



# Double Jeopardy (Scotland) Act 2011

## 2011 asp 16

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 22nd March 2011 and received Royal Assent on 27 April 2011**

An Act of the Scottish Parliament to make provision as to the circumstances in which a person convicted or acquitted of an offence may be prosecuted anew; and for connected purposes.

### *Double jeopardy*

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

- (1) It is not competent to charge a person who, whether on indictment or complaint (the “original indictment or complaint”), has been convicted or acquitted of an offence (the “original offence”) with—
  - (a) the original offence,
  - (b) any other offence of which it would have been competent to convict the person on the original indictment or complaint, or
  - (c) an offence which—
    - (i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and
    - (ii) is an aggravated way of committing the original offence.
- (2) Subsection (1) is subject to sections 2, 3 and 4 and is without prejudice to sections 107E(3) (prosecutor’s appeal against acquittal: authorisation of new prosecution), 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) and 185 (authorisation of new prosecution) of the 1995 Act.
- (3) In this Act, references to a person being “convicted” of an offence are references to—
  - (a) the person being found guilty of the offence,
  - (b) the prosecutor accepting the person’s plea of guilty to the offence, or
  - (c) the court making an order under section 246(3) of the 1995 Act discharging the person absolutely in relation to the offence,and related expressions are to be construed accordingly.
- (4) For the purposes of subsection (3)—

- (a) section 247(1) (conviction of person placed on probation or absolutely discharged deemed not to be a conviction) of the 1995 Act does not apply, and
- (b) it is immaterial whether or not sentence is passed.

*Exceptions to rule against double jeopardy*

**2 Tainted acquittals**

- (1) A person who, whether on indictment or complaint (the “original indictment or complaint”), has been acquitted of an offence (the “original offence”) may, provided that the condition mentioned in subsection (2) is satisfied, be charged with, and prosecuted anew for—
  - (a) the original offence,
  - (b) any other offence of which it would have been competent to convict the person on the original indictment or complaint,
  - (c) an offence which—
    - (i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and
    - (ii) is an aggravated way of committing the original offence.
- (2) The condition is that the High Court has, on the application of the Lord Advocate—
  - (a) set aside the acquittal, and
  - (b) granted authority to bring a new prosecution.
- (3) The court may not set aside the acquittal unless it—
  - (a) is satisfied that the acquitted person or some other person has (or the acquitted person and some other person have) been convicted of an offence against the course of justice in connection with the proceedings on the original indictment or complaint, or
  - (b) concludes on a balance of probabilities that the acquitted person or some other person has (or the acquitted person and some other person have) committed such an offence against the course of justice.
- (4) Where the offence against the course of justice consisted of or included interference with a juror or with the trial judge, the court must set aside the acquittal if it—
  - (a) is unable to conclude that the interference had no effect on the outcome of the proceedings on the original indictment or complaint, and
  - (b) is satisfied that it is in the interests of justice to do so.
- (5) But the acquittal is not to be set aside if, in the course of the trial, the interference (being interference with a juror and not with the trial judge) became known to the trial judge, who then allowed the trial to proceed to its conclusion.
- (6) Where the offence against the course of justice is not one mentioned in subsection (4), the acquittal may be set aside only if the court is satisfied—
  - (a) on a balance of probabilities as to the matters mentioned in subsection (7), and
  - (b) that it is in the interests of justice to do so.
- (7) The matters referred to in subsection (6)(a) are—
  - (a) that the offence led to—

- (i) the withholding of evidence which, had it been given, would have been capable of being regarded as credible and reliable by a reasonable jury, or
    - (ii) the giving of false evidence which was capable of being so regarded, and
  - (b) that the withholding, or as the case may be the giving, of the evidence was likely to have had a material effect on the outcome of the proceedings on the original indictment or complaint.
- (8) In this section, “offence against the course of justice” means an offence of perverting, or of attempting to pervert, the course of justice (by whatever means and however the offence is described) and—
  - (a) includes—
    - (i) an offence under section 45(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (aiding, abetting, counselling, procuring or suborning the commission of an offence under section 44 of that Act),
    - (ii) subornation of perjury, and
    - (iii) bribery,
  - (b) does not include—
    - (i) perjury, or
    - (ii) an offence under section 44(1) of that Act (statement on oath which is false or which the person making it does not believe to be true).

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

- (1) A person who, whether on indictment or complaint (the “original indictment or complaint”), has been acquitted of an offence (the “original offence”) may, if the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—
  - (a) the original offence,
  - (b) an offence mentioned in subsection (2) (a “relevant offence”).
- (2) A relevant offence is—
  - (a) an offence (other than the original offence) of which it would have been competent to convict the person on the original indictment or complaint, or
  - (b) an offence which—
    - (i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and
    - (ii) is an aggravated way of committing the original offence.
- (3) The conditions are that—
  - (a) after the acquittal—
    - (i) the person admits to committing the original offence or a relevant offence, or
    - (ii) such an admission made by that person before the acquittal becomes known, and
  - (b) the High Court, on the application of the Lord Advocate, has—
    - (i) set aside the acquittal, and
    - (ii) granted authority to bring a new prosecution.

- (4) The court may set aside the acquittal only if satisfied—
- (a) in the case of an admission such as is mentioned in subsection (3)(a)(ii), that the admission was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of the acquittal in respect of the original offence,
  - (b) that the case against the person is strengthened substantially by the admission,
  - (c) that, on the admission and the evidence which was led at the trial in respect of the original offence, it is highly likely that a reasonable jury properly instructed would have convicted the person of—
    - (i) the original offence, or
    - (ii) a relevant offence, and
  - (d) that it is in the interests of justice to do so.

#### **4 New evidence**

- (1) A person who, on indictment in the High Court (the “original indictment”), has been acquitted of an offence (the “original offence”) may, if the conditions mentioned in subsection (3) are satisfied, be charged with, and prosecuted anew for—
- (a) the original offence,
  - (b) an offence mentioned in subsection (2) (a “relevant offence”).
- (2) A relevant offence is—
- (a) an offence (other than the original offence) of which it would have been competent to convict the person on the original indictment, or
  - (b) an offence which—
    - (i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment, and
    - (ii) is an aggravated way of committing the original offence.
- (3) The conditions are that—
- (a) there is new evidence that the person committed the original offence or a relevant offence, and
  - (b) the High Court, on the application of the Lord Advocate, has—
    - (i) set aside the acquittal, and
    - (ii) granted authority to bring a new prosecution in the High Court.
- (4) For the purposes of subsection (3)(a), evidence which was not admissible at the trial in respect of the original offence but which is admissible at the time the court considers the application under subsection (3)(b) is not new evidence.
- (5) Only one application may be made under subsection (3)(b) to set aside the acquittal of an original offence.
- (6) But an application may not be made to set aside the acquittal of an original offence if the person was charged with, and prosecuted anew for, that offence by virtue of this section.
- (7) The court may set aside the acquittal only if satisfied that—
- (a) the case against the person is strengthened substantially by the new evidence,

- (b) the new evidence 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,
- (c) on the new evidence and the evidence which was led at that trial, it is highly likely that a reasonable jury properly instructed would have convicted the person of—
  - (i) the original offence, or
  - (ii) a relevant offence, and
- (d) it is in the interests of justice to do so.

*Exceptions to rule against double jeopardy: common provisions*

**5 Applications under sections 2, 3 and 4**

- (1) On making an application under section 2(2), 3(3)(b) or 4(3)(b), the Lord Advocate is to send a copy of the application to the acquitted person.
- (2) The acquitted person is entitled to appear or to be represented at any hearing of the application.
- (3) For the purposes of hearing and determining the application, three of the Lords Commissioners of Justiciary are a quorum of the High Court (the application being determined by majority vote of those sitting).
- (4) The court may appoint counsel to act as amicus curiae at the hearing in question.
- (5) The decision of the court on the application is final.
- (6) Subsection (3) is without prejudice to any power of those sitting to remit the application to a differently constituted sitting of the court (as for example to the whole court sitting together).

**6 Further provision about prosecutions by virtue of sections 2, 3 and 4**

- (1) This section applies to a new prosecution brought by virtue of section 2, 3 or 4.
- (2) The new prosecution may be brought despite the fact that any time limit for the commencement of proceedings in such a prosecution, other than the time limit mentioned in subsection (3), has elapsed.
- (3) Proceedings in the new prosecution are to be commenced within 2 months after the date on which authority to bring the prosecution was granted.
- (4) For the purposes of subsection (3), proceedings are deemed to be commenced—
  - (a) in a case where a warrant to apprehend the accused person is granted—
    - (i) on the date on which it is executed, or
    - (ii) if it is executed without unreasonable delay, on the date on which it was granted, and
  - (b) in any other case, on the date on which the accused person is cited.
- (5) Where the 2 months mentioned in subsection (3) elapse and no new prosecution has been brought, the decision under section 2, 3 or 4 setting aside the acquittal has the effect, for all purposes, of an acquittal.

- (6) On granting authority under section 2, 3 or 4 to bring a new prosecution, the High Court may, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit that person to bail.
- (7) The provisions of the 1995 Act mentioned in subsection (8) below apply to an accused person who is detained under subsection (6) as they apply to an accused person detained by virtue of being committed until liberated in due course of law.
- (8) Those provisions are—
  - (a) in solemn proceedings, section 65(4)(aa) and (b) and (4A) to (9) (prevention of delay in solemn proceedings), and
  - (b) in summary proceedings, section 147 (prevention of delay in summary proceedings).
- (9) In proceedings in a new prosecution it is competent for either party to lead evidence which it was competent for that party to lead in the proceedings on the original indictment or complaint (the “earlier proceedings”).
- (10) But the prosecutor must identify in the indictment or complaint in the new prosecution any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (9) which would not have been competent but for that subsection.
- (11) Where, in a new prosecution, the accused is convicted of an offence, no sentence may be passed in relation to the offence which could not have been passed under the earlier proceedings.

*Plea in bar of trial*

**7 Plea in bar of trial that accused has been tried before**

- (1) This section applies where a person is charged with an offence—
  - (a) whether on indictment or complaint,
  - (b) other than by virtue of—
    - (i) section 2, 3, 4, 11 or 12, or
    - (ii) section 107E(3) (prosecutor’s appeal against acquittal: authorisation of new prosecution), 118(1)(c) (disposal of appeals), 119 (provision where High Court authorises new prosecution), 183(1)(d) (stated case: disposal of appeal) or 185 (authorisation of new prosecution) of the 1995 Act.
- (2) The person may aver, as a plea in bar of trial, that the offence arises out of the same, or largely the same, acts or omissions as have already given rise to the person being tried for, and convicted or acquitted of, an offence.
- (3) The court must sustain the plea if satisfied on a balance of probabilities as to the truth of the person’s averment.
- (4) But the court may repel the plea despite being so satisfied if it—
  - (a) is persuaded by the prosecutor that there is some special reason why the case should proceed to trial, and
  - (b) determines that it is in the interests of justice to do so.
- (5) Subsection (4) is subject to sections 8, 9 and 10.

## **8 Plea in bar of trial for murder: new evidence and admissions**

- (1) This section applies where—
  - (a) a person is charged with murder,
  - (b) the person avers, as a plea in bar of trial under section 7(2), that the charge arises out of the same, or largely the same, acts or omissions as have already given rise to the person, whether on indictment or complaint (the “original indictment or complaint”), being tried for, and convicted or acquitted of, an offence other than murder, and
  - (c) the prosecutor asserts, as a special reason why the case should proceed to trial, one of the matters mentioned in subsection (2).
- (2) Those matters are that, since the trial on the original indictment or complaint (the “original trial”)—
  - (a) there is new evidence that the person committed the murder charged,
  - (b) the person has admitted to committing the murder charged,
  - (c) such an admission made before the conviction or acquittal at the original trial has become known.
- (3) For the purposes of subsection (2)(a), evidence which was not admissible at the original trial but which is admissible at the time the court considers the plea is not new evidence.
- (4) For the purposes of determining whether to sustain or repel the plea, three of the Lords Commissioners of Justiciary are a quorum of the High Court (the plea being determined by majority vote of those sitting).
- (5) Where the special reason relates to the matter mentioned in subsection (2)(a), the court may repel the plea only if satisfied that—
  - (a) the case against the person is strengthened substantially by the new evidence,
  - (b) the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the original trial,
  - (c) on the new evidence and the evidence which was led at that trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the murder had it been charged, and
  - (d) it is in the interests of justice to do so.
- (6) Where the special reason relates to the matter mentioned in subsection (2)(b) or (c), the court may repel the plea only if satisfied—
  - (a) in the case of an admission such as is mentioned in subsection (2)(c), that the admission was not known, and could not with the exercise of reasonable diligence have become known, to the prosecutor by the time of the conviction or acquittal at the original trial,
  - (b) that the case against the person is strengthened substantially by the admission,
  - (c) 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 murder, and
  - (d) that it is in the interests of justice to do so.
- (7) Section 5 (other than subsections (1) and (3)) applies to a case to which this section applies as it applies to an application under section 4(3)(b), with the modifications that—

- (a) the reference in subsection (2) of that section to the acquitted person is to be read as a reference to the person charged, and
- (b) the reference in subsection (6) of that section to subsection (3) is to be read as a reference to subsection (4) of this section.

## **9 Plea in bar of trial: nullity of previous trial**

- (1) This section applies where—
  - (a) a person avers, as a plea in bar of trial under section 7(2), that the charge arises out of the same, or largely the same, acts or omissions as have already given rise to the person, whether on indictment or complaint (the “original indictment or complaint”), being tried for, and convicted or acquitted of, an offence, and
  - (b) the prosecutor asserts, as a special reason why the case should proceed to trial, that the trial on the original indictment or complaint (the “original trial”) was a nullity.
- (2) Where the proceedings are before—
  - (a) the sheriff, or
  - (b) a justice of the peace court,the sheriff or justice of the peace court must remit the case to the High Court.
- (3) Where the proceedings are—
  - (a) before the High Court, or
  - (b) are remitted to that court under subsection (2),the court must determine whether to sustain or repel the plea.
- (4) The High Court may repel the plea only if satisfied that—
  - (a) the original trial was a nullity,
  - (b) the existence of that trial was not known to the prosecutor before the commencement of the proceedings in which the plea is made, and
  - (c) it is in the interests of justice to do so.

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

- (1) This section applies where the previous trial averred under section 7(2) took place outwith the United Kingdom.
- (2) In determining under section 7(4)(b) whether it is in the interests of justice for the case to proceed to trial, the court is in particular to have regard to—
  - (a) whether the purpose of bringing the person to trial in the foreign country appears to have been to assist the person to evade justice,
  - (b) whether the proceedings in the foreign country appear to have been conducted—
    - (i) independently and impartially, and
    - (ii) in a manner consistent with dealing justly with the person,
  - (c) whether such sentence (or other disposal) as was or might have been imposed in the foreign country for the offence of the kind of which the person has been convicted or acquitted is commensurate with any that might be imposed for an offence of that kind in Scotland, and



- (d) the extent to which the acts or omissions can be considered to have occurred in, respectively—
  - (i) Scotland,
  - (ii) the foreign country.
- (3) But the court may not repel the plea if permitting the case to proceed to trial would be inconsistent with the obligations of the United Kingdom under Article 54 of the Schengen Convention.
- (4) In subsection (3), the “Schengen Convention” means the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985.

#### *Other subsequent prosecutions*

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

- (1) This section applies where—
  - (a) a person (“A”) is, whether on indictment or complaint, convicted or acquitted of an offence (the “original offence”) involving the physical injury of another person (“B”),
  - (b) after the conviction or acquittal, B dies, apparently from the injury, and
  - (c) in a case where A was acquitted, the condition mentioned in subsection (3) is satisfied.
- (2) It is competent to charge A with—
  - (a) the murder of B,
  - (b) the culpable homicide of B, or
  - (c) any other offence of causing B’s death.
- (3) The condition referred to in subsection (1)(c) is that, on the application of the prosecutor and after hearing parties, the High Court is satisfied that it is in the interests of justice to proceed as mentioned in subsection (2).
- (4) Subsection (5) applies where—
  - (a) A was convicted of the original offence, and
  - (b) A is subsequently convicted of an offence mentioned in subsection (2).
- (5) The court may—
  - (a) on the motion of A made immediately on A’s being convicted, and
  - (b) after hearing the parties on that motion,quash A’s conviction of the original offence where satisfied that it is appropriate to do so.
- (6) A party may appeal to the High Court against the grant or refusal of a motion under subsection (5).
- (7) Where A was convicted of the original offence and is subsequently acquitted of an offence mentioned in subsection (2), A may appeal against the conviction under section 106(1)(a) or, as the case may be, section 175(2)(a) of the 1995 Act.
- (8) An appeal may be brought by virtue of subsection (7) despite the fact that A, before the acquittal mentioned in that subsection—
  - (a) had appealed, or

(b) had been refused leave to appeal,  
against the conviction or against any other matter mentioned in section 106(1) or  
175(2) of the 1995 Act in relation to the original offence.

(9) Sections 121 and 193 of the 1995 Act do not apply in relation to an appeal under  
subsection (7).

## 12 Nullity of proceedings on previous indictment or complaint

(1) This section applies where—

- (a) a person has, whether on indictment or complaint, been charged with, and  
acquitted or convicted of, an offence, and
- (b) the condition mentioned in subsection (3) is satisfied.

(2) The person may be charged with, and prosecuted anew for, the offence.

(3) The condition referred to in subsection (1)(b) is that, on the application of the  
prosecutor and after hearing parties, the High Court is satisfied that—

- (a) the proceedings on the indictment or complaint were a nullity, and
- (b) it is in the interests of justice to proceed as mentioned in subsection (2).

### *Disclosure of information*

## 13 Disclosure of information

(1) Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) (disclosure  
of information) is amended as follows.

(2) After section 140 (review of ruling under section 139) insert—

### *“Disclosure in relation to 2011 Act proceedings*

#### **140A 140A Sections 140B to 140F: interpretation**

In sections 140B to 140F—

“2011 Act” means the Double Jeopardy (Scotland) Act 2011 (asp 16),

“2011 Act proceedings” means—

- (a) an application under section 2(2), section 3(3)(b) or section 4(3)  
(b) of the 2011 Act to set aside a person’s acquittal and grant  
authority for a new prosecution,
- (b) an application under subsection (3) of section 11 of that Act to  
charge a person as mentioned in subsection (2) of that section,
- (c) an application under subsection (3) of section 12 of that Act  
to charge, and prosecute anew, a person as mentioned in  
subsection (2) of that section,

“respondent” means the person to whom the 2011 Act proceedings relate.

### **140B 140B. Duty to disclose on institution of 2011 Act proceedings**

- (1) This section applies where 2011 Act proceedings are instituted in relation to a respondent.
- (2) As soon as practicable after the relevant act the prosecutor must—
  - (a) review all information of which the prosecutor is aware that relates to the 2011 Act proceedings, and
  - (b) disclose to the respondent any information that falls within subsection (3).
- (3) Information falls within this subsection if it is—
  - (a) information that the prosecutor was required by virtue of section 121(2)(b), 123(2)(b), 133(2)(b), 134(2)(b), 136(2), 137(2) or 138(2) to disclose in, or in relation to, the first proceedings but did not disclose,
  - (b) information to which, during the first proceedings, the prosecutor considered paragraph (a) or (b) of section 121(3) or subsection (3) of section 133 did not apply but to which the prosecutor now considers one or both of those paragraphs or that subsection would apply,
  - (c) information of which the prosecutor has become aware since the disposal of the first proceedings that, had the prosecutor been aware of it during or after those proceedings, the prosecutor would have been required to disclose by virtue of section 121(2)(b), 123(2)(b), 133(2)(b), 134(2)(b), 136(2), 137(2) or 138(2), or
  - (d) information of which the prosecutor has become aware since the disposal of the first proceedings, other than information that falls within paragraph (c), which—
    - (i) would materially weaken or undermine the evidence that is likely to be led or relied on by the prosecutor in the 2011 Act proceedings involving the respondent,
    - (ii) would materially strengthen the respondent's case, or
    - (iii) is likely to form part of the evidence to be led or relied on by the prosecutor in the 2011 Act proceedings involving the respondent.
- (4) The prosecutor need not disclose under subsection (2)(b) anything that the prosecutor has already disclosed to the respondent.
- (5) In this section—

“appellate proceedings” has the meaning given by section 132,  
“first proceedings”, in relation to 2011 Act proceedings, means the proceedings (including any appellate proceedings or other appeal) in or as a result of which the respondent was convicted or acquitted,  
“relevant act” means the making of the application under section 2(2), 3(3)(b), 4(3)(b), 11(3) or 12(3) of the 2011 Act.

### **140C 140C. Continuing duty of prosecutor**

- (1) This section applies where—

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- (a) the prosecutor has complied with section 140B(2) in relation to a respondent, and
  - (b) during the relevant period, the prosecutor becomes aware of information which relates to the 2011 Act proceedings and falls within section 140B(3).
- (2) The prosecutor must disclose to the respondent any information that falls within section 140B(3).
- (3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the respondent.
- (4) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.
- (5) In subsection (1), “relevant period” means the period—
- (a) beginning with the prosecutor’s compliance with section 140B(2), and
  - (b) ending with the relevant conclusion.
- (6) In subsection (5), “relevant conclusion” means the disposal or abandonment of the 2011 Act proceedings.

**140D 140D. Application to prosecutor for further disclosure**

- (1) This section applies where—
- (a) the prosecutor has complied with section 140B(2) in relation to a respondent, and
  - (b) the respondent lodges a further disclosure request—
    - (i) during the preliminary period, or
    - (ii) if the court on cause shown allows it, after the preliminary period but before the relevant conclusion.
- (2) A further disclosure request must set out—
- (a) the nature of the information that the respondent wishes the prosecutor to disclose, and
  - (b) the reasons why the respondent considers that disclosure by the prosecutor of any such information is necessary.
- (3) As soon as practicable after receiving a copy of the further disclosure request the prosecutor must—
- (a) review any information of which the prosecutor is aware that relates to the request, and
  - (b) disclose to the respondent any of that information that falls within section 140B(3).
- (4) The prosecutor need not disclose under subsection (3)(b) anything that the prosecutor has already disclosed to the respondent.
- (5) In this section—
- “preliminary period”, in relation to the 2011 Act proceedings concerned, means the period beginning with the relevant act and ending with the beginning of the hearing of the 2011 Act proceedings,

“relevant act” has the meaning given by section 140B(5),  
“relevant conclusion” has the meaning given by section 140C(6).

*Court rulings on disclosure: 2011 Act proceedings*

**140E 140E. Application by respondent for ruling on disclosure**

- (1) This section applies where the respondent—
  - (a) has made a further disclosure request under section 140D, and
  - (b) considers that the prosecutor has failed, in responding to the request, to disclose to the respondent an item of information falling within section 140B(3) (the “information in question”).
- (2) The respondent may apply to the court for a ruling on whether the information in question falls within section 140B(3).
- (3) An application under subsection (2) is to be made in writing and must set out—
  - (a) a description of the information in question, and
  - (b) the respondent’s grounds for considering that the information in question falls within section 140B(3).
- (4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.
- (5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—
  - (a) comply with subsection (3), or
  - (b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 140B(3).
- (6) At a hearing appointed under subsection (4), the court must give the prosecutor and the respondent an opportunity to be heard before determining the application.
- (7) On determining the application, the court must make a ruling on whether the information in question, or any part of the information in question, falls within section 140B(3).
- (8) In this section and in section 140F, “the court” means the High Court.
- (9) Except where it is impracticable to do so, the application is to be assigned to the judge or judges who are to hear the 2011 Act proceedings.

**140F 140F. Review of ruling under section 140E**

- (1) This section applies where—
  - (a) a court has made a ruling under section 140E that an item of information (the “information in question”) does not fall within section 140B(3), and
  - (b) during the relevant period—
    - (i) the respondent becomes aware of information (“secondary information”) that was unavailable to the court at the time it made its ruling, and

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- (ii) the respondent considers that, had the secondary information been available to the court at that time, it would have made a ruling that the information in question does fall within section 140B(3).
- (2) The respondent may apply to the court which made the ruling for a review of the ruling.
- (3) An application under subsection (2) is to be made in writing and must set out—
  - (a) a description of the information in question and the secondary information, and
  - (b) the respondent's grounds for considering that the information in question falls within section 140B(3).
- (4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.
- (5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—
  - (a) comply with subsection (3), or
  - (b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 140B(3).
- (6) At a hearing appointed under subsection (4), the court must give the prosecutor and the respondent an opportunity to be heard before determining the application.
- (7) On determining the application, the court may—
  - (a) affirm the ruling being reviewed, or
  - (b) recall that ruling and make a ruling that the information in question, or any part of the information in question, falls within section 140B(3).
- (8) Except where it is impracticable to do so, the application is to be assigned to the judge or judges who dealt with the application for the ruling that is being reviewed.
- (9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.
- (10) In this section, “relevant period”, in relation to a respondent, means the period—
  - (a) beginning with the making of the ruling being reviewed, and
  - (b) ending with the relevant conclusion.
- (11) In subsection (10), “relevant conclusion” has the meaning given by section 140C(6).”.

#### *General*

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

For the purposes of sections 1 to 4 and 7 to 12, it is immaterial whether the conviction or, as the case may be, acquittal referred to in each of those sections was before or after the coming into force of this Act.

## **15 Transitional provision etc.**

- (1) The Scottish Ministers may by order made by statutory instrument 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.
- (2) An order under subsection (1) may modify any enactment (including this Act).
- (3) A statutory instrument containing an order under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (4) But no order under subsection (1) which contains provisions which add to, replace or omit any part of the text of an Act may be made unless a draft of the statutory instrument containing it has been laid before and approved by resolution of the Scottish Parliament.

## **16 Consequential amendments**

The schedule, which makes amendments of enactments consequential on the provisions of this Act, has effect.

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

- (1) The short title of this Act is the Double Jeopardy (Scotland) Act 2011.
- (2) In this Act, the “1995 Act” means the Criminal Procedure (Scotland) Act [1995 \(c.46\)](#).
- (3) This Act, except this section, comes into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.

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## SCHEDULE

*(introduced by section 16)*

### CONSEQUENTIAL AMENDMENTS

#### *Contempt of Court Act 1981*

- 1 Schedule 1 to the Contempt of Court Act 1981 (c.49) (times when proceedings are active for the purposes of section 2 of that Act) is amended as follows.
- 2 After paragraph 1 (meaning of “criminal proceedings” and “appellate proceedings”), insert—
  - “1ZA Proceedings under the Double Jeopardy (Scotland) Act 2011 (asp 16) are criminal proceedings for the purposes of this Schedule.”.
- 3 In paragraph 4 (initial steps of criminal proceedings), after sub-paragraph (e) insert—
  - “(f) the making of an application under section 2(2) (tainted acquittals), 3(3)(b) (admission made or becoming known after acquittal), 4(3) (b) (new evidence), 11(3) (eventual death of injured person) or 12(3) (nullity of previous proceedings) of the Double Jeopardy (Scotland) Act 2011 (asp 16).”.
- 4 In paragraph 5 (conclusion of criminal proceedings), after sub-paragraph (c) insert—
  - “(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f)—
    - (i) by refusal of the application;
    - (ii) if the application is granted and within the period of 2 months mentioned in section 6(3) of the Double Jeopardy (Scotland) Act 2011 (asp 16) a new prosecution is brought, by acquittal or, as the case may be, by sentence in the new prosecution.”.
- 5 In paragraph 7 (discontinuance of proceedings), after sub-paragraph (c) insert—
  - “(d) where the initial steps of the proceedings are as mentioned in paragraph 4(f) and the application is granted, if no new prosecution is brought within the period of 2 months mentioned in section 6(3) of the Double Jeopardy (Scotland) Act 2011 (asp 16).”.

#### *Criminal Procedure (Scotland) Act 1995*

- 6 The Criminal Procedure (Scotland) Act 1995 (c.46) is amended as follows.
- 7 In section 94 (transcripts of record and documentary productions), after subsection (2A) insert—
  - “(2AA) Subsection (2A) applies to a person mentioned in subsection (2AB) as it applies to a person convicted at the trial, with the modification that the reference to the transcript in subsection (2A) is to be construed as a reference to the transcript of the record made of proceedings at the trial resulting in the acquittal mentioned in subsection (2AB)(b).
  - (2AB) The person mentioned in subsection (2AA) is a person who—
    - (a) is convicted of the offence mentioned in subsection (1) of section 11 of the Double Jeopardy (Scotland) Act 2011 (asp 16));



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- (b) is subsequently acquitted of an offence mentioned in subsection (2) of that section; and
  - (c) desires to appeal, under subsection (7) of that section, against the conviction of the offence mentioned in paragraph (a).”
- 8 In section 107 (leave to appeal), after subsection (2) insert—
  - “(2A) In respect of an appeal by virtue of section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16), the “report under section 113” in subsection (2) (c) means—
    - (a) the report of the judge who presided at the trial resulting in the appellant’s acquittal for an offence mentioned in section 11(2) of that Act;
    - (b) where an appeal against conviction was taken before that acquittal, the report of the judge who presided at the trial resulting in the conviction in respect of which leave to appeal is sought prepared at that time; and
    - (c) any other report of that judge furnished under section 113.”
- 9 In section 109 (intimation of intention to appeal), after subsection (1) insert—
  - “(1A) Where a person desires to appeal under section 106(1)(a) of this Act by virtue of section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16), subsection (1) applies with the following modifications—
    - (a) for the words “two weeks of the final determination of the proceedings” substitute “two weeks of the date on which the person is acquitted of an offence mentioned in section 11(2) of the Double Jeopardy (Scotland) Act 2011 (asp 16)”; and
    - (b) the reference to identifying the proceedings is to be construed as a reference to identifying—
      - (i) the proceedings which resulted in the conviction desired to be appealed; and
      - (ii) the proceedings which resulted in the person’s acquittal as mentioned in section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16).
  - (1B) Subsections (5) to (9) of section 106 of this Act do not apply where the modifications specified in subsection (1A) apply.”
- 10 In section 110 (note of appeal), after subsection (3) insert—
  - “(3A) In respect of a written note of appeal relating to an appeal by virtue of section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16)—
    - (a) subsection (1) applies as if the reference to the judge who presided at the trial were a reference to—
      - (i) the judge who presided at the trial resulting in the conviction to which the written note of appeal relates; and
      - (ii) the judge who presided at the trial for an offence mentioned in section 11(2) of that Act resulting in the convicted person’s acquittal; and
    - (b) subsection (3)(a) applies as if the reference to the proceedings were a reference to—

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- (i) the proceedings which resulted in the conviction to which the written note of appeal relates; and
  - (ii) the proceedings which resulted in the convicted person's acquittal.”.
- 11 In section 113 (judge's report)—
- (a) in subsection (1), at the beginning, insert “Subject to subsections (1A) to (1D),”;
  - (b) after subsection (1) insert—
    - “(1A) Subsections (1B) to (1D) apply where the copy note of appeal mentioned in subsection (1) relates to an appeal by virtue of section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16).
    - (1B) The reference in subsection (1) to the judge who presided at the trial is to be construed as a reference to—
      - (a) the judge who presided at the trial for an offence mentioned in section 11(2) of that Act resulting in the appellant's acquittal; and
      - (b) where subsection (1C) applies, the judge who presided at the trial resulting in the conviction to which the copy note of appeal relates.
    - (1C) This subsection applies—
      - (a) where, in connection with the appeal, the High Court calls for the report to be furnished by the judge mentioned in subsection (1B)(b); and
      - (b) it is reasonably practicable for the judge to furnish the report.
    - (1D) For the purposes of subsections (1) to (1C), it is irrelevant whether or not the judge mentioned in subsection (1B)(b) had previously furnished a report under subsection (1).”;
  - (c) in subsection (3), for “subsection (1)” substitute “subsections (1) to (1D)”.
- 12 In section 118 (disposal of appeals), after subsection (1) insert—
- “(1A) Where an appeal against conviction is by virtue of section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16), paragraph (c) of subsection (1) does not apply.”.
- 13 After section 176 insert—

**“176A Application of section 176 in relation to certain appeals**

**“176A “176A Application of section 176 in relation to certain appeals**

- (1) Section 176 applies in relation to an appeal under section 175(2)(a) by virtue of section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16) with the following modifications.
- (2) In subsection (1)(a), for the words “one week of the final determination of the proceedings” substitute “one week of the date on which the appellant is acquitted of an offence mentioned in section 11(2) of the Double Jeopardy (Scotland) Act 2011 (asp 16)”.

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- (3) In subsection (2), the reference to the proceedings is to be construed as a reference to the proceedings resulting in the appellant's acquittal as mentioned in section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16).
- (4) In subsection (5), the reference to the inferior court is to be construed as a reference to the court which acquitted the appellant of an offence under section 11(2) of the Double Jeopardy (Scotland) Act 2011 (asp 16)."
- 14 In section 178 (stated case: preparation of draft), after subsection (1) insert—
- “(1A) Where an application for a stated case under section 176 of this Act relates to an appeal by virtue of section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16)—
- (a) the reference in subsection (1) to the final determination of proceedings is to be construed as a reference to the date on which the appellant is acquitted of an offence mentioned in section 11(2) of that Act; and
- (b) the reference in subsection (1)(b) to the judge who presided at the trial is to be construed as a reference to the judge who presided at the trial resulting in the conviction in respect of which the application for a stated case is made.”
- 15 In section 179 (stated case: adjustment and signature), after subsection (10) insert—
- “(11) In relation to a draft stated case under section 178 of this Act relating to an appeal by virtue of section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16)—
- (a) the reference in subsection (1) to the court is to be construed as a reference to the court by which the appellant was convicted; and
- (b) the references in this section to the judge are to be construed as references to the judge who presided at the trial resulting in that conviction.”
- 16 In section 183 (stated case: disposal of appeal), after subsection (1) insert—
- “(1A) Where an appeal against conviction is by virtue of section 11(7) of the Double Jeopardy (Scotland) Act 2011 (asp 16), paragraphs (a) and (d) of subsection (1) do not apply.”

*Criminal Justice and Licensing (Scotland) Act 2010*

- 17 Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) is amended as follows.
- 18 In section 116 (meaning of “information”)—
- (a) after subsection (2) insert—
- “(2A) In this Part, “information”, in relation to 2011 Act proceedings, includes material of any kind given to or obtained by the prosecutor in connection with those proceedings or the first proceedings.”
- (b) after subsection (3) insert—
- “(3A) In subsection (2A)—

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- “2011 Act proceedings” has the meaning given by section 140A,  
“first proceedings” has the meaning given by section 140B(5).”.
- 19 In section 141 (application for section 145 order)—
- (a) in subsection (1), for “or (3)” substitute “, (3) or (3A)”,
  - (b) after subsection (3) insert—
    - “(3A) The conditions are that—
      - (a) by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b) the prosecutor is required to disclose an item of information to a respondent,
      - (b) the information is not likely to form part of the evidence to be led or relied on by the prosecutor in the proceedings, and
      - (c) the prosecutor considers that subsection (4) applies.”
- 20 In section 142 (application for non-notification order or exclusion order)—
- (a) in subsection (2), after “concluded” insert “or to 2011 Act proceedings”,
  - (b) in subsection (8)—
    - (i) for the definition of “accused” substitute—
      - ““accused” includes—
        - (a) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, the appellant or other person to whom the prosecutor is required to disclose the item of information, and
        - (b) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3A) of that section being met, the respondent,”
    - (ii) after the definition of “appellant” insert—
      - ““respondent” has the meaning given by section 140A.”.
- 21 In section 143 (application for non-notification order and exclusion order), in subsection (11), for the words from “include” to the end substitute “include—
- (a) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial, and
  - (b) where subsection (5) of section 141 applies by virtue of the conditions in subsection (3A) of that section being met, references to the respondent receiving a fair hearing in the 2011 Act proceedings.”.
- 22 In section 145 (application for section 145 order: determination)—
- (a) in subsection (2)(c)—
    - (i) omit “or” immediately following sub-paragraph (i), and
    - (ii) after sub-paragraph (ii) insert “or
      - (iii) where the application for the section 145 order is made by virtue of section 141(3A), whether the conditions in subsection (4A) apply,”

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- (b) in subsection (2)(d), for “or, as the case may be, (4)” substitute “, (4) or, as the case may be, (4A)”,
- (c) after subsection (4), insert—
  - “(4A) The conditions are—
    - (a) that by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b) the prosecutor is required to disclose an item of information to a respondent,
    - (b) the information is not likely to form part of the evidence to be led or relied on by the prosecutor in the proceedings,
    - (c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
    - (d) that withholding the item of information is not inconsistent with the respondent’s receiving a fair hearing in the 2011 Act proceedings to which the item relates, and
    - (e) that the public interest would be protected only if a section 145 order were to be made.”
- (d) in subsection (5)(a), for “or, as the case may be, paragraph (c) of subsection (4)” substitute “, paragraph (c) of subsection (4) or, as the case may be, paragraph (c) of subsection (4A)”,
- (e) in subsection (6) for “or, as the case may be, (4)” substitute “, (4) or, as the case may be, (4A)”.

23 In section 146 (order preventing or restricting disclosure: application by Secretary of State)—

- (a) in subsection (1), for “or (4)” substitute “, (4) or (4A)”,
- (b) after subsection (4) insert—
  - “(4A) The condition is that the prosecutor proposes to disclose to a respondent information which the prosecutor is required to disclose by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b).”
- (c) in subsection (6)—
  - (i) in paragraph (c), for “or (3)” substitute “, (3) or (4A)”,
  - (ii) omit “or” immediately following paragraph (d)(i),
  - (iii) after paragraph (d)(ii) insert “or
    - (iii) where the application for the section 146 order is made by virtue of subsection (4A), whether the conditions in subsection (8A) apply,”
  - (iv) in paragraph (e), for “or, as the case may be, (8)” substitute “, (8) or, as the case may be, (8A)”,
- (d) after subsection (8) insert—
  - “(8A) The conditions are—
    - (a) that by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b) the prosecutor is required to disclose an item of information to a respondent,
    - (b) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,

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- (c) that withholding the item of information is not inconsistent with the respondent's receiving a fair hearing in the 2011 Act proceedings to which the item relates, and
  - (d) that the public interest would be protected only if a section 146 order of the type mentioned in subsection (10) were to be made.”,
  - (e) in subsection (9)(a), for “or, as the case may be, paragraph (b) of subsection (8)” substitute “, paragraph (b) of subsection (8) or, as the case may be, paragraph (b) of subsection (8A)”,
  - (f) in subsection (10), for “or, as the case may be, (8)” substitute “, (8) or, as the case may be (8A)”,
  - (g) in subsection (13)—
    - (i) for the definition of “accused” substitute—
      - ““accused” includes—
        - (a) where subsection (3) or (4) applies, the appellant or other person to whom the prosecutor is required to disclose the item of information, and
        - (b) where subsection (4A) applies, the respondent,”
      - (ii) after the definition of “appellant” insert—
        - ““respondent” has the meaning given by section 140A.”,
  - (h) in subsection (14), for the words from “include” to the end substitute “include—
    - (a) where subsection (3) or (other than in relation to an accused) (4) applies, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial, and
    - (b) where subsection (4A) applies, references to the respondent receiving a fair hearing in the 2011 Act proceedings.”.
- 24 In section 147 (application for ancillary orders: Secretary of State), in subsection (2), after “concluded)” insert “or to 2011 Act proceedings”.
- 25 In section 150 (special counsel), in subsection (10)—
  - (a) for the definition of “accused” substitute—
    - ““accused” includes—
      - (a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and
      - (b) respondent,”
    - (b) after the definition of “non-notification case” insert—
      - ““respondent” has the meaning given by section 140A.”.
- 26 In section 152 (role of special counsel), after subsection (5) insert—
  - “(5A) In subsection (1), the reference to the accused receiving a fair trial includes reference to the respondent receiving a fair hearing in the 2011 Act proceedings.”.
- 27 In section 153 (appeals), in subsection (10)—
  - (a) for the definition of “accused” substitute—
    - ““accused” includes—

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- (a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and
    - (b) respondent,”
  - (b) after the definition of “appellant” insert—
    - ““respondent” has the meaning given by section 140A.”.
- 28 In section 155 (review of section 145 order)—
- (a) in subsection (6), after “145(3)” insert “or (4A)”,
  - (b) in subsection (8)—
    - (i) for the definition of “accused” substitute—
      - ““accused” includes—
      - (a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and
      - (b) respondent,”
    - (ii) after the definition of “relevant period” insert—
      - ““respondent” has the meaning given by section 140A,”,
  - (c) in subsection (9)—
    - (i) omit “or” immediately following paragraph (g),
    - (ii) after paragraph (h) insert “, or
    - (i) the 2011 Act proceedings are disposed of or abandoned.”,
  - (d) after subsection (10) insert—
    - “(11) In its application to proceedings involving a respondent, subsection (9) is to be read as if paragraphs (a) to (h) were omitted.”.
- 29 In section 156 (review of section 146 order)—
- (a) in subsection (8)—
    - (i) for the definition of “accused” substitute—
      - ““accused” includes—
      - (a) appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and
      - (b) respondent,”
    - (ii) after the definition of “relevant period” insert—
      - ““respondent” has the meaning given by section 140A,”,
  - (b) in subsection (9)—
    - (i) omit “or” immediately following paragraph (g),
    - (ii) after paragraph (h) insert “, or
    - (i) the 2011 Act proceedings are disposed of or abandoned.”,
  - (c) after subsection (10) insert—
    - “(11) In its application to proceedings involving a respondent, subsection (9) is to be read as if paragraphs (a) to (h) were omitted.”.
- 30 In section 158 (applications and reviews: general provisions)—
- (a) in subsection (4), after paragraph (b) insert—

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- “(c) if the 2011 Act proceedings to which the application or review relates are continuing, to the same judge or judges as have been (or are to be) assigned to those proceedings.”,
- (b) in subsection (5), for “or, as the case may be, other person” substitute “, other person or, as the case may be, respondent”,
- (c) for subsection (6) substitute—
- “(6) In this section—
- “appellant” and “appellate proceedings” have the meanings given by section 132,
- “respondent” has the meaning given by section 140A.”.
- 31 In section 160 (means of disclosure), in subsection (9)—
- (a) for the definition of “accused” substitute—
- ““accused” includes—
- (a) appellant or, in any case relating to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies, and
- (b) respondent,”,
- (b) after the definition of “appellant” insert—
- ““respondent” has the meaning given by section 140A.”.
- 32 In section 162 (confidentiality of disclosed information), for subsection (8) substitute—
- “(8) In this section—
- “accused” includes—
- (a) where information is disclosed by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2), the appellant or, as the case may be, person to whom the prosecutor is required to disclose the information, and
- (b) where information is disclosed by virtue of section 140B(2)(b), 140C(2) or 140D(3)(b), the respondent,
- “respondent” has the meaning given by section 140A.”.
- 33 In section 166 (abolition of common law rules about disclosure)—
- (a) in subsection (3)—
- (i) for “and 139” substitute “, 139 and 140E”,
- (ii) for “or appellant” substitute “, appellant or respondent”,
- (b) in subsection (4)—
- (i) for “or the appellant” substitute “, the appellant or the respondent”,
- (ii) for “or 139” substitute “, 139 or 140E”,
- (iii) omit “or” immediately following paragraph (a),
- (iv) after paragraph (b) insert “, or
- (c) information does not fall within section 140B(3).”.
- (c) in subsection (5), for “or, as the case may be, the appellant,” substitute “, the appellant or, as the case may be, the respondent”,
- (d) in subsection (6)—
- (i) after “accused” insert “or the respondent”,
- (ii) for “or 139” substitute “, 139 or 140E”,



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- (e) in subsection (7)—
  - (i) for “or, as the case may be, the appellant” substitute “, the appellant or, as the case may be, the respondent”,
  - (ii) for “or 139” substitute “, 139 or 140E”,
- (f) for subsection (8) substitute—
  - “(8) In this section—
    - “appellant” has the meaning given by section 132,
    - “respondent” has the meaning given by section 140A.”.

34 In section 167 (interpretation of Part 6)—

- (a) in subsection (3)—
  - (i) for “or the appellant or other person” substitute “, the appellant or other person or the respondent”,
  - (ii) for “or, as the case may be, the appellant or other person” substitute “, the appellant or other person or, as the case may be, the respondent”,
  - (iii) in paragraph (e), after “145(4)(a)” insert “, (4A)(a)”,
  - (iv) in paragraph (f), after “(8)(c)” insert “, (8A)(c)”,
- (b) after subsection (5) insert—
  - “(6) References in the following sections to the respondent include references to a solicitor or advocate acting on behalf of the respondent—
    - (a) section 140B(2)(b) and (4),
    - (b) section 140C(1)(a), (2) and (3),
    - (c) section 140D(1), (2), (3)(b) and (4).”.