



Scottish Police Federation

5 Woodside Place Glasgow G3 7QF

JCC Circular 61 of 2015

Ref: CS/LS

25 November 2015

Attachments: Criminal Verdicts (S) Bill
Explanatory Notes
Policy Memorandum
Delegated Powers Memorandum

Dear Colleague

Criminal Verdicts (Scotland) Bill - Consultation

The Justice Committee is currently seeking views on the Criminal Verdicts (Scotland) Bill, which would remove the "not proven" verdict as one of the available verdicts in criminal proceedings and require an increased majority of jurors for a guilty verdict.

The Bill and accompanying papers are attached and I would appreciate any comments/observations you may have to be sent to Lesley.stevenson@spf.org.uk by **Tuesday 22 December 2015**.

Yours sincerely

Calum Steele
General Secretary

ACCOMPANYING DOCUMENTS

Explanatory Notes, together with other accompanying documents, are printed separately as SP Bill 42-EN. A Policy Memorandum is printed separately as SP Bill 42-PM.

Criminal Verdicts (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to provide for the removal of the not proven verdict as one of the available verdicts in criminal proceedings; and for a guilty verdict to require an increased majority of jurors.

1 Removal of the not proven verdict

After section 292 of the 1995 Act insert—

“Available verdicts

292A Available verdicts

There are only two verdicts available in criminal proceedings, guilty and not guilty.”.

2 Jury verdicts

(1) In section 90 (death or illness of jurors) of the 1995 Act—

- (a) in subsection (1) for “subsection (2)” substitute “section 90ZA”,
- (b) subsection (2) is repealed.

(2) After section 90 of the 1995 Act insert—

“90ZA Verdict by jury

- (1) A jury of 15 members may return a verdict of guilty only if at least 10 of them are in favour of that verdict.
- (2) Where by virtue of section 90(1) a jury has fewer than 15 members, it may return a verdict of guilty only if—
 - (a) in the case of 14 members, at least 10 of them are in favour of that verdict,
 - (b) in the case of 13 members, at least 9 of them are in favour of that verdict,
 - (c) in the case of 12 members, at least 8 of them are in favour of that verdict.
- (3) A jury of any number must return a verdict of not guilty if it is unable to return a verdict of guilty.”.

3 Meaning of the “1995 Act”

In this Act, the “1995 Act” means the Criminal Procedure (Scotland) Act 1995.

4 Ancillary provision

- 5 (1) The Scottish Ministers may by order make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision made by or under this Act.
- (2) An order under subsection (1) may modify any enactment (except this Act).
- 10 (3) Any power of the Scottish Ministers to make an order under this Act includes the power to make different provision for different purposes.
- (4) Any order under subsection (1) which adds to, replaces or omits any part of the text of any Act is subject to the affirmative procedure.
- (5) All other orders under subsection (1) are subject to the negative procedure.

5 Commencement

- 15 (1) Sections 3, 4, 6 and this section come into force on the day after Royal Assent.
- (2) Sections 1 and 2 come into force at the end of the period of 12 months beginning with the day of Royal Assent or such earlier day as the Scottish Ministers may by order appoint.

6 Short title

20 The short title of this Act is the Criminal Verdicts (Scotland) Act 2014.

Criminal Verdicts (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to provide for the removal of the not proven verdict as one of the available verdicts in criminal proceedings; and for a guilty verdict to require an increased majority of jurors.

Introduced by: Michael McMahon
On: 27 November 2013
Bill type: Member's Bill

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS
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ISBN 978-1-78392-242-0

CRIMINAL VERDICTS (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Criminal Verdicts (Scotland) Bill introduced in the Scottish Parliament on 27 November 2013:

- Explanatory Notes;
- a Financial Memorandum;
- Michael McMahon's statement on legislative competence; and
- the Presiding Officer's statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 42-PM.

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Non-Government Bills Unit on behalf of Michael McMahon, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE BILL

3. The Bill replaces the three verdicts currently available in criminal trials with two, and amends the law concerning the size of the majority required for a jury to return a verdict of guilty in criminal trials.

COMMENTARY ON SECTIONS

Section 1 – Removal of the not proven verdict

4. Section 1 makes an insertion to the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to provide that there are only two verdicts available in criminal trials: “guilty” and “not guilty”, effectively removing the third option of a “not proven” verdict. This applies to all trials: jury trials under solemn procedure, and trials conducted without a jury under summary procedure.

5. The not proven verdict is a long established element of the Scottish criminal justice system. There is however no explicit mention of it within current legislation. It is alluded to within section 90 of the 1995 Act (in the context of jury numbers), which refers to “any other verdict” than the guilty verdict, implying that there is more than one alternative.

6. The new statutory limitation to two verdicts would supersede any current provision to the contrary, whether contained in legislation or otherwise.

Section 2 – Jury verdicts

7. Section 2 amends the law concerning the size of the jury majority required to enable a verdict of guilty to be returned in solemn proceedings.

8. Subsection (1) repeals the existing provision in that regard, contained within section 90(2) of the 1995 Act, which is replaced by new section 90ZA. Section 90(2) provides that where jury numbers are reduced because of death or illness then at least eight of the remaining members must be in favour of a guilty verdict to enable such a verdict to be returned.

9. Section 90ZA, inserted by section 2(2) of the Bill, provides firstly that a jury of 15 members may return a verdict of guilty only if at least 10 of them are in favour of that verdict (90ZA(1)).

10. Section 90ZA(2) sets out the number of jurors required to return a verdict of guilty where the jury size falls below 15. In each case, the number involved (i.e. at least 10 from 14, nine from 13, eight from 12) mean that a majority of at least two thirds of the jurors is required. The Bill does not change the law concerning the size of a jury when first empanelled (i.e. 15), the circumstances in which a juror may be excused, or the minimum size to which a jury may be reduced (i.e. 12), as provided for under the 1995 Act.

11. Section 90ZA(3) obliges a jury, whatever its size, to return a not guilty verdict where it is not in a position to return a guilty verdict in terms of the provision on majority numbers set out at subsections (1) and (2).

Section 4 – Ancillary provision

12. This section has the effect of creating a power for the Scottish Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provision for the purposes of giving full effect to provision made by or under this Act. An order under subsection (1) is subject to the negative procedure except where such an order amends an Act. Where an order amends an Act it is subject to the higher level of scrutiny afforded by the affirmative procedure (subsection (4)). It is envisaged that the Scottish Ministers may wish to use the order making power under section 4 when establishing arrangements for the operation of section 1 and 2.

13. The Interpretation and Legislative Reform (Scotland) Act 2010 made provision about the publication, interpretation and operation of Acts of the Scottish Parliament and instruments made under them and for the scrutiny of subordinate legislation by the Scottish Parliament. Orders made under Acts of the Scottish Parliament are made via Scottish Statutory Instruments (SSIs). Under the affirmative procedure, subordinate legislation is not to be made unless a draft of the SSI containing it is laid before, and approved by resolution of, the Scottish Parliament. An SSI subject to the negative procedure comes into force unless the Parliament resolves to annul it within 40 days of it being laid.

Section 5 – Commencement

14. Section 5 provides for commencement of the Bill. The Bill's main provisions, i.e. sections 1 and 2, dealing with removal of the not proven verdict, and making revised provision in respect of jury majorities, are to be brought into force not later than twelve months from Royal Assent. The other sections of the Bill come into force immediately following Royal Assent. These include section 4, enabling the Scottish Ministers to put in place any subordinate legislation required to facilitate the new legislation in advance of the substantive provisions of the Bill coming into force.

FINANCIAL MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Verdicts (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 27 November 2013. It has been prepared by the Non-Government Bills Unit on behalf of Michael McMahon MSP, the member in charge of the Bill, to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.
2. The purpose of this Financial Memorandum is to set out the best estimates of the administrative and other costs to which the provisions of the Bill will give rise and an indication of the margins of uncertainty in these estimates.
3. The Bill—
 - replaces the current three-verdict system in all criminal trials with two verdicts, by effectively removing the “not proven” verdict.
 - increases the size of majority required for conviction in trials by jury.

Removal of “not proven”

Theoretical increase in guilty verdicts and miscarriages of justice

4. The “not proven” verdict is not often used. Of all the people acquitted after trial in 2011-12, 82 per cent were found not guilty and only 18 per cent received a “not proven” verdict. Not proven verdicts accounted for less than one per cent of the overall total of those proceeded against in court.¹
5. Both the current not guilty and not proven verdicts are verdicts of acquittal which have the same effect in law – so on one view removing one of them should not make any difference to rates of conviction. On the other hand, there are some reasons to think otherwise, and these have been carefully considered.
6. Juror simulation studies support the idea that removal of the not proven verdict could produce more guilty verdicts.² Such exercises are not thought to be very reliable, however, because the frequency of each type of verdict chosen in simulation does not mirror those verdicts reached in real life. (Juror simulation is the best available evidence as actual jurors are forbidden by law from disclosing the nature of their deliberations.) For these reasons, there is no way of knowing whether the number of convictions will increase, or (if so) by how much. It is therefore impossible to quantify what (if any) additional costs there may be – including additional costs to the Scottish Prison Service if the number of convictions leading to imprisonment was to rise.

¹ Scottish Government. *Statistical Bulletin, Crime and Justice Series, A National Statistics publication for Scotland, Criminal Proceedings in Scotland, 2011-12*. 27 November 2012, paras 3.22 and 3.23 and Table 2a. Available at: <http://www.scotland.gov.uk/Resource/0043/00434185.pdf>

² Law Hum Behav (2008) 32:241–252 *A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making*. Available at: <http://www.uccs.edu/~faculty/egreene/pdf/A%20third%20verdict%20option.pdf>

7. As set out in the consultation document for the Bill, it has been argued that an increase in guilty verdicts, if it arose, might result in a higher incidence of wrongful conviction. The Thomson Committee³ took this view, though it was disputed by Professor Peter Duff.⁴

8. It may be the case, as anecdotal evidence suggests, that there is some mis-use of the not proven verdict at present, to acquit those the jury thinks are guilty but feels compassion for. If the result of the Bill is that at least some of these people are now convicted then this could lead to greater costs of imprisonment. Balanced against this, there are costs associated with allowing guilty people to go free – i.e. the costs associated with the further crimes they may go on to commit.

9. In any case, as set out above, there is no strong evidence to support the idea that a greater number of convictions would result from the removal of a third verdict. It is not, therefore, possible to state with any degree of certainty whether any additional costs will arise and what the scale of any such costs would be.

Time taken to reach a verdict

10. It was suggested, in response to the member's consultation, that the removal of a third verdict could make it more likely that juries spend more time reaching a verdict, with a consequent impact on court costs in some cases. An argument could equally be made that the removal of a third option would simplify matters and lead to quicker decision making. Both of these suggestions are speculative in nature and there does not appear to be any evidence to support either of them.

11. In conclusion, no evidence exists to demonstrate that there would be an increase in guilty verdicts or that more miscarriages of justice would arise as a result of removing the third verdict. Nor is there any firm basis for the suggestion that juries might take longer to reach a verdict.

Increasing the majority required for conviction

12. The provision relating to majority does not introduce a possibility of hung juries and retrials. It would remain the case that if the required majority is not achieved, the accused would be acquitted.

13. There is a very similar provision to this in the Scottish Government's Criminal Justice (Scotland) Bill (at section 70). The Government states in its Financial Memorandum that it does not anticipate any additional costs as a result of this provision.

COSTS ON THE SCOTTISH ADMINISTRATION

14. Costs on the Scottish Administration will potentially fall on the Scottish Government, the Scottish Prison Service (SPS), the Scottish Court Service, the Crown Office and Procurator Fiscal Service (COPFS), the Scottish Police Authority and the Legal Aid Fund. As set out above,

³ Thomson Committee, *Criminal Procedure in Scotland, Second Report*, Cmnd. 6218 (1975).

⁴ Peter Duff, "The Scottish Jury – a very peculiar institution", *Law and Contemporary Problems*, Vol 62, No. 2 (1999).

it is not possible to say with any degree of certainty whether greater costs will be incurred by SPS. As far as the Scottish Government is concerned, minor costs will be incurred in the preparation of subordinate legislation but it should be possible for this to be absorbed within the normal running costs of the Justice Department. COPFS will incur minor costs in circulating information on the changes to its staff.

The Scottish Court Service

15. Both areas of the Bill will require information to be circulated to those working within the court system but the changes are sufficiently straightforward that training or retraining costs are not envisaged. It is anticipated that any additional guidance required for those responsible for court procedures would be combined with guidance that will be required in relation to the Criminal Justice (Scotland) Bill (which makes much more fundamental changes) and could easily be absorbed into normal running costs.

The Scottish Police Authority

16. The changes only affect the conduct of trials, while the role of the police is limited to the investigation of offences and the collection of evidence. There will, therefore, be no significant impact on policing.

Legal Aid Fund

17. It is not anticipated that any additional costs will fall on the Legal Aid budget.

COSTS ON LOCAL AUTHORITIES

18. There may be additional costs placed on Scottish local authorities as a result of the Bill. If, as discussed above, the Bill results in an increase in convictions, some may lead to community sentences, which will place some additional burden on local authorities. It is not possible to quantify this potential additional cost given the uncertainty that the rate of conviction would, in fact, change.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

The legal profession

19. Criminal defence lawyers and Crown counsel will be required to adjust to the change, as they are involved in the court process. The changes are straightforward in nature and such professions, in the course of their work, keep up to date with changes of procedure. It is not anticipated that any additional expenditure will be incurred.

MEMBER'S STATEMENT ON LEGISLATIVE COMPETENCE

On 27 November 2013, the member in charge of the Bill (Michael McMahon MSP) made the following statement:

“In my view, the provisions of the Criminal Verdicts (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER'S STATEMENT ON LEGISLATIVE COMPETENCE

On 27 November 2013, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Criminal Verdicts (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

These documents relate to the Criminal Verdicts (Scotland) Bill (SP Bill 42) as introduced in the Scottish Parliament on 27 November 2013

CRIMINAL VERDICTS (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS
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ISBN 978-1-78392-243-7

CRIMINAL VERDICTS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Non-Government Bills Unit on behalf of Michael McMahon MSP. Its purpose is to assist consideration by the Delegated Powers and Law Reform Committee, in accordance with Rule 9.6.2 of the Parliament's Standing Orders, of provisions in the Criminal Verdicts (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. This short Bill comprises two elements: firstly it replaces the three verdicts which are currently available in criminal trials with two, the not proven verdict being removed. Secondly, it amends the law concerning the size of the majority required for a jury to return a verdict of guilty in all criminal trials.

3. The Bill's core elements are taken forward by means of insertions to the Criminal Procedure (Scotland) Act 1995, which represents the principal statutory reference point for procedural matters concerned with the criminal law of Scotland.

Rationale for subordinate legislation

4. The Bill contains two powers to make subordinate legislation which are delegated to the Scottish Ministers. These powers are new, and no existing powers are amended or repealed. The powers are explained in detail in the following paragraphs, but in explaining if and how provision should be set out in subordinate legislation rather than on the face of the Bill the member has had regard to –

- the need to strike a balance between the importance of ensuring full Parliamentary scrutiny of the Bill's core provisions and making proper use of Parliamentary time;
- this being a member's Bill and in consequence the relatively better position of the Scottish Ministers, when compared with an individual member, in making decisions on the best use of public resources to meet objectives;
- the possible requirement to make further provision to ensure that where a need is identified to address any matter associated with the effective operation of the Bill this can readily be taken forward.

Delegated powers

Section 4 – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: generally negative resolution of the Scottish Parliament (but affirmative procedure to apply where amending an Act)

Provision

5. Section 4 enables the Scottish Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provision. This can be done where the Scottish Ministers consider such action to be appropriate, whether for the purposes of, in consequence of, or for giving full effect to, any provision made by or under the new Act (subsection 1). An order made under the power can be used to modify any enactment, with the exception however of the new Act. The power can be used to make different provision for different purposes (subsection 3). The negative procedure applies for orders made under section 4, unless the order making power is used to amend the text of an Act. In such circumstances, the affirmative procedure is to apply.

Reason for taking power

6. It is possible that the Scottish Ministers may wish to make (or may consider that there is a need to make) ancillary provisions in connection with the new legislation, in particular when establishing arrangements for the operation of sections 1 and 2.

7. As with any new legislation, it is possible that there may be a requirement for consequential provisions in order to assist preparations for the significant changes which the Bill makes, in terms of reducing the number of available verdicts in criminal proceedings, and amending existing provisions relating to jury majorities. Changes might also conceivably be required to other related legislation. Similarly, there may be a need for transitional provisions etc, as the revised provision which the Bill makes in regard to criminal verdicts come into place. This order making power is therefore considered necessary to provide for flexibility in those areas.

8. This subordinate legislation making power has been provided for within the Bill to avoid any later need for primary legislation to deal with such matters. That might, otherwise, have been required even where the subject matter is of no major consequence, yet being concerned with a

matter which is clearly within the scope and policy intentions of the Bill. It would not in such circumstances be an efficient or effective use of Parliamentary resources to have to proceed by way of primary legislation. It is therefore considered appropriate for suitable provision, and adopting a relatively standard form, to be made within the Bill itself.

Choice of procedure

9. It may be noted firstly that the section 4 order making power is limited insofar as it can only be used to make provisions of an ancillary nature which the Scottish Ministers consider appropriate for the purposes of, or in consequence of, or for giving full effect to, the Bill or any provision made by or under it. That represents an important restriction on the use of the power, which can only be exercised in relation to the narrow and specific subject matter which is dealt with in this Bill.

10. Exercise of the order making power set out in section 4 will normally be by means of the negative procedure. So, where the power is exercised so as deal with something other than an amendment to primary legislation, it would be subject to the negative procedure. That, it is considered, would provide a sufficient, and appropriate level of scrutiny where the power is exercised in that manner.

11. Where however the power set out in section 4 is used to amend the text of an Act (whether by way of adding to the existing text, or replacing or omitting text) the exercise of it is to be subject to the affirmative procedure. Plainly, if this power were to be used to amend existing primary legislation then it is appropriate that exercise of it should be subject to the more rigorous form of Parliamentary scrutiny afforded by the affirmative procedure. That is accordingly provided for, under reference to the provision made at section 4(4).

Section 5 – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Order to be laid before Parliament (subject to section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Provision

12. Section 5(1) of the Bill provides for sections 3, 4 and 6, together with section 5 itself, to come into force on the day after Royal Assent. Section 5(2) provides that sections 1 and 2 are to come into force 12 months from Royal Assent or, alternatively, on such earlier day as the Scottish Ministers may by order appoint.

Reason for taking power

13. The “default” position is that sections 1 and 2, which represent the Bill’s operative provisions, are to come into force 12 months from Royal Assent. The order making power contained within section 5(2) enables however the Scottish Ministers to bring those sections into

force at an earlier date, should they choose to do so. It may be that the Scottish Ministers will consider that any preparations necessary to bring the Bill fully into force can be dealt with sooner, and this power provides them with the flexibility to do so.

Choice of procedure

14. In accordance with what is now the usual approach for commencement orders, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

This document relates to the Criminal Verdicts Bill (SP Bill 42) as introduced in the Scottish Parliament on 27 November 2013

CRIMINAL VERDICTS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

CRIMINAL VERDICTS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Verdicts (Scotland) Bill introduced in the Scottish Parliament on 27 November 2013. It has been prepared by the Non-Government Bills Unit on behalf of Michael McMahon MSP, the member in charge of the Bill, to satisfy Rule 9.3.3A of the Parliament's Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 42-EN.

POLICY OBJECTIVES OF THE BILL

2. The Criminal Verdicts (Scotland) Bill ("the Bill") amends the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") to replace the current system of three verdicts in criminal trials with two, and to increase the majority required for conviction.

DETAIL OF THE BILL

Number of verdicts

3. Under Scots criminal law, three verdicts are currently available: guilty, not guilty and not proven. The availability of three verdicts is unusual, and is of somewhat obscure 18th century non-statutory origin. The not proven verdict is not often used. Of the cases which resulted in acquittal following trial in 2011-12, 82 per cent involved a not guilty verdict and only 18 per cent involved not proven.¹

4. This Bill will reduce the verdicts available in criminal trials from three to two and the verdicts will be guilty and not guilty. This policy is founded on the principle that accused persons are innocent until proved guilty and, as such, are entitled to a straightforward and unqualified acquittal where the prosecution case against them cannot be established beyond reasonable doubt.

5. In law an acquittal, whether not guilty or not proven, has the same effect. However, it is a widely held view that that the person given a verdict of not proven is unfairly stigmatised, particularly as they have no right to a retrial or appeal in order to "clear their name".

¹ Scottish Government. Statistical Bulletin, Crime and Justice Series, A National Statistics publication for Scotland, CRIMINAL PROCEEDINGS IN SCOTLAND, 2011-12. 27 November 2012, para 3.2.3 and Table 2a. Available at: <http://www.scotland.gov.uk/Resource/0043/00434185.pdf>

6. Some uncertainty exists around the three verdict system and this is compounded by the fact that juries are not allowed to receive guidance on the difference between the two acquittal verdicts. Some commonly held misconceptions exist – such as that a not proven verdict allows for a retrial. In practice, not proven has exactly the same status as not guilty and retrials are, therefore, only permitted under the circumstances defined in the Double Jeopardy (Scotland) Act 2011.² It is extremely important for any justice system to be transparent and fully understood.

7. The three-verdict system is sometimes regarded as offering a compromise or intermediate option and it is argued that this makes juries less likely to convict – skewing the justice system in favour of the accused. Juror simulation studies³ explored this theory and found that the likelihood of a conviction was reduced when a not proven option was available. This compromise effect may not, however, be borne out to the same degree in reality, with the not proven option being chosen much more often in the study than it is in actual criminal trials.

8. If the case against an accused person cannot be proved beyond reasonable doubt then it is more logical that a not guilty verdict is returned and this Bill accordingly seeks to remove the illogical, confusing and potentially stigmatising not proven verdict.

Which verdicts?

9. The not proven verdict, though it is an acquittal, does not convey the same clarity and finality as a not guilty verdict. There are logical arguments in favour of a two-verdict system of proven and not proven – it would reinforce the fact that juries exist to decide whether or not a prosecution has successfully made the case for conviction. However, retention of the not proven verdict could perpetuate the stigma that is often attached to it and would do nothing to dispel people's misconceptions about it being something less than a full acquittal.

10. It is for these reasons that the Bill provides for the not proven verdict to be removed and guilty and not guilty retained.

Former acquittals

11. The Bill does not have retrospective effect, and abolition of the not proven verdict would not affect any person acquitted in this way prior to the Bill being enacted.

12. Under the provisions of the Bill, individuals facing prosecution (under the terms of the Double Jeopardy (Scotland) Act 2011) for a crime for which they have previously been acquitted will be subject to the two verdicts.

Majority required for conviction

13. Scottish juries number 15 but may be reduced in size due to excusals, or other absence, to a minimum of 12. A majority of eight is required to return a guilty verdict, regardless of whether the jury has been reduced in size by excusals.

² <http://www.legislation.gov.uk/asp/2011/16/contents>

³ Law Hum Behav (2008) 32:241-252. *A Third Verdict Option: Exploring the Impact of the not Proven Verdict on Mock Juror Decision Making*. Available at: <http://www.uccs.edu/~faculty/egreene/pdf/A%20third%20verdict%20option.pdf>

14. In contrast, juries in England and Wales are normally required to reach a verdict unanimously although they may, after a period of deliberation, convict by a majority of 10 or 11 (out of 12 jurors). It is argued by many that, in cases where an accused is convicted by a majority as narrow as eight jurors versus seven, it cannot be demonstrated that a case has been proved beyond reasonable doubt.

15. The policy is to retain the jury size of 15, and to leave unchanged the arrangements for excusals but move to a qualified majority of at least two-thirds of the jury being required to convict. The number required to convict will be reduced on a sliding scale if excusals or other absence reduce the size of the jury.

16. It is not the member's intention to legislate on majority for its own sake. Rather, he examined whether the removal of the third verdict created a need to examine the majority required for conviction.

17. Based on the juror simulation studies mentioned above, the removal of an alternative acquittal seems likely to create an increase – perhaps small – in the proportion of trials ending in conviction.

18. If there is any possibility that more guilty verdicts will arise from the removal of the not proven verdict, it is important to ensure that such convictions are safe. In order to address any possible bias against the accused as the result of the loss of not proven, it therefore makes sense to increase the majority required to convict and to take both measures forward at the same time.

Legislative context

Criminal Procedure (Scotland) Act 1995

19. The 1995 Act, at section 90, sets out the position with regard to jury numbers in the event of death or illness of jurors. A jury of 15 may convict only if eight or more jurors reach that view.

20. Section 90 allows for the size of a jury to be reduced if a juror dies or if the court is satisfied that it is for any reason inappropriate for any juror to continue to serve as a juror. The minimum number to which the jury may be reduced in this way is 12. Where the number of jurors is reduced below 15, the majority required for conviction remains at eight.

21. There is no explicit statutory provision for three verdicts, that system and in particular the availability of the not proven verdict having evolved as a matter of common law. Some very limited, indirect statutory reference is made to the three verdict system – see in particular the reference in section 90(2) of the 1995 Act to “any other verdict” in the context of circumstances where the majority required for a guilty verdict does not exist.

Scottish Government's position

22. In November 2011, Lord Carloway published his review of criminal procedures.⁴ This review was triggered by the case of *Cadder v. HM Advocate*,⁵ which found that the practice whereby an accused person could be detained for up to six hours by the police for questioning without access to a solicitor was contrary to the European Convention on Human Rights. Scotland is obliged to comply with the Convention. Carloway was therefore tasked with reviewing the law and practice of questioning suspects in a criminal investigation, examining legal advice prior to and during police questioning. He was also tasked with considering the requirement for corroboration and the suspect's right to silence.

23. The Scottish Government consulted on proposals arising from Lord Carloway's review between 3 July and 5 October 2012. A further consultation seeking views on additional safeguards following the removal of the requirement for corroboration (the "Additional Safeguards" consultation)⁶ was launched on 19 December 2012, and ran until 15 March 2013. It is this consultation that has the greatest relevance to this Bill because it sought views on increasing the jury majority required to return a verdict and on whether the not proven verdict should be retained.

24. The analysis of responses to this Additional Safeguards consultation showed that most respondents supported increasing the jury majority required to return a guilty verdict. Whilst the majority of respondents also supported the abolition of the not proven verdict, some expressed concern about the consequences of doing so.

25. Following this consultation, the Scottish Government introduced the Criminal Justice (Scotland) Bill (SP Bill 35)⁷ on 20 June 2013. That Bill, at section 70, contains provision analogous to section 2 of the Criminal Verdicts (Scotland) Bill, on increasing the majority required to convict.

26. The Government's Bill does not make any provision for the removal of the not proven verdict. At introduction, the Government announced that "now is not the right time to consider any further change in the light of other significant reforms being proposed. However, we have agreed in principle with the Scottish Law Commission that a review of this verdict should be carried out by them in a future work programme".⁸

27. It is thought that the Scottish Law Commission will take approximately two years to complete its review. It appears unlikely therefore that the Scottish Government will legislate on the issue of the third verdict during this Session.

⁴ The Carloway Review. Available at: <http://www.scotland.gov.uk/About/Review/CarlowayReview>

⁵ Supreme court judgement available at: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0022_Judgment.pdf

⁶ Scottish Government. Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the requirement for Corroboration. Available at: <http://www.scotland.gov.uk/Resource/0042/00425488.pdf>

⁷ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx>

⁸ <http://news.scotland.gov.uk/News/Criminal-Justice-Bill-published-19d.aspx>

CONSULTATION

28. The member first consulted on the removal of a third verdict in Session 2, in 2007.⁹ At that time he proposed that the verdicts should be proven and not proven and also gathered views on jury majority. This consultation did not attract a high number of responses, though a majority supported the proposal.

29. The member undertook a fresh consultation¹⁰ between 28 June and 31 October 2012. The proposal was for a Bill “to replace the current system of three verdicts in criminal trials with two, and to increase the majority required for conviction”, and this time the consultation document proposed that the remaining two verdicts should be guilty and not guilty. Nineteen responses were received and respondents included representative organisations, academics and individuals.

30. A majority of respondents (13 or 68%) supported the general principle of the proposal and were in favour of a move to a two-verdict system. Five (26%) opposed the proposal while one (5%) expressed no clear view. Of the 10 respondents who expressed a view on what the two remaining verdicts should be, four (40%) preferred guilty and not guilty, two (20%) preferred proven and not proven and two (20%) were content with either of those pairings. Two (20%) felt that guilty and not proven was the best pair.

31. The Scottish Government also consulted on the removal of not proven as part of its consultation on Additional Safeguards.¹¹ It is important to note that the question was asked in the context of the removal of corroboration. Having said that, the responses repeated what the member had found through his own consultation i.e. that the meaning of the verdict is not explained to the jury, that it is incompatible with the presumption of innocence, that it is confusing to have two acquittal verdicts with the same practical outcome and that an acquitted person has the right to a clear acquittal and should not be tainted with any stigma. The Scottish Government’s consultation found an even split between support for guilty/not guilty and proven/not proven.

32. Those supporting the maintenance of not proven argue that it provides a safeguard against wrongful conviction where the prosecuting case has failed to prove the case beyond reasonable doubt.

33. Some support within the member’s consultation for removal of a third verdict made a link with the Scottish Government’s plans to remove the requirement for corroboration. One submission argued that it “could leave the level of protection available against wrongful conviction in Scotland at a dangerously weak level”. Another contended that a majority higher

⁹ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/18155.aspx>

¹⁰ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/52683.aspx>

¹¹ Scottish Government. Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the requirement for Corroboration. Available at: <http://www.scotland.gov.uk/Resource/0042/00425488.pdf>

than eight was necessary to demonstrate that guilt had been established “beyond reasonable doubt”¹².

34. On the question of whether any change to the number of verdicts should lead to a change in the majority of jury members required to convict, respondents were divided. A clear majority (nine of the 14 who answered this question, or 64%) were in favour of increasing the majority required to convict. Their reasons varied, but were quite often unrelated to the move to a two-verdict system. Five (36%) of those answering disagreed that it was necessary to alter the majority required to convict.

35. The Scottish Government’s Additional Safeguards consultation (mentioned above) received a high level of support for moving to a qualified majority (22 of 32 who answered the question). It is important to note that the question was asked in the context of whether it offered a desirable safeguard against wrongful conviction once the requirement for corroboration was removed.

ALTERNATIVE APPROACHES

Removal of third verdict

36. Arguments for proven and not proven or yes and no as the two available verdicts were rehearsed in the member’s consultation and in its responses. It was argued both of these pairings better reflect the position that juries are placed in – to decide whether the case against the accused has been proved. However, for the reasons set out above, removing not proven and leaving guilty and not guilty intact is considered to offer the greatest clarity and has the advantages of familiarity and continuity.

37. One of the difficulties with the not proven verdict is that the judge is prohibited, under court rules, from explaining to jurors the difference between it and the other acquittal, not guilty. While removing this rule might remove some of the confusion around the verdict, it would not constitute a satisfactory alternative because it fails to address the objection that not proven is incompatible with the presumption of innocence and that an acquitted person has the right to a clear acquittal and should not be tainted with any stigma. Nor would this approach provide a solution to the existence of an “intermediate” option which can be seen as skewing justice in favour of the accused.

38. There is, therefore, no realistic alternative to removing the third verdict that would satisfactorily address all of the issues set out in this memorandum.

Majority required for conviction

39. The member consulted on the appropriate majority required for returning a guilty verdict. While a majority of those responding supported the idea of increasing the majority required, few ventured a preferred model.

¹² Reform of Criminal Verdicts Consultation Summary. Para 36. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/52683.aspx>

40. The member proposed a majority of two-thirds as a starting point for consultation and remains committed to this. The Scottish Government's Criminal Justice Bill¹³ proposes the same arrangements.

41. The member considered whether to proceed with a Bill that would remove the third verdict but leave the majority requirement unchanged. As rehearsed earlier in this document, if there is any possibility that a removal of an alternative acquittal (i.e. not proven) could mean that jurors are more likely to opt for a guilty verdict then it seems sensible to ensure that convictions can only be made once a higher threshold is met. For this reason, the member wishes to proceed with the adjustment to majority verdict hand in hand with the move to a two-verdict system.

Is legislation necessary?

42. The provisions of the Bill are very specific and can only be achieved by adjusting the current legislation governing the majority required to reach a guilty verdict and by legislating to abolish the not proven verdict. As such, there is no alternative route to achieving the same result.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

43. The Bill's provisions are not discriminatory on the basis of race, age, disability, religion and belief, or sexual orientation.

44. The not proven verdict is most commonly used by juries in rape, attempted rape and sexual assault cases. Based on 2011-12 figures of the acquittals for all crimes, 82% were acquitted with not guilty while 18% received not proven but 56% of acquittals for rape or attempted rape were not guilty while 44% were not proven. For sexual assault, 79% of acquittals were not guilty and 21% were not proven.¹⁴

45. Victims of rape and sexual offences are more likely to be female. Some rape trials rest on the accused's word against the word of the alleged victim as to whether consent was given and, in the absence of corroborating evidence, lead to acquittal. There is a concern that the removal of the not proven verdict would mean that juries can no longer use this intermediate verdict to "send a message" by acquitting in a way that indicates to the alleged victim that the jurors, although unable to opt for guilty beyond reasonable doubt, are not necessarily accepting an accused's story over a victim's. It is argued by some that this could have an impact on a victim's willingness to report such crimes if the incidence of not guilty verdicts increased as a result.

46. On the other hand, an advocacy respondent (that is, a body representing the rights and views of those affected by sexual crimes) to the Scottish Government's consultation on

¹³ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx>

¹⁴ Scottish Government. Statistical Bulletin, Crime and Justice Series, A National Statistics publication for Scotland, Criminal Proceedings in Scotland, 2011-12. 27 November 2012. Available at: <http://www.scotland.gov.uk/Resource/0043/00434185.pdf>

additional safeguards said that the not proven verdict “has a devastating effect on victims and their families” as it fails to produce a conclusive result.

47. It is not possible to say with any certainty whether removing the not proven verdict would result in a greater unwillingness to report rape and sexual offences.

48. In any case, it is the member’s view that a verdict should never be used to “send a message” to the accused or to an alleged victim.

49. Furthermore, while three verdicts exist, the not guilty verdict will always be seen as a stronger and more conclusive vindication of the accused. A move to a two-verdict system would remove this apparent hierarchy of acquittals and observers might be less likely to associate not guilty with a complete vindication but view it, more accurately and properly, as an indication that the case had not been proved beyond reasonable doubt.

Human rights

50. The European Convention on Human Rights upholds the presumption that an accused person is to be considered innocent until proven guilty. One respondent to the Scottish Government’s consultation on Additional Safeguards¹⁵ further commented that—

“Jurisprudence of the European Court of Human Rights has extended this central protective notion to preclude expressions of suspicion by the courts after acquittal.

“The Not Proven verdict in and of itself is not incompatible with ECHR. However the system must not allow for lingering doubts about the acquitted person’s innocence when such a verdict is returned.”

51. The recent Cadder judgement¹⁶ demonstrated the potential vulnerability of Scot’s law to successful challenge on ECHR grounds. A removal of the not proven verdict would remove the risk of a challenge on the grounds that the presumption of innocence was compromised by such a verdict.

Island communities

52. The Bill is designed to benefit everyone in Scotland. It does not have specific implications for those living in island communities.

Local government

53. The Bill could result in new costs on local authorities if it were to result in a greater number of community sentences arising from an increase in guilty verdicts. However, there is no clear evidence that any increase in convictions will result, and even if it did, the increase in those

¹⁵ Scottish Government. Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration. Analysis of Consultation Responses. Para 5.8 Available at: <http://www.scotland.gov.uk/Resource/0042/00425488.pdf>

¹⁶ http://www.supremecourt.gov.uk/docs/UKSC_2010_0022_Judgment.pdf

This document relates to the Criminal Verdicts (Scotland) Bill (SP Bill 42) as introduced in the Scottish Parliament on 27 November 2013

convictions that involve a community sentence is likely to be extremely small. It would appear then that the effect of removing this verdict would be a very minimal impact on the staff resource required to supervise and support community sentences.

Sustainable development

54. The Bill does not have any impact on sustainable development.

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CRIMINAL VERDICTS (SCOTLAND) BILL

POLICY MEMORANDUM

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS
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ISBN 978-1-78392-244-4