

# DOUBLE JEOPARDY (SCOTLAND) ACT 2011

---

## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *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)).
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.

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

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.