

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

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### *Exceptions to rule against double jeopardy*

##### *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.

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

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).