

Criminal Procedure (Reform of Verdicts) (Scotland) Bill



Public Consultation

by

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FOREWORD

The debate over the 'Not Proven Verdict' and its place in Scottish criminal proceedings has been ongoing for over 200 years. Sir Walter Scott famously dubbed this acquittal decision as 'the bastard verdict', such was the level of outrage he had noted at the illogicality of this outcome at the end of a particular court case.



It was the more contemporary case of Amanda Duffy that first brought concerns about the second acquittal verdict to my attention.

In 1992 Amanda Duffy, a drama student from Hamilton, Lanarkshire, was found dead in a car park in the town. The man accused of her murder, Francis Auld, was acquitted 'Not Proven' despite a raft of evidence against him which included his teeth marks on her body.

The case of Amanda Duffy prompted the 'Abolish the Not Proven Verdict Campaign' which was led by her father and a successful civil action was subsequently brought against Francis Auld by Amanda's parents.

I believe that not only dissatisfaction with the outcome of this specific case but many others which have occurred before and since highlights the need for a debate on the second acquittal.

The issue of the three verdict system in Scotland has been debated since the Amanda Duffy case in the House of Commons; however, it has never been debated in the Scottish Parliament.

I feel that it is now time for the Scottish Parliament to debate this highly contentious issue and that is why I have drafted this consultation paper.

I commend my proposal to you and look forward to your valuable contribution.

Best wishes

Michael McMahon MSP

INTRODUCTION

1. I intend to introduce a Bill in the Scottish Parliament to create a two verdict system in Scots criminal procedure with the verdicts of “proven” and “not proven”, in place of the current three verdict system.
2. My proposal for a Bill would ensure that there is only one acquittal verdict. In so doing it would address the issues connected with the current three verdict system. By removing the not guilty verdict Scotland will be left with a clearer two verdict system putting an end to the confusion and misunderstanding brought about by having two acquittal verdicts. My proposal will reinstate balance to the criminal justice system. No longer can the criminal justice system be seen as favouring the accused. In clarifying the meaning of acquittal in Scottish criminal procedure the likelihood of challenge under the European Convention of Human Rights is reduced.
3. Over the last 30 years or so, there have been three reviews of the Scottish verdict system: the Thomson Committee¹ in 1975; in 1988 the Criminal Law Committee of the Law Society of Scotland considered the issue; and most recently the Scottish Office in 1994². Westminster debated the not proven verdict in 1969, when former First Minister, Donald Dewar MP, introduced a Ten Minute Rule Bill to abolish the not proven verdict and again in 1993 when George Robertson tabled a private member’s bill, Criminal Procedure (Abolition of Not Proven Verdict) (Scotland) Bill.
4. This will be the first opportunity the devolved Scottish Parliament will have to debate the three verdict system and your comments will contribute to this debate.
5. My consultation also provides an opportunity to comment on how juries reach a decision on whether an accused person is found to have committed an offence. In order to convict a person of an offence at least eight jurors have to be convinced of their guilt. This is referred to as the simple majority. I would like to establish whether any issues arise as a result of my proposal to abolish the second acquittal verdict.

BACKGROUND

6. The verdicts³ used in Scots law have evolved over a long period of time, changing to meet the circumstances of the time.

The history of verdicts in Scottish criminal trials

7. The original verdicts in Scots law were known as “culpable” and “convict” or “clense”.

¹ Second Report by the Thomson Committee on Criminal Procedure in Scotland (Cmnd 6218) (1975)

² Improving the Delivery of Justice in Scotland, Juries and Verdicts, The Scottish Office 1994

³ Verdicts are the decision of a criminal court on whether an accused is found to have committed an offence.

8. Guilty and not guilty were introduced by Cromwell during the Usurpation, when he imposed English judges on Scotland. After the reformation Scottish courts reverted to asking judges to find whether the facts in the indictment were "proven" or "not proven."
9. It wasn't until the trial of Samuel Hale in 1726 that the "not guilty" verdict appeared. This came about because the jury was so convinced of Samuel Hale's innocence that they returned a verdict of not guilty. Two years later Carnegie of Findhorn was put on trial for the murder of the Earl of Strathmore where his counsel asked for the jury to insist on a verdict of not guilty rather than letting the judge having the final say.⁴
10. This established the three verdict system used in Scotland today, with a choice of guilty, not proven and not guilty verdicts. Scotland has the only three verdict system in the world.

Operation of the current three verdict system

11. There are two distinct types of criminal procedures, solemn procedure and summary procedure.
12. Briefly, solemn procedure deals with what is considered to be more serious cases and involves a jury, whereas summary procedure relates to less serious cases without the involvement of a jury. The High Court of Justiciary when sitting as a trial court exercises jurisdiction under solemn procedure only; whereas the Sheriff Court exercises jurisdiction under both solemn and summary procedure. The District Court exercises jurisdiction under summary procedure only.
13. In cases prosecuted under solemn procedure the judge decides questions of law whereas the jury decides questions of fact. The jury has to consider whether or not the Crown has established, beyond reasonable doubt, that the charge before them was committed by the accused. If that is the case then a verdict of guilty can be returned. To return a verdict of guilty at least eight jurors must agree.
14. If a jury is not satisfied that the facts of the case have not been proved, then a verdict of not guilty or not proven can be returned. The jury should then decide whether to return a verdict of not guilty or not proven. Either of these verdicts can be unanimous or by a simple majority.
15. Where a case is prosecuted under summary procedure, it is for the judge to decide both questions of law and fact.

The acquittal verdicts

16. There is no common law or statutory definition of "not proven", however the effect of the not guilty and not proven verdicts is the same - the accused is acquitted of the charge and cannot be tried for it again.

⁴ S A Bennett, 'Not Proven: The Verdict' Scots Law Times, SLTA 2002, 12, page 97

17. The following table details the percentage of those prosecuted that are acquitted after trial and the percentage of those acquitted where the not proven verdict was returned.

All crimes and offences	Acquitted Not Guilty	Acquitted Not Proven	Not proven as a % of All Acquitted
2002 ⁵	3%	1%	21%
2003 ⁶	3%	1%	20%
2004/05 ⁷	2%	1%	18%

18. This shows that the not proven verdict isn't used as frequently as the not guilty verdict.

19. It is also interesting to note that research in 1999 shows that juries make proportionally more use of the not proven verdict returning it in 42 per cent of High Court cases and 33 per cent of Sheriff Court cases. Sheriffs and justices who hear cases summarily only used the not proven verdict in 21 per cent of cases, however, as more cases are tried summarily than by solemn procedure, 88 per cent of all not proven verdicts are returned by justices or sheriffs sitting alone.”⁸

PROBLEMS ARISING WITH THE SECOND ACQUITTAL VERDICT

20. Debate over the not proven verdict and its place in Scots criminal procedure has been ongoing for nearly the past 200 years. One notable Scot so incensed by the illogicality of the verdict in a case that saw a woman acquitted of the charges against her, when he thought her patently guilty, referred to the verdict as:

“that bastard verdict”

Sir Walter Scott, Advocate & Writer 1827⁹

⁵ Statistical Bulletin, Criminal Justice Series, Criminal Proceedings in Scottish Courts 2003, CrJ/2005/4

⁶ Statistical Bulletin, Criminal Justice Series, Criminal Proceedings in Scottish Courts 2002,

⁷ Bulletin, Criminal Justice Series, Criminal Proceedings in Scottish Courts 2004/05, CrJ/2006/3

⁸ Criminal Justice in Scotland (edited by Peter Duff and Neil Hutton, 1999), page 165, note 21

⁹ Gow, N. The Case for Not Proven, New Law Journal 1993, p753

21. For a number of reasons the not proven verdict has given rise to sustained debate by the legal profession, victims, their families and those acquitted on a not proven verdict.

Public perception of the not proven verdict

22. In the eyes of the law, an acquittal, whether not guilty or not proven, has the same effect; the accused cannot be tried for the same crime again. Commonly however the public's perception of the not guilty and not proven verdicts differs.
23. The most frequent belief is that the not proven verdict implies that the accused was guilty but that this could not be proved. That they have escaped conviction because of some technical inadequacy of evidence or the lack of corroboration.
24. No other case typifies the public's feeling towards a second acquittal verdict better than the acquittal of Francis Auld in the case of the murder of Amanda Duffy, a drama student, in Hamilton in 1992. Ms Duffy was found dead at a car park in Hamilton. It was reported that Francis Auld was acquitted of the murder despite a raft of evidence against him, including his teeth marks on her body.¹⁰ That case prompted a fervent campaign - 'Abolish the Not Proven Verdict Campaign'. More recently the trial of Sean Flynn¹¹ accused of the murder of his mother, Louise Tiffney has continued to fuel the debate.
25. For the accused being in receipt of the not proven verdict can have a substantial negative effect on their life post verdict. Some have indicated their dissatisfaction that they feel they have not been found fully innocent of the charge. They feel stigmatised by the verdict and the public's view of it arguing that if the prosecution case cannot be proved then a verdict of not guilty is more appropriate. The Miscarriages of Justice Organisation highlighted its concerns with regard to rape and child abuse allegations where it says that allegations "can be made a long time after the event, when there is no physical evidence". "Not proven does not mean you are guilty of a crime, but you are left with a stigma against you."¹²
26. The existence of two different forms of acquittal suggests two differing degrees of innocence. This is neither acceptable for the victim or the accused. Nor is it necessary for the operation of the justice system as no other country shares our three verdict system.
27. Further uncertainty surrounds the practical effect of the not proven verdict. People wrongly believe if further evidence is brought forward then the acquitted person can be put on trial again for the same charges. Along similar lines there is also a popular misconception that the not proven verdict prevents anyone else from being convicted for that crime.¹³

¹⁰ The Scotsman, 'Who earns what – part 1', Donald Findlay QC, 17 September 2003

¹¹ BBC News, 'Family anger at Tiffney verdict', 16 March 2005

¹² The Daily Mail 'Victims may have to carry 'not proven' verdicts to grave', 20 April 2006

¹³ Improving the Delivery of Justice in Scotland, Juries and Verdicts, The Scottish Office 1994, page 31

Fairness of two acquittal verdicts

28. Another criticism of the not proven verdict is that the criminal justice system favours the accused, with the jury having two acquittal verdicts to hand. It has also been said that the existence of the not proven verdict offers jurors a easy option where they might otherwise have convicted.
29. The issues of fairness and discrimination form the central plank in an ongoing challenge against the not proven verdict in the European Court of Human Rights by the family of a murdered man.
30. The family of Christopher Cawley, a Glasgow barman stabbed to death while working in the city's Laurieston Bar in 2000 lodged an appeal with the European Court of Human Rights seeking a review of how the case was handled. The appeal asks the court to rule on whether the not proven verdict breaches articles 6 and 14 of the European Convention on Human Rights (ECHR). Article 6 guarantees the right of citizens to a fair trial. The family believes the not proven verdict denies the right to a fair trial because it gives the accused two chances of being acquitted and only one of being convicted. Article 14 guarantees citizens the right not to be discriminated against. The family claims Scots are discriminated against because they live in the only country in the world that uses the not proven verdict.¹⁴ The European Court has agreed to conduct a review. To the best of my knowledge no public progress has been made.
31. On the other side of the coin, it could be that the not proven verdict raises possible human rights issues for those acquitted on a not proven verdict. It could be argued that justice systems that have only one acquittal verdict assure a greater standard of justice, in that they better comply with the presumption of innocence as set out in Article 6.2 of the ECHR - everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Guidance for juries on the verdicts available

32. Juries are told by judges in clear terms that if they have reasonable doubt as to the guilt of the accused then they must acquit. However in terms of the direction given to juries on the acquittal verdicts themselves, judges have been instructed by the Appeal Court not to attempt to explain the significance of the two acquittal verdicts when charging juries. This was because of a number of successful appeals on the grounds of misdirection after those presiding had given their versions of what not proven means. In response to one interpretation by a sheriff, the Appeal Court warned the judiciary that in their view it is "highly dangerous to explain what the not proven verdict is in relation to the not guilty verdict".¹⁵
33. The Contempt of Court Act 1981 makes it an offence to question juries about their deliberations making it difficult to say with any certainty that the lack of direction on the not proven verdict impacts on the delivery of justice, let alone

¹⁴ Times Online, 'Not proven verdict faces European test', 16 January 2005

¹⁵ McDonald v HMA 1989, SLT 298B

whether there is a need for a second acquittal verdict. Nevertheless, one case in 1958 gave a small insight into how having two acquittal verdicts can cause confusion. In the case of the LA v Nicholson¹⁶ the foreman of the jury announced a verdict of guilty by majority. The Sheriff unusually allowed the defence to ask what the majority was. The response from the foreman was “we were six for guilty; five for not guilty and four for not proven”. An acquittal verdict of not guilty was therefore recorded. Although an old case it demonstrates the scope for confusion over the current Scottish verdict system – who knows how many similar confusions or persons wrongly convicted have arisen since.

34. More recently Sheriff Gordon said “Either there is a storable difference between not proven and not guilty, in which case the jury are entitled to be told what it is, or there is no such difference between them, in which case one of them should be abolished.”¹⁷

A TWO VERDICT SYSTEM

Which acquittal verdict?

35. My Bill would ensure that there is only one acquittal verdict. In so doing it would address the issues connected with the current three verdict system. By removing the second acquittal a clear message is presented that the person is acquitted of the charges against them putting an end to the confusion and misunderstanding brought about by having two acquittal verdicts. No longer can the criminal justice system be seen as favouring the criminal in this way. In clarifying the meaning of acquittal in Scottish criminal procedure the likelihood of ECHR challenges is reduced. The public and the accused will be in no doubt what acquittal means.
36. There is some discussion to be had however over what the two verdicts could be called. For example the acquittal verdict could be referred to as not guilty, not proven or simply acquitted. With regard to a verdict that reflects that the charges against an accused have been proved beyond reasonable doubt, the choices could be guilty or proven.
37. It is my intention to legislate so that the verdicts available to the court should be proven and not proven. Primarily, this is because when juries are asked to return a verdict, the question put to them is “Do you find the charge proven or not proven?” and not do you find the accused guilty or innocent. Having not proven as the only acquittal verdict fits well with current criminal trial practice.
38. In my view it would be misleading to find the accused not guilty because although the prosecution is trying to prove that the accused is guilty, the defence is not trying to prove that the accused is not guilty, merely that there

¹⁶ LA v Nicholson 1958 SLT 17 (Sh Ct)

¹⁷ The verdict muddle – a way out, Ian Willock applies logic to the “not proven” controversy, SCOLAG, 1993, 196, 5)

is not sufficient proof of guilt. It also has to be borne in mind that a trial takes place against a background of presumption of innocence.

39. It could be argued that the stigma attached to the previous usage of the not proven verdict could continue to lead to misunderstanding. However, I believe this will no longer be an issue as there will only be one acquittal verdict and the problem stems from having two acquittal verdicts. Also by utilising the same positive and negative term it will be clear that as far as the court is concerned a person either committed the offence or not. Removing the other acquittal verdict will remove the presumption of different degrees of innocence. Thus addressing the ECHR difficulties highlighted previously.
40. As well as my proposal clarifying the legal system, there may be additional longer term benefits in Scotland having a two verdict criminal justice system in a developing area of European jurisprudence.
41. The paper has concentrated on the effect of a two verdict system on juries and public perceptions, but it is important to recognise that abolishing the second acquittal verdict would I believe have no negative consequences for judges or sheriffs sitting alone.

Question 1: I have suggested that the verdicts should be proven and not proven, what are your views on which verdicts should be available to the courts? Please explain the reasons for your choice.

Majority required to reach a verdict

The number of jurors

42. In considering a change to the three verdict system and the majority needed to opt for a particular verdict it is helpful to understand how the number of jurors required in a criminal jury contributes to the effectiveness of Scotland's criminal justice system.
43. The Scottish criminal jury comprises of fifteen people. This number can drop if members of the jury become ill during a trial or are excused for some other reason. The trial can continue provided there are not less than 12 jurors remaining.

Simple majority

44. Presently a majority of eight jurors is required to return a guilty verdict; otherwise the result must be acquittal. With the removal of the second acquittal verdict there is concern that it is not really safe to convict someone if almost half of the jurors are not convinced of the accused's guilt. Without the fall back position of a second acquittal verdict, some people consider that the simple majority could lead to an increased number of miscarriage of justice cases as they believe juries will convict if they cannot opt for the not proven verdict.
45. Therefore it is suggested by some that a larger majority might provide a better balance where the third verdict is not available.

Changing the majority

46. On the other hand raising the majority required to convict or acquit a person might be considered unnecessary for the protection of the innocent in view of other existing safeguards within the criminal justice system for protection of the innocent such as sufficiency of evidence and corroboration.
47. Before arriving at the majority required, consideration should be given to the potential change of number of jurors that can occur throughout a trial, as explained earlier. As such any majority should be workable whether there are 15 or 12 jurors as can be the case. So for instance if the majority was increased to twelve, then in some circumstances only a unanimous verdict could be delivered if a conviction is to follow.
48. The law in England currently requires a majority of ten to two, whether for conviction or acquittal. If the majority is increased for both the guilty and acquittal verdict in Scotland then this raises concerns about lengthy jury deliberations and could introduce the concept of hung juries into the Scottish system,¹⁸ as it may make it more difficult for jurors to reach an agreement. At present there is no such thing as a hung jury in Scotland because the rule that at least 8 jurors have to find the accused guilty or the person is acquitted avoids this situation.
49. The Thomson Committee in 1975 canvassed the possibility that the ratio required for a guilty verdict should be two to one, that is, ten to five or, if the size of the jury were reduced, eight to four, but the overwhelming majority of the submissions received were in favour of retaining the bare majority¹⁹. The former Scottish Office also looked at the majority required for conviction, particularly if the three verdict system were to be abolished. The paper suggested that ten jurors out of 15 for a guilty verdict.²⁰ Again, most respondents to this review favoured the simple majority.
50. There appears to be further inconsistency with the law as it relates to verdicts given by judges and the way in which juries are tasked with delivering a verdict. Section 162 of the Criminal Procedure (Scotland) Act 1995 (c. 46) provides that:

“in a summary prosecution in a court consisting of more than one judge, if the judges are equally divided in opinion as to the guilt of the accused, the accused shall be found not guilty of the charge or part thereof on which such division of opinion exists.”
51. The upshot of this is that if the bench consisted of two judges, one voting guilty and the other not proven, section 162 would oblige them to return a verdict of not guilty.

¹⁸ A hung jury is a jury that is deadlocked and cannot agree on a verdict.

¹⁹ Second Report by the Thomson Committee on Criminal Procedure in Scotland (Cmnd 6218) (1975)

²⁰ Improving the Delivery of Justice in Scotland, Juries and Verdicts, The Scottish Office 1994, page 25

Question 2: What should the majority be to convict, or acquit, an accused? Please state your reasons in support of your answer.

Financial implications

52. As highlighted in the previous paragraphs altering the criminal justice system could have an impact in the area of hung juries, length of jury deliberations, and miscarriage of justice cases. This in turn has associated financial implications.

Changing the majority

53. By increasing the majority needed for a guilty (or acquittal) verdict could lead to longer jury deliberations. This will give rise to additional costs such as jurors' accommodation and expenses. In some cases agreement on a verdict may not be reached therefore necessitating a retrial. Having to fund an increased level of retrials would be an additional cost for the criminal justice system - impacting on court time and judicial resources.

Question 3: What are the potential costs if the majority is increased?

Retaining the current majority

54. Some fear that retaining the current majority in a two verdict system will result in an increased number of miscarriage of justice cases. If this was the case then there would be costs associated with dealing with these cases within the criminal appeals system. Ultimately if the appeals system was exhausted by an appellant then there would be costs for the Scottish Criminal Cases Review Commission as their applications may proportionately increase too. To put this into context, the number of cases submitted to the Commission was 165 for 2005-6 an increase of 40% from the previous year.²¹

Question 4: Your comments on any potential costs associated with creating a two verdict system are invited.

55. I have made every effort to cover the main areas associated with changing the verdict system, but there may be other issues that require to be addressed or other matters that you think should be considered in relation to the proposed Bill. Please feel free to bring these to my attention. It is also not always possible to identify at an early stage issues that may affect individuals' equal opportunities and that is why it would be particularly helpful if you could indicate where you think equal opportunities questions might arise.

Question 5: What are the equal opportunity questions that arise from this proposal?

Question 6: Do you have any other comments?

²¹ The Scotsman, 'Miscarriage of justice inquiries soar' 4 July 2006

CONCLUSIONS AND HOW TO RESPOND

56. Thank you for reading this consultation paper. I hope you have been persuaded that there is need to change the criminal justice system to ensure that both victims and accused have a
57. You are now invited to respond to this consultation paper by answering the questions which are repeated below and making any other comments that you consider appropriate.
58. Responses, which should be submitted by **19th June 2007** should be sent to:

Michael McMahon MSP
Parliamentary Advice Office
188 Main Street
Bellshill ML4 1AE

Tel: 01698 304501

Fax: 01698 300223

E-mail: michael.mcmahon.msp@scottish.parliament.uk

59. Please make it clear whether you are responding as an individual or on behalf of an organisation.
60. If you wish your response to be confidential, please say so. Otherwise it will be available for public inspection, in accordance with the principles of transparency and freedom of information. Confidential responses will be included in any summary or statistical analysis but this will not reveal the identity of any respondent who has requested confidentiality.
61. Additional copies of the paper or alternative formats can be requested using the contact details above. An on-line copy is available on the Scottish Parliament website [The Scottish Parliament: - Bills - Proposals for Members' Bills.](#)

QUESTIONS

- Question 1:** I have suggested that the verdicts should be proven and not proven, what are your views on which verdicts should be available to the courts? Please explain the reasons for your choice.
- Question 2:** What should the majority be to convict, or acquit, an accused? Please state your reasons in support of your answer.
- Question 3:** What are the potential costs if the majority is increased?

Question 4: Your comments on any potential costs associated with creating a two verdict system are invited.

Question 5: What are the equal opportunity questions that arise from this proposal?

Question 6: Do you have any other comments?