliament. Separate Assessments were not

considered necessary for this Order as its effect is restricted to commencement and transitional provisions supplemental to the 2011 Act.

### **FINANCIAL IMPLICATIONS**

11. The Order does not have any new financial or business or regulatory effects that were not anticipated when the 2011 Act was enacted. A Financial Memorandum was produced for the Bill which set out its financial implications.

**Justice Directorate  
Scottish Government**