

DOUBLE JEOPARDY (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Plea in bar of trial

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.¹ Two further examples of special reason are contained within sections 8 and 9.

¹ For further detail, see paragraphs 2.31 to 2.35 of the SLC’s Report