SUMMARY OF CONSULTATION RESPONSES

UPDATED 29 OCTOBER 2013 WITH MINOR CORRECTIONS TO THE FIGURES

PROPOSED REFORM OF CRIMINAL VERDICTS BILL – MICHAEL MCMAHON MSP

SUMMARY OF CONSULTATION RESPONSES

1. This document summarises and analyses the responses to a consultation exercise carried out on the above proposal.

2. The background to the proposal is set out in section 1, while section 2 gives an overview of the results. A detailed analysis of the responses to the consultation questions is given in section 3. These three sections have been prepared by the Scottish Parliament's Non-Government Bills Unit (NGBU). Section 4 has been prepared by Michael McMahon MSP and includes his commentary on the results of the consultation.

3. In some places, the summary includes quantitative data about responses, including numbers and proportions of respondents who have indicated support for, or opposition to, the proposal (or particular aspects of it). In interpreting this data, it should be borne in mind that respondents are self-selecting and it should not be assumed that their individual or collective views are representative of wider stakeholder or public opinion. The principal aim of the document is to identify the main points made by respondents, giving weight in particular to those supported by arguments and evidence and those from respondents with relevant experience and expertise. A consultation is not an opinion poll, and the best arguments may not be those that obtain majority support.

4. Copies of the individual responses are available on the following website: http://michaelmcmahonmsp.snappages.com/criminal-verdict-bill-responses.htm. Responses have been numbered for ease of reference, and the relevant number is included in brackets after the name of the respondent.

5. A list of respondents is set out in the Annexe.

SECTION 1: INTRODUCTION AND BACKGROUND

6. Michael McMahon MSP's draft proposal, lodged on 28 June 2012, is for a Bill to:

> Replace the current system of three verdicts in criminal trials with two, and to increase the majority required for conviction.

7. The proposal was accompanied by a consultation document, prepared with the assistance of NGBU. This document was published on the Parliament's website, from where it remains accessible: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/29731.aspx.

8. The consultation period ran from 28 June to 5 October 2012 initially and was extended by the member to 31 October.

9. NGBU understands that over 120 organisations and individuals were invited to respond to the consultation. These included membership organisations, professional bodies, academics and representative groups.

10. The consultation exercise was run by Michael McMahon MSP's parliamentary office.

11. The consultation process is part of the procedure that MSPs must follow in order to obtain the right to introduce a Member's Bill. Further information about the procedure can be found in the Parliament's standing orders (see Rule 9.14) and in the *Guidance on Public Bills*, both of which are available on the Parliament's website:

- Standing orders (Chapter 9): http://www.scottish.parliament.uk/parliamentarybusiness/26514.aspx
- Guidance (Part 3): http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25690.aspx

SECTION 2: OVERVIEW OF RESPONSES

12. In total, 19 responses were received.

13. The responses can be categorised as follows:
- 3 from representative organisations
- 1 from an inspectorate
- 4 from academics
- 11 from private individuals (members of the public)

14. 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. Among those who supported the move to two verdicts, six (which equates to 31% of all who responded to the consultation) felt that those two verdicts should be “guilty” and “not guilty”.

15. 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 (9 of the 14 – i.e. 64%) of those who answered this question 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 this question disagreed that it was necessary to alter the majority required to convict, while a further five (26% of the total number of those responding to the consultation) did not express a view.

SECTION 3: RESPONSES TO CONSULTATION QUESTIONS

16. This section sets out an overview of responses to each question in the consultation document.

General aim of proposed Bill

17. Pages 5 to 15 of the consultation document outlined the aim of the proposed Bill and what it would involve. The consultation sought views on a proposal to replace the current system of three verdicts ("guilty", not "guilty" and "not proven") with two and sought views on what the two verdicts should be. The consultation also asked respondents to consider whether a change to a two-verdict system would necessitate any alteration to the majority required for conviction. Currently, an absolute majority (i.e. at least 8 of 15 jury members) is required to convict. This is in contrast to systems such as that in England and Wales, where unanimity is normally required.

18. Respondents were asked:

Question 1: Do you support the general case set out above for moving to a two-verdict system? Please give reasons for your choice.

19. All 19 respondents answered this question.

20. Thirteen (68%) of those responding supported the proposed Bill, while five (26%) opposed it and one (5%) was unconvinced.

Reasons for supporting the proposed Bill

21. The most common reason given for supporting a move to a two-verdict system was that a three-verdict system is illogical and is confusing for juries, for victims and for the accused. Concern was also expressed over the guidelines which prohibit judges from explaining the difference between a not guilty and a "not proven" verdict, particularly in relation to that fact that, in a majority of cases following a "not proven" verdict, the accused cannot be tried again for the same crime.

22. It was pointed out by some responding to the consultation that the "not proven" and "not guilty" verdict are both acquittals. However, several respondents claimed that juries do not always appear to understand that a "not proven verdict" has the same practical consequence (i.e. acquittal) as a "not guilty" verdict. (Robert Hutton-McKee, Prof James Chalmers and Dr Fiona Leverick, Victim support Scotland, Andrew Clubb, Professor Paul Roberts, Professor Hugh McLachlan).

23. It was felt by Prof James Chalmers and Dr Fiona Leverick (Glasgow University), Prof Hugh V McLachlan (Glasgow Caledonian University) and HM Inspectorate of Constabulary for Scotland that the not proven verdict can unfairly stigmatise those acquitted through this verdict. Robert Hutton-McKee agreed that "the taint of guilt can ruin an innocent person's life".

24. It was also argued by Prof Paul Roberts (University of Nottingham), Prof Hugh McLachlan (Glasgow Caledonian University) and HM Inspectorate of Constabulary that the not proven verdict undermines the principle of "innocent until proved guilty". It was pointed out that and that there is no middle ground – guilt is either proven or not.

25. Catherine McMillan claimed that the current system leads to a mistrust with the Scottish legal system and can leave victims and families feeling let down.

Reasons for opposing the Bill

26. Five respondents to the consultation disagreed that the number of verdicts should be reduced. Daniel Higgins argued that the "not proven" verdict can prevent the wrong verdict being introduced in circumstances where prosecuting counsel have failed to mount a sufficiently persuasive argument when making the case against an accused person. He stated that "the system isn't broken therefore does not need fixing". Dr David Gasking not only felt that the "not proven" verdict should be retained, but also that an allowance should be made that would permit the retrial of those handed this verdict at a later date, subject to new evidence being available. This is at odds with those who argue that a "not proven" verdict is another form of acquittal.

27. Michael Kiernan argued that the not proven verdict offered a valuable safety net, pointing out that "police make mistakes … witnesses are unreliable … and some evidence can't be considered".

Which two verdicts?

28. This section sought views on the merits of a two verdict system as opposed to a three verdict system and asked respondents to state a preference.

Question 2: If there is to be a two-verdict system, should these be (a) "proven" and "not proven", (b) "guilty" and "not guilty", or (c) some alternative system (such as the Yes/No approach outlined)? Please give reasons for your choice.

29. Two (10%) of those responding declined to answer this question because they disagreed that the number of verdicts should be reduced, while seven (37%) expressed no view. Two (10%) agreed on a move to a two-verdict system and selected more than one option for what those two verdicts could be. Eight (42%) did select an option. The "guilty" and "not guilty" verdicts proved the most popular pair.

Proven and not proven

30. This option (or its alternative: "proved and not proved") was favoured by four (21%) respondents, who described it as the most logical of the potential options, arguing that it is a jury's role to come to a view of the case put before them, rather than make a moral judgement on the guilt or innocence of the accused.

Guilty and not guilty

31. This option was the most popular option, favoured by six (31%) of those answering the question. Reasons for this preference centred round its familiarity and clarity.

An alternative system

32. There was a very small amount of support for "yes" and "no" or "guilty" and "not proven" or "convict" and "aquit". Two respondents thought that "guilty" and "not proven" would be appropriate with one respondent stating that "yes" and "no" and "convict" and "aquit" would be reasonable systems.

Majority required for conviction

33. This section deals with the question of whether moving to a two-verdict system would require a change to the size of the majority as a consequence. Consultees were asked:

Question 3: Do you agree that moving to a two-verdict system makes it necessary to increase the majority required for a conviction? If so, please explain your reasons.

34. Fourteen of the 19 respondents answered this question. Nine (64%) agreed that the majority required for conviction should be increased while five (36%) disagreed.

35. The Scottish Government's plans to remove the requirement for corroboration in criminal cases had a bearing on some of the responses to this question. Some argued that the case for altering the majority required for conviction could be made on its own merit, without reference to the number of verdicts.

36. Some of the reasons put forward in support of an increased majority were:

- According to Professor James Chalmers and Dr Fiona Leverick (University of Glasgow), a removal of a third verdict alongside the removal of a requirement for corroboration "could leave the level of protection available against wrongful conviction in Scotland at a dangerously weak level".

- Paul Roberts (University of Nottingham) argued that a higher majority, if not unanimity, is necessary to demonstrate that guilt has been proved "beyond reasonable doubt". Ewan Kennedy agreed.
- Hugh McLachlan agreed that there was a general case for altering the present majority voting system but argued that a move to a two-verdict system did not affect the argument either way, describing it as a "separate issue".

37. Those believing that there was no need to change the majority argued that a "simple majority" was easy to understand. Victim Support Scotland believed that "setting the bar too high could act as an impediment to justice" while HM Inspectorate of Constabulary for Scotland felt that the current "balance of justice is adequate".

How large a majority?

38. Views were sought on the optimal size of the majority required to convict and whether the size of the jury, the quorum or any other factors should also be altered.

Question 4: If there is to be an increased majority, how should it be defined?

Question 5: Would an increased majority also require changes to (a) the size of the jury; (b) the quorum; (c) any other related factor (such as the right of jurors to abstain in any vote)?

39. Six respondents ventured an opinion on question 4.

40. Feelings were not strongly held but two respondents (The Law Society of Scotland and Prof James Chalmers and Dr Fiona Leverick of Glasgow University) felt that a 12:3 ratio in a jury of 15 would be appropriate. One (Prof Pamela R Ferguson, Dundee University) proposed reducing the size of the jury to 12 and requiring a majority of 10. Hugh McLachlan also favoured an increased majority.

41. Arguments centred round the concept of "reasonable doubt". Hugh McLachlan believed "if five people out of fifteen think that there is reasonable doubt about someone's guilt, it is unreasonable to convict that person".

42. Again, there were no firm views expressed in response to question 5. Pamela Moffat (University of Dundee) proposed that the quorum could be reduced to 10, with a majority of 8 required for conviction. The Law Society called for more research in this area before coming to any conclusion.

Financial implications

Question 6: What is your assessment of the likely financial implications (if any) of the proposed bill?

Question 7: How quickly could the proposed changes be brought into effect?

43. Three respondents suggested that the proposed bill could reduce costs if the size of juries was reduced and Ewan Kennedy pointed out that if the changes resulted in fewer miscarriages of justice and associated appeals, this would reduce costs. On the other hand, Robert Hutton-McKee pointed out that the absence of a not-proven verdict might cause juries to deliberate for longer, leading to increased costs.

44. On the question of how quickly any changes could be brought into effect, two respondents (10%) called for a wider review of these and associated issues (such as corroboration) before any changes were made and two (10%) answered "as soon as possible" or "almost immediately".

45. Professor Chalmers and Dr Leverick added that provision would be needed (preferably in a commencement order) to clarify the new law's application to particular cases. Their suggestion was that this should be done according to when a prosecution was first initiated, so there could be no incentive to delay the beginning of a trial to take advantage of any perceived advantage of the change to the accused.

Equalities issues

Question 8: Is the proposed bill likely to have any substantial positive of negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

46. Just three of the 19 respondents answered this question. Robert Hutton-McKee thought that, as criminal trials involve a greater proportion of people from ethnic minorities, a rise in the conviction rate may affect this group disproportionately. Hugh McLachlan argued that the outcomes of fair and just trials should be accepted, regardless of any implications on equality.

Other considerations

Question 9: Do you have any other comments or suggestions relevant to the proposal?

47. The question of basing any changes on empirical research was raised by more than one respondent (David Howdle, The Law Society of Scotland, the Faculty of Advocates) and it was also argued that any changes should sit within a broader review of criminal justice issues such as corroboration.

SECTION 4: MEMBER'S COMMENTARY

48. Michael McMahon MSP has provided the following commentary on the results of the consultation, as summarised in sections 1-3 above.

49. I would like to begin by expressing my sincerest thanks to the Non-Government Bills Unit (NGBU) for their assistance in creating the consultation document accompanying my legislative proposal. I thank those who participated in the consultation on the proposed Reform of Criminal Verdicts (Scotland) Bill for offering their advice and expertise on this pertinent issue.

50. Of the nineteen responses received, three were from representative organisations, one was from an inspectorate, four were from academics and eleven were from members of the general public. The low number of responses can be attributed to the nature of the bill and the professional stature of those possessing expertise in Scotland's criminal law. Many of these professionals chose not to participate in such a consultation as it presents a conflict of interest. Therefore, this limits the number of responses received and as a result, the majority of advice provided comes from academics knowledgeable in the field of criminal law.

51. Although the cohort of respondents appears limited in size, it must be noted that the breadth of knowledge and expertise present among the individual professionals and organisations makes their suggestions most helpful in further discussions of this legislation.

52. In examining the responses to the consultation, I was pleased to find that most respondents expressed their support for my general recommendations to eliminate the "not proven" option and to increase the majority required to convict.

53. Thirteen of the nineteen participants responded favourably when asked if Scotland should move to a two-verdict system. Six of those thirteen also indicated that the two verdict options available to criminal juries should be "guilty" and "not guilty".

54. Moreover, nine of the thirteen respondents expressed their desire to increase the majority required to convict, even though these respondents touted a variety of reasons for believing so.

55. After reviewing the responses received in this consultation and with the encouragement of the professionals consulted, I continue to advocate the changes to Scotland's system of criminal verdicts that I previously proposed. Namely, a new majority system should be enacted, and the verdicts available to juries should be limited to two options: guilty and not guilty.

ANNEXE

List of Respondents in order received

Name of organisation/individual	Response number
Prof Pamela R Ferguson – School of Law, Dundee University	1
The Law Society of Scotland	2
Prof James Chalmers and Dr Fiona Leverick – School of Law, Glasgow University	3
Victim Support Scotland	4
Mrs Catherine McMillan	5
Prof Hugh V McLachlan – Department of Social Sciences, Media and Journalism, School for Business and Society, Glasgow Caledonian University	6
HM Inspectorate of Constabulary for Scotland	7
Prof Paul Roberts – Department of Criminal jurisprudence, University of Nottingham	8
Andrew Clubb	9
Daniel Higgins	10
Ewan G Kennedy	11
Robert Hutton-McKee	12
Dr David Gasking	13
David Howdle	14
Linda McFarlane	15
William W. Scott	16
Rt. Hon. Lord Marnoch	17
Faculty of advocates	18
Michael Kiernan	19

Alphabetical list of respondents

Name of organization/individual	Response number
Andrew Clubb	9
Daniel Higgins	10
David Howdle	14
Dr David Gasking	13
Ewan G Kennedy	11
Faculty of advocates	18
HM Inspectorate of Constabulary for Scotland	7
Linda McFarlane	15
Michael Kiernan	19
Mrs Catherine McMillan	5
Prof Hugh V McLachlan – Department of Social Sciences, Media and Journalism, School for Business and Society, Glasgow Caledonian University	6
Prof James Chalmers and Dr Fiona Leverick – School of Law, Glasgow University	3
Prof Pamela R Ferguson – School of Law, Dundee University	1
Prof Paul Roberts – Department of Criminal jurisprudence, University of Nottingham	8
Robert Hutton-McKee	12
Rt. Hon. Lord Marnoch	17
The Law Society of Scotland	2
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William W. Scott	16